

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001639-MR

MARC CREECH

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE ROBERT JACKSON, JUDGE
ACTION NO. 98-CI-00100

DEBORAH JEAN WILSON

APPELLEE

OPINION
AFFIRMING IN PART;
REVERSING IN PART AND REMANDING
** ** * * * * *

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

EMBERTON, JUDGE: The appellant, Marc Creech, filed this action to collect from the appellee, Deborah Jean Wilson, money she allegedly owed him. Wilson counterclaimed alleging that Creech wrongfully obtained and caused to be executed a Writ of Possession causing her vehicle to be impounded.

In 1993, Creech and Wilson, who were involved in a romantic relationship, entered into a verbal agreement pursuant to which Creech sold Wilson a 1991 Ford Thunderbird automobile. Wilson agreed to pay the full outstanding indebtedness on the vehicle, \$6,000, to Citizens Bank of Jackson. Additionally,

Creech maintains that the parties orally agreed that Wilson would pay Creech an additional \$2,500.

Wilson made the payment to Citizens and the indebtedness was paid in full. In March 1997, the bank's lien was released and Creech signed title of the vehicle to Wilson. Although Wilson procured and maintained insurance on the vehicle, to avoid the sales tax, title was not transferred to Wilson.

In April 1997, Creech requested Wilson go with him to the Citizens National Bank of Jessamine County and sign a promissory note. Creech maintains the purpose of the loan was to enable Wilson to pay him the \$2,500 owed him for the vehicle and \$1,800 owed him for cash loans made by him to her between the time of sale of the vehicle and April 1997. A loan was arranged in the amount of \$5,138.98, with \$4,300 going to Creech, \$700 to Wilson, and \$138.98 to administrative fees. Creech purchased a certificate of deposit for \$4,300 which was pledged to the bank as collateral for the loan and signed a Guaranty Agreement with the bank guaranteeing the note signed by Wilson in the amount of \$5,138.98.

Wilson made the payments on the loan until December 1997, when she advised Creech that she would make no more payments. On January 14, 1998, Creech took over the payments on the loan and made two payments in the amount of \$343.98. On February 17, 1998, Creech was informed by the bank that it was calling the loan and he was required to pay \$4,179.61. As provided by the Guaranty Agreement, Creech paid the loan in full.

Title to the vehicle having remained in Creech's name, he sought and obtained an Ex Parte Writ of Possession which was executed and the Thunderbird was removed from Wilson's possession and impounded.

Wilson and Creech, involved in a romantic relationship, did not evidence their financial transactions by written documentation. Creech, perhaps realizing the relationship was dissolving, sought to cut his losses by guaranteeing a loan taken by Wilson to repay him for money he had allegedly loaned her. Creech, however, did not cosign the promissory note. The only document signed by him is the loan Guaranty Agreement.

The issue in this case as perceived by this court is simply whether Creech, as a guarantor who has paid the principal debt in full, can be subrogated to the rights of the bank and recover the amount paid from Wilson. It is a general principle of equity that:

[W]here the person paying the debt or performing the obligation of another stands in the relation of surety or guarantor to the person whose debt or obligation has been performed, equity substitutes him in the place of the creditor or obligee as a matter of course, without any special agreement to that effect and without requiring any further showing to be made of circumstances entitling him to subrogation.

Grubbs v. Slater, Ky., 266 S.W.2d 85 (1953), citing Brandts, The Law of Suretyship and Guaranty, 3rd Ed., Volume 1, p. 611.

Wilson asserts that in paragraph 10 of the Guaranty Agreement Creech waived any right of action he had against her arising from his obligations under the agreement, including subrogation. The pertinent part of the agreement provides:

The Undersigned waives any claim remedy or other right which the Undersigned may now have or hereafter acquire against Borrower or any other person obligated to pay Indebtedness arising out of the creation or performance of the Undersigned's obligation under this guaranty, including, without limitation, any right of subrogation, contribution, reimbursement, indemnification, exoneration, and any right to participate in any claim or remedy the Undersigned may have against the Borrower, collateral, or other party obligated for Borrower's debts, whether or not such claim, remedy or right arises in equity, or under contract, statute or common law.

This case squarely presents the novel question of what rights, if any, the principal debtor acquires under a guaranty agreement between the guarantor and the creditor.

Only Creech and the bank were parties to the Guaranty Agreement which is independent from the note executed by Wilson. Citizens Fidelity Bank & Trust Co. V. Lamar, Ky. App., 561 S.W.2d 326, 328 (1977).

Wilson, a non-party to the agreement seeking to benefit from its terms, must demonstrate that the contract was made and entered into directly or primarily for her benefit. Long v. Reiss, 290 Ky. 198, 160 S.W.2d 668, 674 (1942). As explained by King v. National Industries, Inc., 512 F.2d 29,33 (1975), the only category of third-party beneficiaries having rights under a contract are donee beneficiaries and creditor beneficiaries:

One is a donee beneficiary if the purpose of the promisee in buying the promise is to make a gift to the beneficiary. A person is a creditor beneficiary if the promisee's expressed intent is that the third party is to receive the performance of the contract in satisfaction of an actual or supposed duty or liability of the promisee to the beneficiary. Any others who may incidentally benefit from

a contract are no more than incidental beneficiaries with no enforceable rights under the contract.

The principal debtor may be characterized as only an incidental beneficiary to a guaranty agreement. Without the guarantor's guarantee of the loan, the debtor would not be able to obtain the loan amount. However, this benefit to the debtor is only indirect and the intended benefit of the guaranty agreement is to the creditor by legally obligating the guarantor in case of the debtor's default. The principal debtor's obligations to, or from, the creditor are not affected by the terms of the guaranty agreement.

In In re: Fastrans Incorporated, 142 B.R. 241, 27 Collier Bankr. Cas. 2d 401 (Bankr. E.D. Tenn. 1992), the court was presented the issue of whether a trustee in bankruptcy had standing to contest the terms of a guaranty and held that the trustee has no standing to assert the terms of the guaranty contract. We find the court's reasoning to be persuasive:

In the instant case, the trustee stands in the shoes of the debtor, who was not a party to the Guaranty. By its terms, the Guaranty benefits Associates by providing for payment collaterally to Associates in the event the debtor does not pay its obligations. The Guaranty does not relieve Associates of any duty owed the debtor. The trustee, vis-a-vis the debtor, is not an intended third party beneficiary of the Guaranty and has no standing to enforce, challenge, or otherwise interfere with that contract. Because the trustee lacks standing to contest the provisions of the Guaranty, the court need not address his contentions regarding the validity of the waiver provision of the Guaranty.

Id. at 245.

Wilson has no enforceable rights under the guaranty contract, and therefore, we hold cannot bind Creech to the waiver provisions of the guaranty contract. Since Creech has paid the debt in full to the bank, he is in the same position as the bank and can recover the amount paid pursuant to the promissory note executed by Wilson to the bank.

The trial court not only denied Creech's claim for the amount paid under the guaranty agreement, but after finding that the Writ of Possession had been erroneously entered, awarded punitive damages in the amount of \$2,500 to Wilson on her counterclaim. Wilson maintains that under Nantz v. Lincoln Lexington Mercury Subaru, Ky., 947 S.W.2d 36 (1997), title was transferred when Creech signed the necessary transfer documents even though she did not record the title. In direct conflict with case and statutory law, Wilson argues, Creech obtained a duplicate certificate of title in his name, misrepresenting to the court the actual legal ownership of the automobile.

The courts have, only recently, begun to unravel the legal complexities dealing with our automobile titling statutes. Even if this court is to accept Wilson's proposition that Nantz, supra, extends beyond cases where the issue is not one of insurance coverage, punitive damages are simply not warranted under the facts of the case. Citing 15 Am.Jur. pp. 713, et. seq., Damages, Section 278, the court in Home Finance co. V. Ratliff, Ky., 374 S.W.2d 494, 496 (1964), stated the limitations imposed on the recovery of punitive damages.

While every legal wrong entitles a party injured to recover damages sufficient to

compensate for the injury inflicted, not every legal wrong entitles the injured party to recover exemplary damages. It is universally recognized that punitive or exemplary damages, if recoverable at all, may be recovered only in cases where the wrongful act complained of is characterized by, or partakes of, some circumstances of aggravation, such as wilfulness, wantonness, malice, gross negligence or recklessness, oppression, contumely and indignity, outrageous conduct, insult, or gross fraud.

The action of Creech in obtaining the Writ of Possession cannot be said to be wilful, wanton, malicious, nor grossly negligent. Although he may have been under the mistaken belief that he remained the owner of the vehicle, he was at best negligent and ignorant of the law. Punitive damages are not warranted under the facts.

Two items of damages awarded by the trial court are not challenged by either party. Creech was awarded nominal damages in the amount of \$300 for breach of the agreement to purchase the automobile. It is unclear as to the basis for this award; Wilson, however, did not file a cross-appeal so we leave this part of the judgment undisturbed. Except for the punitive damages award, Creech does not contest the award to Wilson of damages caused by the execution of the Writ of Possession, we likewise affirm that award.

The judgment is reversed and remanded so far as it denies Creech recovery for the amount paid pursuant to the Guaranty Agreement and as to the award of punitive damages.

COMBS, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN PART AND DISSENTS IN PART,
AND FURNISHES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur in part and dissent in part. I concur with the majority as to the fact that the guaranty agreement was made by and between Creech and the Bank and thus, the provision was not enforceable between Creech and Wilson. Therefore, paragraph ten (10) of the guaranty agreement waiving a right of action by Creech against Wilson cannot be enforced. As such, Creech can maintain an action against Wilson for damages he sustained when she defaulted on the loan agreement with the Bank. However, there was much controversy presented at trial as to who received the benefit of the loan and how much, if any, Wilson still owed Creech, either for the car or for personal loans made by him to her. Thus, I would remand the matter back to the trial court for a determination as to the actual damages, if any, Creech sustained due to Wilson defaulting on the loan.

I dissent from the majority as to the issue of punitive damages awarded by the trial court to Wilson. The majority apparently believes that Creech was under "the mistaken belief that he remained the owner of the vehicle, [thus] he was at best negligent and ignorant of law." I do not accept this interpretation of the actions taken by Creech. I find that his actions in taking the vehicle and misrepresenting the facts to the county clerk and the court deceitful, wilful, malicious, oppressive and outrageous. I believe the trial court who, as trier of the facts, had the opportunity to examine the evidence and truthfulness of the witnesses was in a much better position than this Court to decide the issue. It was obvious to the trial

court that Creech's actions went beyond being merely a "mistaken belief." Everyone has a right to protect one's financial interests, but one must do so honestly and legally. In this case, Creech willfully and maliciously overstepped this line in order to inflict inconvenience, hardship and punishment on Wilson. As such, he should pay the price.

BRIEF FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

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ORAL ARGUMENT FOR APPELLANT:

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