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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000164-MR

PHILLIP BARNETT — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 08-CI-00504

COMMUNITY TRUST BANK, INC.
AND KATHY LOVELY — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: FORMTEXT LAMBERT AND VANMETER, JUDGES; HARRIS, SENIOR JUDGE.

LAMBERT, JUDGE: Phillip W. Barnett (hereinafter "Phillip") appeals from a December 29, 2008, summary judgment order entered by the Fayette Circuit Court. This order dismissed Phillip's claims of negligence, breach of contract, and unjust enrichment against Community Trust Bank, Inc., and Kathy Lovely. Finding genuine issues of material fact precluding judgment as a matter of law in favor of

Community Trust Bank and Lovely, we hereby vacate the Fayette Circuit Court's order and remand this matter for further proceedings.

Since this appeal addresses the propriety of a summary judgment decree, we will recite the facts in a light most favorable to Phillip. *See Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) ("The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.").

After being diagnosed with terminal cancer, Donnie Barnett (hereinafter "Donnie") asked his brother, Phillip, to act as his attorney-in-fact and agent in the purchase of several certificates of deposit (CDs). Phillip agreed to do so and on January 25, 2005, Phillip used funds from Donnie's bank account to purchase three CDs from a Heritage Community Bank branch (later acquired by Community Trust Bank) in Danville, Kentucky. In accordance with his brother's instructions, the first CD was purchased in the amount of two hundred thousand dollars ($200,000). This CD was owned jointly by Phillip and Donnie, with each one possessing a right of survivorship. The second CD was purchased in the amount of one hundred thousand dollars ($100,000) and was owned solely by Donnie. This CD was made payable upon Donnie's death to his estate. The third CD was also in the amount of one hundred thousand dollars ($100,000) and owned solely by Donnie, but this CD was made payable upon Donnie's death to Phillip. Phillip delivered the three original CDs to Donnie pursuant to Donnie's instructions.

Subsequent to the purchase of the above CDs, Donnie intended to and did in fact change the death beneficiary on the second and third one hundred thousand dollar ($100,000) CDs to his ex-wife, Kathy Lovely. Phillip does not challenge or contest his brother's actions or intent relating to these CDs. Rather, the dispute in this case arises as to Donnie's actions and intent regarding the first CD jointly owned by the brothers in the amount of two hundred thousand dollars ($200,000).

On December 18, 2006, less than one month prior to his death, Donnie drove to a Community Trust Bank branch in Lexington, Kentucky with Lovely and their three-year-old grandchild. At that time, Donnie presented the three original CDs delivered to him by Phillip to Jason Pursiful, a bank employee. Donnie told Pursiful that he wanted to add Lovely as the sole death beneficiary on all three of these CDs. According to Pursiful, Donnie indicated that he was terminally ill. Donnie further stated that he wanted to change the death beneficiary on the CDs so that his only child (later determined to be grandchild) was provided for after his death.

In order to accomplish Donnie's request as to the individually-owned CDs, Pursiful knew that he simply needed to change the death beneficiary designation on these CDs to Lovely. However, simply adding Lovely as a death beneficiary to the jointly-owned CD would not have been sufficient to allow Lovely access to these funds upon Donnie's death. This is so because "[s]ums remaining on deposit at the death of a party to a joint account belong to the

surviving party or parties to the account as against the estate of the decedent unless there is clear and convincing written evidence of a different intention at the time the account is created." Kentucky Revised Statutes (KRS) 391.315(1)(a). Thus, if Donnie wanted to ensure that this jointly-owned CD was payable to Lovely upon his death, it was necessary to remove Phillip as a joint owner of that CD.

According to bank policy, when any joint owner with a right of survivorship wishes to change the ownership or distribution terms of a jointly-owned CD, the following is required: (1) that all owners approve any such changes or requests, or (2) that the owner wishing to make such changes first withdraw all funds from the jointly-owned CD (effectively closing that CD) and then open a new CD with the withdrawn funds reflecting the changed terms.

In this case, Pursiful mistakenly thought that Donnie was the sole owner of all three CDs, when in fact he was sole owner of only the second and third CDs. Due to Pursiful's mistaken belief, Pursiful did not inquire of Donnie as to whether he wished to remove Phillip's name as a joint owner of the two hundred thousand dollar ($200,000) CD and did not follow bank policy as to the "cashing out" of the jointly-owned CD and opening of a new individually-owned CD. Rather, Pursiful simply presented Donnie with the same documentation for changing the death beneficiary on the two hundred thousand dollar ($200,000) CD as he did for the former CDs. This documentation consisted of a revised signature card indicating the following: (1) that the two hundred thousand dollar ($200,000)

CD was owned solely by Donnie; and (2) that Donnie intended for this CD to be payable upon his death to Lovely.

According to Pursiful, his habit was to go over the terms and conditions of each signature card prior to having the customer sign that card. Pursiful testified that he remembered Donnie looking over each signature card very closely prior to signing it. Upon signing the new signature card for the two hundred thousand dollar ($200,000) CD, Donnie was issued a revised CD reflecting him as the sole owner of this CD and Lovely as the payable-on-death beneficiary to that CD. Donnie left the bank with both the revised CD (indicating sole ownership) and the original CD (indicating joint ownership) that was presented to the bank.

After Donnie and Lovely's departure, Pursiful realized his mistake and tried to contact Donnie in order to conform the paperwork to the bank's internal policies. According to Pursiful, all he needed to do was change the account number on the revised CD in order to reflect that it was a new account (rather than it reflecting the account number from the previous joint account).[1] However, Donnie passed away before any corrective actions could be taken.

Thereafter, Phillip attempted to cash out the two hundred thousand dollar ($200,000) CD, as his understanding from conversations with Donnie was that this CD was intended to be payable to Phillip upon Donnie's death. Phillip acknowledged that he was aware of Donnie's intention to make the one hundred

[1] Pursiful probably also needed to confiscate the original jointly-owned CD as proof that this CD was being "cashed out" or closed.

thousand dollar ($100,000) CDs payable to Lovely, but stated that the $200,000 CD was intended to pay back an eighty thousand dollar ($80,000) loan Donnie took from the brothers' joint business and to ensure that the family business would continue after Donnie's passing. Phillip was unable to cash out this CD as Lovely had already done so.

On February 4, 2008, Phillip filed claims against Community Trust Bank for negligence and breach of contract and against Lovely for unjust enrichment. After several months of pleadings, motions, and discovery, the trial court entered a summary judgment order against Phillip on December 29, 2008. Having reviewed the record, which included the depositions of Phillip, Lovely, Pursiful, and two other bank employees, the trial court concluded that no genuine issue of material fact existed that would preclude judgments in favor of Community Trust Bank and Lovely as to all claims. An appeal from this order now follows.

Our black-letter law directs that "summary judgment is to be cautiously applied and should not be used as a substitute for trial." *Steelvest*, 807 S.W.2d. at 483. "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* at 480. "[W]here the conflict is between inferences to be drawn from undisputed facts, summary judgment may be granted when it is clear that the only reasonable inference is in favor of the moving party." *Harker v. Fed. Land Bank of Louisville*, 679 S.W.2d 226, 229 (Ky. 1984).

Designed to be narrow and exacting so as to preserve one's right to trial by jury, summary judgment is nevertheless appropriate in cases where the nonmoving party relies on little more than "speculation and supposition" to support his claims. *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (internal citation and quotation omitted). Thus, nonmoving parties are obligated to set forth "at least some affirmative evidence showing that there is a genuine issue of material fact for trial" to withstand a properly supported motion for summary judgment. *Steelvest*, 807 S.W.2d at 482. "The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001).

In this case, the controlling facts are undisputed and thus, the determinative questions lie in whether the only reasonable inferences from these facts are in favor of Community Trust Bank and Lovely. In other words, we must determine whether Phillip set forth enough affirmative evidence on this record so as to allow his claims to proceed to a jury. *Id.* Upon careful review, we hold that jury issues do exist regarding the inferences to be drawn in this case.

In his first argument, Phillip claims there are issues of material fact regarding whether Community Trust Bank was negligent in the handling of Donnie's December 18, 2006, bank transaction. In order to prevail on a negligence claim, Phillip was required to set forth three elements: "(1) a duty on the part of the defendant; (2) a breach of that duty; and (3) consequent injury." *Mullins v.*

Commonwealth Life Ins. Co., 839 S.W.2d 245, 247 (Ky. 1992). It is generally recognized "that summary judgments in negligence cases should be granted with extreme caution, because determination of the issue of fact of negligence depends upon application of the inexact standard of care of an ordinarily prudent man." *Payne v. B-Line Cab Co.*, 282 S.W.2d 342, 344 (Ky. 1955); *see also Dossett v. New York Min. and Mfg. Co.*, 451 S.W.2d 843, 845 (Ky. 1970), and *Poe v. Rice, M.D.*, 706 S.W.2d 5, 6 (Ky. App. 1986).

It is without question that banks in Kentucky have a duty to exercise ordinary care and good faith in the handling of their customers' accounts. *Bullitt County Bank v. Publishers Printing Co., Inc.*, 684 S.W.2d 289, 291 (Ky. App. 1984). At the time of the December 18, 2006, transaction, Phillip was a customer of Community Trust Bank. Thus, he was certainly owed a duty of ordinary care and good faith by Community Trust Bank in the handling of his joint account.

Disputes in this case, however, arise as to breach and injury. Phillip claims there is a genuine question as to whether Community Trust Bank breached its duty of ordinary care to Phillip during the December 18, 2006, transaction with Donnie by: (1) failing to verify ownership of the CD prior to initiating the transaction; and (2) failing to properly discern Donnie's intent during the transaction by following the bank's internal procedures and policies. Phillip argues that if the answer to the above question is yes, then an additional question arises as to whether he was injured by Community Trust Bank's failure to conform to a reasonable standard of care in the execution of the above transaction.

Making no specific findings on this issue, the trial court simply concluded that the bank's failure to follow internal policies and procedures did not result in liability to Phillip. To support this conclusion, the trial court cited the terms of the account agreement entered into between the bank and Phillip, as well as KRS 391.300 through KRS 391.360 (governing the distribution of multiple party accounts).

The Account Agreement entered into between Community Trust Bank and Phillip sets forth as follows: "Each joint Account holder, *without the consent of any other Account Holder*, may, and hereby is authorized by every other joint Account Holder, to make any transaction permitted under the Agreement, including without limitation: to withdraw all or any part of the account funds . . . and, to close the account, with the disbursement of account proceeds as instructed by the joint Account Holder." (Emphasis added). The Agreement further provides: "Each joint Account Holder is authorized to act for the other Account Holder(s) and we may accept orders and instructions regarding the account from any joint Account Holder."

KRS 391.310 provides that "[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." KRS 391.330 provides that "[a]ny multiple-party account may be paid, on request to any one (1) or more of the parties." In *Pulliam v. Pulliam*, 738 S.W.2d 846 (Ky. App. 1987), this Court held that banks have no legal duty under KRS

391.330 "to inquire of or inform one joint depositor about the actions taken in regard to the account by another joint owner." *Id.* at 848. Finally, KRS 391.350 states that "[p]ayment made pursuant to KRS 391.330 to 391.345 discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors."

Phillip does not dispute that his brother was entitled to 100% of the funds in the brothers' joint account since Donnie made 100% of the contributions to that account. Nor does Phillip dispute that his brother had both a contractual and a statutory right to withdraw all funds from the jointly-owned CD without notice to or authorization from Phillip and to use or designate these funds in any manner he so wished. Further, Phillip does not contest the trial court's finding that a change of ownership of the CD was effectuated when Pursiful inadvertently reissued the two hundred thousand dollar ($200,000) CD in solely Donnie's name.

Rather, Phillip argues that there still exists a genuine issue of material fact as to whether Donnie would have actually consented to or authorized the transaction in question if Pursiful had verified ownership of the CD and then properly discerned Donnie's intent by adhering to bank policies regarding the "cashing out" of the first CD and the reopening of a new CD in Donnie's name only. In other words, Phillip argues that there is a genuine question as to whether Donnie actually intended to divest Phillip of any beneficial interest in the two

hundred thousand dollar ($200,000) CD during the December 18, 2006, transaction.[2]

To support this argument, Phillip cites to his own testimony. This testimony indicates that Donnie did inform Phillip of his intention to designate his ex-wife as the sole beneficiary on both of the one hundred thousand dollar ($100,000) CDs and to remove Phillip's name from a jointly-owned checking account. Upon learning of these actions in early December 2006, Phillip asked Donnie, "where does that leave me?" According to Phillip, Donnie replied, "you still have the big one," which was an apparent reference to the jointly-held two hundred thousand dollar ($200,000) CD.

Phillip also cites to deposition testimony provided by Pursiful. This testimony indicates that at no time did Donnie ever instruct Pursiful to remove Phillip as a joint owner of the CD or to transfer ownership of the jointly-owned CD to Donnie individually. According to Pursiful, he never asked Donnie these questions during the December 18, 2006, transaction because "it was just my understanding from [Donnie] that they were his individual CDs . . . ." Pursiful acknowledged that if he had adhered to bank policy and verified ownership of the

[2] The dissent claims that KRS 391.350 absolutely discharges Community Trust Bank from any liability in this case as a matter of law. We disagree. The plain language of this statute directs that banks are protected from liability only when payments are made pursuant to KRS 391.330 to 391.345. KRS 391.330 provides that "[a]ny multiple-party account may be paid, on request to any one (1) or more of the parties." Appellant disputes whether Donnie actually requested or intended to request payment to be made on the two hundred thousand dollar ($200,000) CD during the December 18, 2006, transaction. Community Trust Bank is entitled to KRS 391.350 protection only if the answer to this question is yes. Nothing in *Pulliam* contradicts this interpretation. A contrary interpretation would allow banks to escape liability even when they fail to reasonably follow the directives of their customers.

CDs prior to engaging in the transaction, he would have proceeded differently. Pursiful would have advised Donnie that he needed to "cash out" the jointly-owned CD and open a new individually-owned CD in order to accomplish Donnie's verbalized intentions, which were the following: "[Donnie] did say that he wanted [Lovely] as [the death beneficiary] on all three CDs. He did say that."

When these facts are viewed in a light most favorable to Phillip, we not only agree that there is sufficient affirmative evidence on this record to indicate a lack of due diligence on Pursiful's part, but also that it is not unreasonable to conclude that such a lack of due diligence constituted a breach of the bank's general duty of ordinary care in the handling of customer accounts. *See Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003) (breach is a question of fact for the jury). The general standard of care presumes, at the very least, that bank employees will attempt to verify ownership of financial instruments prior to engaging in transactions involving those instruments. The bank's acknowledgment that it failed to follow its own policies and procedures, as well as Pursiful's testimony that he would have executed the transaction differently had he known about the CD's joint ownership, also supports a conclusion that the bank breached its duty of care.

Establishing enough evidence on the record to create a genuine issue concerning whether Community Trust Bank breached its duty of care to Phillip is not, however, sufficient to reverse the trial court's summary judgment in this case. We must further determine whether there is sufficient evidence on the record to

allow a reasonable jury to conclude that legal causation existed between the bank's breach and the injury claimed by Phillip. For the reasons set forth herein, we hold that sufficient evidence existed to submit this question to a jury.

An "actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm." *Id.* at 91-92 (internal citation and quotation omitted). Depending on the circumstances, legal causation can be a question of fact for the jury or a question of law for the court. *Id.* at 92. It is a question of fact for the jury if there exists "an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff." *Id.* (internal citation and quotation omitted).

In this case, there is no injury to Phillip as a matter of law unless a reasonable inference can be drawn from this record that Donnie did not intend to completely divest Phillip of any ownership or beneficial interest in the two hundred thousand dollar ($200,000) CD during the December 18, 2006, transaction. The trial court determined, and both Community Trust Bank and Lovely argue, that this is not a reasonable inference that can be drawn from the undisputed facts of this case. They point to the fact that Donnie presented all three CDs to the bank and unequivocally requested that Lovely be named as the sole death beneficiary on these CDs. They further cite undisputed evidence showing that Donnie signed and received documentation reflecting the change in ownership and addition of a death beneficiary on the two hundred thousand dollar ($200,000)

CD. Thus, even if Community Trust Bank were negligent in its handling of the December 18, 2006, transaction, Community Trust Bank and Lovely argue there was no actual injury to Phillip as a matter of law since the use and distribution of the two hundred thousand dollar ($200,000) CD upon Donnie's death was consistent with Donnie's intentions.

A "[d]etermination of intent is normally inappropriate for summary judgment." *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991); *see also Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006). This is so because an intent or "state of mind" determination "usually entails a drawing of factual inferences as to which reasonable men might differ . . . ." *Perry v. Motorists Mutual Ins. Co.*, 860 S.W.2d 762, 765 (Ky. 1993). Determinations such as these are a "traditional function of the jury." *Id.*

Upon careful review, we disagree with Community Trust Bank, Lovely, and the trial court that this record is not sufficient to allow a reasonable inference to be drawn in Phillip's favor regarding whether his brother intended to completely divest Phillip of any ownership or beneficial interest in the two hundred thousand dollar ($200,000) CD during the December 18, 2006, transaction. Donnie's stated intentions during this transaction were, at best, unclear. Viewing the testimony in a light most favorable to Phillip, it seems likely that Donnie was aware of his brother's joint ownership interest in the two hundred thousand dollar ($200,000) CD at the time of the December 18, 2006, transaction and yet, Donnie at no time verbalized any intent to cash out the original CD or to

remove his brother as a joint owner of that CD. This lack of clarity was heightened by Pursiful's failure to verify ownership of the CD and to follow internal policies and procedures. While the implications of Donnie's actions may seem obvious in the context of subsequent legal proceedings setting forth the vagaries of banking law and procedures, most citizens do not possess this type of specialized knowledge prior to the onset of such proceedings. Accordingly, we cannot say that it is impossible for reasonable men to differ as to Donnie's true intentions at the time he presented the CDs to Pursiful.

This holding is not to be construed to suggest that evidence of record is not sufficient to warrant a jury verdict in favor of Community Trust Bank and Lovely. Indeed, there is no doubt that evidence of record is certainly strong to support the inferences urged by the appellees. Rather, we simply hold that such evidence is not so compelling as to warrant a summary dismissal of Phillip's negligence claim against Community Trust Bank. Phillip's evidence rises above mere "speculation and supposition" to entitle him to his "day in court" on the issues of whether the bank breached its duty of care to Phillip and if so, whether this breach caused injury to Phillip. *See Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 822 (Ky. 1992) ("The conscience of the community speaks through the verdict of the jury, not the judge's view of the evidence.... [If] deciding when to take a case from the jury is a matter of degree, a line drawn in sand, ... this is all the more reason why the judiciary should be careful not to overstep the line.")

(internal citation omitted). Accordingly, the trial court erred in granting summary judgment in favor of Community Trust Bank.

In his second and third arguments on appeal, Phillip claims the trial court also erred in summarily dismissing his breach of contract claim against Community Trust Bank and his unjust enrichment claim against Lovely. If indeed a jury should find that the bank wrongly removed Phillip's name from the jointly-owned CD and then erroneously distributed the funds to Lovely when she was in fact not entitled to those funds, then viable claims for breach of contract and unjust enrichment still exist. Accordingly, the trial court erred in summarily dismissing these claims also.

As Phillip has set forth reversible error by the trial court, we hereby vacate the Fayette Circuit Court's December 29, 2008, order of summary judgment dismissing Phillip's claims against Community Trust Bank and Lovely and remand this matter to the trial court so that Phillip may proceed to trial on his claims.

HARRIS, SENIOR JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. The majority opinion ignores the plain provisions of KRS Chapter 391 governing multiple party accounts, KRS 391.300 to 391.355, specifically KRS 391.350, which clearly provides:

> **Payment made pursuant to KRS 391.330 to 391.345 discharges the financial institution from all claims for amounts so paid** whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors. The protection here given does not extend to payments made after a financial institution has received written notice from any party to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, any other party to the account and the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected under this section. **No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided here.** The protection here provided shall have no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

(Emphasis added.) In addition, in my view, the majority also ignores this court's decision in *Pulliam v. Pulliam*, 738 S.W.2d 846 (Ky.App. 1987), and the undisputed fact that Donnie had contributed 100% of the funds in the C.D. I would affirm the summary judgment of the Fayette Circuit Court.

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