

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 4, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0598

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

EULALIA I. ADDISON,

Plaintiff-Respondent,

v.

CHALLONER MORSE McBRIDE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Door County:
SUSAN E. BISCHHEL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Challoner Morse McBride appeals the foreclosure of a mortgage on her real estate. The mortgage secured a \$39,000 promissory note that McBride and her deceased husband executed to a foundation established by Eulalia Addison, who is now the assignee of the note and mortgage. McBride and her husband issued the note and mortgage in their personal capacities to McBride's husband as payee in his official capacity as Addison's foundation's trustee, as part of a scheme to steal \$55,000 in U.S. Treasury Note proceeds Addison had entrusted to their care. McBride was convicted of theft by bailee for her part in the crime. On appeal, McBride

argues that her theft by bailee conviction operates as a collateral estoppel implicitly invalidating the note and mortgage. She points out that the prosecutor considered the entire transaction a fraudulent scheme. She also argues that the evidence did not prove default on the note. We reject these arguments and affirm the foreclosure judgment.

McBride's criminal proceedings had no bearing on the validity of the note and mortgage. The criminal jury determined that McBride executed the note and mortgage as a false promise, with a concealed, deceitful intent to dishonor both. *See, e.g., Fitch v. State*, 185 So. 435, 437-38 (Fla. 1938); PERKINS, CRIMINAL LAW 303 (2d ed. 1969). Although this constituted theft by bailee, it would not invalidate the note and mortgage. The legal obligations created remained valid regardless of McBride's concealed, deceitful intent to dishonor them. Only victims, not deceivers and defrauders, may invalidate fraudulent instruments. *See Gunther v. Ullrich*, 82 Wis. 222, 230, 52 N.W. 88, 90 (1892); *see also* RESTATEMENT OF CONTRACTS §§ 472 and 476 (1932). In addition, the prosecution's comments in the criminal trial did nothing more than recognize that McBride committed a theft by deceit; they did not enlarge McBride's rights. Addison remains the only one who may invalidate the transaction. Moreover, the criminal proceedings did not bind Addison, who was not a party or privy. *See Kichefski v. American Family Mut. Ins. Co.*, 132 Wis.2d 74, 78-80, 390 N.W.2d 76, 78-79 (Ct. App. 1986). Finally, the record contains sufficient evidence of default to warrant the mortgage's foreclosure.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.