RECORD NO. 23-2084

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

IN RE: DEBORAH FAYE PARKER

Debtor,

DAN GREGORY MARTIN,

Plaintiff – Appellant,

v.

DEBORAH FAYE PARKER,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRIC OF VIRGINIA

ALEXANDRIA DIVISION

RESPONSIVE BRIEF OF APPELLEE

SUBMITTED BY:

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OPENING BRIEF OF APPELLEE

Jurisdictional Statement

This court has appellate jurisdiction over this matter pursuant to 28 U.S.C Section 158(d)(1).

Statement of Issues Presented

1. Did the District Court commit reversible error in reversing the bankruptcy court and ruling in favor of Parker?
2. Did the District Court commit reversible error in concluding that based on the record from the bankruptcy court, there simply was no evidence that Parker was guilty of embezzlement?

Statement of The Case

The dispute between the parties in this case rivals the epic battle of the Hatfields and the McCoys. The parties' dispute is over a decade long. Their

unfortunate drama can be summarized as follows: Mr. Martin believes that Mrs. Parker stole an inheritance that rightfully belonged to him. Mrs. Parker, for her part, believes that nothing can be further from the truth and contends that the inheritance following the passing of her father belongs to her. Mr. Martin filed a lawsuit in state court for breach of contract and unjust enrichment. Mr. Martin prevails in state court and obtains a judgment for roughly $150,000. Mrs. Parker refuses to satisfy the judgment and ultimately files for bankruptcy. Mr. Martin files a complaint in bankruptcy court asking that the bankruptcy court except his debt from the chapter 7 discharge that Mrs. Parker obtained. A trial takes place in bankruptcy court. The bankruptcy court denies all causes of action argued by Mr. Martin, except, ironically enough, the one cause of action that Mr. Martin does not plead or argue to the court-the count of embezzlement. The bankruptcy court finds that the debt owed to Mr. Martin should be excepted from discharge because Mrs. Parker committed embezzlement. Mrs. Parker then appeals the ruling of the bankruptcy court to the United States District Court for the Eastern District of Virgnia. The district court reverses the decision of the bankruptcy court and concludes that the evidence did not support a finding that Mrs. Parker committed embezzlement. The appeal to this honorable court then follows.

Background

Mr. Martin's mother, Peggy L. Martin ("Peggy"), and Mrs. Parker's father, Morton H. Poindexter ("Morton") lived together for many years, but were never legally married. In 2004, they executed a peculiar document called the "Post Marital Agreement" (the "Agreement"). Under the Agreement, they agreed to execute reciprocal wills providing that ultimately Mr. Martin would receive two-thirds of their combined estates, and that Mrs. Parker and her siblings would received just one-third of their combined estate. Mr. Martin's mother, Peggy, passed away in April of 2009. Mrs. Parker's father, Morton, passed away in August of 2013.

During the years that followed the execution of the Agreement, over a time period that spanned nearly two decades, Morton, made a number of financial decisions, which seemingly were in contradiction to the Agreement that he had executed with his significant other, Peggy. For instance, Morton added his daughter, Mrs. Parker, to a number of his bank accounts as a joint account holder, and designated Mrs. Parker as beneficiary on several annuities. In August of 2013, after the passing of her father, by operation of the law, Mrs. Parker began to be notified by a number of banks and financial institutions that these accounts now belonged to her.

Dispute and State Court Lawsuit

Shortly after the passing of Morton, Mr. Martin is able to obtain the original will that Morton left behind from Mrs. Martin. Pursuant to the will Mr. Martin is appointed as executor. Mr. Martin does not seem to make any effort to request from Mrs. Parker that she turn over property that he believes are assets belonging to him for estate administration. Instead, Mr. Martin simply files a lawsuit in state court against Mrs. Parker. The causes of action pursued in the state court litigation were under count I, breach of contract, and under count II, unjust enrichment. In the "wherefore clause" of the lawsuit, the plaintiff asked that the court (in the alternative) find that the assets of Morton were transferred in breach of a binding Agreement, and that the court should enter a judgment of $152,845 in favor of Mr. Martin. Mrs. Parker, in turn, through counsel, responded to the second amended complaint by denying all the material allegations set forth in the complaint, and by asserting that the Agreement was unenforceable as being a violation of public policy of Virginia existing at the time of the execution of that Agreement in 2004; specifically, that the agreement encouraged cohabitation between adults of the opposite gender, which was then prohibited by the law in Virginia.

On September 10, 2019, the Circuit Court for the County of Roanoke enters an order granting judgment in favor of Mr. Martin for $151,000. The one-page order notes that on August 30, 2019, the parties appeared before the court on Mr. Martin's

motion for summary judgment, and that at the conclusion of oral argument that plaintiff moved the court to enter summary judgment on its behalf as to the validity of the Agreement. In other words, the state court found that the Agreement was in fact enforceable despite the arguments of Mrs. Parker that the Agreement was in violation of Virgnia's public policy.

Mrs. Parker files for bankruptcy and the litigation that follows

On December 24, 2021, after failing to satisfy the judgment owed to Mr. Martin, Mrs. Parker files for bankruptcy protection. As expected, Mr. Martin then filed a complaint (the "Complaint"), and then subsequently an Amended Complaint (the "Amended Complaint") with the bankruptcy court in which he sought to have his judgment excepted from the chapter 7 discharge that Mrs. Martin had obtained. The Amended Complaint filed by Mr. Martin seeks to have the judgment owed to him excepted from discharge under either count I, alleging that Mrs. Parker's actions amounted to fraud, under count II, alleging that Mrs. Parker's actions amounted to fraud or defalcation while action in a fiduciary capacity, and finally, under count III, plaintiff alleged that the debt owed to him should be excepted from discharge because Mrs. Parker's actions was a willful and malicious injury, and such actions are not subject to discharge. Most notably, the Amended Complaint, uses the word "Conversion" or some variation of the word conversion at least five times. Conversely, the word "Embezzlement" appears in the Amended Complaint

zero times. All material allegations in the Amended Complaint are denied by Mrs. Parker, discovery is conducted, and the parties then proceed to trial before the bankruptcy court.

Evidence Presented at Trial before the Bankruptcy Court

The parties appeared before the bankruptcy court on November 2, 2022 for trial (the "Trial"). At trial, the first witness to be called was Mr. Martin. His testimony is spent recounting what a hard time he had obtaining the original will belonging to Morton from Mrs. Parker and how despite winning in state court, and despite collection efforts that he pursued after he won in state court, that to date, he had yet to receive a single penny from Mrs. Parker.

Regarding the allegation that Mrs. Parker embezzled the funds that rightfully belonged to him, Mr. Parker spent a total of zero seconds testifying in any way, shape, or form, that embezzlement is what transpired in this case. The word embezzlement is not uttered by him a single time.

At the conclusion of the testimony of Mr. Martin, Mrs. Parker then testifies before the court. Mrs. Parker's testimony suggests that there was no love lost between her and Mr. Martin, that she was distraught when her father passed away, and that she did in fact read the will belonging to her father after he died which left her confused. She also testified that after a number of checks started arriving in the mail following her father's passing, that she called each bank/institution that

provided her with a payment to inquire whether the proceeds that were sent to her were in fact legally hers, considering the fact that her father's will, and the Agreement, suggested otherwise. Each bank/institution reassured her that the money was hers to keep despite the will and the Agreement saying otherwise. As such, she kept the money. Mrs. Parker also testified that in addition to the funds that she had received roughly one decade earlier after the death of her father, that she also received house as a gift from her mother a few years prior to her death some five years prior to her filing for bankruptcy, and some additional money from her mother, after her passing a few years prior to her filing for bankruptcy.

Most notably, upon being cross-examined by Mr. Martin, never once is she accused of embezzling the funds that should have lined the pockets of Mr. Martin instead of hers. Never once, is there any suggestion, insinuation, or questioning by Mr. Martin as to what would have Mrs. Parker believe that this money truly belonged to her despite the clear language of her father's will or the Agreement.

At the conclusion of the trial, the bankruptcy court takes the matter under advisement. A few weeks later, a ruling is made by the bankruptcy court in which it finds that the plaintiff did not prove any of its causes of action. However, the court takes it upon itself to conclude that -while the plaintiff did not plead embezzlement- that the debt owed to Mr. Martin is excepted from discharge on the ground that Mrs. Parker's actions amounted to embezzlement.

Appeal to the District Court

Mrs. Parker then appealed the ruling of the bankruptcy court to the district court, arguing that Mr. Martin did not even plead embezzlement, let alone prove embezzlement. The district court agrees. The district court in its ruling finds that Mrs. Parker "was operating under a good-faith belief that she was entitled to the funds that she took. Such a belief, even if ultimately mistaken, precludes a finding of fraudulent intent." Second, the district court found, that some of the property "passed directly to Parker and did not constitute property to another that Parker could have embezzled."

Summary of Argument

Contrary to the assertion made by Martin in their "summary of argument," the state judgment does not form the basis for Martin's claim against Parker in the bankruptcy case. The state judgment merely proved that Martin prevailed on his cause of action for breach of contract. But, that certainly does not prove that the actions of Parker in 2013 amounted to embezzlement. The judgment from 2019 merely gives you the roadmap to argue conversion, which is precisely what Martin argued throughout the trial. However, proving conversion -which the plaintiff only partially proved at trial- is certainly not the same thing as proving embezzlement. In addition, Martin had absolutely no intention of proving that Parker embezzled at trial. Rather, Martin's strategy was proving that Parker intentionally converted his

assets which may lead a bankruptcy court to conclude that such intentional act justifies concluding that the debt is not dischargeable.

The state court judgment merely determined that Martin's cause of action for breach of contract had merit. Moreover, the Virginia Circuit Court did not hear any witness testimony, and did not determine the merits of Martin's argument. Rather, the state court simply stated and determined on summary judgment that the Agreement was enforceable and thus the breach of contract claim was valid and enforceable. Martin won on a technicality, and not on the merits.

The bankruptcy court, presented with absolutely no evidence whatsoever of intent to embezzle nonetheless decided to "do the right thing," having presumably concluded that it was not fair for Parker to keep the money.

ARGUMENT

The non-existing evidence presented by the plaintiff at trial

When one goes into the woods to hunt for game, you bring a rifle. When one goes to the lake to catch fish, you bring a fishing rod. When one walks into bankruptcy court seeking to prove that the debtor's taking of your property was embezzlement, you bring evidence that the property is not only clearly yours, but that the debtor knew darn well that he had no legal basis or justification in keeping the property, and that any argument by debtor to the contrary, is nothing short of absurd.

In this case, Mr. Martin did not do that. Mr. Martin did not come to court armed with any evidence that debtor committed embezzlement for the simple reason that Mr. Martin had absolutely no intention of proving embezzlement at trial. Why? Because the entire theory of Mr. Martin's case was conversion.

Since the foundation of plaintiff's case was conversion, and since the cause of action of conversion does not care about the defendant's state of mind and whether they believed that they were acting in good faith, or whether they had a mistaken belief, or whether they were confused, the plaintiff did not bother to put on any evidence to prove fraudulent intent.

All that Mr. Martin sought to prove in bankruptcy court is that the property rightfully belonged to him, and that Mrs. Parker took something that did not belong to her. As for why Mrs. Parker did that, from Mr. Parker's perspective, that was wholly irrelevant. All that mattered is that she took his property. Conversion, after all, is essentially a strict liability cause of action.

Embezzlement on the other hand, raises the bar for the plaintiff and demands that the accuser also prove to the court that the defendant acted with fraudulent intent. Embezzlement demands that the state of mind of the accused be examined. Does the accused honestly believe that his best friend gifted him an antique corvette for his birthday as opposed to letting him borrow the car for two hours?

Does the evidence point to a logical conclusion that a gift of the car was made? If so, then one is not guilty of embezzlement, but perhaps guilty of conversion.

At trial before the bankruptcy court, conspicuously absent from the evidence presented by Mr. Martin when he testified was any evidence that he had inquired into why Mrs. Martin chose to keep "his inheritance" and any assertion by him that her justification for keeping "his inheritance" was patently absurd and contrary to law. At no point does his attorney ask Mr. Martin, for instance: Well, Mr. Martin, did you confront Ms. Parker with her father's will? Did you confront her with the Agreement? Did you inquire as to what explanation in the world she could offer to make her believe that the funds were hers to keep in contravention of these documents? Did your attorney write a demand letter asking for an explanation as to what legal ground she might have in keeping these funds. None of the foregoing questions were asked for the simple reason that Mr. Martin could care less about the "why" and "the logic" behind why Mrs. Martin chose to keep "his inheritance." All he was concerned with was proving was conversion.

The fact that Mr. Morton was completely disinterested in proving embezzlement was demonstrated during a critical point in the trial, at the conclusion of Mrs. Parker's direct testimony. At this point, Mrs. Parker has provided the court with a seemingly plausible and rationale explanation for why

she kept all the assets following the death of her father. The cross examination of Mrs. Parker ensues (bottom of JA 409) as follows:

Q. So the lawsuit was filed and you were served with it in May of 2014, correct?

A. Correct.

Q. Okay. But you testified that you found the marital agreement and the will, and you had read those in 2013, correct?

A. Yes.

After these two questions are posed and answered the entirety of the rest of the cross examination focus on what transpired after the lawsuit was filed and how Mrs. Parker was allegedly lavishly spending "her client's money" during the next five years while the litigation is pending. At no point in time does Mr. Martin challenge the testimony of Mrs. Parker that she had a good faith belief in concluding that she could hold on to the inheritance. At no point in time is Mrs. Parker "put on the hot seat" and demand placed on her to explain yet again, how she so conveniently concluded that the inheritance was hers to keep when she made that decision in 2013.

At no point is Mrs. Martin asked the following series of questions that could have been asked: Mrs. Parker, did it not seem odd to you that you can keep all these assets despite the language in the Agreement and will saying otherwise? Why

did you not consult with an attorney that specialized in wills and estates? Did it ever occur to you that you were perhaps stealing my client's inheritance? Did it ever occur to you that the banks/institutions you were speaking with had no idea what they were talking about? But, alas, none of that took place.

The bankruptcy court's legal conclusion

The bankruptcy court's ruling can be paraphrased as follows: Parker read her father's will. Parker was aware of the terms of the will. Moreover, she acknowledged that Martin told her of the Agreement shortly after the passing of her father. Parker did not like what she read. She decided to keep the assets for herself. Therefore, she committed embezzlement. As for her conversations with the various financial institutions, they were not made aware of the entire story.

The district court's legal conclusion

In analyzing whether fraudulent intent was proven the district court noted that a plaintiff has to prove that the accused had knowledge that the appropriation of the assets in question were contrary to the wishes of the owner of the property. Clearly, that much was proven. But, a defendant acting under an erroneous belief of entitlement lacks fraudulent intent. A person who acts with a good-faith belief that the property belongs to him is not guilty of embezzlement. The fact that Mrs. Parker acted under a rationale erroneous belief in concluding that the property belonged to her was not something that the bankruptcy court spent much time

considering. It should have. The fact that the accused honestly and justifiably -even if later proven to be wrong- believes that the property he is taking belongs to him makes all the difference in the world when one is accused of embezzlement.

As for the argument that "you read the will and that the will speaks for itself, and you simply did not want to abide by the language in the will" the district court properly notes that "the funds are not self-evidently part of Morton's estate."

As to Mrs. Parker's knowledge of the Agreement, the District Court correctly pointed out that the plaintiff needed to prove that Mrs. Parker was aware of the terms of the agreement shortly after the passing of her father, when she refused to surrender the funds to Mr. Martin. That was not proven. And even if proven, that still would not have moved the needle.

Finally, the district court was correct to note that some of the key finding of facts that the bankruptcy court drew were simply contrary to evidence presented. Thus, the finding of fact that "the financial institutions [knew] only that [Parker] was a joint account holder" when they advised her that the funds were hers to keep is simply contrary to the unrebutted testimony presented by Mrs. Parker. The financial institutions knew about the will and the Agreement, but the bankruptcy court chose to ignore this key fact.

Finally, the district court, spent part of its opinion highlighting one more fact that the bankruptcy court had essentially glossed over, which was that not all of the

property that was kept by Mrs. Parker was "the property of another." As the district court explained -far better than the undersigned ever could- some of the property left behind by Mrs. Parker's father upon his passing was not property of this estate; some of the property passed outside of probate, and thus, some of that property never belonged to Mr. Martin and as such, if certain property does not belong to you, then it cannot be embezzled from you. With that being said, the illuminating discussion of the District Court as to whether the property alleged to be illegally taken was even Martin's property in the first place, the foregoing is mere icing on the cake. Even if, assuming arguendo, that the entirety of the funds kept by Mrs. Parker were in fact the property of Mr. Morton, the fact of the matter is that Mr. Morton never proved fraudulent intent as to any of it.

The arguments presented by Mr. Martin in his brief

The first argument that Mr. Martin makes in this appeal is that "In reviewing the evidence, the Bankruptcy Court was called upon to determine the dischargeability of the State Judgment debt…." Mr. Martin's position is incorrect. The state court judgment arose from a breach of contract cause of action that Mr. Martin prevailed on during his motion for summary judgment. The judgment is obviously res judicata and the amount of the judgment cannot be disturbed. Equally true is that a breach of contract judgment is dischargeable in bankruptcy. But, the bankruptcy court was not called upon to determine the dischargeability of

a debt arising from a state court judgment. Rather, the bankruptcy court was called upon to examine if the actions that transpired in 2013, and the decision of Mrs. Parker to keep the assets in 2013 following the death of her father amounted to embezzlement.

As such, the argument that "Because the State Judgment order had already liquidated the amount of the claim asserted in the bankruptcy case, there was no need for the Bankruptcy Court to parse the State Court's ruling and further trace the financial assets, or determine which amounts would have flowed to Morton's Estate but for Parker's taking them" is entirely without merit and again bolsters the argument of Mrs. Parker that Martin walked into bankruptcy court intent on proving only one thing: that Parker committed conversion.

In addition, to state that "the District Court erred in its reliance on evidence never presented to the Bankruptcy Court" and to then further state that "The District Court, on it own initiative, and after oral argument, appear to has sua sponte pulled state court records and dissected the State Court Lawsuit……" is patently false. Mr. Martin presented the bankruptcy court with its list of trial exhibits. Exhibit 1 and exhibit 2 was the second amended complaint filed in state court and the defendant response to the second amended complaint. The District Court did not pull any records. They were introduced into evidence by Mr. Martin.

As for the argument that the District Court, in its astute analysis that not all the property taken by Mrs. Parker was in fact the "property of another" crossed the line by "going behind the State Court" misses the mark. The district court did not conclude that Mr. Martin did not obtain a judgment for $150,000. Clearly Martin did, and no court can change that fact. Mr. Martin obtained a judgment stemming from Mrs. Parker's breach of contract for that amount. But, the focal point for purposes of embezzlement is whether all the property that Mrs. Parker received in 2013 (as opposed to 2019 when the judgment was rendered) was property that belonged to Mr. Martin in the first place.

As for the fact that the fact that in reversing the bankruptcy court on the issue of fraudulent intent, the district court needed to find that the bankruptcy court decision was clearly erroneous, and that the bar set by this standard is a high one, Mr. Martin is correct. However, that does not change the fact that in making certain crucial findings of fact -as it concerns the information provided by Mrs. Parker to the financial institutions- and the legal conclusions of the bankruptcy court in concluding that fraudulent intent was proven -while dismissing the good faith belief of Mrs. Parker- the bankruptcy court most certainly was clearly erroneous.

Mr. Martin goes about trying to prove fraudulent intent on the part of Mrs. Parker by simply regurgitating the memorandum opinion of the bankruptcy court: you read the will, you read the agreement, you chose to keep it, and you refused to

turn it over when demand was placed upon you. Ergo, embezzlement. What Mr. Martin in his brief does not do is point to a single piece of evidence from trial that proves with specificity that Mrs. Parker knew, or should have clearly known, that the funds did not belong to her, and that what she was doing was in contravention of the law.

As the bankruptcy court noted in Macarthur Co. v. Cupit (In re Cupit), 514 B.R. 42 (Bankr. Colo. 2014):

> For embezzlement, however, there must be knowledge that the appropriation is contrary to the wishes of the owner. Stockton, 788 F.2d at 217; 3 Wayne R. LaFave, Substantive Criminal Law § 19.6(f)(1) (2d ed. 2012) ("One who converts the property of another which is in his lawful possession is not guilty of embezzlement (for his conversion is not fraudulent) if, when he converts, he honestly believes the property is his own or is nobody's, or he otherwise honestly believes he is authorized to convert it.").

Mrs. Parker, when she converted the property of Mr. Martin honestly believed that the property belonged to her. Mrs. Parker acted reasonably under the circumstances.

As for the argument that the Fourth Circuit has previously opined that fraudulent intent can be inferred from the totality of the facts and circumstances of any given case, that is partially true. Virtually all circuits have accepted the logical fact that a debtor will hardly ever break down on the stand and admit that they acted with fraudulent intent when they chose to transfer a valuable piece of property out of their name seven months prior to bankruptcy filing, or embellished

the value of his assets when filling out a loan application in order to secure a necessary loan from a bank, but that does not change the fact that the plaintiff has the burden of proving by a preponderance of the evidence each and every necessary element of embezzlement.

Finally, the fact that Mrs. Parker chose to "place the money beyond creditor reach" during the five-year duration of the lawsuit, does not diminish her position that she did not embezzle the funds, but rather it bolsters it. After all, what the case law has also pointed out is that the person who commits embezzlement knows that they have stolen, and as such, they tend to act "under the cover of night" and hide in the shadows, whereas the innocent operate out in the open.

Conclusion

Parker acted reasonably under the facts and circumstances of this case. Parker honestly believed that the funds belonged to her. Parker acted logically under the facts of this case since the evidence showed that she was not estranged from her father, but far from it. Parker even helped her father make certain financial decisions in the decade or so preceding his death. Thus, it was perfectly logical for Parker to assume that his estate would go to her as opposed to his "step-son." When she read his will she was rightfully confused. She then sought the advice of the financial institutions that provided her with her father's assets. The financial institutions assured her that the money was hers to keep. And since the

banks and financial institutions assured her that she could keep the money, and since these institutions deal with these issues on a regular basis, she adhered to their advice. That is not embezzlement. This, at worse is "wishful thinking," but certainly not a person that know' s in their heart of heart's that what they are doing is wrong or illegal. In short, this is not the very definition of embezzlement, but the very definition of conversion.

Statement Regarding Oral Argument

The record speaks for itself. Oral argument would be superfluous.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opening Brief of the Appellee is compliant with the type-volume limits because, excluding part of the document exempted by Fed. R. App. P. 32(f), this brief was prepared with a proportionally spaced typeface (Times New Roman) using Microsoft Word in 14 point fond, and contains 4498 words.

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