

RENDERED: JULY 9, 1999; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002736-MR

LOIS SUMMERS PRICE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 91-CI-803

ELNA KAY TOLSON PRITCHARD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Lois Summers Price (Price) appeals from a judgment of the Fayette Circuit Court entered on June 25, 1996, which adjudged a quitclaim deed for certain property from Elna Kay Tolson Pritchard (Pritchard) to Price void, ordered Price to execute a deed conveying title to that property to Pritchard and to pay Pritchard as punitive damages a sum of money equal to the balance due on a land contract, not to exceed \$35,000. Price

claims various errors regarding the punitive damages award. We affirm.

On August 6, 1975, Pritchard and her former husband, Jack W. Tolson, executed a land contract to Price for the sum of \$15,000 payable at 8.5% interest, with monthly payments of \$135 per month. Pritchard and Tolson divorced;¹ however, Pritchard remarried and continued to make payments on the land contract until June 1989. According to Price, beginning in June 1989, Pritchard did not make a payment for five months. Then, in October 1989, Pritchard tendered five checks of \$135 each to Price. Price claims she was told that these checks could not be cashed at that time, and she claims that she never cashed them.² Price concedes that from October 1989 to December 1990, she did not demand payment or make any attempt to collect any payments from Pritchard. However, Price claims that in December 1990, she went to Pritchard's house, presented her with the uncashed checks and asked her why no payments had been made. She claims Pritchard told her that she could not pay the arrearage on the contract. Pritchard claims that Price notified her that she was going out of town in October 1989, and told her to suspend payments until she contacted her.³ Pritchard claims that Price did not contact her until December 1990, at which time Price

¹The record does not disclose when they divorced.

²Price does not state why the checks could not be cashed.

³Pritchard claims that Price would periodically disappear without leaving an address where she could be reached.

agreed to allow her to pay off the \$6,000 balance due on the land contract. Pritchard claims she made arrangements to obtain financing assistance and had the title to the property examined.

In January 1990, Price sought legal advice concerning Pritchard's delinquency. She claims that an attorney informed her that she could either foreclose or obtain a deed-in-lieu of foreclosure. After a quitclaim deed was prepared, Price told Pritchard that, in order to refinance the land contract and in order for Price to convey the property to her, all parties, including her ex-husband, would have to execute the quitclaim deed. To obtain her ex-husband's signature, Pritchard was forced to release him from a judgment lien for child support arrearage he owed in the amount of \$10,000. On January 3, 1991, Pritchard delivered the executed quitclaim deed to Price. The title examination had disclosed an unreleased mortgage lien for which Pritchard obtained a release. Price claims that after obtaining the quitclaim deed she agreed to lease the property to Pritchard for \$135 per month, but that Pritchard never paid any rent. Price never informed Pritchard that the quitclaim deed was going to be used as a deed-in-lieu of foreclosure. Pritchard claims that as of February 11, 1990, Price led her to believe that everything was ready for a closing. Pritchard claims, however, that Price informed Pritchard's closing attorney that she was not going to allow Pritchard to pay off the land contract and that she was not going to convey the property to Pritchard. Price then recorded the quitclaim deed as a deed-in-lieu of

foreclosure, which effectively eliminated any equity Pritchard had acquired in the property.⁴

On February 28, 1991, Price filed a forcible detainer action against Pritchard in Fayette District Court. On March 4, 1991, Pritchard brought suit in Fayette Circuit Court against Price claiming fraud in the inducement in the signing of the quitclaim deed. Price's answer claimed that after the quitclaim deed was executed, she agreed to lease the property to Pritchard for \$135 per month, that Pritchard never paid under this oral lease and that Pritchard's complaint should be dismissed. The action lay dormant from 1991 until 1996.

On April 22, 1996, Price filed a motion for partial summary judgment stating that Price's 1992 discharge in bankruptcy extinguished Pritchard's claim for punitive damages⁵ and that there being no genuine issue of material fact, summary judgment was proper. Pritchard filed a response to the motion arguing that mutual claims were involved in that Pritchard owed Price money on the balance of the land contract and Price owed a monetary claim to Pritchard for punitive damages. Pritchard argued that this was a setoff⁶ and that a discharge in bankruptcy does not affect a right of setoff. Pritchard stated that any

⁴Both parties have agreed that the value of the property was \$30,000 and since \$6,000 was owed on the land contract, Pritchard lost approximately \$24,000 in equity.

⁵United States Bankruptcy Code, 11 U.S.C. § 101(5) and (12).

⁶United States Bankruptcy Code, 11. U.S.C. § 553(a).

punitive damages award should be limited to the amount needed to pay off the balance on the land contract.

The matter went to a jury trial on May 13, 1996. Prior to the conclusion of the trial, the trial court denied Price's motion to dismiss the punitive damages claim; however, the trial court limited the award of punitive damages to an amount equal to the balance owed on the land contract. At trial, the jury found for Pritchard on her fraud claim and returned a verdict awarding Pritchard \$35,000 in punitive damages. The jury was not instructed on any limit to a punitive damages award. Judgment was entered on June 25, 1996. Price filed a motion for a new trial which was denied on September 4, 1996. This appeal followed.

Price first argues that "[t]he jury disregarded the law, the facts, and the court's instruction." We understand this argument to mean that the jury did not follow the instructions and the jury disregarded uncontroverted facts. "Where a verdict is ambiguous, irregular or defective in form or in substance, a trial court has the power, indeed, the duty when its attention is called to the verdict, to require the jury to reconsider and change its verdict whether or not the court is requested to do so." Anderson's Executrix v. Hockensmith, Ky., 322 S.W.2d 489, 490 (1959). In Davis v. Graviss, Ky., 672 S.W.2d 928 (1984), the Court stated as follows:

[T]he trial court is charged with the responsibility of deciding whether the jury's award appears "to have been given under the

influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). This is a discretionary function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial.

Id. at 932. On the other hand, an appellate court reviews the trial court's denial of a motion for new trial to determine "whether the trial judge abused his discretion. The decision of the trial judge is presumptively correct.'" Shortridge v. Rice, Ky.App., 929 S.W.2d 194, 196 (1996), quoting McVey v. Berman, Ky.App., 836 S.W.2d 445, 448 (1992).

After some deliberation, the jury returned to the courtroom. The trial court noticed that rather than specifying a dollar amount, the jury had written a narrative in the margin in response to a punitive damages amount. Instruction No. 4 and the jury narrative stated as follows:

You have found under Interrogatory No. 2 that the Defendant acted to defraud the Plaintiff intentionally, or with reckless disregard, you may now, in your discretion, award punitive damages against the Defendant in addition to any other relief awarded.

We[,] the jury[,] unanimously find that the plaintiff is entitled to punitive damages equal to the plaintiff's court costs & attorney fees as well as the voiding of the quitclaim deed to allow the plaintiff to pay off the remaining balance of the land contract within 30 days. If the plaintiff does so, she is entitled to the deed to the house.

The trial court conferred with counsel, who both agreed that the trial court should instruct the jury that the verdict

could not be accepted in this form and that they should re-deliberate and fill in the blank with a dollar amount. The jury did so by writing "\$35,000" in the blank. Price argues that the original narrative response should void the verdict because it was irregular. Pritchard responds by noting that counsel for both parties agreed to instruct the jury to fill in the blank with a dollar amount; and that the jury did so.

The jury's original notation on the verdict form clearly indicated an intent to award punitive damages equal to the amount required to pay off the balance owed on the land contract, court costs, and attorney's fees, even though it failed to state a specific dollar amount. When the jury deliberated again, it followed the trial court's instructions and provided a dollar amount for the punitive damages. We conclude that the trial court did not abuse its discretion in ordering the jury, with the agreement of both parties, to deliberate again, and in accepting the second verdict. As stated in Callis v. Owensboro-Ashland Company, Ky.App., 551 S.W.2d 806, 808 (1977), "the inconsistency was one of form rather than substance and a jury may be returned to correct the form of its verdict at any time."

Price also argues that the verdict was incomplete and should not have been accepted because the jury completely ignored Interrogatory No. 3 following Instruction No. 5. Pritchard contends that the jury was correct in skipping Interrogatory No. 3 based on their answers to previous questions. We agree with Pritchard that Price's argument completely ignores the simple

language of the instructions since the only way the jury would have even reached Instruction No. 5 would have been if they had answered in the negative to Interrogatory No. 1. Instead, the jury answered in the affirmative to Interrogatory No. 1, and went, as the instructions directed, to Instruction No. 2. The jury answered in the affirmative to Interrogatory No. 2 which stated that they were to proceed to Instruction No. 4. At the end of Instruction No. 4 was the admonition, "Please return to the Courtroom." Instruction No. 5 represented an alternative theory of relief which the jury did not award. A finding of fraud based on Instruction No. 1 voided the quitclaim deed, thus there was no purpose in the jury considering any alternative claim that the deed constituted a mortgage. It is clear that the jury followed the instructions. Thus, there was no error in the jury not answering Interrogatory No. 3.

Price alleges the following additional errors: (1) Pritchard presented no evidence of bad faith as is required for a punitive damages award; (2) the jury did not award compensatory damages, therefore, the punitive damages award cannot stand; (3) the trial court did not correctly instruct the jury on punitive damages; and (4) the jury should have been instructed to limit the punitive damages award in accordance with court orders.

Since the jury found that Price committed fraud, the question of punitive damages was properly before it. Punitive damages are "the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damage award must make a

qualitative assessment based on a host of facts and circumstances unique to the particular case before it." Hanson v. American National Bank & Trust Company, Ky., 865 S.W.2d 302, 311 (1993), quoting TXO Production Corp. v. Alliance Resources Corp., 509 U.S. ___, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). The evidence of Price's failure to disclose to Pritchard the actual purpose of the quitclaim deed was sufficient evidence to allow the jury to determine that Price acted with bad faith.

Price next argues that the punitive damages award cannot stand because no compensatory damages were awarded. However, that is not the law in Kentucky. In Louisville & N.R. Co. v. Ritchel, 148 Ky. 701, 147 S.W. 411 (1912), the jury returned a verdict for punitive damages only and the appellant argued that since there had been no finding of compensatory damages, any punitive damages award was improper. When presented with the question of whether an actual damage award was an essential predicate to a punitive damages award, the Court stated as follows:

It is true that there are respectable authorities which appear to hold that punitive damages cannot be awarded when the actual injury is merely nominal. Stacy v. Publishing Company, 68 Me. 287. In our opinion, however, this view is not correct, and does not agree with the great weight of authority. The correct rule, we think, is that if a right of action exists—that is, if the plaintiff has suffered an injury for which compensatory damages might be awarded, although nominal in amount—he may in a proper case recover punitive damages. Sedgwick on Damages, (8th Ed) vol. 1, § 361; Alabama Great Southern Railroad Co. v. Sellers, 93

Ala. 9, 9 South. 375, 30 Am. St. Rep. 17;
Hefley v. Baker, 19 Kan. 11; Dosker v.
Western Union Telegraph Co., 77 S.C. 56, 57
S.E. 671.

Id. 147 S.W. at 414. Accord Estep v. Werner, Ky., 780 S.W.2d 604, 607 (1989); Lawrence v. Risen, Ky.App., 598 S.W.2d 474, 475-476 (1980); and Brink v. Kennedy, 286 Ky. 566, 571, 151 S.W.2d 58, 61 (1941).⁷ Clearly, the jury determined that a right of action for fraud existed. This finding of fraud included a finding of injury; therefore, there was a basis for a punitive damages award.

Price argues that the trial court did not correctly instruct the jury on punitive damages when it failed to instruct according to Kentucky Revised Statutes (KRS) 411.184 and 411.186.

Pritchard claims that Price failed to preserve this issue for appellate review. CR 51(3) states as follows:

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

Price did not offer a punitive damages instruction or make a motion regarding the instructions; however, Price as well as

⁷A survey of the other states reveals that 30 states require an award of compensatory damages before punitive damages can be awarded and 15 do not require that a compensatory damage award be made, but they do require an injury for which compensatory damages might be awarded.

Pritchard objected to the common law form of the instruction, thus preserving the error for our review.

The instructions given by the trial court required the jury to find that "based on clear and convincing evidence, that the Defendant, Lois Summers Price, acted intentionally or with reckless disregard for the rights of the Plaintiff, Elna Kay Pritchard." KRS 411.184(2) states that punitive damages are recoverable when "the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." KRS 411.186 lists five factors for the fact-finder to consider in determining the amount of punitive damages to award. In this case, the trial court gave common law instructions to the jury, which did not list the five statutory factors or note the statutory requirement of oppression, fraud, or malice. The trial court stated that it gave this common law instruction rather than the statutory instruction because it had previously been held in Williams v. Wilson, Ky., 972 S.W.2d 260 (1998), that KRS 411.184 and 411.186 were unconstitutional and that Williams v. Wilson was then on appeal to this Court. This Court affirmed the circuit court, and subsequently, the Supreme Court granted discretionary review. The Supreme Court also affirmed, holding that KRS 411.184(1)(c)⁸ was a violation of the jural rights doctrine, and

⁸KRS 411.184(1)(c) states that "'Malice' means either conduct which is specifically intended by the defendant to cause tangible or intangible injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that

(continued...)

therefore unconstitutional. However, the Court determined that the question of the constitutionality of KRS 411.184(2) was not properly before the Court, and it declared that it would express no opinion as to the constitutionality of that statute. The Supreme Court stated as follows:

In 1988 the Kentucky General Assembly considered broad tort reform legislation embodied in HB 551. From among the proposals, the Legislature enacted a statute codified at KRS 411.184 intended to modify Kentucky law with respect to punitive damages. In general, the intent of the Legislature was to redefine the circumstances in which punitive damages were recoverable, and toward that end a new legal standard was established. Departing from the traditional common law standard which permitted a jury to impose punitive damages upon a finding of gross negligence as measured by an objective standard, the new statutory standard, here under review, requires a determination that the defendant acted with "flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm." It also requires proof by clear and convincing evidence. The Fayette Circuit Court and the Court of Appeals decided the constitutional question and invalidated the statute on the view that it offends Sections 14, 54 and 241 of the Constitution of Kentucky. Both courts below held that the statute effectively destroyed the common law

⁸ (...continued)

such conduct will result in human death or bodily harm." The Supreme Court in Williams stated that this section impinged on the jural rights doctrine because it departed from the traditional common law standard which permitted a jury to impose punitive damages upon a finding of gross negligence as measured by an objective standard, whereas the new statutory standard required a determination that the defendant acted with "flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in human death or bodily harm."

right of action for punitive damages and that such was precluded by the doctrine of jural rights.

Id. at 261 (citation omitted).

Even though the Court ruled that KRS 411.184(1)(c) was in violation of the jural rights doctrine, and therefore, unconstitutional, the Court determined that the question of the constitutionality of KRS 411.184(2) was not properly before it. Thus, it refused to express an opinion as to the constitutionality of that statute. This would appear to leave a question unanswered about whether a trial court should use the factors set forth in KRS 411.186(2) in preparing jury instructions. One of the factors is "[t]he degree of the defendant's awareness of that likelihood [that serious harm would arise from the defendant's misconduct.]" Id. at (2)(b). Having ruled that the statutory requirement in KRS 411.184(2) that a defendant have a subjective belief was unconstitutional, it would be inconsistent to include a factor which, in fact, includes the defendant's awareness. Under these circumstances, we cannot say that the trial court erred in abandoning the factors listed in KRS 411.186(2) and in using the common law standard.

Price's next issue is whether the trial court should have instructed the jury to limit the punitive damages award to the payoff of the land contract. The trial court had previously ruled that punitive damages would be limited to the payoff amount. The trial court and both counsel discussed how to present the setoff scenario to the jury. Both parties agreed

that a jury instruction on this issue would have been too confusing. This agreement was reiterated during a discussion before jury instructions were given, and the trial court specifically included the limited language in the judgment. Price cannot now be allowed to contend that the trial court erred in not instructing the jury that any award would only be used to offset the land contract balance. Furthermore, we agree with Pritchard that there was no need to present proof of the amount due on the land contract since the parties had agreed not to instruct the jury on the limit.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

DYCHE, JUDGE, CONCURS.

KNOFF, JUDGE, CONCURS IN RESULT ONLY.

KNOFF, JUDGE, CONCURRING IN RESULT ONLY.

Although I agree with the result reached in the majority opinion, I cannot agree with some of the reasoning. The majority correctly finds that Price cannot raise the irregularity of the jury's first verdict on appeal because the parties agreed to resubmit the issue to the jury following the first verdict. I also agree with the majority, reluctantly, that there was sufficient evidence to support an award of punitive damages despite the absence of an award of compensatory damages. Furthermore, I agree with the majority that the award of punitive damages was not clearly excessive. However, I am concerned about the inadequacy of the jury instructions on the amount of punitive

damages. Moreover, I cannot agree with the dicta in the majority opinion which questions the constitutionality of KRS 411.186(2).

First, I am concerned about the inadequacy of the trial court's instruction to the jury regarding the amount of punitive damages. The jury in the present case was not instructed as to any factors to consider in calculating the amount of damages. The instruction does not give any guidelines to determine the amount of punitive damages. In the absence of any directive from the trial court to consider the culpability of Price's conduct, the jury was left without any framework within which to calculate the amount of punitive damages.

Nonetheless, I believe that any error with regard to the instruction was harmless. It is my understanding that the trial court limited any recovery for punitive damages to an amount equal to the balance due under the land sale contract. The parties have apparently agreed that the balance due under the contract is approximately \$6,000.00. Given the scope of this Court's review of an award of punitive damages and the facts of this case as found by the jury, I cannot conclude that an award of \$6,000.00 in punitive damages was clearly excessive.

However, I disagree with the majority's view that the factors set forth in KRS 411.186(2) are inconsistent with the Supreme Court's ruling in Williams v. Wilson, Ky., 972 S.W.2d 260 (1998). I believe that the majority's reasoning overstates the holding of Williams v. Wilson, and in so doing, impinges upon due

process rights. Moreover, I believe that the jury instruction is inadequate even under the common law standard.

Under KRS 411.184, a jury was to find by clear and convincing evidence that a defendant acted with "fraud, oppression, or malice" in determining whether to award punitive damages. In Williams v. Wilson, our Supreme Court found the statute unconstitutional because it restricted a jural right of recovery for wrongful death or personal injury by eliminating recovery for punitive damages based on gross negligence, in violation of Ky. Const. §§ 14, 54 and 241. Id. 972 S.W.2d at 267-68. However, the Supreme Court specifically stated that it was not considering the constitutionality of KRS 411.184(2), Id. at 269, and the Court did not even address KRS 411.186. The majority's discussion takes Williams v. Wilson beyond its scope.

Furthermore, I cannot agree with the underlying proposition that the factors listed in KRS 411.186(2) violate any jural right of recovery. Under the statutory scheme, a jury must first consider whether to impose punitive damages. Once the jury determines that punitive damages are appropriate, KRS 411.186(2) directs the jury to *consider* the following factors:

- (a) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;
- (b) The degree of the defendant's awareness of that likelihood;
- (c) The profitability of the misconduct to the defendant;
- (d) The duration of the misconduct and any concealment of it by the defendant; and

(e) Any actions by the defendant to remedy the misconduct once it became known to the defendant.

Williams v. Wilson merely holds that the defendant's subjective awareness that such conduct would result in harm is not a valid requirement to determine whether punitive damages should be imposed. The factors listed in KRS 411.186, on the other hand, are considerations in determining the amount of punitive damages. The egregiousness of a defendant's behavior has always been a relevant factor in the calculation of the proper amount of punitive damages to impose. Hensley v. Paul Miller Ford, Inc., Ky., 508 S.W.2d 759, 763 (1974). Thus, the factors listed in KRS 411.186(2) are in no way inconsistent with the common law standard for punitive damages, and cannot be held to limit a jural right of recovery. Therefore, the factors listed in KRS 411.186(2) are not inconsistent with the Supreme Court's decision in Williams v. Wilson. Consequently, while I agree with the majority's result affirming the award, I do not believe the majority's interpretation of Williams v. Wilson is compelled.

BRIEF FOR APPELLANT:

Hon. Ronald A. Newcomer
Lexington, KY

BRIEF FOR APPELLEE:

Hon. John P. Brice
Lexington, KY