

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

---

Ford Motor Credit Company,

COURT FILE NO.: 62-C2-02-006015

Plaintiff,

vs.

**AMENDED ORDER**

William Donmay,

Defendant.

---

The above-entitled matter came for a hearing before Judge Judith M. Tilsen, District Court Judge for the State of Minnesota, on June 2, 2003 at 1:30 p.m., on Plaintiff's Motion for Summary Judgment.

The Plaintiff was represented by Thomas Nuss, Attorney at Law. The Defendant was represented by Thomas Lyons, Attorney at law.


Based on all of the files, records, and proceedings herein:

**IT IS HEREBY ORDERED that:**

1. Plaintiff's Motion for Summary Judgment is **DENIED** in part and **GRANTED** in part.
2. The following Memorandum is a part of this Order and constitutes the Court's Findings of Fact and Conclusions of Law to the extent required by Minnesota Rule of Civil Procedure 52.01.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

August 29, 2003

  
Judith M. Tilsen  
Ramsey County District Court Judge

## MEMORANDUM OF LAW

### FACTS

On March 3, 2001 an individual representing himself as William Donnay purchased a Ford Explorer and executed a retail installment contract at the Inver Grove Heights Ford dealership. A May 4, 2001 entry in Ford Motor Credit Company's (FMCC) collection log indicated conversations with two police officers and impound lot personnel revealing the car had been purchased fraudulently by one Quincy Forest through the use of a false name and social security number. Over the next several days additional collection log entries show that other police and impound lot personnel confirmed the car was involved in a fraud ring. On May 18, 2001, FMCC was able to repossess the vehicle from the lot. On or just before November 20, 2001, FMCC forwarded a file to its attorneys, Messerli & Kramer, for collection proceedings against Donnay.

Donnay was informed on October 9, 2001, by Qwest telephone company that in early July several cell phone accounts had been activated fraudulently in his name. The next day Donnay received a Trans Union Credit Report, which included the delinquent Ford account. This was the first Donnay had learned of his identity theft at the Ford dealership. On November 5, 2001, Donnay sent a dispute letter to Trans Union. On November 14, 2001 Donnay sent letters to consumer reporting agencies Experian, CSC, and Trans Union requesting a 7-year fraud alert on his credit history. Despite following their dispute procedures both CSC and Trans Union responded in early December with the Ford account as "verified". On December 26, 2001, Donnay sent a letter to FMCC's collection department stating that he was the victim of identity fraud, that he had not purchased the car or executed the loan. He also requested that FMCC inform the

consumer reporting agencies the account was not his. Despite using the FMCC address provided by CSC, his letter was returned as undeliverable. On January 8, 2002 Donnay learned by correspondence from the Dakota County Attorney that Quincy Valentino Forrest a/k/a Cameron Jerod Wright had been charged for the crime. Donnay then attached the letter from Dakota County to his December 26 letter and resent it to FMCC at Old American Road, Dearborn, MI 48121. He received a response at the end of January from Ron Goodman, executive assistant at FMCC, that he should direct all inquiries to Messerli & Kramer. Donnay did then send a letter to Messerli & Kramer on February 4, 2002.

On March 25, 2002, Mr. Donnay received a Summons and Complaint naming him as a defendant in a lawsuit initiated by FMCC. Donnay telephoned and sent letters documenting the identity theft to Messerli & Kramer, but received no response and was not allowed to talk to any attorney.

On April 11, 2002 Donnay turned to the dealership itself for assistance where a Jerry Bauer offered to look into the matter. About a week later Donnay received word through Mike Saxson at the Inver Grove Heights dealership that FMCC had conferred with Messerli & Kramer, and that they would suspend litigation against him pending outcome of the criminal case in Dakota County. One of Quincy Forrest's accomplices, Charles Earl Ray, plead guilty on April 30, 2002 to Theft by Swindle and identity theft.

Not until July 10, 2002, after Donnay filed a formal answer and counterclaims, did FMCC dismiss their suit. FMCC objected to a dismissal with prejudice. During this same period FMCC sought restitution from Quincy Forrest in Dakota County, characterizing itself as the victim of identity theft.

## ANALYSIS AND DECISION

### **1. Summary Judgment Standard**

Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03 (2000). A party opposing summary judgment may not rely merely on its pleadings but must present specific facts demonstrating there is a genuine issue of material fact. Minn. R. Civ. P. 56.05 (2000); *W.J.L. v. Bugge*, 573 N.W.2d 677 (Minn. 1998). When considering such a motion, the Court must view the facts in the light most favorable to the non-moving party. *Nord v. Herreid*, 305 N.W.2d 337 (Minn. 1981). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), 106 S. Ct. 1348, 1356 (1986)).

### **2. Does the Fair Credit Reporting Act preempt Defendant's defamation and invasion of privacy claim?**

As originally enacted in 1970, the Fair Credit Reporting Act represented the fruit of Congress' "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C.A. § 1681(a)(4). In 1996 Congress amended the Act to impose duties also on furnishers of credit information, i.e. creditors who give information to the credit reporting agencies. See 15 U.S.C. § 1681s-2.

Subsection (a) of § 1681 imposes a duty on furnishers to provide credit reporting agencies with accurate information, however subsection (d) specifically delegates the enforcement of this duty to government agencies (the FTC) and officials. As such there

can be no private cause of action for violations of subsection (a). See e.g. *Hasvold v. First USA Bank*, 194 F.Supp.2d 1228, 1235 (D.Wyo. 2002).

Subsection (b) imposes on furnishers certain other duties, such as investigation and reporting of errors found, upon being given notice of a consumer dispute regarding their credit history. The majority of courts have concluded that unlike § 1681 (a), § 1682(b) does provide a legal platform capable of supporting a private cause of action by an aggrieved consumer. See, e.g., *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1059-60 (9th Cir. 2002).

FMCC argues that Domay's common law claims of defamation and invasion of privacy are preempted by the absolute immunity provision of the FCRA. See 15 U.S.C § 1681i(b)(1)(F). This provision was added during the 1996 amendments and states:

No requirement or prohibition may be imposed under the laws of any State with respect to any subject matter regulated under ... section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies ....

It appears to conflict with the original preemption provision which Congress left intact, section 1681h(e). This provision grants only limited immunity, stating:

**(e) Limitation of liability**

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency ... except as to false information furnished with malice or willful intent to injure such consumer.

Three main solutions to this apparent statutory self-contradiction have emerged in the federal district courts, but no circuit court has yet addressed this issue. Several jurisdictions have sought to harmonize these two sections by a so-called temporal approach. Under this reading each preemption section operates during a different time

period. The first period ends once the furnisher of information receives notice of the dispute. At that point the duty to investigate is triggered, and the second period begins. Adherents to this approach reason that Section 1681s-2 does not apply to the time period before the furnisher receives notice of a dispute, and therefore any conduct occurring prior to this notice will be regulated by Section 1681h(e), while any conduct occurring after notice will be regulated by Section 1681t(b)(1)(F). Any state claims arising during this second period will be preempted. See *Atlagi v. Nationscredit Fin. Servs. Corp.*, 196 F.Supp.2d 1186, 1194-96 (D.Kan. 2002). Cases following this approach include *Riley v. General Motors Acceptance Corp.*, 226 F.Supp.2d 1316 (S.D.Ala.2002); *Vazquez-Garcia v. Trans Union de Puerto Rico*, 222 F.Supp.2d 150 (D.P.R. 2002); *Mattice v. Equifax Credit Information Services*, 2003 WL 21391679 (D.Minn.); *Stafford v. Cross Country Bank*, 262 F.Supp.2d 776, 785 (W.D.Kent. 2003); *Zalvan v. Transunion Corp.*, 2003 WL 1733561 (N.D.Ill.); *Mendoza v. Experian Information Solutions Inc.*, 2003 WL 2005832 (S.D.Tex.); and *Carney v. Experian Information Solutions Inc.*, 57 F.Supp.2d 496, 503 (W.D.Tenn. 1999).

Although the temporal analysis avoids the construction pitfall of nullifying one of the preemption sections and seems a conveniently neat division of labor, the argument is not without its inconsistencies. The recent Iowa decision of *Gordon v. Greenpoint Credit*, 2003 WL 21360105 (S.D.Iowa June 11, 2003) described the analysis as "strained at best", noting that § 1681s-2(a)(1)(A) charges furnishers to report information accurately regardless of whether they have been noticed of a dispute. Therefore the argument that § 1681s-2 applies only after notice is seriously flawed. *Id.* at 5.

A second approach pursued by fewer courts is that because § 1681t(b)(1)(F) was added after § 1681h, it completely supercedes §1681h(e). *Harvold v. First USA Bank, N.A.*, 194 F.Supp.2d 1228, 1239 (D.Wyo.2002). The introduction of § 1681t(b)(1)(F) indicated Congress' desire to completely eliminate all state causes of action as they relate to responsibilities of person who furnish information to consumer reporting agencies. *Id.* This approach was followed by *Jaramillo v. Experian Solutions Inc.*, 255 F.Supp.2d 356, 363 (E.D.Pa.2001) (vacated upon reconsideration) and *Purcell v. Universal Bank, N.A.*, 2003 WL 1962376 (E.D.Pa).

This reading of the statute however defies the familiar rule of statutory construction that no section shall be rendered superfluous. "A statute ought, upon the whole, to be so construed that if it can be prevented, no clause, sentence, or word shall be rendered superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

A third group of cases espouses a reading where § 1681h(e) applies only to torts, while § 1681t(b)(1)(F) applies only to state statutory regulation. See e.g. *Carlson v. Trans Union, LLC*, 259 F.Supp.2d 517 (N.D.Tex.2003). The court stated:

Section 1681h(e) clearly applies to torts. The section specifically references "any action in the nature of defamation, invasion of privacy, or negligence." 15 U.S.C. § 1681h(e). All claims in the (non-exclusive) list are torts. Section 1681t(b)(1)(F) gives every indication of dealing only with state statutory regulation. This is made yet more clear when you consider the two laws that are specifically excluded from Section 1681t(b)(1)(F)'s coverage [the Massachusetts and California statutes].

259 F.Supp.2d at 521 (emphasis in original).

This reading of the two sections is further supported by its faithfulness to the principle of statutory construction that “a general statute must yield when there is a specific statute involving the same subject matter.” *Craighead Elec. Coop. Corp. v. City Water & Light Plant*, 278 F.3d 859, 861 (8<sup>th</sup> Cir.2002). Section 1681t(b) is by virtue of its own title, “General Exceptions”, a more general preemption provision.

There are other textual clues that Section 1681t(b)(1)(F) contemplates statutes and not common law. Section 1681t(b) states that “no requirement or prohibition may be imposed under the laws of any state.” Meanwhile several sections refer to “any state law in effect on the date of enactment.” See Sections 1681t(b)(1)(B) and 1681t(b)(1)(E). Common law is not thought to “be in effect” on any one date. This is the language of the process of legislation. As referred to above, the two “laws” specifically excluded from 1681t(b)(1)(F)’s coverage are Massachusetts and California statutes.

Cases adopting the common law/statutory distinction between the two subsections include *Gordon v. Greenpoint Credit*, 2003 WL 21360105 (S.D.Iowa June 11, 2003); *Dornhecker v. Ameritech Corp.*, 99 F.Supp.2d 918, 931 (N.D.Ill.2000); *Jeffery v. Trans Union LLC*, 2003 WL 21738588 (E.D.Va. July 24, 2003); and *Yatesler v. Sears Roebuck & Co.*, 2003 WL 21147607 (D.Minn.) (rejecting the temporal analysis as not supported by the language of the FCRA and applying Section 1681h(e) to the defamation claim).

Based upon the language of the statute and the principles of construction we must apply, the court believes that the third approach best reconciles the apparent conflict between the two statutory provisions. It gives a fuller effect to each without ignoring either. The court finds that the Defendant’s claims for defamation and invasion of privacy are not preempted by §1681t(B)(1)(F). Furthermore, based on Defendant’s



allegations and evidence, genuine fact issues persist regarding FMCC's possible malicious or willful conduct, which precludes immunity under §1681h(e).

**3. Has the Defendant raised a genuine issue of material fact as to the malicious prosecution claim?**

To state a claim for malicious prosecution a plaintiff must demonstrate that:

- (1) the action was brought without probable cause or reasonable belief that the plaintiff would ultimately prevail on the merits;
- (2) the action must be instituted with malicious intent; and
- (3) the action must terminate in favor of the defendant.

*Jordan v. Lamb*, 392 N.W.2d 607, 609 (Minn. App.1986) (citing *First Nat'l Bank v. Marquette Nat'l Bank*, 482 F.Supp. 514, 522-23 (D.Minn.1979)), review denied (Minn. Oct. 29, 1986).

With respect to the first element, probable cause as applied to a civil action has been described as "such reason, supported by facts and circumstances as would warrant a reasonable man in the belief that his action, and the means taken in prosecuting it, are legal, just, and proper." *Nelson v. International Harvester Co.*, 135 N.W. 808, 810 (Minn. 1912) (citing *Burton v. St. Paul M & M Ry.*, 22 N.W. 300 (Minn. 1885)).

With respect to the second element, malice in this context can include action taken with willful disregard of the rights of others. See *Lammers v. Mason*, 143 N.W. 359, 360 (Minn. 1913). But rarely can one establish a malicious intent through direct proof. In an action for malicious prosecution, malice may be, but is not necessarily to be, inferred from proof of want of probable cause. *Hanowitz v. Great Northern Ry. Co.*, 142 N.W. 196, 197-98 (Minn. 1913).

The Defendant has alleged that FMCC received word on multiple occasions and from multiple sources that Donnay did not purchase the vehicle or execute the loan. Several inferences could be made from these facts. The Defendant alleges that despite this knowledge they brought a baseless suit against Donnay to collect on the loan. FMCC contends that the entire affair is the result of unfortunate miscommunication, misunderstanding and mistake. However to give FMCC the benefit of the doubt in this instance would be to view the facts in the light most favorable to the moving party, something the court does not indulge in at the summary judgment stage. Reasonable minds could differ as to lack of probable cause and malice from the facts asserted by the Defendant.

FMCC also argues that Donnay did not obtain a termination in his favor because they dismissed their claim *without* prejudice. While a dismissal without prejudice may not be the ultimate victory, it is nevertheless a termination in that party's favor. Therefore, the Plaintiff's Motion for Summary Judgment on the malicious prosecution claim is DENIED.

**4. Has the Defendant raised a genuine issue of material fact as to his abuse of process claim?**

In addition to his malicious prosecution claim, Donnay has asserted abuse of process.

The tort of abuse of process is predicated on the misuse or misapplication of the process, after it has once been issued, for an end other than it was designed to accomplish. *Pow-Bel Constr. Corp. v. Gondak*, 192 N.W.2d 812, 814 (Minn. 1972). The essential elements of an action for abuse of process are only two, namely, (a) the existence of an ulterior purpose, and (b) the act of using the process to accomplish a

result not within the scope of the proceeding in which it was issued, whether such result might otherwise be lawfully obtained or not. *Hoppe v. Klapperich*, 28 N.W.2d 780, 786 (Minn. 1947).

Despite its broad moniker, the tort of abuse of process appears to be narrowly focused on the evil of litigation under a false pretense or litigation used as a subterfuge. A party sues for one thing but secretly desires another. There has been no allegation or evidence that FMCC initiated its suit for any other reason than to collect the debt. Thus, regardless of whether Donmay actually owed the debt, obtaining payment from him would have been a result within the scope of the proceeding.

For this reason it is evident that abuse of process is not a proper theory under which to proceed in this case and on which Donmay cannot prevail as matter of law. Therefore summary judgment on the abuse of process claim is GRANTED in favor of Plaintiff FMCC.

**5. Has the Plaintiff raised a genuine issue of material fact to support a claim for punitive damages?**

The Minnesota statute on punitive damages provides:

**Subdivision 1.**

(a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

(b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20.

Punitive damages are allowed only where the harm complained of is the result of conduct done in malicious, willful, or reckless disregard for the rights of others. *Wilson v. City of Egan*, 297 N.W.2d 146, 150 (Minn. 1980) (citing *Huebsch v. Larson*, 191 N.W.2d 433, 435 (1971)). Whether punitive or exemplary damages are appropriate under the particular facts of this case is within the discretion of the jury. *Id.* The weight and force to be given evidence relating to punitive damages is exclusively a jury question. *Id.*; *Johnson v. Wolf*, 172 N.W. 216 (1919).

The Defendant has alleged that Plaintiff FMCC learned over the course of months from multiple sources that Donmay did not purchase the car or execute the loan, yet still maintained their lawsuit against him for collection on the fraudulently obtained loan. The court believes that the Defendant has established a prima facie case in which reasonable jurors could find FMCC acted with deliberate disregard for Donmay's rights. As such, Plaintiff FMCC's motion for summary judgment to preclude a prayer for punitive damages is DENIED.

**6. Has the Defendant provoked a genuine issue of material fact over damages he suffered due to Plaintiff's violation of 15 U.S.C. §1681a-2(b)?**

The Plaintiff argues that Donmay cannot pursue his claim against FMCC for their alleged violation of §1681a-2(b) because he never experienced a denial of credit due to a false credit report.

Section 1681a allows the awarding of punitive damages for willful noncompliance with requirements of the FCRA. Section 1681a allows the awarding of actual damages for mere negligent noncompliance. However, punitive damages may be

available even where a plaintiff has sustained no actual damages. *Casella v. Equifax Credit Booth v Information Services*, 56 F.3d 469, 475 (2d cir. 1995) (citing *TRW Credit Data*, 557 F.Supp. 66, 71-72 (S.D.N.Y. 1982)). Furthermore, "To show willful noncompliance with the FCRA, [the plaintiff] must show that [the defendant] 'knowingly and intentionally committed an act in conscious disregard for the rights of others,' but need not show 'malice or evil motive.'" *Baker v. McKinmon*, 152 F.3d 1007, 1013 (8th Cir. 1998) (citing *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997)).

Abundant federal case law has borne out that undergoing a denial of credit is not the golden prerequisite to maintaining an FCRA claim. Indeed, even where no pecuniary or out-of-pocket loss has been shown, the FCRA permits recovery for humiliation and mental distress. *Thompson v. San Antonio Retail Merchants Ass'n*, 682 F.2d 509 (5th Cir. 1982); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976); see *Evers v. Equifax*, 650 F.2d 793 (5th Cir. 1981). Actual damages have been ruled to also include injury to one's reputation and creditworthiness. *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 151 (5th Cir. 1983); *Bryant v. TRW Inc.*, 689 F.2d 72 (6th Cir. 1982) (citing Representative Sullivan's remarks, set forth at 116 Cong.Rec. 36570 (1970)).

The Defendant has alleged both willful noncompliance deserving of punitive damages and the sufferance of actual damages. The Defendant has asserted and offered evidence that FMCC received word on multiple occasions and from multiple sources that Donny did not purchase the car or execute the loan. It would be within reason to conclude that FMCC's failure to then investigate the dispute and rectify the situation

constituted 'conscious disregard for the rights of others'. Accordingly, FMCC's motion for summary judgment on Count VI of Donnay's counterclaim is DENIED.

#### CONCLUSION

The court finds as a matter of statutory interpretation that the FCRA does not preempt Defendant's state credit defamation and invasion of privacy claims. Because genuine issues of material fact remain outstanding, Plaintiff's Motions for Summary Judgment on the malicious prosecution, punitive damages, and FCRA claims are also denied. The court grants Plaintiff's motion for Summary Judgment on the abuse of process claim.

JMT