

RENDERED: January 16, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 95-CA-3490-MR  
NO. 96-CA-0905-MR  
NO. 96-CA-1985-MR

CUMBERLAND INSURANCE COMPANY, INC.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
CIVIL ACTION NO. 90-CI-003506

MANNING FAMILY TRUST and  
JOHN W. BACKER

APPELLEES

OPINION  
REVERSING AND REMANDING

\* \* \* \* \*

BEFORE: DYCHE, GUIDUGLI and SCHRODER, Judges.

GUIDUGLI, JUDGE. Cumberland Surety Insurance Company, Inc. (Cumberland) appeals from several orders entered by the Fayette Circuit Court regarding its position as surety on a supersedeas bond issued to stay execution of a judgment in favor of the Manning Family Trust (MFT) against Dr. John W. Backer (Backer). We reverse and remand.

The facts in this case are surprisingly simple. MFT filed suit against Backer for breach of contract and/or specific performance. MFT alleged that it entered into an oral contract with Backer wherein Backer agreed to sell a mare named Female Star who was currently in foal to Alydar and her 1990 Alydar colt

to MFT. Following a bench trial, the trial court entered judgment against Backer on July 17, 1992, awarding MFT specific performance along with damages and costs. In order to stay execution of the judgment pending appeal, Backer obtained a surety bond (the bond) from Cumberland naming Cumberland as surety and Backer as principal in the amount of \$550,000. The bond provided in pertinent part:

The appellant having appealed from a judgment of this court rendered on July 17, 1992, for \$73,459.15 plus specific performance and costs, we, John W. Backer as principal and Cumberland Surety Insurance Company, Inc., as surety, bind ourselves and our estates to appellee in the amount of \$550,000.00 to satisfy the judgment together with interest, costs and damages for delay if for any reason the appeal is dismissed or the judgment is affirmed, and to satisfy in full such modification fo [sic] the judgment and such interest and costs, including costs on the appeal, as the appellate court may adjudge.

The trial court approved the bond on October 29, 1993. Backer appealed from the trial court's judgment.

This Court entered its opinion on Backer's appeal on July 14, 1995. The Court affirmed the trial court's finding that an oral contract for the sale of the horses existed between Backer and MFT. However, the Court found that the trial court erred in awarding specific performance on the ground that the colts were no longer available. Thus, the Court affirmed the judgment in part and "reversed and remanded to reconsider damages and determine a monetary damage award."

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Following issuance of the Court of Appeals's decision, Backer filed a motion for restitution with the trial court on August 7, 1995. In the motion Backer sought, among other relief, a release of the bond. The trial court entered an order on September 11, 1995, denying Backer's motion insofar as it sought release of the bond.

Following the trial court's denial of Backer's motion, Cumberland filed its own motion seeking release of the bond on November 13, 1995. In its motion, Cumberland argued that as a result of the decision of the Court of Appeals, there was no judgment remaining to be paid or stayed and that Cumberland had performed its obligations under the bond and was entitled to discharge. In its response filed with the trial court on November 21, 1995, MFT argued that Cumberland was not a party to the action and thus lacked standing to request release of the bond. MFT further contended that the only rights Cumberland had in the action were those afforded to Backer as principal; and pointed out that Backer's motion to release the bond had already been denied. Following a hearing, the trial court denied Cumberland's motion by order entered January 2, 1996.

Prior to the trial court's denial of Cumberland's motion to release the bond, Cumberland filed a motion to intervene with the trial court on November 29, 1995. In its motion, Cumberland stated that it was not seeking to intervene in the trial court's determination as to damages, but instead was seeking intervention "for the limited purpose of protecting its

own interest in its supersedeas bond." The trial court denied the motion by order entered December 20, 1995. On December 22, 1995, Cumberland filed its notice of appeal from the trial court's orders of December 20, 1995, September 11, 1995, and the order denying Cumberland's motion for release of the bond.

The trial court conducted a bench trial on the issue of damages and entered judgment in favor of MFT against Backer in the amount of \$1,483,294.00. On February 23, 1996, MFT filed a motion for judgment against Cumberland in the amount of \$550,000.00 representing the penal sum of the bond. The trial court entered judgment in favor of MFT against Cumberland in the amount of \$550,000.00 by order entered March 27, 1996. Cumberland appealed from the judgment, and this appeal was consolidated with the earlier appeal.

MFT and Backer settled their dispute whereby MFT agreed to accept \$171,000 cash, a 2/3 interest in a 1995 filly, and the claim against the bond. MFT further agreed to forebear any other collection efforts against Backer. Backer agreed not to file bankruptcy within ninety days, not to appeal the judgment, and to cooperate in another lawsuit with MFT.

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Following its second appeal, Cumberland entered into a supersedeas bond with Nobel Insurance Company in the amount of \$682,000 to stay execution on the \$550,000 judgment (bond II). The amount of bond II represented the judgment amount and two years' interest at the legal interest rate of 12%. The bond was

approved by the trial court on April 19, 1996. On April 29, 1996, MFT filed a motion with the trial court pursuant to CR 73.06 requesting that bond II be increased.

The trial court held oral arguments on MFT's motion on June 4, 1996. At the hearing, MFT presented testimony from several experts as to the losses sustained by MFT. In an order entered June 20, 1996, the trial court held:

[MFT] would use the superseded money to purchase six to eight mares in foal, then would sell the foals and rebreed [sic] the mares over the next two years. Due to the delay in collecting the judgment, Plaintiff will lose two crops of foals over the next two years. Mr. Manning, according to expert testimony, could purchase seven mares and produce 14 foals in two years. If all the foals lived, he would realize \$700,000 in gross revenues. As a result, this Court finds, based on the expert testimony, that Mr. Manning potentially will lose \$700,000 gross profit due to the delay of the appeal.

This Court notes that the parties concede that all the foals might not live, however, the purpose of the bond is to secure the Plaintiff against all loss due to the delay. If the appeal is affirmed, Plaintiff will not automatically be entitled to the amount superseded but will have to prove by a preponderance of the evidence to this Court that these damages were incurred.

Wherefore, it is hereby ORDERED that the supersedeas bond posed by Cumberland Surety on April 29, 1996, is insufficient. This Court hereby disapproves that supersedeas bond and ORDERS the supersedeas bond to be set at \$1,250,000.00 to secure the judgment, costs on appeal, interest, and damages for delay.

This Court denied Cumberland's motion for emergency relief by order entered June 27, 1996. Cumberland filed its notice of

appeal from the trial court's order of June 20, 1996, on July 17, 1996.

As this case raises several novel issues, we will address each issue separately.

I. DID THE TRIAL COURT ERR IN REFUSING TO ALLOW CUMBERLAND TO INTERVENE TO REPRESENT ITS INTEREST IN THE SURETY BOND?

Cumberland contends that it should have been permitted to intervene to represent its interest in the surety bond. We agree.

Under Kentucky Rules of Civil Procedure (CR) 24.01, a party is entitled to intervene as a matter of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest unless that interest is adequately represented by existing parties." As Cumberland discovered when its motion for release of the bond was denied, a party who is not a party to an action cannot make a claim for relief in the action until a motion to intervene has been made and granted by the trial court. Ashland Public Library Board of Trustees v. Scott, Ky., 610 S.W.2d 895, 896 (1981).

As Cumberland indicates, the trial court did not find that Cumberland's motion to intervene was untimely. In denying Cumberland's motion, the trial court indicated that it could not find any authority which would allow Cumberland to intervene and

pointed out that the Court of Appeals only reversed part of the judgment as opposed to reversing the entire judgment.

We have conducted our own search on the ability of a surety to intervene to protect its interest on a bond when the judgment the bond covers is reversed on appeal as to the amount of damages and have found no case law which specifically addresses this issue. The only case we have found is Neeley v. Bankers Trust Co. of Texas, 848 F.2d 658 (5th Cir. 1988), where the Court noted in its recitation of the facts that the surety was permitted to intervene on remand to protect its interest in an appeal bond after the trial court granted the appellant's motion to stay release of the bond. Neeley, 848 F.2d at 659.

We find that Cumberland had an interest in this case which could not be adequately represented by Backer on remand. As Cumberland points out, Backer would be held liable to MFT for any judgment entered by the trial court on remand. However, we believe that there was a legitimate question regarding Cumberland's liability for any judgment rendered on remand following reversal of the trial court's original award of damages which could not be adequately represented by Backer. If anything, the positions of Backer and Cumberland can be characterized as adverse upon remand. Because Cumberland was in a position to be bound by a judgment in an action where representation of its interest by a party to the action would have been inadequate, the trial court erred in not allowing Cumberland to intervene pursuant to CR 24.01(6).

II. WAS CUMBERLAND'S APPEAL BOND DISCHARGED AS A MATTER OF LAW BY THIS COURT'S REVERSAL OF THE DAMAGES PORTION OF THE SUPERSEDED JUDGMENT?

The question of whether a surety's obligation on a supersedeas bond is discharged by operation of law upon entry of an appellate opinion which affirms liability but reverses a damages award and remands the matter for a new trial on the issue of damages is a matter of first impression in Kentucky. However, other federal and state jurisdictions which have addressed this identical issue have held that the supersedeas bond is discharged upon entry of an appellate opinion which remands a superseded judgment for a new trial on the issue of damages.

The United States Supreme Court noted in Gay v. Parpart, 101 U.S. 391, 25 L.Ed. 841 (1879), that the purpose of the supersedeas bond is to compensate the non-appealing party for damages and costs incurred in the event of an unsuccessful appeal, and held "[i]f, on the final disposition of a writ of error or appeal, the judgment or decree brought under review is not substantially reversed, it is affirmed and the writ of error or appeal has not been prosecuted with effect." Gay, 101 U.S. at 392, 25 L.Ed. at 841. The Supreme Court later expounded its holding in Gay in the later case of Crane v. Buckley, 203 U.S. 441, 27 S.Ct. 56, 51 L.Ed. 260 (1906), when it defined "to effect" as "an expression substantially equivalent to prosecuting his appeal with success; to make substantial and prevailing his attempt to reverse the decree or judgment awarded against him." Crane, 203 U.S. at 447, 27 S.Ct. at 58, 51 L.Ed. at 263. The



Court further held that the obligation of a surety under a supersedeas bond is strictissimi juris and is "not to be extended by implication or enlarged construction of the terms of the contract entered into." Id.

The jurisdictions which have addressed this same issue have held that an affirmance of liability on appeal coupled with a reversal for a new trial on the issue of damages constitutes prosecution of an appeal with effect. In Neeley, supra, the appellate court affirmed the trial court's verdict finding the defendant guilty of fraud but remanded for a new trial on the issue of damages. The surety intervened on remand and sought release of the bond, but the trial court denied the motion. On appeal, the Court held that the surety bond was discharged by the judgment entered by the appellate court.

The language of the bond is explicit in that it includes only the judgment, sentence or decree and award of damages of the court of appeals. On the original appeal, there were no damages awarded. Instead, all of the damages were either reversed or vacated for a new trial.

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Here, there was no judgment, in terms of money damages, to enforce after the appeal. Instead, a new trial was necessary. The bond, limited by its explicit terms to the judgment of the court of appeals, was discharged.

Neeley, 848 F.2d at 659. See also, Aetna Casualty & Surety Co. v. LaSalle Pump & Supply Co., 804 F.2d 315 (5th Cir. 1986); Tennessee Valley Authority v. Atlas Machine & Iron Works, 803 F.2d 794 (4th Cir. 1986); Revlon, Inc. v. Carson Products Co., 647 F.Supp. 905 (S.D.N.Y. 1986). Many state courts have also

reached the same conclusion. In Amwest Surety Ins. Co. v. Graham, 949 S.W.2d 724 (Tex. Ct. App. 1997), the Court held that reversal of the supersedeas judgment discharges the surety from its obligation as a matter of law. "To hold otherwise would violate the rule established by our own supreme court that "[t]he sureties are no further bound than they have contracted to be.["]" Amwest, 949 S.W.2d at 729 (citation omitted). See also Holmes v. United States Fidelity & Guaranty Co., 844 S.W.2d 632 (Tenn Ct. App. 1992); Kennedy v. Miller, 528 N.E.2d 406 (Ill. App. Ct. 1988); Kroll v. Crest Plastics, Inc., 369 N.W.2d 487 (Mich. Ct. App. 1985); Kirkpatrick v. Munn, 181 So.2d 150 (Miss. 1965); Kulhanjian v. Moomjian, 105 So.2d 783 (Fla. 1958); Harp v. American Surety Co. of New York, 311 P.2d 988 (Wash. 1957).

We believe that Kentucky case law and the language of the bond in question mandate the same outcome in this case. Kentucky courts have recognized that the extent of a surety's liability is to be determined from the terms of the surety contract, and the surety is not obligated to pay a judgment unless it is "within the purview of the agreement between surety and principal." Ohio Casualty Ins. Co. v. Ky. Natural Resources and Environmental Protection Cabinet, Ky. App., 722 S.W.2d 290, 292 (1986). Furthermore, a judgment which is reversed on direct appeal is to be treated as if it has never been entered. Clay v. Clay, Ky. App., 707 S.W.2d 352, 353 (1986).

In this case, the bond specifically references the judgment entered by the trial court on July 14, 1992, and

promises to satisfy the judgment only if the appeal is dismissed, or the judgment is affirmed or modified on appeal. As the original damages judgment was reversed, we are to treat it as if it had never been entered. Thus, the bond was discharged by entry of our earlier opinion as a matter of law and the trial court erred in entering judgment against Cumberland as surety on the supersedeas bond.

III. DOES THIS COURT HAVE JURISDICTION TO HEAR CUMBERLAND'S CLAIMS REGARDING DISCHARGE OF THE SURETY BOND?

MFT argues that this Court lacks jurisdiction to address the issue regarding discharge of the bond. Miller contends that since Backer's motion to discharge the bond was denied and because Backer did not appeal from the trial court's entry of judgment following the retrial, the judgment is final and we cannot consider Cumberland's claims. We disagree.

First, as discussed supra, Cumberland should have been permitted to intervene in order to protect its interest on the bond. Once it is permitted to intervene in accordance with this opinion, it has the right to request dismissal of the bond and the trial court will have no choice but to discharge the bond in accordance with the terms of this opinion. The fact that Backer has not appealed from the second judgment has no bearing on our decision that Cumberland should have been permitted to intervene to protect its interest on the bond.

IV. IS A MOTION FOR INTERMEDIATE RELIEF PURSUANT TO CR 76.30 THE PROPER METHOD TO CHALLENGE A TRIAL COURT'S

RULINGS REGARDING  
SUPERSEDEAS BONDS?

Cumberland asks us to rule whether a trial court's order either increasing or decreasing a supersedeas bond is final and appealable or subject to our review only through a motion for intermediate relief pursuant to CR 76.33. We answered this question quite clearly in Industrial Redistribution Center, Inc. v. Plastipak Packaging, Ky. App., 706 S.W.2d 2 (1986), where we held:

The appellee who has reason to believe a supersedeas bond is defective or the surety is insufficient should file a motion in the trial court. The motion should be supported by an affidavit giving grounds for the action. If after the hearing on the motion, the trial court finds the supersedeas defective or the surety inadequate, it may direct action it deems appropriate. This may include requiring new or additional surety. A party who believes the trial court abused its discretion may file a motion for intermediate relief in the appeal pending in the appellate court.

Industrial Redistribution, 706 S.W.2d at 3. As this Court held that the trial court abused its discretion in ordering an increase in its supersedeas bond by an order entered October 28, 1996, the balance of the issues raised on appeal by Cumberland in No. 96-CA-1985-MR are moot.

Having considered the parties' arguments on appeal, the trial court's order denying Cumberland's motion to intervene is reversed and this matter is remanded to the trial court with instructions to discharge Cumberland's obligation under the bond.

SCHRODER, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

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Maureen D. Carman  
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BRIEF AND ORAL ARGUMENT FOR  
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William A. Dykeman  
Winchester, KY