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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Supreme Court No. 20140409

APR 06 2015

STATE OF NORTH DAKOTA

State of North Dakota, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
New Holland LW230B Payloader, )  
VIN: ZEF00W23100955104 )  
 )  
Defendant, )  
 )  
and )  
 )  
Arnie Rummel, Agent of the )  
North Dakota Bureau of Criminal )  
Investigation, )  
 )  
Interested Party and Appellant. )

APPEAL FROM THE ORDER DATED NOVEMBER 21, 2014

DICKEY COUNTY DISTRICT COURT

THE HONORABLE DANIEL NARUM, PRESIDING

REPLY BRIEF OF APPELLANT  
STATE OF NORTH DAKOTA

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## **[¶1] ARGUMENT**

### **[¶2] I. DESPITE BASING HIS DISTRICT COURT CLAIM ON GOOD FAITH PURCHASER STATUS, SCHRUM HAS ABANDONED THAT CLAIM ON APPEAL.**

[¶3] In his appellant's brief, the Attorney General contended as a matter of law, Darrell Schrum (Schrum) could not be a good faith purchaser of a stolen payload when no transaction of purchase had occurred between the owner of the payload and the thief who stole it. The Attorney General was unable to find a state court that would award good faith purchaser status in such a circumstance. The issue is crucial because the Court's award of remedial contempt sanctions was based on a finding Schrum was a good faith purchaser and was deprived of ownership of the loader by Agent Rummel's contempt:

Mr. Schrum argued that as a good faith purchaser for value, he had an ownership and possessory interest in the seized payload...Contrary to the Search Warrant issued by this Court on May 20, 2014, and contrary to N.D.C.C. 29-01-20 and N.D.C.C. Ch. 29-31.1., Agent Rummel, without lawful authority, transferred possession of the loader to Pyramid Trucking...As a result, Mr. Schrum has been permanently divested of his ownership and possessory interests in the payload.

(Appendix pages 31-32.)

[¶4] Schrum's abandonment of the good faith purchaser claim on appeal is curious. In his initial five-page motion for return of the payload, Schrum mentioned his good faith purchaser status no fewer than seven times. Schrum continued to insist he was a good faith purchaser at the June 4, 2014, hearing. (June 4 transcript, pages 10 and 129.) Schrum alleged Agent Rummel and the Attorney General were relying on an antiquated N.D. Supreme Court opinion and the U.C.C. had superseded that decision. (June 4 transcript, page 130, lines 1-4.)

[¶5] The trial court did not make a finding at either court hearing that Schrum was a good faith purchaser. Despite that, over the Attorney General's objection, Schrum requested the trial court to include such a finding in the final order. (October 9 transcript, page 8, lines 15-18.) On page nine of the October 9 transcript, the trial court agreed with Schrum that he had purchased the loader in good faith without knowledge that it was stolen, despite the court's earlier statement to the contrary:

I think it's appropriate that the property be brought back to Dickey County and be held in Dickey County pending disposition of that property with notice and opportunity to be heard for all those claiming a property interest in it.

(June 4, 2014, transcript, p. 150 line 10, thru p. 151, line 3.)

[¶6] On appeal, Schrum contends "the actual issue before the Court must be clarified in order for the relevant facts to be properly recited." (Appellee Brief, ¶5.) Schrum claims for the Attorney General what issue the Attorney General gets to appeal:

The issue before the Court is not a determination of Darrell Schrum's ownership and possessory interests in the loader. Mr. Schrum, the Dickey County District Court, and all other interested parties were deprived of the opportunity to address that question by Rummel's willful disregard of multiple court orders, and his actions in having the loader immediately and permanently removed from North Dakota.

(Appellee brief, ¶5.)

[¶7] Schrum makes this claim despite having argued Schrum's ownership and possessory interests at every turn, and then insisting that the court include a finding regarding the ownership and possessory interests in the final order. At Schrum's urging, the trial court resolved the ownership and possessory claim in

Schrum's favor. (Appendix pages 31-32.) Now, on appeal, Schrum states, "More importantly, the State's entire attempt to litigate the factual issues regarding ownership and possessory interests is a red herring." (Appellee brief, ¶30.)

[¶8] Schrum's defense of the good faith purchaser finding is contained in one paragraph (¶29) and he cites zero cases for support. Schrum does not explain how anyone's ability to litigate their ownership or possessory interests in the loader depends on the loader being located on his lot or in the Dickey impound lot. As noted above, the lack of the presence of the loader didn't impact the trial court resolving the issue in Schrum's favor.

[¶9] Schrum now contends the Attorney General's appeal of the trial court's findings on ownership and possession is merely "smoke and mirrors," to divert the Supreme Court's attention from the contempt issue. Schrum has no choice but to change the issue on appeal, as his claim of a possessory interest is as lacking in legal merit as his abandoned good faith purchaser claim.

**[¶10] II. SCHRUM DOES NOT HAVE A REPAIRMAN'S LIEN OR OTHER POSSESSORY INTEREST IN THE LOADER.**

**[¶11] A. A repairman's lien under N.D.C.C. §35-13-01 requires that the repairs be requested by the owner.**

[¶12] In addition to claiming that he is the owner as a good faith purchaser, Schrum claims he has a perfected repairman's lien in the payload. "He had a repairman's lien on that loader. He invested in excess of \$7,000 in time and repair parts, not including additional expenses that he incurred, but a possessory lien is perfected by possession. Once Mr. Schrum was divested of possession, he lost that lien." (September 2, 2014, transcript, p. 52, lines 12-17.)

[¶13] Even though the court's own search warrant would have divested Schrum of possession, the trial court made a finding that Schrum had "proven a possessory lien interest in the property and that he is entitled to the value of his property as requested, \$48,839.74, I believe is the amount requested, plus costs for attorney's fees." (Id. at p. 54, lines 9-12.) This finding was made despite that there are no facts or finding at all that the owner of the payloader had requested the repairs:

Any blacksmith, machinist, farm equipment dealer, construction equipment dealer, welder, garage keeper, mechanic, or aviation operator, having an established place of business in this state who makes, alters, or repairs any automobile, truck, engine, combine, tractor, farm equipment, construction equipment, well machine, aircraft, or watercraft ***at the request of the owner or legal possessor of the property*** has a lien on that property, and on any accessories and parts placed upon the property, for reasonable charges for work done and materials furnished, until the charges are paid....

N.D.C.C. §35-13-01.

[¶14] If the award of punitive contempt sanctions was tied to Schrum's repairman's lien, and not his status as good faith purchaser, then he would only be entitled to the cost of his repairs and not the expenses of driving to Iowa and purchasing the loader, *provided he repaired it at the request of the owner*. There is no finding, and no facts offered that would support a finding, that the owner or legal possessor of the payloader requested Schrum to repair the loader. There is no dispute on the facts, and as a matter of law, there can be no repairman's lien without a request by the owner for repairs. See Briley v. Donald Knudtson Implement, 112 N.W.2d 557 (N.D. 1961).

[¶15] B. Like repairman's liens, general possessory liens under N.D.C.C. §35-20-11 require the property be legally possessed and the service be rendered to the owner.

[¶16] N.D.C.C. §35-20-11 is similar to the repairman's lien in that it requires that the service be rendered to the owner. The statute also requires the artisan for this lien be lawfully in possession of the article of personal property:

Every person, excepting those entitled to a specific lien under other chapters of this title, *who, while lawfully in possession of an article of personal property, renders any service to the owner thereof* by labor or skill employed for the repair, protection, improvement, safekeeping, or carriage thereof has a special lien thereon, dependent on possession, for the compensation, if any, which is due to the person from the owner for such service...

N.D.C.C. §35-20-11.

[¶17] If Schrum was not a good faith purchaser, and as argued in the appellant's brief, he could not have been, then he was not in legal possession of the payloader at the time he made repairs. As a matter of law, Schrum was not entitled to a lien under N.D.C.C. §35-20-11.

[¶18] III. **WITHOUT A LEGAL CLAIM OF OWNERSHIP OR ACQUISITION OF A STATUTORY LIEN, SCHRUM WAS NOT ENTITLED TO REMEDIAL CONTEMPT SANCTIONS.**

[¶19] In the portion of Schrum's brief where he claims to clarify the issues and focus only on the contempt sanctions, Schrum makes the statement, "It is undisputed that Rummel unlawfully gave away Schrum's loader..." (Appellee brief ¶28.) That's exactly the point the Attorney General is making. The trial court awarded the contempt sanctions as if Rummel gave away Schrum's loader, when as a matter of law, it was not his loader. Without a transaction of purchase, the thief could not pass good title to Schrum. Without a request by the owner, Schrum could not acquire either a repairman's lien or general lien.



[¶20] The Attorney General is not arguing that a chosen remedial sanction is an abuse of discretion simply because other alternatives exist. Under the language of N.D.C.C. §27-10-01.4, a remedial sanction is to “compensate a party or complainant, other than the court, for a loss or injury suffered as a result of the contempt, including an amount to reimburse the party for costs and expenses incurred as a result of the contempt.” Id. Without a showing he legally owned the payloader or acquired a statutory lien, Schrum suffered no injury as a result of the contempt. His original loss or injury was suffered by the fraud perpetrated on him by the thief, Greg Luss. The costs and expenses occurred later were a result of his attorney pursuing a procedurally botched course of action and relying on an incorrect interpretation of good faith purchaser status under the Uniform Commercial Code.

[¶21] If the trial court believed a punitive contempt sanction was appropriate, it could have imposed one. Instead, the court imposed a remedial contempt sanction to compensate Schrum when he is not entitled to compensation from the Attorney General or Agent Rummel. Schrum’s cause of action is against Greg Luss, and possibly against Jay Hansel, who sold the loader for Luss.

[¶22] Schrum concludes his brief by applauding the Dickey County State’s Attorney for protecting the interests of a “North Dakota purchaser rather than someone from out-of-state where I am unsure what their interest in that property is.” (Appellee brief ¶31.) Schrum compares that to the contemptuous conduct of the Attorney General and the Bureau of Criminal Investigation, “working tirelessly

to protect out-of-state and foreign parties, while ignoring the rights of an innocent citizen of North Dakota..." (Appellee brief ¶31.)

[¶23] The Attorney General's advice to Agent Rummel relayed the status of the law as pertains to good faith purchaser claims, independent of the location and state of residence of the litigants. (See June 4 transcript, pages 103 and 121-122.) Although in this case, the payloader was stolen from a non-resident, that is not always the case. Property sometimes is stolen from North Dakota citizens and eventually gets located outside the state. When that occurs, the Attorney General and Special Agent Rummel would apply the same law to work in the interests of the owner of the stolen property. The Equal Protection and Commerce Clauses demand it.

In applying our democratic principles of law, the only blindness that is allowed and acceptable is that in which justice is blind to such things as a person's national origin or ethnic background or one's race or color or religious beliefs, because those characteristics play no role in deciding legal issues such as those that confront this Court today. If we truly believe in the principles espoused in this nation's Declaration of Independence and the United States Constitution, we must give more than lip service to those principles.

United States v. Goba, 220 F.Supp.2d 182 (W.D.N.Y. 2002).

[¶24] In hindsight, Agent Rummel admits the better practice would have been to seek court approval before releasing the payloader. Agent Rummel admitted to the court, "At this point I realize that I should not have released it (the payloader) to someone where I could not reproduce it." (September 2, 2014, transcript, page 43, lines 2-3.) However, criticism of Agent Rummel should be tempered. Police officers in this state and elsewhere return stolen property to its rightful owner as a routine part of police business. See generally Johnny Dell, Inc. v. New York State

Police, 84 Misc.2d 360 (1975)(State Police have a duty to impound and seize stolen property wheresoever located and to return such property to its rightful owner.); Robinson v. Durham, 537 So.2d 966 (Ala. 1988)(FBI seized a stolen 1968 Camaro and returned it to its rightful owner in Florida.); State v. Ueding, 400 N.W.2d 550 (Iowa 1987)(Under the circumstances the State was clearly entitled to return the stolen truck to owner without being compelled to defend against a ludicrous claim that it was thereby intentionally destroying evidence.)

[¶25] In State v. Antwine, 6 Kan.App.2d 900, 636 P.2d 208 (1981), the issue was the conflict between the accused's entitlement to use any exculpatory evidence and the rightful owner's right to the return of his property. The opinion describes the important interest involved in returning stolen property to its owner:

On the other hand, the plight of the victims and owners of physical evidence must also be given due consideration. It is tragedy enough that a person has been deprived of his property through some criminal act of another without such loss being compounded by any unnecessary delay in returning the property to its rightful owner. It is the duty of the prosecution and the court to see that a person criminally deprived of property has it restored to him, if possible, at the earliest opportunity consistent with the protection of the rights of both the state and the defendant.

Id. at 903.

[¶26] There is no North Dakota criminal case, and the payloader was not needed as evidence here. Although the boilerplate language of the search warrant indicated the "evidence" should be brought before the court, nobody expected Agent Rummel to deliver the payloader to the District Court chambers on the upper floor of the Dickey County Courthouse. Despite the fact that Agent Rummel should have obtained court permission before releasing the loader,

Rummel's failure does not create an ownership or possessory right in Schrum that the law does not bestow on him, or excuse Schrum from following standard court procedures in seeking to be reimbursed for his losses.

**[¶27] CONCLUSION**

[¶28] As the Attorney General argued at the District Court, if the judge thought a punitive sanction was necessary to make a point, "you'll have to do what you think is appropriate to make it right to you." (September 2, 2014, transcript, p. 51, lines 3-6.) Instead, the trial court awarded remedial contempt sanctions to Schrum for a loader that he never owned or had a legitimate possessory interest in. The trial court's order awarding remedial contempt sanctions must be overturned.

Dated this 6th day of April, 2015.

RESPECTFULLY SUBMITTED:

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Supreme Court No. 20140409

State of North Dakota,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
New Holland LW230B Payloader,	)	<b>AFFIDAVIT OF SERVICE</b>
VIN: ZEF00W23100955104	)	<b>BY MAIL</b>
	)	
Defendant,	)	
	)	
and	)	
	)	
Arnie Rummel, Agent of the	)	
North Dakota Bureau of Criminal	)	
Investigation,	)	
	)	
Interested Party and Appellant.	)	

.....

STATE OF NORTH DAKOTA	)
	) ss
COUNTY OF BURLEIGH	)

Vanessa K. Kroshus states under oath as follows:

[¶1] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶2] I am of legal age and on the 6th day of April, 2015, I served the attached Reply Brief of Appellant upon Mark Friesse and Gary Neuharth by placing true and correct copies thereof in envelopes addressed as follows:

MR MARK FRIESE  
ATTORNEY AT LAW  
PO BOX 1389  
FARGO ND 58107-1389

MR GARY NEUHARTH  
ATTORNEY AT LAW  
PO BOX 38  
ELLENDALE ND 58436-0038

and depositing the same, with postage prepaid, in the United States mail at  
Bismarck, North Dakota.

Vanessa K Kroshus  
Vanessa K. Kroshus

Subscribed and sworn to before me  
this 6th day of April, 2015.

Alice M. Johnson  
NOTARY PUBLIC

