

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001493-MR

ROBERT WILEY

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 90-CI-00440

MARK ADAMS, and Additional
Appellees as Named on a
List Attached to the
Notice of Appeal

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM, and KNOX, Judges.

BUCKINGHAM, JUDGE. Robert G. Wiley appeals from a judgment of the Knox Circuit Court awarding \$2,188,950.00 damages in a class action suit. Finding no error, we affirm.

On October 17, 1990, a number of former students ("appellees") of Excel College ("College"), a proprietary business college in Corbin, Kentucky, filed suit against the College, a Kentucky corporation, and Wiley, its "defacto [sic] manager." The appellees alleged that the college and Wiley committed fraud by inducing them to enroll in the College with false promises, by causing misleading advertisements to be placed

in the newspapers, by indicating that the appellees' credits could be transferred to other colleges and universities, by arranging government-sponsored federally insured loans, and by otherwise defrauding them. The appellees contended that they were entitled to recover compensatory damages for lost tuition, damages for lost educational opportunities including delay of entry into the labor market, and punitive damages.

The appellees were later permitted to amend their complaint to name Huntington Federal Savings and Loan Association of Huntington, West Virginia ("Huntington Federal"), as a defendant. The amended complaint alleged that Huntington Federal likewise committed fraud against the appellees by continuing to allow the College and Wiley to act as its agents in soliciting federally insured loans from a majority of the appellees despite its knowledge of the College's fraudulent operations.

Wiley was initially represented by counsel, but his attorney was allowed to withdraw from Wiley's representation by an order of the trial court entered on October 30, 1992. Wiley moved to Texas to operate another business school and did not retain new counsel to represent him. Because Wiley failed to advise the court or counsel for the appellees of a new address, efforts to locate him were unsuccessful.

The case was actively litigated between the appellees and Huntington Federal for several years and, at one point, was removed to federal court only to be remanded to the trial court. Further, the trial court certified the case as a class action and

later denied a motion by Huntington Federal to decertify the class.

On August 1, 1997, a hearing was held before the trial court, and the trial date was rescheduled to November 17, 1997.¹ On October 22, 1997, an order was entered which stated that the trial would be bifurcated with the first phase addressing the issue of Huntington Federal's liability and the second phase addressing the issues of individual reliance by the appellees and damages. Neither this order nor the order rescheduling the trial date were sent to Wiley, as his whereabouts had not been communicated to the court.

On October 13, 1997, four days before the trial date, Wiley filed a motion and affidavit wherein he moved the trial court to continue the trial on the grounds that he had received no notices, pleadings, or orders in the case and that he was unaware that the case was still pending until he was contacted in late October by an attorney representing Huntington Federal. The trial court denied Wiley's motion, and the case proceeded to trial as scheduled with Wiley being absent.

On the second day of the trial, Huntington Federal settled the appellees' claims against it for \$323,000.00. Because Wiley did not appear for the trial, the trial court granted judgment to the appellees on the issue of Wiley's liability and scheduled the damages portion of the trial for March 9, 1998. The damages portion of the trial was held as

¹ The order rescheduling the trial date was entered on August 26, 1997.

scheduled, and Wiley was present and represented by counsel. After hearing testimony from witnesses on behalf of the parties and after being instructed by the court, the jury awarded compensatory damages against Wiley in the amount of \$1,188,950.00 and punitive damages in the amount of \$1,000,000.00, for a total award of \$2,188,950.00. Following the entry of a judgment by the trial court in accordance with the jury's verdict, Wiley appealed to this court.

Wiley's first argument on appeal is that the trial court erred in maintaining the case as a class action and by specifically allowing the jury to award monetary damages to the appellees as a class.² He argues that "it became apparent that there was a disparity among the class members as to the question of damages" and that "any commonality of interest that the Appellees may have had insofar as liability of the Appellant is concerned breaks down when we reach the question of damages" Kentucky Rule of Civil Procedure (CR) 23.01 states the prerequisites to a class action as follows:

Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

The relevant portion of CR 23.02 states that

² There were over 300 individual members of the class.

[a]n action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition:

. . . .

(c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Wiley challenges only the commonality requirement for class certification and argues that there were significant differences among the members of the class, including their period of time at the school, whether or not they finished the course, whether they received Pell Grants, the amount of tuition paid, whether they participated in the settlement with Huntington Federal, whether they had any interest in the transfer of credits, and whether they obtained work in a job-related field. Wiley contends that these factors were significant in determining the damages of the individuals who make up the class and that placing all the individuals in one class was error.

Although CR 23.01(b) requires that there must be questions of law or fact common to the class, it does not require that all questions of law or fact be common. See 6 Kurt A. Philipps, Jr., Kentucky Practice, CR 23.01, cmt. 6, at 397 (5th ed. 1995). Furthermore, CR 23.02(c) requires only that the questions of law or fact that are common to the members of the class predominate over the questions which affect individual members. In short, as each member of the class was a former student of the College who claimed to have been the victim of

fraud, we conclude that the trial court did not err by maintaining this case as a class action. "It is not necessary that there be a complete identity of facts relating to all class members, as long as there is a common nucleus of operative facts." Id. at 416.³

Wiley's second argument is that the trial court erred in requiring him to proceed to trial on the issue of liability when the trial court's order specifically stated that the first phase of the trial would involve only the liability of Huntington Federal. He also claims that he had insufficient notice of the trial date and that the trial court should have granted his motion for a continuance. CR 40 provides that "no case shall be assigned for trial without giving reasonable notice to all parties not in default of the day on which a trial date will be fixed."

The uncontroverted truth in this regard is that Wiley's attorney withdrew from representation of Wiley, that Wiley did not retain another attorney to represent him in these proceedings, that Wiley moved to Texas and did not make the court or opposing counsel aware of his location or his new address, and that Wiley made no effort to otherwise defend himself in these

³ We question whether Wiley has preserved any error in this regard, since he neither objected to the motion to certify the class nor joined in Huntington Federal's motion to decertify the class. He does not state in his brief where he preserved this error for our review as required by CR 76.12(4)(c)(iv), other than stating that he objected to the jury being instructed as a single class during the damages trial. See Broaddus v. Campbell, Ky. App., 911 S.W.2d 281, 283 (1995). However, as we have reviewed Wiley's argument on the merits and have rejected it, we will not address this issue.

proceedings from October 1992 until four days before trial.

"[I]t is a familiar rule that parties litigant, once in court, either for themselves or through their attorneys, must keep track of their cases and take notice of the time of trial when the date has been fixed according to rules." Burns v. Brewster, Ky., 338 S.W.2d 908, 910 (1960). Neither the trial court nor opposing counsel can be blamed for Wiley's failure to defend himself at trial. "The decision whether to grant or to deny a motion for continuance lies within the sound discretion of the trial court." Kentucky Farm Bureau Mut. Ins. Co. v. Burton, Ky. App., 922 S.W.2d 385, 388 (1996). We conclude that the trial court did not abuse its discretion in denying Wiley's motion for a continuance.

Wiley's third argument is that the trial court erred by failing to grant a directed verdict due to the appellees' failure to produce competent evidence showing their damages. The trial court instructed the jury to award damages to the appellees based on "the difference in the tuition paid by them and the value of the education they received and thereby place them in the same position they would have been had they not been defrauded." While Wiley himself testified that tuition at the College for a full year ranged from \$4,500.00 to \$5,400.00, he maintains that the appellees failed to offer evidence of the cost of the education for which they had paid and the value of the education they actually received. He further argues that the appellees presented no evidence showing the amount of tuition paid by each of the class members and the amount of tuition for a course of

less than a full year. In short, Wiley argues that the trial court allowed the jury to speculate concerning damages.

In Johnson v. Cormney, Ky. App., 596 S.W.2d 23, 27 (1980), overruled on other grounds by Marshall v. City of Paducah, Ky. App., 618 S.W.2d 433 (1981), this court held as follows:

As a general rule, the measure of damages for fraud is the actual pecuniary loss sustained, and one injured by the commission of fraud is entitled to recover such damages in a tort action as would place him in the same position as he would have occupied had he not been defrauded.

However, "[w]here it is reasonably certain that damage has resulted, mere uncertainty as to the amount does not preclude one's right of recovery or prevent a jury decision awarding damages." Id. As Wiley testified concerning the cost of tuition, and as the jury heard testimony from representatives of the class concerning the benefits or value they received from their education at the College, we conclude that the uncertainty as to the exact amount does not preclude the appellees' recovery of damages in this class action suit.

Wiley's fourth argument is that the trial court erred in allowing the jury to award punitive damages, as this was a breach of contract case and not a fraud case. He cites Kentucky Revised Statute (KRS) 411.184(4) which states that "in no case shall punitive damages be awarded for breach of contract." We first note that it had already been determined prior to the damages phase of the trial that Wiley had engaged in fraudulent conduct and was liable to the appellees; thus, this is a fraud

case. Furthermore, punitive damages are allowed where a party has been induced by fraud to enter into a contract. Hanson v. American Nat'l Bank & Trust Co., Ky., 865 S.W.2d 302, 306 (1993). The trial court properly submitted the issue of punitive damages to the jury.

For the foregoing reasons, the judgment of the Knox Circuit Court is affirmed.

KNOX, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, CONCURS IN RESULT ONLY.

BRIEF AND ORAL ARGUMENT FOR
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