Vehicle Repossessions and Article 9: Recent Developments

James P Nehf

Each year courts decide countless cases involving vehicle repossessions. There are several reasons for this. Some have to do with bankruptcy laws with debtors claiming damages in their bankruptcy proceedings after having lost their vehicles following default. Some get litigated because the unlawful repo also supports claims for intentional torts such as conversion or trespass to chattels. And many cases find their way into federal courts because an unlawful repo is also a violation of the Fair Debt Collection Practices Act. Given all the litigation, it is not surprising that decisions are not always consistent. In this paper, we review some recent decisions that raised some interesting issues with this common situation in consumer secured transactions.

I. Overview of Breach of the Peace Doctrine

A creditor repossessing through self-help, without any judicial process, cannot commit a breach of the peace. Article 9 makes no attempt to define this crucial term "breach of the peace." As a result, cases decided under old Article 9 are still valid precedent. It is easy to extract pat definitions of "breach of peace" from the cases, but the predictive value of these definitions is often limited. The opinions speak of force, violence or conduct creating a risk of violence.[1] But having a police officer or sheriff assist in the seizure—an action surely calculated to reduce the risk of

[1] Jeffries v. Wells Fargo Bank, NA, 2011 U.S. Dist. LEXIS 121405 (N.D. Ill. Oct. 19, 2011) ("conduct that invites or is likely to invite immediate public turbulence, or that leads to or is likely to lead to an immediate loss of public order and tranquility"); Hanson v. 5K Auto Sales, LLC, 2011 U.S. Dist. LEXIS 147898 (D. Minn. Dec. 23, 2011) (identified several factors in evaluating the reasonableness of a secured party's conduct in repossessing property: "(1) where the repossession took place, (2) the debtor's express or constructive consent, (3) the reactions of third parties, (4) the type of premises entered, and (5) the creditor's use of deception").

violence—is regularly held to be a breach of the peace.[2] The courts feel forced to this conclusion because they want to maintain a clear line of distinction between judicial process, which involves state action and is therefore subject to constitutional restrictions, and self-help which is deemed to be a purely private matter, not subject to due process restrictions. In addition, if law enforcement is present, the debtor effectively loses his right to object to the repossession.[3] Comment 3 to Section 9-609 confirms that a law-enforcement officer is not allowed to assist in a self-help repossession. Trespass onto another's property can be a breach of the peace. Some courts say that trespass is permitted if three factors are met: the debtor must have defaulted on the debt, the creditor must have a present right to repossess the vehicle, and the entry must be reasonably necessary in order to take possession of the vehicle.[4] On the other hand, towing a car from the debtor's street or driveway in the midst of the night—an act which seemingly carries a high risk the bullets may start flying—is rather uniformly held not to be a breach of the peace so long as the debtor does not intervene and offer sufficient resistance.[5] Similarly, seizures from parking lots are also permitted.[6]

---

[2] See Chorches v. Ogden (In re Bolin & Co., LLC), 437 B.R. 731 (D. Conn. 2010) (holding that "[t]he mere presence of a police officer while a repossession is taking place is not sufficient to establish a breach of the peace; rather, breach of the peace occurs when a police officer is present in order to assert his or her authority and compel a debtor to give a secured party possession of collateral."); Duke v. Garcia, 2014 U.S. Dist. LEXIS 48062, at n. 5 (D.N.M. Feb. 28, 2014). Other opinions find a breach of the peace even though the police officer is not actively involved in the seizure. Walker v. Walthall, 121 Ariz. 121, 588 P.2d 863 (1978) (police officer neither said not did anything during the course of the repossession); First & Farmers Bank v. Henderson, 763 S.W.2d 137, 7 U.C.C. Rep. Serv. 2d (CBC) 1305 (Ky. App. 1988) (when altercation broke out, deputy approached the parties; deputy nodded affirmatively when debtor asked if the bank could legally repossess); O'Connell v. Pursuit, LLC, 2019 U.S. Dist. LEXIS 17951, at *7 (E.D. Ky. Feb. 5, 2019) ("the court only asks if law enforcements connection gives any impression that the state is involved in the repossession").

[3] *See* McLinn v. Thomas Cnty. Sheriff's Dep't, 2021 U.S. Dist. LEXIS 79251, at *21 (D. Kan. Apr. 26, 2021) ("[A] repossessing secured party may not use a law enforcement officer in its effort to repossess the collateral without judicial process. The debtor should not be forced to defy a police officer in order to assert its legal right to require a judicial repossession.") (citation omitted).

[4] *See* Moore v. Capital One, N.A., 2016 U.S. Dist. LEXIS 54428, at *2 (D. Minn. Apr. 22, 2016); Clopton v. City of Plymouth, 2017 U.S. Dist. LEXIS 594, at *22 (D. Minn. Jan. 3, 2017).

[5] Ford Motor Credit Co. v. Ryan, 189 Ohio App. 3d 560, 2010-Ohio-4601, 939 N.E.2d 891 (10th Dist.) (four repossessions of vehicles from a private driveway, three of which were repossessed uneventfully and held not breaches of peace, and one repossessed with a verbal and physical altercation and held to be a breach of peace).

[6] James v. Ford Motor Credit Co., 842 F. Supp. 1202, 24 U.C.C. Rep. Serv. 2d 363 (D. Minn. 1994), aff'd, 47 F.3d 961 (8th Cir. 1995) (seizure from public parking lot); Ford Motor Credit Co. v. Ditton, 52 Ala. App. 555, 295 So.

The key element in these cases seems to be that the debtor is not present to be able to try to block the repossession. If the debtor intervenes, the courts disagree as to how strongly the resistance must be before the creditor is obligated to back off. As the cases discussed below illustrate, courts are even divided as to whether unequivocal oral protests make continued seizure efforts a breach. Some of the opinions seem to encourage violence by saying that oral objection is insufficient to require the repo agent to stop. On the other hand, it seems that the repo specialist can retreat and then later pounce on the car when the debtor is no longer standing guard. Many courts seem to accept a risk of violence, viewing the situation as low-grade guerilla warfare with the debtor attempting to hold on to the car by moving, hiding, and resisting and the repo specialist trying to bag its prey with sophisticated technology (e.g., license plate scanners) and swift repo trucks that can grab a car in seconds.

II. **Verbal Protest Alone Is Not a Breach of the Peace**

Under the federal Fair Debt Collection Practices Act, repossession of property is prohibited if "there is no present right to possession of the property claimed as collateral through an enforceable security interest" or the property "is exempt by law from such dispossession or disablement."[7] In *McCarthy v. First Credit Resources, Inc.,*[8] McCarthy alleged that First Credit violated the FDCPA by breaching the peace in violation of UCC Section 9-609 as enacted in Pennsylvania, and thus First Credit had no right to possession. Under Section 9-609(b)(2), a creditor may perform a non-judicial repossession so long as "it proceeds without breach of the peace." The FDCPA claim therefore depended on interpretation of the breach of peace doctrine in Pennsylvania.

2d 408, 14 U.C.C. Rep. Serv. 1474 (Ala. Civ. App. 1974) (seizure from parking lot where debtor worked). But see Akerlund v. TCF Nat'l Bank, 2001 U.S. Dist. LEXIS 22816 (D. Minn. 2001) (seizure from U.S. Postal parking lot with no trespassing signs is breach).

[7] 15 U.S.C. § 1692f(6)(A), (C).

[8] 702 F.Supp.3d 366 (W.D. Pa. 2023).

McCarthy also brought a conversion action against First Credit, but this claim also depended on the breach of peace doctrine because a central element of conversion is deprivation of property "without lawful justification." When a conversion claim is premised on an alleged breach of the peace, if the improper repossession claim fails, the conversion claim also fails.

Allegations regarding breach of the peace. To allege breach of the peace, McCarthy admitted that she was delinquent on her car payments. Due to this delinquency, the creditor ultimately secured First Credit to carry out a repossession of McCarthy's car. At 11:30 a.m. on March 30, 2023, an employee of First Credit came to McCarthy's home to repossess the car. McCarthy "immediately ran outside her home," verbally objected to the repossession, called the police to try and stop the repossession, and stood in front of the First Credit tow-truck to prevent it from driving away. When the police arrived, they told McCarthy that First Credit was allowed to take the car, and she relented.

Standard for breaching the peace in a repo. The court first observed that Pennsylvania courts "have not specifically defined what actions constitute a breach of the peace," and there was little case law interpreting a breach of the peace regarding vehicle repos. Determinations of what constitutes a breach of the peace should be made on a case-by-case basis. Citing decisions from various jurisdictions, the court said courts look at several factors, including the use of law enforcement; violence or threats of violence; trespass; verbal confrontation; and disturbance to third parties. Courts also consider verbal objections by the debtor, whether the creditor trespassed on the debtor's property, whether the debtor physically obstructed the creditor, whether there was actual violence such as pushing, whether the creditor physically obstructed the debtor from the property, whether the creditor threatened the debtor in response to the debtor's objections, and whether there was yelling, continued protests, and/or physical intimidation.

Pleading failed to establish breach of the peace. The court then held that McCarthy's complaint failed to allege a breach of peace. The allegations centered exclusively on the actions of McCarthy,

and not First Credit. She ran outside of the house. She verbally confronted First Credit. She stood in front of the tow truck. She called the police. The court said, "What she did isn't the point."[9] The law imposes liability on the defendant when the defendant causes the breach of the peace. The taking of a vehicle over the "oral objection of the owner, however strenuous, is not a breach of the peace unless accompanied by factors indicating that the activities of the repossession agent are of a kind likely to cause violence, or public distress and/or consternation." As pled in the complaint, First Credit did nothing except show up, and once the police said First Credit was entitled to do so, it repossessed the car. Those allegations did not rise to the level of a breach of peace as a matter of law.

Correct result? Many courts have held that police intervention in repossessions constitutes a breach of the peace, but in most of those cases the repossessor, not the debtor as in this case, contacted the police for assistance. Should that make a difference? This court seemed to hold that the debtor has to point to something the repossessor did that crossed the line, which makes some sense, but in this case McCarthy was seemingly penalized for calling the police, which doesn't seem quite right. Many courts have also held that a debtor's objection to the repossession need not be strong. McCarthy alleged she stood in front of the tow truck and told them to stop. "Even polite reposessors breach the peace if they meet resistance from the debtor." *Marcus v. McCollum*, 394 F3d 813 (10th Cir. 2004). Did the court expect McCarthy to resist more strongly, possibly provoking violence or risking serious injury? Should debtors in Pennsylvania be advised to resist more demonstrably? The decision is from a federal district court interpreting Pennsylvania law so it is not binding precedent on this subject. It will be interesting to see if it is followed in other cases

[9] The court cited Labadie v. NU Era Towing & Serv., Inc., 2022 U.S. Dist. LEXIS 152255, (W.D.N.Y. June 14, 2022) (no breach of the peace where the plaintiff alleged that she objected three times but did not allege that the creditor ever "raised his voice or threatened" plaintiff), and Chrysler Credit Corp. v. Koontz, 661 N.E.2d 1171 (Ill. App. Ct. 1996) (no breach of the peace when the plaintiff yelled "don't take it" and the person repossessing the vehicle did not respond verbally or physically).

where the debtor objects to the repo, and makes some attempt to stop it, but then ultimately relents and allows the repo to go forward.

III. Verbal Protest Alone May Result in Breach of the Peace

In contrast to *McCarthy v. First Credit Res., Inc.,* we now have a contrary view from another district court in Pennsylvania, *Gonzalez v. VJ Wood Recovery, LLC.*[10] Both cases arose out of claims that the repossession was unlawful and therefore a violation of the FDCPA.

Facts of the case. Rashay Gonzalez purchased a vehicle with the help of a bank but fell behind on her payments and defaulted on her loan. VJ Wood Recovery LLC was contacted to repossess the vehicle. During the early hours of December 16, 2022, an agent of VJ Wood located the vehicle on a public street in front of the Gonzalez residence and began the repo process. Before the agent completed repossession, Gonzalez exited her home and confronted the agent. As she exited her house, she yelled at the agent, "No, No, No," and stated to him three times that she did not agree to the repossession. The two discussed the matter briefly before Gonzalez returned to her home. (This was all recorded on her cell phone.) At no point during the exchange did tempers flare and there was no physical contact between Gonzalez and the agent or threats of violence. The parties disagreed about whether the vehicle was "hooked up" to the agent's flatbed tow truck when Gonzalez confronted the agent with her verbal protest, i.e., whether the agent was in control of the vehicle at that time. After she went back to her house, the agent fully secured the vehicle and towed it away.

FDCPA and breach of the peace. Gonzalez brought an action in federal court alleging that there was a breach of the peace and, therefore, the FDCPA was violated. VJ Wood moved for summary judgment on this issue. To avoid violating the FDCPA when repossessing property, a debt collector

[10] 2024 U.S. Dist. LEXIS 54629 (E.D. Pa. 2024).

must have a “present right to possession” at the time of repossession. Because the FDCPA does not define "present right to possession," courts look to state law for an answer. The controlling state law was the Pennsylvania UCC, specifically court interpretation of what constitutes a breach of the peace under Section 9-609(b)(2). If there was a breach of the peace, there was no longer a “present right to possession” and the FDCPA was violated.

Breach of peace without contributory conduct by repossessor. The court rejected VJ Wood’s argument that, as a matter of law, no breach of the peace can occur absent contributory conduct from the repossessing party. Although the Third Circuit had not addressed this issue, other circuit courts have discussed whether repossessing over verbal protests of the debtor constitute a breach of the peace. Both the Sixth and Tenth Circuits have held that verbal objection alone may rise to a breach of peace.[11]

Court disagrees with *McCarthy* decision. The court noted that the Pennsylvania district court in *McCarthy v. First Credit Res., Inc.* had recently reached a different conclusion on similar facts. The *McCarthy* court stated that the "taking of a vehicle over the oral objection of the owner, however strenuous, is not a breach of the peace unless accompanied by factors indicating that the activities of the repossession agent are of a kind likely to cause" a breach of the peace. The court in *Gonzalez* chose not to follow *McCarthy* because it “diverges from the majority rule.” The majority rule is based on a “plain reading of the Pennsylvania UCC.” Under Section 9-609(b)(2), a secured creditor may repossess secured collateral "without judicial process if it proceeds without breach of the peace." The statute does not say or even suggest that a repossession is lawful so long as the repossessing party does not contribute to the breach of the peace. The debtor's opposition, “however slight and

[11] See Hensley v. Gassman, 693 F.3d 681 (6th Cir. 2012) ("an objection . . . is the debtor's most powerful (and lawful) tool in fending off an improper repossession because it constitutes a breach of the peace requiring the creditor to abandon his efforts to repossess"); Marcus v. McCollum, 394 F.3d 813 (10th Cir. 2023) ("[E]ven polite repossessors breach the peace if they meet resistance from the debtor”). The court said that the “overwhelming majority” of lower courts had agreed.

even if merely oral, normally makes any entry or seizure a breach of the peace." The court thought this was good policy because "the law should not make a debtor physically confront a repossessor in order to sustain a claim of breach of the peace." If physical confrontation were required, the law might encourage violence in repossession activities.

Jury question. The court ultimately held that whether a breach of the peace in fact occurred is a jury question. The court refused to grant VJ Wood's motion for summary judgment and ruled that the issue should be presented to a jury for a determination whether a breach of the peace occurred.

Did the agent control the vehicle before the breach of peace? Once the repossessing party has gained sufficient dominion over the collateral, courts say the repossession has effectively been completed and objection by the debtor will not cause a breach of the peace. Consequently, even if a jury were to conclude that the verbal objections of Gonzalez during the repo process created a breach of the peace, VJ Wood still had a "present right to repossess" the vehicle if her protest occurred after the agent had already taken control of the vehicle. The court said there was no question that, at some point, the VJ Wood agent gained control of the vehicle, but it was not clear exactly when that occurred. This issue should also be decided by the jury.

Third Circuit may settle the matter. If either the *Gonzalez* or *McCarthy* case gets appealed, the Third Circuit will have an opportunity to settle the "debtor objection" issue in that Circuit. If it ultimately disagrees with the Sixth and Tenth Circuits and sides with the district court in *McCarthy*, we will have a Circuit split on an issue that is important to the operation of a federal statute, the FDCPA. Resolving the split could justify a Supreme Court challenge if that occurs.

IV. Repo with Debtor in Vehicle is Breach of the Peace

Another recent case involving verbal objections is *Shue v. Jmac Distrib., LLC*, 2024 U.S. Dist. LEXIS 147061 (D. Mass. 2024). Shue financed a 2013 BMW through a loan from

Bridgecrest. He claimed that the vehicle had mechanical issues and that having to pay for repairs resulted in him falling behind on his loan payments. Bridgecrest nevertheless contracted with LPS, a nationwide company that does skip tracing and repos on behalf of creditors, to repossess the BMW. LPS then subcontracted the repossession to JMAC.

Shue tries to prevent the repo. One evening Shue noticed a JMAC tow truck near his parked vehicle. Shue told the JMAC representative to stop the repossession but the JMAC representative continued. Shue then sat down in the BMW to prevent JMAC from taking the vehicle. JMAC then hooked the BMW to the tow truck and lifted the car with Shue inside of it "so that he could install dollies on the vehicle."

Unable to complete the repossession with Shue still inside the BMW, the JMAC representative called the police. The police arrived on the scene, spoke with the JMAC representative and told Shue that if he did not get out of the car, he would be arrested for breaching the peace and face possible felony charges. Shue protested but nonetheless got out of the car. The JMAC representative then completed the repossession.

Shue brings lawsuit for state and federal violations. Shue subsequently brought an action against JMAC for violation of Section 1692f(6) of the FDCPA and breach of peace under Article 9. Section 1692f(6)(A) of the FDCPA prohibits "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest." Because the FDCPA does not define "present right to possession," rights are governed by the relevant state law, including Article 9 of the UCC. Courts usually hold that if the repo breaches the peace, there is no longer a "present right to possession," and the FDCPA is violated.

The court held that Shue pleaded sufficient facts to state a claim that JMAC's repossession breached the peace. It noted that there is some uncertainty among the courts about whether repossession over a debtor's verbal objection alone is enough to constitute a breach of the peace, but in this case the repo involved more than a mere expression of protest. Hooking the car to the tow truck and proceeding to lift it with Shue still in the car "more than adequately" supported a breach of the peace claim. JMAC's actions "plainly constituted the kind of hazard resulting from confrontation during self-help repossession that the UCC seeks to avoid."

Police involvement also contributed to breach of peace. The court also noted that calling in law enforcement to aid in self-help repossession could "independently" constitute a breach of the peace. Many courts have held that if law enforcement is brought in to support the repossession, a breach of the peace has occurred. See, e.g., Albertorio-Santiago v. Reliable Fin. Servs., 612 F. Supp. 2d 159 (D.P.R. 2009). Some courts have held, however, that police participation is permitted so long as the officer serves only to prevent violence and does not support the actions of the repossessing party. In this case, Shue alleged that the officer told him that if he continued to protest he would be arrested. There is a distinction between maintaining neutrality and taking an active role in the repossession, so Shue's allegation was sufficient on this point.

Had the repo concluded before Shue got in the car? Shue alleged that he got into the car before JMAC hooked it up to the truck. Had JMAC already hooked up the car and lifted it before Shue got inside, a court might conclude that the repo had already taken place at that point. Courts have held that once the repo is completed, there can be no breach of the peace. In that scenario, the court might have had to decide whether continuing the repo over Shue's verbal protest alone, which apparently did occur prior to hooking up the car, constituted a breach of the peace. See

Hansen v. Santander Bank, N.A., 689 F. Supp. 3d 679 (D. Minn. 2023). In addition, the repo may have been unlawful if Shue had a valid reason to stop paying on the vehicle debt. He alleged that he stopped paying because the BMW needed costly repairs. If there was a breach of warranty, Shue may have been justified in withholding payments and would not have been in default at the time of the repossession.

V. Repo by Non-creditor from Non-Defaulting Debtor Did Not Violate Article 9

Section 9-628 creates a potential affirmative defense for a creditor who does not know that someone had the status of a debtor entitled to notifications and other protections in Part 6 of Article 9. Section 628(a)(1) provides, "Unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person . . . the secured party is not liable to the person . . . for failure to comply with this Article." A federal district court *in Johnson v. Westlake Flooring Co., LLC*,[12] was called upon to interpret this language and held that an aggrieved debtor must allege more than the creditor's "constructive knowledge."

Unusual fact pattern. This was an odd scenario. Tierra Johnson sued several defendants alleging that they acted in concert to impermissibly repossess her 2016 Buick Verano. She brought claims for violation of Article 9 as enacted in Virginia, gross negligence, conversion and trespass to chattels. Johnson sought actual and statutory damages for the alleged violations of Article 9, as provided in Section 9-625(c), and actual and punitive damages related to the common law claims. Significantly, she was not in default on her car loan, and she did not even have a contractual relationship with the repossessing creditor.

Facts of the case. Johnson purchased her vehicle from Car Central LLC in Fredericksburg, Virginia. Less than five months later, she discovered that her car had gone missing in the middle of the night.

[12] 2024 U.S. Dist. LEXIS 227377 (E.D. Va. 2024).

She called 911 to report what she believed was vehicular theft, only to be told that her car had been repossessed even though she was current on her payments. Within a day or so, the car was returned undamaged, but not before she spent hours on the phone trying to determine its whereabouts, missed work, and experienced mental and emotional distress. She claimed, and defendant Westlake did not dispute, that Westlake ordered defendant Select Recovery Agents to repossess her vehicle, despite Johnson being completely current on her loan obligations to a different creditor and not even having a security relationship with Westlake. It turns out that Westlake was the floor planner for the dealership who sold Johnson her car several months earlier. When the dealer defaulted, Westlake (via the repo agent) somehow located and towed away her vehicle which was at her home and nowhere near the dealer's lot.

Does Article 9 apply here? Surely the repo was wrongful, but was Article 9 violated? Johnson may have been a debtor in a secured transaction because it seems she financed her car purchase. Westlake was a creditor in a secured transaction because it financed the car dealer. But the two were not in a debtor-creditor relationship together. The court might have said that Article 9 does not apply in this situation, but it just assumed that it did apply without much discussion. This could be because Westlake conceded that it was a secured party and that Johnson was a debtor, as defined by the UCC.

Westlake's affirmative defense. Having concluded that Article 9 applies, the court noted that under Section 9-609 a creditor can lawfully repossess collateral but only if there has been a default on a debt secured by that collateral. Clearly, there was no default by Johnson here so there was a violation of Article 9. The parties disagreed, however, about whether Johnson had to allege in her complaint that Westlake knew Johnson was a debtor, knew her identity, and knew how to communicate with her for purposes of Section 9-628.

As a procedural matter, the court said Westlake could avail itself of the affirmative defense, even at the motion to dismiss stage, provided that all facts necessary to support it existed on the face of the complaint. Westlake argued that Johnson's pleading showed that Westlake did not have the requisite knowledge, and it could therefore use the affirmative defense in Section 9-628 to avoid liability for any Article 9 violations. Johnson's response was that Westlake had at least constructive knowledge of her identity and how to communicate with her because, had Westlake performed a quick review of the Virginia title records, it would have seen that Johnson (and not Westlake's debtor, the dealer) was the owner of the vehicle.

"Knowledge" vs "notice" in the UCC. The court looked at the language of Section 9-628 and Section 9-605. Both insulate a secured creditor who does not "know" that someone is a debtor. Article 9 does not define "know" or "knowledge," but the terms are defined in Section 1-202(b) which provides, somewhat tautologically, "knowledge" means "actual knowledge," and "knows" has a corresponding meaning. In contrast, Section 1-202(a) defines "notice" as having "reason to know." In light of these definitions, the court ruled that the requirement is not satisfied by proving the existence of notice or constructive knowledge. The court therefore held that because Johnson had not pled that Westlake had knowledge-in-fact of her status as a debtor, her identity, and how to communicate with her, Westlake could use the affirmative defense provided in Section 9-628. Johnson's claim for damages under Article 9 therefor failed as a matter of law, and the court dismissed that claim.

Gross negligence and other tort claims survived. As you might expect, Johnson's other claims survived Westlake's motion to dismiss. She alleged gross negligence by Westlake. The court agreed that the tort was properly pleaded, finding that the alleged facts indicated "a complete lack of care on Defendant Westlake's behalf when it decided to repossess Plaintiffs vehicle." Westlake provided no evidence that it conducted any due diligence before it directed Select Recovery Agents to repossess Johnson's vehicle. Even "de minimis due diligence" would have revealed that the party

with which Westlake did have a security relationship—the car dealer that sold Johnson her vehicle—no longer had any possessory interest in the vehicle, given that it had sold the vehicle many months earlier. Westlake also failed to explain why it would repossess a vehicle in an individual's driveway when the cars with which it had security interests were on the lot of the car dealership. The opinion says Westlake "created a situation where the company acted imprudently by temporarily stealing Plaintiff's vehicle without engaging in any verification of whether Plaintiff was delinquent on her payments, or if Defendant had any security relationship with Plaintiff's vehicle whatsoever. These actions, reflecting a disregard for Plaintiffs interest in their vehicle and utter carelessness, would shock a fair-minded person." The court also refused to dismiss Johnson's claims based on conversion and trespass to chattels.

Prompt return of vehicle was no defense. The court also said Johnson pled damages that qualified as "cognizable" regarding the tort claims. The court agreed with Westlake that Johnson could not include the diminution of value to the vehicle as part of the damages because the car was returned unharmed only a day later. But other damages were alleged and could be proved. Even when property is promptly returned, the owner can claim damages for the loss of use during the period of detention. Johnson spent a full day ascertaining its whereabouts, and she missed work in the process. In addition, Virginia law permits distress damages in conversion and other tort actions. Westlake argued that a complete mitigation of damages would constitute an affirmative defense, but the court said, "Where a person is liable for conversion, the return of the property at issue is not a defense, only a way of mitigating damages."