COURT OF APPEALS
DECISION
DATED AND RELEASED

July 6, 1995

No. 95-0148-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

RIVER BANK OF DE SOTO
f/n/a DE SOTO STATE BANK,

Plaintiff-Appellant,

v.

RAYMOND FISHER,

Defendant,

KAREN FISHER DUNCAN,

Defendant-Respondent.

APPEAL from a judgment and an order of the circuit court for Vernon County: Michael J. Rosborough, Judge. *Reversed and cause remanded*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

GARTZKE, P.J. River Bank of De Soto appeals from an order dismissing its claim against Karen Duncan and a judgment in her favor of $100

damages and $2,251.09 attorney fees and expenses. The issue is whether, as the trial court concluded, the bank's conduct was unconscionable under the Wisconsin Consumer Act, ch. 425, STATS. The offending conduct was the bank's mailing[1] to Duncan's ex-husband, Raymond Fisher, car titles. The cars themselves were security for the bank's loan to Duncan and Fisher. We conclude the bank's conduct was not unconscionable. We therefore reverse.

When Fisher and Duncan divorced in 1990, they were indebted to the bank. The divorce judgment assigned to Fisher the responsibility to pay the debt. Fisher's two antique cars secured the debt. The bank had possession of the titles to the cars. Each title shows Fisher as the owner and the bank as "first lienholder." Subsequently, the loan was renewed twice, with Fisher and Duncan signing the renewal notes.

In August 1991, after Fisher told Duncan he intended to move to Texas, she told the bank she was concerned that he might hide the cars. Fisher moved to Texas in September 1991 and he continued making payments to the bank. When the debt came due on June 26, 1992, he signed a consumer loan agreement for its renewal. In August 1992, the bank asked Duncan to sign the "renewal documents" but she refused because of Fisher's past payment history and his plan to move the cars to an undisclosed location.

Fisher made monthly payments on the renewed loan until May 1993. In early June 1993, when the debt was delinquent, he told the bank that he was arranging refinancing in Texas to pay the debt in full. He said he needed to use the cars for collateral for the new loan, and he asked the bank to forward the car titles to him to facilitate refinancing. The bank complied, without signing the titles or intending to release the collateral. In July 1993, Fisher told the bank that he did not intend to make further payments and that the cars were in Mexico. In October 1993, the bank brought this action against Fisher and Duncan on the debt. The record fails to disclose whether the bank has ever proceeded against the security. It did not do so in this action. Fisher did not appear in the action.

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[1] We have substituted "mailing" for "releasing," the verb the trial court used. The titles were not security and the bank did not release its security interests in the cars when it mailed the titles to Fisher.

Following a bench trial, the trial court found that Duncan reasonably expected that if she did not sign the renewal loan the bank would be forced to call it due and the cars would be sold to relieve her of most, if not all, liability. The court also found that although the bank was not required to have the car titles in its possession, it had them as additional protection on the loan. The court further found that the bank had obvious options available to it rather than sending the titles to Fisher in Texas: it could have sent them directly to a new lender.

The loan was a consumer credit transaction under ch. 425, STATS. Section 425.107(1), STATS., provides that if a court as a matter of law finds "unconscionable" any aspect of a consumer credit transaction, any conduct directed against the customer by a party to the transaction or any result of the transaction, the court shall refuse to enforce the transaction against the customer and shall provide the customer with the remedy provided in § 425.303, STATS. Section 425.303 makes the party who acted unconscionably liable to the customer for $100 plus actual damages. No statute defines "unconscionable," although § 425.107(3) lists factors pertinent to the issue of unconscionability.

The trial court concluded that because the bank's conduct in "releasing" (i.e., mailing) the titles to Fisher left Duncan in a position where she had "an absence of meaningful choice," the bank had treated her unconscionably and she should be relieved of any liability on the loan. The court concluded it was appropriate to impose against the bank the remedies available to Duncan under § 425.303(1), STATS., and her reasonable attorney fees pursuant to § 425.308(1), STATS. The court made no findings that the provisions in the loan documents are unconscionable.

The trial court took its definition of unconscionability from ***Discount Fabric House v. Wisconsin Tel. Co.***, 117 Wis.2d 587, 601, 345 N.W.2d 417, 424 (1984). The ***Discount Fabric*** court held that an exculpatory provision in an advertising contract between the plaintiff and the telephone company, to the effect that the company was not liable for errors or omissions in telephone directory advertising, was void as against public policy. The court relied on ***Allen v. Michigan Bell Tel. Co.***, 171 N.W.2d 689, 692-94 (Mich. App. 1969). The ***Allen*** court recited from ***Williams v. Walker-Thomas Furniture Co.***, 350 F.2d 445, 449 (D.C.Cir. 1965), which said: "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the

parties together with contract terms which are unreasonably favorable to the other party."

The note which both Fisher and Duncan had signed provided in part:

> Without affecting my liability or the liability of any endorser, surety, or guarantor, Lender may, without notice, grant renewals or extensions, accept partial payments, *release or impair any collateral security for this Note or* agree not to sue any party liable on it. Presentment, protest, demand and notice of dishonor are waived.

(Emphasis added.)

The bank asserts that its loan documents are identical to Wisconsin Bankers Association form 455, which the Wisconsin Commissioner of Banking approved by letter on March 4, 1991. The commissioner stated that the approval may not be construed as an approval of any business practice utilized in a transaction involving an approved form. However, the bank asserts that its conduct cannot be considered unconscionable when every action it took was explicitly allowed under the loan document the commissioner had approved. Section 426.104(4)(b), STATS., provides that any act, practice or procedure submitted to the administrator in writing and approved by the administrator shall not be deemed to be a violation of chs. 421 to 427, STATS., the consumer-transactions chapters.

The trial court referred to the quoted provision in the note as "boilerplate fine print language" having "no benefit or value whatsoever to the consumer." The court's characterization is irrelevant. First, we cannot accept the proposition that when the quoted provision has been approved by the commissioner of banking and is not, in and of itself unconscionable, release by the bank of the car titles, without more, is unconscionable. Second, the provision itself is irrelevant to this dispute. The bank did not release or impair its security. It mailed the titles to Fisher, but the titles were not security. Fisher

could not sell the cars without the titles, but each title showed on its face that the bank had a lien on the vehicle.

Duncan argues that when the bank sent the car titles to Fisher without informing her, it breached its duty to her under a document separate from the note, the loan agreement, which provided in part,

> You acknowledge that we are under no duty to preserve or protect any Collateral until we are in actual, or constructive, possession of the Collateral.... We shall only be considered in "constructive" possession of the Collateral when we have both the power and intent to exercise control over the Collateral.

Duncan claims that the bank had constructive possession of the cars by holding their titles, and therefore owed her a duty to preserve and protect the collateral. The trial court made no findings on the constructive-possession issue. Indeed, it made no findings whatever with regard to the quoted provision. In particular, it did not decide whether this provision is for the benefit of Fisher, who was the sole owner of the collateral, or for the benefit of Duncan, who had no interest in the collateral. Duncan has not shown how the bank's turning over the titles to Fisher breached a duty to her.

We turn to the grounds relied on by the trial court: whether, as the court found, the bank's conduct in mailing the titles to Fisher indeed "left Duncan in a position where she had an `absence of meaningful choice' ...." Because the court did not explain how or why Duncan was left in a position of having no meaningful choice, we review the question de novo. It is, on the undisputed facts before us, a question of law. We disagree with the trial court's conclusion.

Duncan has not shown that before the bank mailed the titles to Fisher, she had a "meaningful choice." She has shown no right to compel the bank to commence an action against Fisher or to compel the bank to apply the security to the debt. She has never explained how she had the right to prevent

Fisher from taking the security out of Wisconsin.[2] She cites no statutory or case-law authority supporting such rights.

Because Duncan failed to show she had a "meaningful choice" regarding the security before the bank mailed the titles to Fisher, she failed to show the bank's conduct in that regard affected her choices after that event. We conclude that the bank's conduct did not deprive Duncan of a meaningful choice. For that reason we conclude that the bank's conduct was not "unconscionable."

Our conclusion requires that we reverse the judgment and order.

By the Court.--Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.

[2] The record does not disclose whether Fisher has sold the security.

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EICH, C.J. (*dissenting*). It may be, as the majority opinion indicates, that the bank did not "release" its security interest in Fisher's automobiles, but its act of returning the title documents to him facilitated his sale or other disposition of the cars in Mexico.

It is also true that the note permitted the bank to release or impair the collateral security for the loan. But the ancillary loan agreement indicated that once the bank had actual or constructive possession of the collateral--which I believe it did when it had possession of the titles to the automobiles--it undertook the duty "to preserve or protect" that collateral.

It is undisputed that the value of the automobiles exceeded the loan balance; and I believe the inference is inescapable that when Fisher, then living in Texas, asked for the title documents it was for the purpose of disposing of the cars. In my opinion, when the bank complied with Fisher's request without any notice to Duncan, it left her in a position where she lacked any "meaningful choice" because the bank could, as it did, proceed against her for the full amount of the loan balance under circumstances in which, according to the trial court's unchallenged findings of fact, she could reasonably expect that any liability she might have on the original note would be satisfied by the bank's sale of the collateral.

I believe the trial court could properly rule as it did and would affirm the judgment and order.