

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002663-MR

BRANCH BANKING & TRUST COMPANY

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION NO. 01-CI-01779

PHILLIP BARTLEY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

MINTON, JUDGE: Branch Banking & Trust Company (BB&T) appeals from the order dismissing its third party complaint against Phillip Bartley. We reverse and remand because we hold that there are genuine issues of material fact in dispute that preclude summary judgment on BB&T's theories of recovery.

I. THE CIRCUIT COURT DISMISSED BB&T'S CLAIMS.

A few years ago, Phillip established two accounts at BB&T, a savings account and a certificate of deposit (CD)

account. He set both of them up as joint accounts with the right of survivorship. They were listed in his name and in the name of his minor son, Travis Bartley, using Phillip's taxpayer identification number. Neither account was set up as a custodial account designated "an account in the name of [Phillip Bartley] 'as custodian for [Travis Bartley] under the Kentucky Uniform Transfers to Minors Act'" (KUTMA) by that language or its equivalent.¹

After the accounts had been in existence for several years, a court in Michigan sent a garnishment to BB&T against Phillip for an unsatisfied judgment of \$43,481.01 in child support. Within a few days, BB&T sent Phillip notice that a hold was being placed on the two accounts because of this garnishment. Phillip never responded. Seventeen days later, BB&T cashed the CD and sent all of its proceeds and most of the money from the savings account, a total of \$6,516.00, to the Michigan court to satisfy the garnishment.

Several weeks after the garnishment was paid, a "Mrs. Bartley" appeared at BB&T stating that these bank accounts belonged to Travis, and the funds should not have been seized and sent to Michigan to satisfy the judgment against Phillip. BB&T also received two demand letters from the Bartleys'

¹ See Kentucky Revised Statutes (KRS) 385.092(1)(b).

attorney demanding that BB&T restore the money taken from these accounts. After investigating, BB&T restored the \$6,516.00.

Despite this refund, Phillip, as next friend and father of Travis, filed suit against BB&T for wrongful garnishment, seeking compensatory damages, including, but not limited to, lost interest, penalties, and service fees; punitive damages; attorney's fees; costs; pre-judgment interest; and post-judgment interest. BB&T filed a third party complaint against Phillip in his individual capacity alleging that the garnishment was the result of Phillip's negligence in setting up the accounts as joint accounts using his own taxpayer identification number, in failing to pay his child support obligation, and in allowing the accounts to be garnished despite notice of the impending garnishment order. BB&T sought to recover from Phillip all debts it paid on his behalf and any additional amounts that it might be required to pay Travis because of Phillip's negligence.

Phillip filed a motion for judgment on the pleadings, asserting that BB&T failed to state a claim upon which relief may be granted. A hearing was scheduled on the matter; but, at the hearing, the parties agreed to have the case decided on the written record. Both BB&T and Phillip then filed memoranda in support of their positions.

Without providing any statement of basis for its decision, the circuit court nominally granted judgment on the pleadings in Phillip's favor on all of BB&T's claims. We consider this a summary judgment order because the order does not indicate that the trial court excluded matters beyond the pleadings, namely, previously filed answers to interrogatories. Under Kentucky Rules of Civil Procedure (CR) 12.03, "[i]f, [on a motion for judgment on the pleadings], matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in [CR] 56" And since it does not dispose of the claims in the original complaint brought on behalf of Travis against BB&T, it is actually a partial summary judgment order. But the order is final and appealable under CR 54.02, and it contains the following language: "[t]here being no just reason for delay this shall be considered a final and appealable Order." BB&T filed this appeal from that order.

II. STANDARD OF REVIEW.

Summary judgment on the third party complaint was appropriate only if Phillip showed that BB&T could not prevail on any of the claims against him under any circumstances.² In

² Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citing Paintsville Hospital Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)).

ruling on a motion for summary judgment, we must view the evidence in the light most favorable to the non-moving party, which is BB&T in this instance. On appeal, we must determine whether the trial court correctly found that there were no genuine issues of material fact and that Phillip, the moving party, was entitled to summary judgment as a matter of law.³ Because findings of fact are not involved in the summary judgment process, the circuit court's decision is entitled to no deference.

III. ANALYSIS OF BB&T'S CLAIMS.

BB&T's third party complaint against Phillip is not a model of clarity. But under notice pleading, "[w]e no longer approach pleadings searching for a flaw, a technicality upon which to strike down a claim[.]"⁴ Instead, we should take "a commonsense reading of the complaint," bearing in mind that under the liberal construction rule of CR 8.06, we must assay its claims according to its substance rather than its label or form.⁵ In this light, we find that BB&T has raised three possible theories of recovery against Phillip in the third party

³ Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

⁴ Smith v. Isaacs, 777 S.W.2d 912, 915 (Ky. 1989). See also CR 8.01.

⁵ McCollum v. Garrett, 880 S.W.2d 530, 533 (Ky. 1994). See also CR 8.06.

complaint: apportionment ("contribution"), indemnity, and restitution.

A. Apportionment.

BB&T's third party complaint names contribution as one theory of recovery from Phillip for any additional sums of money that the bank may be required to pay Travis beyond the money that it has already refunded to his accounts. We prefer to use the traditional term "apportionment" here to avoid confusion because, at least before the enactment of KRS 411.182 in 1988, apportionment and contribution referred to different doctrines for allocating liability among joint tortfeasors.⁶

KRS 411.182 codified certain procedural aspects of the common law of comparative fault and its principles for allocating liability equitably among joint tortfeasors.⁷ Under KRS 411.182, "[i]n all tort actions . . . involving fault of more than one (1) party to the action, including third-party defendants" and persons who have been released under "[a] release, covenant not to sue, or similar agreement[,] the finder of fact must determine "[t]he percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant," and persons

⁶ See Ohio River Pipeline Corp. v. Landrum, 580 S.W.2d 713, 719-720 (Ky.App. 1979).

⁷ Kentucky Farm Bureau Mutual Insurance Co. v. Ryan, 177 S.W.3d 797, 802-803 (Ky. 2005).

released under "[a] release, covenant not to sue, or similar agreement[.]" According to KRS 411.182(2), "[i]n determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." KRS 411.182 provides for several liability with each party's liability limited to the degree of fault apportioned to that party.⁸

Under KRS 411.182, the trial court is required to apportion liability among all the parties, including third-party defendants such as Phillip. Even though BB&T returned all \$6,516.00 to Travis, he claims that he suffered lost interest, penalties, and fees as a result of the wrongful garnishment. Assuming for the moment that Travis can prove these damages, we must determine whether summary judgment was appropriately entered in Phillip's favor on BB&T's claim for apportionment of these damages, considering the facts in the light most favorable to BB&T.

We will assume then for purposes of discussion that the funds seized belonged to Travis, as Travis and Phillip claim they did. "Parents owe a fiduciary duty to their children as

⁸ Stratton v. Parker, 793 S.W.2d 817, 820 (Ky. 1990).

regards their children's property."⁹ However, Phillip set up the accounts, not as a custodial account under the KUTMA, but as joint accounts using his own taxpayer identification number. BB&T waited seventeen days after sending Phillip notice of the pending garnishment before actually complying with the garnishment order, but Phillip never responded.

This Court has held that a bank was not liable for garnishing funds that were exempt from attachment where the bank was acting subject to a facially valid court order and where the bank gave the owner of the funds sufficient notice of the pending garnishment to take steps to protect his own interests.¹⁰ This Court has also held that joint accounts are not immune from garnishment by the creditor of one of the joint accountholders.¹¹ There is a presumption that for purposes of attachment and execution, a party to a joint account owns the entire joint account.¹² But, upon notice and objection, "the debtor or any third-party account tenant may rebut that presumption by proof of separate net contributions to the account and an intention that the non-contributor's use of the other's contributions be

⁹ 59 AM.JUR.2D *Parent and Child* § 43 (2005).

¹⁰ American States Insurance Co. v. Citizens Fidelity Bank & Trust Co., 662 S.W.2d 851, 853 (Ky.App. 1983).

¹¹ Brown v. Commonwealth, 40 S.W.3d 873, 879-880 (Ky.App. 1999).

¹² *Id.* at 882.

limited."¹³ Under these circumstances, it is possible that the fact-finder could believe that Phillip breached his fiduciary duty to Travis by setting up joint bank accounts rather than custodial accounts, making them vulnerable to attachment by Phillip's creditors, or by remaining silent—despite reasonable notice—while the accounts were garnished. In either instance, the fact-finder might also find that Phillip's actions contributed to any damages that Travis suffered and might apportion liability accordingly. So we see unresolved genuine issues of material fact here. This means that the trial court erred by granting summary judgment to Phillip on the bank's claim for apportionment.

B. Indemnity.

BB&T also asserted a right to indemnity against Phillip in its third-party complaint. Unlike the right to contribution among joint tortfeasors, the right to indemnity is based on common law.¹⁴ "Indemnity is simply the repayment to one party by another party who caused the loss, of such amounts the first party was compelled to pay."¹⁵ The right to indemnity is available to one exposed to liability because of the wrongful

¹³ *Id.*

¹⁴ Degener v. Hall Contracting Corp., 27 S.W.3d 775, 780 (Ky. 2000).

¹⁵ Liberty Mutual Insurance Co. v. Louisville and Nashville Railroad Co., 455 S.W.2d 537, 541 (Ky. 1970).

act of another with whom he was not equally culpable.¹⁶

Indemnity grants the passively or secondarily negligent party the right to recover against the actively or primarily negligent party "where one of two parties does an act or creates a hazard by which the other party, though not concurrently joining in the act, is thereby exposed to liability to a third party."¹⁷

The Kentucky Supreme Court held that the adoption of comparative fault in Kentucky did not eradicate the doctrine of common law indemnity:

[A]llocation of liability arose from statutory provisions permitting contribution and several liability among joint tortfeasors in pari delicto. It has no application to the common law right of a constructively or secondarily liable party to total indemnity from the primarily liable party with whom he/she is not in pari delicto.¹⁸

Before indemnity can arise at common law, there must be a finding of liability to the injured party.¹⁹

The same facts that might persuade the fact-finder to apportion liability for Travis's damages to Phillip might alternatively support indemnity for BB&T if the fact-finder believes that BB&T was only secondarily or passively liable

¹⁶ Degener, 27 S.W.3d at 780.

¹⁷ Kentucky Utilities Co. v. Jackson County Rural Electric Cooperative Corp., 438 S.W.2d 788, 790 (Ky. 1968).

¹⁸ Degener, 27 S.W. 3d at 780.

¹⁹ Carl v. Hauck Manufacturing Co., 910 S.W.2d 247, 253 (Ky. 1995).

while Phillip was primarily or actively liable. These classifications of primary versus secondary and active versus passive "are not in themselves definitive, but only conclusions which should be arrived at after analyzing the facts[.]"²⁰ Again, because there are genuine issues of material fact, we cannot determine as a matter of law whether either BB&T or Phillip was negligent, much less whether they acted with equal culpability. The trial court erred by granting summary judgment in Phillip's favor on the claim of indemnity.

C. Subrogation.

BB&T's third party complaint also seeks reimbursement from Phillip for the \$6,516.00, which it paid for and on behalf of Phillip. We think that this claim is essentially a claim for equitable or legal subrogation to prevent Phillip from being unjustly enriched.

Equitable or legal subrogation arises by operation of law, unlike conventional subrogation that arises by contract or agreement.²¹ Subrogation allows a party under an obligation to satisfy the debt for which another was primarily liable and then acquire the rights of the creditor against the debtor.²² Because

²⁰ Crime Fighters Patrol v. Hiles, 740 S.W.2d 936, 938 (Ky. 1987).

²¹ Kentucky Hospital Ass'n Trust v. Chicago Insurance Co., 978 S.W.2d 754, 755 (Ky.App. 1998).

²² Wine v. Globe American Casualty Co., 917 S.W.2d 558, 561 (Ky. 1996); Kentucky Hospital Ass'n Trust, 978 S.W.2d at 755.

subrogation is an equitable doctrine, the right to subrogation depends on the specific facts and circumstances of each case.²³

Kentucky's highest court has explained the guiding principles of subrogation as follows: "The doctrine is one of benevolence to prevent unjust enrichment[,] and it attempts to do complete justice between the parties. It is no fixed or flexible rule[,] and its object is to prevent injustice."²⁴ The elements of a subrogation are as follows: (1) payment by one of another's debt; (2) the subrogee is not a volunteer; (3) the debt is not one for which the subrogee is primarily liable; (4) the entire debt must be paid unless the others who made payment are joined; and (5) subrogation must not work any injustice to the rights of others.²⁵

Notably, there is no requirement that the party seeking subrogation be entirely free of negligence or potential liability. "Ordinary negligence may be taken into consideration in determining whether the negligent party is entitled to subrogation but ordinary negligence alone is not a complete bar to subrogation where, in spite of such negligence, the equities

²³ Evans' Adm'r v. Evans, 304 Ky. 28, 1999 S.W.2d 734, 737 (1947).

²⁴ *Id.*

²⁵ Bryan v. Henderson Electric Co., 566 S.W.2d 823, 825 (Ky.App. 1978), *quoted in Wine*, 917 S.W.2d at 561.

are still in favor of the subrogee."²⁶ A secondarily-liable tortfeasor may be subrogated to the rights of the injured party against the primarily-liable tortfeasor.²⁷ Similarly, the first tortfeasor can maintain an action for subrogation against a later tortfeasor for aggravating an injury.²⁸ Where both parties are innocent, equity weighs against the party who was in better position to have averted the loss by reasonable diligence or care.²⁹

In order to determine whether the trial court properly granted summary judgment in favor of Phillip on the subrogation theory, we must determine whether BB&T could possibly succeed on this claim under any set of circumstances. We will do this by examining each element of a subrogation claim.

The first element is payment by BB&T of Phillip's debt. If, as Travis and Phillip allege, BB&T used Travis's money to satisfy the Michigan garnishment against Phillip, then Phillip was unjustly enriched at Travis's expense. Travis then had a restitution claim against Phillip. By giving Travis the

²⁶ 73 AM.JUR.2D *Subrogation* § 17 (2005).

²⁷ *Id.* at § 30.

²⁸ *Id.*

²⁹ Liberty National Bank and Trust Co. of Louisville v. Pep Services, Inc., 600 S.W.2d 475, 476 (Ky.App. 1979).

\$6,516.00 that had been taken from him, BB&T paid a debt owed by Phillip.

Another element is the requirement that the entire debt be paid by BB&T unless others who made payments are joined. In this instance, BB&T paid the entire debt that Phillip owed Travis by restoring the \$6,516.00 to the accounts.

A third element is that the debt not be one for which BB&T was primarily liable. As noted above, BB&T has alleged facts that could lead the fact-finder to believe that the bank is not primarily liable for the debt in question.

A fourth element is that the subrogation must not work any injustice to the rights of others. This is a fact-specific determination that must be determined by the fact-finder. But there is nothing in the facts as alleged by BB&T that indicates that it could not possibly succeed in proving this element at trial.

This leaves the final element—the requirement that the subrogee, BB&T, must not be a volunteer. Phillip argues BB&T was a volunteer. Therefore, we must consider what it means to be a “volunteer” in the context of subrogation.

“Ordinarily one who discharges the debt of another without a legal or moral obligation to do so is considered a volunteer and will not be subrogated to the discharged debtor’s

rights against another[,]"³⁰ at least not under the theory of legal or equitable subrogation.³¹ This volunteer rule is used to describe two different principles to prevent the recovery of any type of restitutionary damages (including in a claim for subrogation) for different reasons:

The first principle is that one who has conferred a benefit upon another with an intention to make a gift, has no equitable claim for relief against the recipient of the benefit in the absence of fraud, mistake, duress or undue influence. In such a case the recipient of the benefit is enriched, but not unjustly, since there is no injustice in retaining a completed gift. . . .

The second principle is that one who confers a benefit upon another without affording that other the opportunity to reject the benefit, has no equitable claim for relief against the recipient of the benefit in the absence of some special policy that would outweigh the right of free choice in the benefited party.³²

Where the facts are undisputed and capable of only one inference, whether a person acts as a volunteer and is consequently prohibited from being subrogated to the rights of the creditor is a question of law. But where the determinative

³⁰ Dodson v. Key, 508 S.W.2d 586, 588 (Ky. 1974).

³¹ *Id.* at 589.

³² DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.9 at 299 (1973) (footnotes omitted).

facts are disputed, these questions must be resolved by the fact-finder.³³

"Generally speaking, the party making payment is a volunteer if, in so doing, he has no right or interest of his own to protect, and acts without obligation, moral or legal, and without being requested by anyone liable on the obligation."³⁴ So a person paying another's debt to protect an interest of his own is not considered a volunteer and is not prohibited from subrogation.³⁵ It is even possible that paying a debt because of an interest in one's reputation might be enough to show that the payor did not act as a volunteer.³⁶ One who paid another's debts in good faith based on the reasonable, albeit mistaken, belief that doing so was necessary to protect his own interest is also entitled to subrogation.³⁷

Kentucky's highest Court has held that an insurance company, which made a good faith settlement with its insured "under circumstances in which it had reasonable cause to believe it might be held liable," did not act as a volunteer and was

³³ See Employers Mutual Fire Insurance Co. v. Piper, 335 S.W.2d 925, 927-928 (Ky. 1960).

³⁴ 73 AM.JUR.2D *Subrogation* § 21 (2005) (footnotes omitted).

³⁵ Evans' Adm'r, 304 Ky. 28, 199 S.W.2d at 737.

³⁶ 73 AM.JUR.2D *Subrogation* § 22 (2005).

³⁷ Dodson 508 S.W.2d at 589. See, e.g., Clarendon National Insurance Co. v. Vctor, 165 S.W.3d 484 (Ky. 2005).

entitled to subrogation from another insurance company, which was ultimately held to be liable.³⁸ "Furthermore, one is not a volunteer where he pays the debt at the instance, solicitation, or request of the person whose liability he discharges, or of that person's agent or representative."³⁹

The facts before us suggest several possible reasons why BB&T may not have been acting as a volunteer when it paid Phillip's debt to Travis. If the attorney who sent the two demand letters to BB&T represented Phillip, then Phillip cannot claim that BB&T acted as a volunteer in paying Phillip's debt to Travis since his representative asked for the bank to do so. Alternatively, it is possible that BB&T paid Travis because it reasonably believed that it might be held liable for wrongfully garnishing the accounts. Yet, another possibility is that the bank paid the debt to protect its business reputation. But we cannot determine as a matter of law whether BB&T was acting as a volunteer when it returned the funds to the accounts because of the procedural posture of the case. There are numerous genuine issues of material fact that must be decided by the fact-finder to determine whether BB&T was acting as a volunteer and ultimately whether it is entitled to subrogation. Because of the existence of these genuine issues of material fact, the

³⁸ Dodson, 508 S.W.2d at 589. See also, Piper, 335 S.W.2d at 927-928.

³⁹ 73 Am.Jur.2d *Subrogation* § 21 (2005).

trial court erred in granting summary judgment on the subrogation claim.

IV. DISPOSITION.

We take no position as to whether BB&T is likely to succeed on any of its claims on the merits. But because there are genuine issues of material fact regarding each of the three claims, we hold that the trial court erred in granting summary judgment in Phillip's favor; and we remand for proceedings consistent with this opinion.

ALL CONCUR.

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