

MARY SANDERS,)
)
 Plaintiff/Appellee,) Appeal No.
) 01-A-01-9601-CV-00006
 v.)
)
 STEVE SANDERS and) Sumner Circuit
 JANET SANDERS,) No. 14074-C
)
 Defendants/Appellants.)

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

FILED
July 31, 1996
Cecil W. Crowson
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT FOR SUMNER COUNTY
AT GALLATIN, TENNESSEE

THE HONORABLE THOMAS GOODALL, JUDGE

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AFFIRMED AS MODIFIED,
AND REMANDED

O P I N I O N

This is an appeal by defendants/appellants, Steve and Janet Sanders, from the trial court's judgment which found they had wrongfully executed on a judgment against plaintiff/appellee, Mary Sanders. The court awarded appellee a judgment against appellants for compensatory damages of \$700.87, attorney's fee of \$3,750.00, and punitive damages of \$5,000.00.

Appellee and appellant Steve Sanders divorced in June 1993. They had two children. In February 1992, their seventeen year old daughter, Gaylee, was involved in an accident while riding as a passenger in an automobile. Sumner Regional Hospital treated Gaylee's injuries and sent a bill for the treatment. Pursuant to the divorce decree, appellant Steve Sanders was responsible for providing medical insurance to the parties' daughter.

Appellant Steve Sanders filed the medical bill with his insurance company, but the company refused to pay, in part, because the driver of the car was responsible for the accident. When Gaylee's hospital bill was not paid, Sumner Regional Hospital turned the bill over to Professional Adjustment Services ("PAS"), a collection agency. When they were not able to collect, PAS filed a suit, case 91-222-666, on behalf of Sumner Regional Hospital against appellant Steve Sanders.

The driver's insurance company paid appellee an amount equal to the daughter's medical bills. When PAS sued appellant Steve Sanders, he authorized his wife, appellant Janet Sanders, to file suit against appellee, case 95-12-36. Appellee testified that when she was served "that is when [she] knew that [she] had to get the money and pay the bill." She paid PAS, and the court clerk noted

this payment in the docket book under case 91-222-666, but did not note the payment under case 93-12-36.

Appellants were subsequently awarded a default judgment against appellee in April 1993 in the sum of \$399.28. When the judgment became final, appellants caused executions to issue on appellee's bank accounts. Because the executions were unsuccessful, appellants requested that a levy issue on appellee's automobile. After the parties levied on the automobile, appellee redeemed it by paying \$554.87, the judgment amount and the court costs.

In July 1994, appellee filed suit against appellants for wrongful execution in the Sumner County General Sessions Court. The general sessions court found in favor of appellee and awarded damages. Thereafter, in April 1995, appellants filed a notice of appeal as to the general sessions court's ruling. After hearing the case, the Circuit Court of Sumner County awarded appellee compensatory damages of \$700.87, attorney's fee of \$3,750.00, and punitive damages of \$5,000.00. Subsequently, appellants filed a timely notice of appeal to this court.

Appellants' first issue is whether "the trial court erred in awarding appellee damages for wrongful execution."

We review the findings of fact of the trial court de novo upon the record with a presumption of the correctness of the findings unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d).

The term "wrongful execution" encompasses a variety of actions including replevin, conversion, trespass, and abuse of process. 30 Am. Jur. 2d *Executions* § 606 (1994). Moreover, an

action for wrongful execution may be brought under a variety of situations, including when the underlying judgment is void or is obtained through fraud. 33 C.J.S. *Executions* §§ 452-53 (1972).

An execution issued on a void, satisfied, or extinguished judgment is wrongful; and a party subjects himself to liability for abuse of process when he procures the issuance of an execution on a judgment which has been vacated or which he knows to have been obtained by fraud and perjury or to have been entered after the payment of a debt.

Id. § 452.

Our supreme court has recognized two causes of action called wrongful levy of an execution and wrongful garnishment. ***Bryson v. Bramlett***, 204 Tenn. 347, 351, 321 S.W.2d 555, 557 (1958). In ***Bryson***, the court stated: "It is well settled that one may maintain an action for the wrongful levy of an execution under a void judgment or for wrongful garnishment." *Id.* (citing ***Long v. Alford***, 14 Tenn. App. 1, 5 (1931)). The eastern section of this court, in a 1987 decision, affirmed the decision of a trial court which awarded plaintiff damages for wrongful levy of an execution. ***Cooke v. Hodge***, CA No. 1095, 1987 WL 14836, at * 1 (Tenn. App. 31 July 1987). While recognizing the right of an individual to bring an action against a party or officer for damages, our supreme court has noted that the appropriate remedy to quash a levy on property exempted from execution is certiorari. ***Sellars v. Fite, Anderson & Green***, 62 Tenn. 120, 129 (1873).

Generally, the owner or a person having an interest in the property seized is entitled to bring an action for wrongful execution. 30 Am. Jur. 2d *Executions* § 607 (1994); 33 C.J.S. *Executions* § 456 (1942). The officer levying the execution may be liable as well as any person who directs or induces the officer to perform the execution. ***Cooke***, 1987 WL 14836, at * 2; ***see Sellars***, 62 Tenn. at 129; ***Long v. Alford***, 14 Tenn. App. 1, 5 (1931). The

western section of this court has stated:

[T]here can be no claim for damages . . . against parties who have acted upon the orders of a court unless the parties conspired to perpetrate a fraud upon the Court to obtain that order [P]arties have the right to act in reliance upon orders of a Court without being subject to a later claim for damages in the event the Court or its officers were in error as long as the parties did not direct or ratify the wrongful acts.

Hawley v. Lavelle, 602 S.W.2d 499, 501 (Tenn. App. 1980). Finally, a party is entitled to direct pecuniary damages and punitive damages "[w]here fraud, malice, gross negligence or oppression intervenes" **Bryson**, 321 S.W.2d at 557 (quoting **Louisville, N. & G.S.R. Co. v. Guinan**, 79 Tenn. 98, 103 (1883)).

The trial court made the following findings of fact and conclusions of law:

(8) As a matter of law, when [the judgment in] 91-222-666 was paid, the third party action 93-12-36 was satisfied and this was not made known to the General Sessions Judge. Mr. Sanders had paid nothing and was owed nothing and he knew this fact and he did not disclose such information to the Court.

. . . .
(11) The Defendants knew or ought to have known that their judgment was only valid as a third party-judgment. The status of case 91-222-666 should have been determined before requesting judgment on 93-12-36 and before causing execution for any reason. Steve Sanders allowed his wife, Janet Sanders, to act for him as "agent." In order to save her automobile from the Sheriff's sale, Mary Sanders paid a total of \$620.87. She also lost the use of her automobile for four days. The value of lost use was set at eighty dollars.

(12) It is noteworthy to the Court that Mr. Sanders, a party to this lawsuit, has failed to appear and offer any explanation or proof concerning this conglomerated state of affairs. His prior wife, Mary Sanders, testified that she had talked with him and advised him that the judgment had been satisfied. The Court considers that a reasonable, prudent person under the same or similar circumstances would appear in this court at the hearing and offer evidence and serve as a witness if he believed that his own testimony or evidence would be favorable to him [Because plaintiffs did not offer the testimony of Mr. Sanders,] the Court can only assume that Mr. Sanders' testimony would not have been favorable to his own cause.

. . . .
(15) It seems absurd to the Court that three hundred and ninety-nine dollars would cause the second Mrs. Sanders to bring about the sale of a vehicle. The Court is convinced she knew the account had been paid and the

sale of the vehicle was brought about for spite and for the continuation of a spleenful and vindictive attitude.

The Court finds that not only was the judgment void, but the conduct of Steve Sanders and Janet Sanders was atrocious, reprehensible, unconscionable, oppressive, appalling, offensive and not in keeping with the standards expected of litigants.

We are of the opinion that the evidence fully supports the findings of the trial court and that the trial court did not err in awarding appellee damages for wrongful execution.

Appellants' second issue is whether "the trial court erred in awarding attorneys fees."

The trial court awarded appellee attorney's fees in the amount of \$3,750.00. In this state, a court may not award attorney's fees "[i]n the absence of a statutory provision therefor, or contractual agreement between the parties" **Goings v. Aetna Casualty & Surety Co.**, 491 S.W.2d 847, 847 (Tenn. App. 1972). The Tennessee Supreme Court has specifically held that attorney's fees incurred in a wrongful attachment law suit are not elements of damages. **Stringfield v. Hirsch**, 94 Tenn. 425, 437-38 29 S.W. 609, 613 (1895). In this case, there was neither a contract between the parties nor any statute which allowed an award of attorney's fees. Therefore, we are of the opinion that the trial court must vacate the award of attorney's fees. On remand, the trial court will enter an order vacating the damages for the amount of the attorney's fees.

Appellants' third issue is whether "the trial court erred in awarding punitive damages."

A court may award punitive damages when a defendant has "acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly." **Hodges v. S.C. Toof & Co.**, 833 S.W.2d 896, 901 (Tenn.

1992). "A person acts intentionally when it is the person's conscious objective or desire to engage in conduct or cause the result." **Id.** "A person acts maliciously when the person is motivated by ill will, hatred, or personal spite." **Id.** The preponderance of the evidence supports a finding that the defendants acted intentionally and/or maliciously. Specifically, there is evidence that appellants knew appellee had paid PAS when they sought to have the Sheriff execute the levy. Thus, the trial court did not err when it awarded punitive damages. This issue is without merit.

Therefore, it results that the judgment of the trial court is affirmed as modified. On remand, the trial court shall enter an order vacating the award of attorney's fees and address any further necessary proceedings. Costs on appeal are taxed one-half to plaintiff/appellee, Mary Sanders, and one-half to defendants/appellants, Steve and Janet Sanders.

SAMUEL L. LEWIS, JUDGE

CONCUR:

BEN H. CANTRELL, J.

WILLIAM C. KOCH, JR., J.