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Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-003222-MR

BERLING CONSTRUCTION COMPANY

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. 90-CI-425

RAYMOND L. SCHLAGEL AND KORLISS
M. SCHLAGEL

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: GUIDUGLI, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Berling Construction Company (Berling) appeals from a final judgment entered in the Boone Circuit Court on August 20, 1996, which awarded Raymond and Korliss Schlagel (the Schlagels) the sum of \$1,224,494 following a jury trial where Berling was found liable for trespass, breach of warranty, violations of the Consumer Protection Act,¹ and misrepresentation regarding construction of a house. The judgment includes \$11,000 for trespass damages, \$45,000 in compensatory damages, \$1,140,000 in punitive damages plus \$28,494 in attorney's fees. Berling

¹ Kentucky Revised Statutes (KRS) Chapter 367.

raises six issues on appeal regarding the award of punitive damages: (1) whether the jury instruction erroneously grouped all theories of recovery together; (2) whether punitive damages can be recovered for breach of a contractual warranty; (3) whether punitive damages can be recovered for violations of the Consumer Protection Act; (4) whether the trial court erred in omitting the "clear and convincing" standard of proof from the jury instruction; (5) whether the award was excessive; and (6) whether the award violated due process. Other issues raised by Berling include: (1) whether the trial court erred by allowing certain expert testimony concerning compensatory damages and by giving the compensatory damages jury instruction; (2) whether the trial court erred by refusing to admonish the jury regarding the Schlagels' alleged improper presentation of evidence; (3) whether the trial court erred in failing to enter a directed verdict on the claim of trespass; and (4) whether the trial court's award of attorney's fees was excessive and unreasonable. Finding no grounds for reversible error, we affirm.

On or about May 24, 1989, the Schlagels purchased a new house which had been constructed by Berling. Berling agreed, in a one-year builder's warranty, to repair or replace, free of costs, all defects in material and workmanship reported by the Schlagels. Shortly after the Schlagels occupied their house, they began to notice problems and notified Berling of these problems. Many of the problems were hidden and not easily disclosed until the Schlagels occupied the house, i.e., no tar paper under the shingles as required by the shingle manufacturer and the applicable building

code; a dead-end underground drainage pipe; no anchor bolts on one end of the house; improper firewalling between the garage and the house; undersized framing to support the second story deck; inadequate footers; etc. Berling responded to some of the Schlagels' complaints, but it claims that many of the problems were never resolved because the Schlagels denied its workers access to the property.

On May 23, 1990, the Schlagels filed a lawsuit against Berling alleging breach of contractual warranty, violation of the Consumer Protection Act, violation of the Kentucky Building Code,² misrepresentation, and trespass. The Schlagels claimed compensatory and punitive damages. Many depositions were taken and many interrogatories were answered. By order dated January 26, 1993, the trial court set the matter for trial by jury on May 3, 1993, but the trial was continued due to scheduling problems.

On May 7, 1993, the trial court ordered that the matter be referred to the Master Commissioner "by virtue of the multiplicity and complexity of the issues" The Schlagels appealed and this Court³ and the Supreme Court⁴ affirmed the trial court's order to refer the case to the Master Commissioner.

On September 1, 1994, the trial court ordered the Schlagels to file a written election of remedies within thirty days. On November 22, 1994, the Schlagels elected the remedy of damages. By order entered November 22, 1994, the matter was

² KRS 198B.130.

³ Case #93-CA-2307-OA, entered November 18, 1993.

⁴ Case #93-SC-1005-MR, rendered June 23, 1994.

assigned to trial by jury on March 20, 1995; however, for reasons the record does not reflect, the trial was continued. On October 24, 1995, the trial court ordered the case assigned to trial on March 6, 1996. A flurry of pre-trial motions and briefs were filed, and on February 7, 1996, Berling moved for a continuance based on the large number of witnesses and the fact that only three days had been set aside for trial. The trial court rescheduled the trial for July 15, 1996.

On July 15, 1996, a five-day jury trial began. The Schlagels' evidence included the testimony of a building inspector, two civil engineers, a licensed surveyor, a building contractor and a certified property appraiser. The testimony of these witnesses detailed many defects and the significance of those defects. The misrepresentation claim was based upon Berling's alleged representation that the house's foundation was poured concrete, when the house was actually constructed on three sides on a foundation of poured concrete and on the back side on a foundation of concrete blocks. The Schlagels claimed that due to the foundation being partly poured concrete and partly concrete block they suffered a leaking foundation, cracking of the concrete floor, cracking of the poured portion of the concrete foundation and other defects. The Schlagels claimed they would not have purchased the house if they had known the truth about the foundation.

Berling's evidence included the testimony of witnesses who disputed the seriousness of the defects, the costs to repair the defects and the diminution of the value of the house caused by the defects. On the fourth day of the trial, the jury viewed the

Schlagels' property. When Berling closed its case, the trial court directed a verdict in favor of the Schlagels on the issue of breach of warranty.

The jury returned a verdict holding Berling liable for trespass, misrepresentation, and violation of the Consumer Protection Act. The jury awarded the Schlagels damages of \$11,000 for the trespass, \$45,000 in compensatory damages for the defects, and \$1,140,000 in punitive damages. After the trial, the Schlagels moved the trial court to award attorney's fees of \$28,494. Berling opposed the motion arguing that since the Schlagels had changed counsel six times, there was an unnecessary duplication of work and thus the attorney's fees were not reasonable. The trial court granted the Schlagels' motion. Berling filed a motion for judgment notwithstanding the verdict or in the alternative requested a new trial. This motion raised substantially the same arguments that Berling now raises on appeal. The trial court denied Berling's motion. This appeal followed.

I. PUNITIVE DAMAGES

A. FAILURE TO SPECIFY THE THEORY OF RECOVERY

Berling argues that the only theory of recovery pursued by the Schlagels that would support an award of punitive damages was the tort of misrepresentation. Berling claims that since the jury instructions did not state under which theory of recovery a punitive damages award could be made, the jury, when considering punitive damages, was permitted to consider evidence of all of Berling's conduct rather than only being allowed to consider evidence of the actions involved in its misrepresentations concerning the foundation. The trial court directed a verdict of

liability against Berling on the breach of warranty claim and the jury found Berling liable under claims for trespass, misrepresentation and violations of the Consumer Protection Act. The jury instructions included a separate damages award for trespass and grouped together the compensatory damages for Berling's liability on all of the other three causes of action. Thus, it is impossible to determine which part of the compensatory damages were awarded for which cause of action. However, for the purposes of determining whether the compensatory damages award supports the punitive damages award, this alleged error is of no consequence.

It is well established that nominal compensatory damages may support a jury's award of punitive damages. Fowler v. Mantooth, Ky., 683 S.W.2d 250, 252 (1984); and Louisville & Nashville Railroad Co. v. Ritchel, 148 Ky. 701, 706, 147 S.W. 411, 414 (1912). Since the jury found Berling liable under all three causes of action, the trial court's failure to separate the damages among the causes of action, if error, was harmless error. Thus, the jury's compensatory damages award for all three causes of action was sufficient to support the punitive damages award under each separate cause of action.

Berling further claims that evidence of the actions of Berling in breaching the warranty and violating the Consumer Protection Act should not have been considered by the jury when awarding punitive damages. Berling contends that only tort liability can support a punitive damages award and that the Schlagels pled only that Berling misrepresented the construction of the foundation and based upon that isolated claim, the jury could

only have based their punitive damages award upon evidence of the tortious actions related to the misrepresentations.⁵

Berling's reliance on the Legislature's enactment of KRS 411.184 in 1988 is misplaced. While KRS 411.184(4) provides that "[i]n no case shall punitive damages be awarded for breach of contract", the Supreme Court in Wittmer v. Jones, Ky., 864 S.W.2d 885, 890 (1993), stated as follows: "It suffices to say that this Court could not interpret KRS 411.184 to destroy a cause of action for punitive damages otherwise appropriate without fatally impaling upon jural rights guaranteed by the Kentucky Constitution, Sections 14, 54, and 241." Thus, Berling's liability for breach of warranty constituted a basis for the punitive damages award.

The Consumer Protection Act at KRS 367.170(1) states that "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." KRS 367.220 states in pertinent part as follows:

(1) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by

⁵ Berling argues that the Schlagels' closing argument regarding the basis for their misrepresentation claim was improper. However, Berling fails to indicate where they preserved the error by objecting to the Schlagels' allegedly improper arguments. Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv). We cannot review a matter which was not brought to the trial court's attention. Lawrence v. Risen, Ky. App., 598 S.W.2d 474, 476 (1980). Berling also failed to follow CR 76.12(4)(c)(iv) on other issues. We reviewed the record for Berling in each instance, although we were not required to do so. See Hollingsworth v. Hollingsworth, Ky. App., 798 S.W.2d 145, 147 (1990); and Sharp v. Sharp, Ky., 491 S.W.2d 639, 644-645 (1973).

KRS 367.170, may bring an action The court may, in its discretion, award actual damages and may provide such equitable relief as it deems necessary or proper. Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate [emphasis added].

Berling relies on Ford Motor Co. v. Mayes, Ky. App., 575 S.W.2d 480 (1978), for the proposition that a cause of action other than a Consumer Protection Act violation must exist if punitive damages are to be recovered. This Court in Mayes stated as follows:

Because their recovery under the Consumer Protection Act is for conduct which the act declares to be "unlawful," they argue that any violation of the act will support a claim for punitive damages. We disagree. After authorizing civil actions for damages attributable to unlawful acts under the Consumer Protection Act, KRS 367.220(1) provides:

Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate.

This provision does not purport to expand the right to claim punitive damages. It only makes clear that the Consumer Protection Act did not limit a right to punitive damages where one previously existed.

Id. at 487 (emphasis added). Berling argues that "[t]he Mayes decision establishes, clearly and unequivocally, that Appellees' reliance upon KRS § 367.220(1) as permitting punitive damage[s] was blatantly misplaced. . . ." However, we believe that Berling has misinterpreted Mayes. We believe the proper interpretation of Mayes is that a violation of the Consumer Protection Act can support a punitive damages award if the violation also meets the

legal criteria for awarding punitive damages. See KRS 411.184; KRS 411.186.

In Wahba v. Don Corlett Motors, Inc., Ky. App., 573 S.W.2d 357, 360 (1978), this Court stated that "KRS 367.220(1) allows for recovery of punitive damages where appropriate" (emphasis original). We hold that a violation of the Consumer Protection Act which also meets the requirements of the punitive damages statute—a finding of oppression, fraud, or malice—constitutes a basis for punitive damages.

B. "CLEAR AND CONVINCING" STANDARD

Berling claims that pursuant to the plain language of KRS 411.184(2) the punitive damages instruction was erroneous because it did not specify that a finding of liability must be made by the standard of "clear and convincing evidence." While the statute, if constitutional,⁶ is clear that the jury must be instructed on the clear and convincing evidence standard of proof, Berling failed under CR 51(3) to preserve this issue for appellate review. CR 51(3) states that "[n]o party may assign as error the giving or the failure to give an instruction unless he . . . makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection."

The general objection that Berling made to the giving of the punitive damages instruction on the grounds that not all theories of the case supported instruction was insufficient. In

⁶ We note that the Supreme Court in Williams v. Wilson, Ky., 972 S.W.2d 260 (1998), recently expressed no opinion as to the constitutionality of KRS 411.184(2).

Chaney v. Slone, Ky., 345 S.W.2d 484, 486 (1961), the Court stated as follows:

The object of this requirement [making known the specific grounds for an objection] is to give the trial court an opportunity to avoid error. Unless the stated ground or grounds for the objection were valid it cannot be said that the court was given that opportunity. For this reason the error we observe on reviewing this record was not preserved and thus would not authorize a reversal.

The Court in Young v. DeBord, Ky., 351 S.W.2d 502, 503 (1961), quoted from Clay, CR 51, comment 4, p. 458, and stated as follows:

"The Rule [CR 51] in effect condemns the general objection to the giving or failure to give an instruction. It requires a party making an objection to state specifically (a) the matter to which he objects, and (b) the grounds of his objections. One important purpose of this requirement is to limit the use of a general objection as a device in securing a subsequent reversal, when the court may well have obviated the error if its attention was directed at the proper time to the particular matter about which the party may subsequently complain on appeal."

Berling did not tender instructions on punitive damages; however, the Schlagels' instruction on punitive damages included the "clear and convincing" standard. Obviously, the Schlagels would not have objected to a change in the trial court's proposed instruction had Berling simply made its concerns known. Berling's failure to specifically object to the allegedly erroneous instruction precludes our consideration of any such error on appeal. Lewis v. Bledsoe Surface Mining Company, Ky., 798 S.W.2d 459, 460 (1990).

C. EXCESSIVENESS OF AWARD

Berling also contends that the punitive damages award is excessive. In Prater v. Arnett, Ky. App., 648 S.W.2d 82, 86 (1983), this Court stated our standard of review for determining whether a trial court erred in setting aside an award of damages as follows:

Upon reviewing the action of a trial judge in so doing, the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge in setting aside the verdict, to determine if his actions constituted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous. Further, the action of the trial judge is presumptively correct and the appellate court will not hastily substitute its judgment for that of the trial judge, who monitored the trial and was able to grasp those inevitable intangibles which are inherent in the decision making process of our system.

The Supreme Court in Davis v. Graviss, Ky., 672 S.W.2d 928, 933 (1984), stated as follows:

Our earlier opinion discussing review of the question of excessive damages in City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964)[,] expresses essentially the same analysis as Prater v. Arnett of the different functions of trial and appellate courts. The basic guideline for appellate review is set out in the Allen case as follows:

"It serves to emphasize the initial and primary role of the trial judge in determining these issues; that his decision shall be prima facie correct and final; and that only in rare instance when it can be said that he has clearly erred, i.e., abused his discretion, will he be

reversed." (Emphasis original.)
385 S.W.2d at 183-184.

Once the issue is squarely presented to the trial judge, who heard and considered the evidence, neither we, nor will the Court of Appeals substitute our judgment on excessiveness for his unless clearly erroneous.

In short, the rules governing appellate practice do not direct the appellate judge to decide if the verdict shocks his conscience or causes him to blush. Those rules charge us with the responsibility to review the record and decide whether, when viewed from a standpoint "most favorable" to the prevailing party, there is evidence to support the verdict and judgment. Rodgers v. Kasdan, Ky., 612 S.W.2d 133 (1981).

Berling argues that the Schlagels' "entire case was designed to play on the passion and prejudice of the jury." Berling argues that the amount of the award bears no relationship to the underlying facts, is completely unsupported by the facts and evidence, and could only be attributed to the jury's unfounded passion and prejudice. The Schlagels point out that a decision to punish is indeed required to support an award of punitive damages and that the jurors naturally felt some hostility toward the nature and extent of the misconduct. The Schlagels argue that the jury heard evidence of safety-related building code violations and that Berling had built over 400 homes with some having similar violations. The Schlagels calculate that the punitive damages award amounted to less than \$3,000 per home built by Berling and that this amount was far less than the cost of repair to the Schlagels' home. The Schlagels note that they requested \$2,000,000 in punitive damages and that they were awarded only \$1,140,000.

The trial court's decision regarding a punitive damages award is presumptively correct. We can reverse only if the trial judge has abused his discretion. The trial judge heard the witnesses firsthand and viewed their demeanor throughout the trial. Upon review of the record, we cannot say the trial judge abused his discretion in refusing to reduce the award.

D. DUE PROCESS REQUIREMENTS

Berling claims that the punitive damages award is "grossly excessive" in relation to Kentucky's legitimate interests in punishing and deterring Berling's conduct, and thus, entered "the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, 822 (1996). See TXO Production Corp. v. Alliance Resource Corp., 509 U.S. 443, 456, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); and Pacific Mutual Life Ins. Co. V. Haslip, 499 U.S. 21, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

A landmark Kentucky case that went before the U.S. Supreme Court is Hanson v. American Nat'l Bank and Trust Co., Ky., 844 S.W.2d 408 (1992).⁷ In Hanson the jury awarded \$1,065,000 in compensatory damages and \$5,775,000 in punitive damages for fraud and misrepresentation by a bank. The Supreme Court of Kentucky affirmed the punitive damages award. However, the U.S. Supreme Court vacated the judgment and remanded the case to be considered in light of the factors listed in TXO Production Corp. v. Alliance Resources Corp., supra (i.e., reasonableness, the amount of money

⁷ American Nat'l Bank & Trust Co. v. Hanson, 509 U.S. 918, 113 S.Ct. 3029, 125 L.Ed.2d 717 (1993).

potentially at stake, the bad faith of the party against whom judgment was rendered, whether a scheme was employed which was part of a pattern of trickery, fraud and deceit, and the wealth of the offending party). In TXO, the punitive damages exceeded compensatory damages by 526 times. On remand,⁸ our Supreme Court once again affirmed the award and noted that TXO recognized that

"Such awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it."

Hanson, 865 S.W.2d at 311, quoting TXO, supra, 113 S.Ct. at 2720, 125 L.Ed.2d at 379.

In the case sub judice, the punitive damages award was approximately 25 times the compensatory award. The Schlagels presented evidence of many defects in the house which were "hidden" from view including: pipes which go nowhere, no tar paper under shingles, lack of anchors between some walls and the foundation, and improper construction or omission of entire sections of footings. They also presented evidence of violations of building safety codes. Obviously, the jury concluded that these "hidden" conditions and safety violations were reprehensible and capable of being repeated. A proper ground for awarding such a large amount in punitive damages is to insure that Berling does not repeat the wrongdoing on other unwitting purchasers. We do not believe that the award was so large and so unrelated to Berling's conduct that

⁸ Hanson v. American Nat'l Bank & Trust Co., Ky., 865 S.W.2d 302 (1993).

it is "grossly excessive" and thus violative of the Due Process Clause.

II. COMPENSATORY DAMAGES

Berling next argues that the trial court erred by allowing certain expert testimony concerning compensatory damages and by giving the compensatory damages jury instruction. Berling argues that the valuation method used by the appraiser who testified for the Schlagels was improper. The appraiser testified that the house would have been worth \$90,000 if it had been properly constructed, but that as constructed the house was worth only \$48,000 because it would cost \$42,000 to correct the problems. Berling claims that the appraiser's valuation was "not an appraisal, but only a mathematical exercise" and that the appraiser's "'after value' is merely a re-statement of someone else's cost of repairs, with absolutely no independent analysis on his part." Berling contends that the method was improper because under this method the costs to repair will always equal the diminution in value.

The appraiser testified that he had been certified as an appraiser by the Kentucky Appraiser Board and had performed appraisals for a bank as well as individuals. We believe that he "demonstrated sufficient knowledge of real estate values in the area to express an opinion for the jury to consider." Commonwealth, Department of Highways v. Farmers Livestock Sales, Inc., Ky., 441 S.W.2d 777, 779-780 (1969). "The amount of that knowledge only affected the weight of the testimony." Id.

The appraiser testified that he inspected the property, studied the plans, and discovered several hidden defects. He stated that the fair market value⁹ of the property as it then existed must be based upon the costs to cure the defects. He testified that he doubted that the property could be sold without the cure.¹⁰ We conclude that the appraiser was competent to express an opinion as to the "before" and "after" value of the house and that it was within the purview of the jury to accord it the proper weight.

Berling argues that the jury instruction for compensatory damages was improper because it did not limit those damages to an amount not to exceed the diminution of fair market value. In a blasting case, Edwards and Webb Construction Co., Inc. v. Duff, Ky. App., 554 S.W.2d 909 (1977), the Court emphasized that it was error to permit recovery of the amount that was required to repair the building since reasonable repair costs cannot exceed the difference in market value before and after the damage. If the cost of repairs exceeds the difference in "before" and "after" market value, the tortfeasor is only liable for the diminution in market value. "Certainly, if one has a \$400.00 automobile and sustains

⁹ Regarding fair market value, "the test of value is the worth in the market place" Farmers Livestock Sales, *supra*, at 780. "By definition, 'fair market value' represents the price that a willing seller will take and a willing buyer will pay for property, neither being under any compulsion to sell or buy." Central Kentucky Drying Co., Inc. v. Commonwealth, Department of Housing, Buildings and Construction, Ky., 858 S.W.2d 165, 167 (1993).

¹⁰ An engineer who prepared one of the estimates for the costs of repair testified for the Schlagels that the house was not marketable in its condition.

damages that would cost \$1,000.00 to repair, the vehicle is a total loss and an insurer, or tort-feasor, must pay only the total value." Id. at 911. It has not been argued in this case that the house was not repairable, and thus was a total loss. Rather, an engineer testifying for the Schlagels stated that the house was marginally functional and could not be resold until most, if not all, of the defects were cured. We believe that in most cases the "after" value of the house can be determined using traditional means of valuation. However, in this case, with the many hidden and unusual defects for a newer house,¹¹ we believe that there was sufficient evidence to support the conclusion that the fair market value reduction was equal to costs to repair. The jury instruction for compensatory damages was not erroneous.

III. IMPROPER PRESENTATION OF EVIDENCE

Berling's next issue is whether the trial court committed reversible error by refusing to admonish the jury regarding the Schlagels' alleged improper presentation of evidence when the jury viewed the house. On the fourth day of the trial, the jury traveled to the Schlagels' house to inspect it. The Schlagels' attorney instructed them "not to put up any signs on things or arrows" and "not to say a word" when the jury visited the house. While the Schlagels were not present, they had placed a level against a wall which they claimed to be out of plumb, and they had

¹¹ The appraiser stated that the defects in the Schlagels' house were defects not found in newer homes but were usually found in much older homes. This is a unique situation and we conclude that it is reasonable to conclude that the best means of determining the "after" value was through the appraiser's reliance on the costs of repair.

placed a ladder on the deck leading up to the roof which they claimed to be improperly constructed. When Berling discovered the Schlagels' actions, a hearing was held and several jurors stated that they had used the level on the wall and climbed the ladder to observe the roof. The trial court stated that such actions were improper and were a form of testimony. Berling indicated to the trial court that it did not want a mistrial and requested that the trial court admonish the jury. The trial court failed to give an admonition.

Berling argues in its brief that "[r]egardless of whether or not a mistrial was requested, [we were] entitled to a Court admonition to the jury." However, Berling failed to renew its request for an admonition and never demanded a ruling on that request. The Schlagels argue that since the trial court expressed sympathy for Berling's complaint that the trial court's failure to rule on the request or to admonish the jury was inadvertent and that Berling should have renewed its motion for an admonition or requested a mistrial.

In Branch v. Whitaker, Ky., 294 S.W.2d 948, 952 (1956), the Court stated that a party must press the trial court for a ruling on a motion. The former Court of Appeals stated that "we have consistently held that a motion or objection not ruled upon is considered waived." In Prichard v. Kitchen, Ky., 242 S.W.2d 988, 993 (1951), the former Court of Appeals stated that should the trial court fail to rule on an objection, "counsel must insist upon a ruling, and save an exception thereto, in order to raise the question on appeal." Thus, any error was waived by Berling.

IV. TRESPASS

Berling next argues that the Schlagels failed to prove trespass. The testimony at trial from Berling's own witness indicated that a subcontractor working for Berling installed the headwall in 1989, after the Schlagels owned the property and without their consent. However, Berling argues that its subcontractor was an "independent subcontractor" which acted at the direction of the planning and zoning commission. Berling claims that the subcontractor was not its agent. Berling has once again failed to comply with CR 76.12(4)(c)(iv) and has not shown where this alleged error was preserved for appellate review.

The jury instruction for trespass stated as follows:

The jury is instructed that you will find for the Plaintiffs if you believe from the evidence presented at trial that:

1. The Plaintiffs were in lawful possession of their property, and;

2. That an employee of Berling Construction Co. or their agent intentionally or negligently, entered the Plaintiffs' property; and

3. That the Plaintiffs had not given their permission to the Defendant, Berling Construction Co., to be on the property;

Otherwise, you shall find [for] the Defendant, Berling Construction Co.

Apparently, Berling did not object to this jury instruction. Thus, the question of whether the subcontractor was acting as Berling's agent when it constructed the headwall was left for the jury to determine as a question of fact. However, while the jury was given a definition for "negligently," it was not given a definition for "agent."

The Supreme Court in United Engineers & Constructors, Inc. v. Branham, Ky., 550 S.W.2d 540, 543 (1977), stated as follows:

It would not be disputed that in determining whether one is an agent or servant or an independent contractor, substance prevails over form, and that the main dispositive criterion is whether it is understood that the alleged principal or master has the right to control the details of the work.

Thus, the question of Berling's legal relationship with the subcontractor was most likely a question of law and not proper for determination by the jury. However, since Berling failed to properly preserve for our review any error in this instruction, we must affirm on this issue. There was evidence of record to support a reasonable jury's determination that the subcontractor was acting as Berling's agent. Berling's own witness testified that the headwall had been constructed by one of Berling's subcontractors. If the trial court erred in submitting this question to the jury, Berling has failed to demonstrate how that error was preserved.

IV. ATTORNEY'S FEES

The final issue raised by Berling is that the trial court erred in awarding attorney's fees and that the award was excessive and unreasonable. However, recovery of reasonable attorney's fees is provided for in both the Consumer Protection Act and the Kentucky Building Code. KRS 367.220 and KRS 198B.130. Berling contends that the Schlagels had retained six different attorneys and that the overlapping work of those attorneys wasted time and made the attorney's fees unreasonable. In Gentry v. Gentry, Ky., 798 S.W.2d 928, 938 (1990), the Supreme Court stated as follows:

The amount of an award of attorney's fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct.

Itemization of each attorney's work was provided as an attachment to the motion for attorney's fees. We cannot conclude that the trial court abused its sound discretion in awarding \$28,494 in attorney's fees.

For the foregoing reasons, we affirm the judgment of the Boone Circuit Court.

GUIDUGLI, JUDGE, CONCURS.

SCHRODER, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

SCHRODER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I agree with the Majority's opinion until we get to the amount of punitive damages, which I believe are excessive. Recent decisions of the United States Supreme Court recognize that the Due Process Clause imposes a limit on awards of punitive damages. BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991). The standard of review in Kentucky to assess whether a particular award of punitive damages is excessive or not can be found in Davis v. Graviss, Ky., 672 S.W.2d 928 (1984) and Fowler v. Mantooth, Ky., 683 S.W.2d 250 (1984). These cases require that the trial judge make a "first blush" determination of

whether a punitive damages award is excessive or not in accordance with the criteria set forth in CR 59.01(d), (e), and (f).

On appeal, the trial court's determination is considered presumptively correct and will be reversed only if it is "clearly erroneous." Davis v. Graviss, 672 S.W.2d at 932; Fowler v. Mantooth, 683 S.W.2d at 253. In reviewing the record, I believe the award of \$1,140,000 in punitive damages is clearly erroneous and unreasonably high. In considering the contract price for the house, the actions of the appellant, the cost of repairs or the injuries of the appellees, and the conduct which punitive damages are intended to deter, I believe the award was overkill.

BRIEFS FOR APPELLANT:

Hon. James G. Woltermann
Hon. John S. "Brook" Brooking
Florence, KY

ORAL ARGUMENT FOR APPELLANT:

Hon. James G. Woltermann
Florence, KY

BRIEF FOR APPELLEES:

Hon. Paul R. Zurkuhlen
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Hon. Dennis H. Shaw
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ORAL ARGUMENT FOR APPELLEES:

Hon. Dennis H. Shaw
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