

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001776-MR

ESTATE OF STUART C. MATHES

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 13-CI-01331

KATHLEEN COSBY, METLIFE, INC.;
GENERAL AMERICAN LIFE INSURANCE
COMPANY; AND GENAMERICA FINANCIAL

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: ACREE, JONES, AND NICKELL, JUDGES.

JONES, JUDGE: This appeal arises out of an order from the Kenton Circuit Court. Therein, the circuit court determined that the Appellant, the Estate of Stuart C. Mathes ("the Mathes Estate"), was not entitled a recovery from the Appellee,

Kathleen Cosby, in excess of the proceeds of a life insurance policy procured by the Appellee's late husband.

Raymond Cosby is Kathleen Cosby's late husband. During the relevant part of his life, Mr. Cosby was employed by MetLife as a financial adviser. In 2003, Mr. Cosby began assisting Stuart C. Mathes in creating a trust. The purpose of the trust was to benefit various members of Mathes's family after his death. The plan was for Mathes to place his life savings, approximately half a million dollars, into the trust. The money in the trust would then be used to procure a life insurance policy on Mr. Mathes's life in the amount of \$900,000. The trust was to be named the beneficiary of the policy.

On February 28, 2003, the Stuart Mathes Irrevocable Life Insurance Trust (“the Mathes Trust”) was created. Mr. Cosby was named as Trustee of the Mathes Trust. On March 12, 2003, Mr. Cosby, acting as an insurance agent, submitted an application to General American Life Insurance Company for a life insurance policy in the amount of \$900,000. The named beneficiary of the policy was the Mathes Trust. On March 24, 2003, Mr. Mathes wrote a check to the trust in the amount of \$543,084.16. The check was endorsed with, “Pay to the order of General American Life Insurance, Raymond K. Cosby Trustee.” On March 31, 2003, General American Life Insurance Company approved the life insurance policy.

On September 22, 2005, Mr. Mathes appointed Mr. Cosby as his Power of Attorney, with no other party listed as a secondary. However, on June 1,

2007, Mr. Mathes sent Mr. Cosby a Revocation of Power of Attorney notice. Next, on July 20, 2007, Mr. Mathes was informed by MetLife that his General American life insurance policy in the amount of \$900,000, listed Cosby's home address as the primary address for the policy. Then, on December 31, 2008, without Mr. Mathes's knowledge or consent, General American, prompted by a loan request completed by Mr. Cosby, wrote a check to the "Stuart C. Mathes Irrev Life Insurance Trust DTD 2/28/2003 Raymond K. Crosby [sic], TTEE, 1941 Coachtrail Dr., Hebron, KY 41048." This check was in the amount of \$105,000. Less than a week later, Mr. Cosby deposited \$105,000 into his business checking account. On August 11, 2009, another check was written by General American to "Stuart C. Mathes Irrev Life Insurance Trust DTD 2/28/2003 Raymond K. Crosby [sic], TTEE, 1941 Coachtrail Dr., Hebron, KY 41048." This check was in the amount of \$366,000. This too was deposited in Mr. Cosby's business account on August 13, 2009. Eventually, Mr. Cosby drained all the money out of the Mathes Trust. By February 2011, there was no money left in the trust to pay the premium on the Mathes life insurance policy. The policy lapsed for nonpayment.

There is no evidence that Mr. Mathes authorized Mr. Cosby to take out the loans or that Mr. Cosby ever repaid any of the money he deposited from the loans into his business and personal accounts. Exactly how Mr. and Mrs. Cosby used all the money is not clear. It is clear, however, that a portion of the money was used by Mr. Cosby to procure his own insurance policy on March 16, 2009.

West Coast Life Insurance Company issued the policy to Mr. Cosby. The policy was for \$900,000, and named Mrs. Cosby as the sole beneficiary.

On May 29, 2012, Edna Wilson, acting as Mr. Mathes's new Power of Attorney, filed a police report against Mr. Cosby for theft of the Mathes Trust funds. The Kenton County Police Department opened an investigation. This investigation resulted in a search warrant for Mr. Cosby's US Bank accounts and his personal residence. The investigation confirmed that Mr. Cosby had diverted money from the Mathes Trust, deposited the money in his business account, and then later deposited the money into his personal account for the benefit of himself and his wife. The police determined that all funds taken by Mr. Cosby were used for the personal gain of Mr. and Mrs. Cosby.

In July of 2012, the police arrived at Mr. and Mrs. Cosby's home. Mr. Cosby was not home. Mrs. Cosby repeatedly tried to call him because she was unsure what to tell the police and was scared. Mr. Cosby refused to return home. He left Kenton County. Sometime that evening, he penned a letter to his wife. In the letter, Mr. Cosby stated that he was scared, did not want to go to jail, and was concerned the couple would have to sell their home and "go small" if he were forced to pay back all the money he took from the Mathes Trust. Mr. Cosby said he was going to talk to a lawyer and would return home after doing so. However, on July 24, 2012, Mr. Cosby's dead body was discovered hanging from the rafters of a barn in rural Grant County. He had committed suicide. On August 30, 2012, Kathleen Cosby received \$900,000 in life insurance proceeds from the policy Mr.

Cosby had procured from West Coast in 2009. She used a portion of this money to pay off the mortgage on her home.

The Mathes Estate filed a complaint against the Cosby Estate in the Kenton Circuit Court on June 24, 2013. The complaint sought damages for conversion and breach of fiduciary duty. On December 13, 2013, the Mathes Estate filed a motion seeking leave to amend its complaint to add claims against Kathleen Cosby, individually, for unjust enrichment as well as various claims against MetLife Inc., and its subsidiary corporations, General American Life Insurance Company and GenAmerica Financial.

Mrs. Cosby objected to the motion to amend as related to the proposed unjust enrichment claim.¹ By order entered February 14, 2014, the circuit court granted the motion to amend as related to Mrs. Cosby. Thereafter, on February 20, 2014, Mrs. Cosby filed a motion to dismiss the unjust enrichment claim. In her motion, Mrs. Cosby argued that the unjust enrichment claim against her was barred by Kentucky Revised Statute ("KRS") 304.14-340(1) because it sought to recover the proceeds of the insurance policy procured by Mr. Cosby for her exclusive benefit. The Mathes Estate responded that KRS 304.14-340 was not applicable because Mr. Cosby was not an ordinary creditor and because Mrs. Cosby had personally and unjustly benefited from the money Mr. Cosby allegedly stole from the Mathes Trust.

¹ As this appeal relates only to the claim against Mrs. Cosby, the other claims will not be discussed at this time.

By order entered August 26, 2014, the circuit court overruled Mrs. Cosby's motion to dismiss, but ordered pursuant to KRS 304.14-340(3) that any recovery from Mrs. Cosby from the proceeds she received as beneficiary of her husband's West Coast Life Insurance policy "shall be limited to the amount of the premiums paid by Raymond Cosby with money determined to have been unlawfully diverted from Stuart C. Mathes."²

The Mathes Estate then filed a timely motion to alter, vacate or amend the circuit court's order on the basis that the circuit court misapplied KRS 304.14-340. By order entered October 22, 2014, the circuit court overruled the Estate's motion. The order provides as follows:

This Court in being in all ways sufficiently advised: **IT IS HEREBY ORDERED AND ADJUDGED** that Plaintiff's Motion to Alter, Amend or Vacate Order is **OVERRULED**. The Court's August 26, 2014, Order is final and appealable pursuant to CR 54.02, there being no just reason for delay.

(R. at 403).

On October 31, 2014, the Mathes Estate filed a notice of appeal from the August 26, 2014, order as "made final by" the circuit court's October 22, 2014, order overruling the motion to alter, amend or vacate. On February 25, 2016, we entered an order directing the parties to show cause why this appeal should not be dismissed as arising out of a non-final order. Only Appellant responded asserting that the trial court's order was final in that it put an end to the question of how much recovery the Mathes Estate could receive.

² The most that could have been paid in annual premiums on the policy was \$2,612.00.

The claim at issue in this appeal is unjust enrichment. The statute upon which the circuit court ruled is KRS 304.14-340.³ The purpose of KRS 304.14-340 is to allow a husband to provide for his wife and children after his death by way of a life insurance policy. *See Williams v. Harth*, 156 Ky. 702, 161 S.W. 1102 (1914). The statute operates to make the proceeds of such a life insurance policy immune from collection by a husband's creditors. Under the statute, all the proceeds from such a policy are exempt, unless it can be shown that the premiums of the policy were paid by the husband "with intent to defraud his creditors." In such a case, the creditors may recover from the policy proceeds, but

³It provides:

(1) Every life insurance policy made payable to or for the benefit of or duly assigned or transferred to a married woman, or to any person in trust for her, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors or any other person effecting or transferring the policy, or his creditors.

(2) A married woman may, without consent of her husband, contract, pay for, take out and hold a policy on the life or health of her husband or children, or against loss by his or their disablement by accident. The premiums paid on the policy shall be held to have been her separate estate, and the policy shall inure to her separate use and benefit and that of her children, free from any claim of her husband or others.

(3) If the premium on any such policy is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of the creditors, subject to the statute of limitations.

Id.

their recovery is limited to "an amount equal to the premium so paid, with interest thereon."⁴

The doctrine of unjust enrichment "is applicable as a basis of restitution to prevent one person from keeping money or benefits belonging to another." *Rose v. Ackerson*, 374 S.W.3d 339, 343 (Ky. App. 2012) (quoting *Haeberle v. St. Paul Fire and Marine Ins. Co.*, 769 S.W.2d 64, 67 (Ky. App. 1989)). There are three elements that a party must prove to prevail on an unjust enrichment claim: "(1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value." *Collins v. Kentucky Lottery Corp.*, 399 S.W.3d 449, 455 (Ky. App. 2012).

While KRS 304.14-340 may be relevant to some extent, the nature of the unjust enrichment claim convinces us that irrespective of the court's ruling on the applicability of KRS 304.14-340, there has been no final adjudication of the Mathes Estate's right of recovery against Mrs. Cosby. If the Mathes Estate was able to demonstrate at trial that Mrs. Cosby benefited from the money that Mr. Cosby deposited into the parties' joint bank account, it would seem to us that she would be a creditor of the estate in her own right making KRS 304.14-340

⁴ We believe the case law is clear that the statute only applies when the creditors are those of the husband alone. In *Williams*, the court held that certain creditors of the decedent, J. F. Harth, could not go after the proceeds of a life insurance policy procured by the decedent and paid to the decedent's wife, Jennie E. Harth. In doing so, the court was clear that the reason for the exemption was that the creditors were Mr. Harth's alone. It explained, "Jennie E. Harth, is not the defendant in the judgment which was made the basis of appellant's action. Nor is she grantee of a fraudulent conveyance. There is no fraud brought home to her." *Id.* The creditors never had an independent claim against Mrs. Harth. Their claim arose solely from a debt acquired by Mr. Harth, independent of his wife.

inapplicable. In other words, the funds would be subject to collection not because Mr. Cosby is a creditor, but because Mrs. Cosby cannot be allowed to benefit unjustly from stolen money.⁵

The problem here, however, is that the unjust enrichment claim has not yet been adjudicated. Only a preliminary determination by the trial court has been made on one potential partial defense that might lie. No determination has been made as to whether Mrs. Cosby is liable as a creditor in her own right or whether the Mathes Trust can establish a constructive trust as related to the proceeds of the policy based on principles of unjust enrichment.

"When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, *the court may grant a final judgment* upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay." Kentucky Rules of Civil Procedure (CR) 54.02 (emphasis added). Here, the circuit court included the finality language. However,

⁵ An example similar to the present situation is discussed in the *Restatement (Third) of Restitution and Unjust Enrichment*:

The Cashier embezzles \$250,000 from Bank and uses the money to purchase a house, taking title jointly with Wife. Wife is unaware of the source of the funds, but Wife is not protected as a bona fide purchaser because she gives no value for her interest. Bank may obtain restitution by asserting rights in the house, claiming either ownership (via constructive trust) or an equitable lien, with an unsecured claim against Cashier for any deficiency. The fact that the house would be exempt from the claims of creditors under local law does not affect Bank's right to restitution of a house that is the product of its money.

Restatement (Third) of Restitution and Unjust Enrichment § 41, Illustration No. 5 (2011).

the problem appears to be that no final judgment was actually rendered with respect to Mrs. Cosby. The circuit court's order only made a *preliminary* determination regarding the Mathes Estate's ability to recover from the insurance proceeds *in the event* the Estate prevailed on its unjust enrichment claim and *in the event* it proved that premiums were paid "with money determined to have been unlawfully diverted from Stuart C. Mathes." However, to date, no judgment has been rendered against Mrs. Cosby and her liability remains undetermined.

This being the case, we must conclude that the circuit court incorrectly designated the order as final and appealable. As our Supreme Court has said, "[I]t is the character of the order that controls." *Sublett v. Hall*, 589 S.W.2d 888, 891 (Ky. 1979) (citing *Hale v. Deaton*, 528 S.W.2d 719 (Ky. 1975)). "The mere recitation of the 'final and appealable' provision of CR 54.02 is not determinative of the matter." *Preferred Risk Mut. Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co.*, 872 S.W.2d 469, 470 (Ky. 1994).

For reasons set forth above, we must conclude that this appeal is from a non-final interlocutory order involving a claim, unjust enrichment, which remains to be decided in the trial court. Accordingly, **IT IS ORDERED** that this appeal is dismissed.

ALL CONCUR.

ENTERED: August 26, 2016

/s/ Allison E. Jones

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