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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002032-MR
AND
CROSS-APPEAL NO. 1997-CA-002554-MR

QUALITY CAR AND TRUCK LEASING, INC.; GLOCKNER CHEVROLET, INC. — APPELLANTS/CROSS-APPELLEES

v.

APPEALS FROM LAWRENCE CIRCUIT COURT
HONORABLE JAMES KNIGHT, JUDGE
ACTION NO. 95-CI-00219

JAMES DARBY; ELLA DARBY — APPELLEES/CROSS-APPELLANTS

OPINION

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: COMBS, DYCHE, AND HUDDLESTON, JUDGES.

DYCHE, JUDGE. This is an appeal by Quality Car and Truck Leasing, Inc. (Quality), and Glockner Chevrolet, Inc. (Glockner), from a jury verdict awarding economic and emotional distress damages to James Darby and Ella Darby (the Darbys), based upon negligent misrepresentations made by an agent of Quality Car and Glockner Chevrolet to the Darbys in conjunction with the leasing of a coal trailer by the Darbys. This is also a cross-appeal by

the Darbys in objection to the submission of a comparative fault instruction. We affirm in part, reverse in part, and remand.

With the intention of setting up his own commercial coal hauling operation, James Darby negotiated a contract on a used 1994 East tri-axle trailer with Glockner. The transaction was negotiated through Steve Noel, used truck sales manager for Glockner. James contends that Noel told him that the trailer was three to five months old, and was "like-new." However, Noel disputes that, contending that he stated only that the trailer had been on the lot for approximately three months. The trailer, in fact, had been previously wrecked and was approximately one year old.

On August 18, 1994, James signed a "Master Commercial Lease Agreement" for the trailer. The transaction was financed as a lease-purchase through Quality, a sister-business of Glockner engaged in vehicle financing and located on premises common to those occupied by Glockner.

James testified that, following his acquisition of the trailer, the trailer experienced uneven tire wear and excessive tire blow-outs. In August of 1995, the tractor and trailer toppled over while James was backing out of a weigh area at a coal delivery site in Bell County, Kentucky. The mishap resulted in extensive damage to the tractor and trailer. Following this, the Darbys discovered that the trailer had been wrecked prior to their purchase of it. The Darbys contend that they, as a result of the August 1995 accident, suffered severe financial difficulties and that they were eventually forced to file for

bankruptcy. The Darbys further contend that the stress of the events resulted in health problems, including problems with Ella's nerves and heart.

On December 20, 1995, the Darbys filed suit against Quality and Fifth Third Bank of Southern Ohio (Fifth Third) in Lawrence Circuit Court. They sought compensatory and punitive damages, alleging fraud, deceit, misrepresentation, violation of KRS 367.170, breach of express and implied warranties, and violation of the Magnuson-Moss Warranty Act. The Darbys subsequently amended their complaint to add Glockner as a defendant. Fifth Third was eventually dismissed from the suit, and, on March 10, 1997, the matter proceeded to trial with Glockner and Quality as defendants. The jury returned a verdict finding that Glockner and Quality were liable to the Darbys for negligent misrepresentation. The jury awarded the Darbys $1,314.90 for excessive tire damage; $25,000.00 for past mental and physical suffering caused by the appellants' negligent representations; and $15,000.00 to compensate them for the lower fair market value of the trailer attributable to the prior wreck. A comparative fault instruction was given and the damages were apportioned 50% to the Darbys, 25% to Glockner, and 25% to Quality. Following apportionment, the net award to the Darbys was $20,657.45.

Following the trial, Glockner and Quality filed a motion for judgment notwithstanding the verdict or for a new trial, and the Darbys filed a motion objecting to apportionment of the judgment and a motion to alter, amend or vacate the

judgment. All post-trial motions were denied and this appeal and cross-appeal followed.

The appellants first argue that the appellees failed to present substantial evidence and that the appellants were entitled to a judgment notwithstanding the verdict. The standard governing the granting of a motion for a judgment notwithstanding the verdict is the same for a motion for a directed verdict. Cassinelli v. Begley, Ky., 433 S.W.2d 651 (1968). The standard for appellate review of a directed verdict is set forth in Lewis v. Bledsoe Surface Mining Company, Ky., 798 S.W.2d 459, 461-2 (1990):

> Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed.

(Citations omitted.)

The appellants' liability in this case, as disclosed by the instructions to the jury, is based upon negligent

misrepresentation. The elements of a claim of negligent misrepresentation are (1) a misrepresentation, (2) concerning a material fact, (3) justifiably relied on by the plaintiff, and (4) loss or damages proximately caused by such misrepresentation. 37 C.J.S. Fraud § 59 (1997); See also Restatement (Second) of Torts, § 552 (1977).[1] An action for negligent misrepresentation is an action for fraud. 37 C.J.S. Fraud § 59 (1997).

Accepting as true all evidence favorable to the Darbys, the verdict of liability against the appellants was not palpably or flagrantly against the evidence. Misrepresentation was shown by testimony that the trailer had previously been wrecked and that James was not told this. In addition, the trailer was represented to James as being three to five months old when, in fact, it was at least one year old. There was evidence presented to show that the appellants in fact knew the actual age of the trailer and that it had been wrecked. Alternatively, there was evidence presented that the appellants, with their expertise in examining and appraising trailers, should have known that the trailer had been wrecked and its actual age.

Materiality was shown by James's testimony that truthful disclosure of the prior wreck and actual age of the trailer would have been of significant relevance to his decision whether to purchase the trailer at the contract price. Moreover, expert Les Smith testified that the prior wreck caused

[1] Kentucky has never specifically adopted the tort of negligent misrepresentation as defined in the Restatement of Torts (Second) § 552. However, neither has the tort theory been specifically rejected and we discern no reason that the tort is not a valid claim of relief in Kentucky.

significant damage and that such information would be important to a buyer in making a decision as to whether to purchase the trailer.

Finally, there was competent testimony tending to show that James justifiably relied on Steve Noel's representations and that the Darbys suffered damages relating to the representations. Hence, taking all the evidence favorable to the Darbys as true, inasmuch as all elements of negligent misrepresentation were shown, we cannot say that the jury's verdict of liability for negligent misrepresentation was palpably and flagrantly against the evidence.

The appellants next contend that the Darbys failed to produce sufficient evidence of damages with respect to the $25,000.00 awarded for pain and suffering and the $15,000.00 awarded for the loss of the fair value of the trailer as a result of the prior wreck.

The jury awarded the Darbys $25,000.00 for "mental pain, humiliation, [and] mortification." While there are compelling arguments that a pain and suffering instruction should not be given in a fraud case such as this, those arguments are not preserved for appeal.

The appellants tendered jury instructions to the trial court. The instructions were filed into the record on March 11, 1997, and are contained in the court record at pages 181 through 185. The tendered instructions, at page 185, include a proposed damage instruction for "pain and suffering." Trial counsel, in regard to any objections to the trial court's proposed jury

instructions, stated only that "we would object to the giving of any Instruction that contradicts the Instructions we've given." The trial court's jury instructions did not materially contradict the jury instructions proffered by the appellants.

Where the source of an instruction alleged by a party to be faulty could be traced to an instruction tendered to the court by the party, CR 51(3) precludes an appellate court from considering the allegation of error. Kendall v. Cleveland Crane & Engineering Company., Ky. App., 555 S.W.2d 817 (1977), *modified on other grounds in* Bohnert Equipment Company, Inc. v. Kendall, Ky., 569 S.W.2d 161 (1978). Hence the propriety of the giving of the instruction is not preserved for our review. Inasmuch as the pain and suffering objection was presented to the jury with the approval of the defendants in the case, having reviewed Ella's testimony describing her suffering, and taking this as true, we cannot say that the jury's award for pain and suffering was excessive or a result of passion or prejudice.

The appellants preserved their objection to the award of $15,000.00 representing the difference in the fair market value of the trailer as it was represented to be versus the fair market value of the trailer as a previously wrecked trailer. We agree with the appellants that this damage award is not supported by the evidence. Expert Les Smith offered the only competent evidence on the issue and he testified that the previously wrecked condition of the trailer, after repair, resulted in a reduction in fair market value of $10,000.00 to $11,000.00. However, we also agree with the appellants that, since the Darbys

were leasing the trailer, not buying it outright, this calculation of damages is improper in any event.

The proper measure of damages for fraud in obtaining a sales contract is the difference between the reasonable market value of the property sold and its value as represented by the fraudulent statement. Webb v. Verkamp Corp. Ky., 254 S.W.2d 717 (1953). This, however, was a lease with a purchase option, and not a sales contract. Generally, the pecuniary loss sustained is a proper measure of damages for fraud. Sanford Construction Company v. S & H Contractors, Inc., Ky., 443 S.W.2d 227 (1969).

Only one-fourth of the lease term was performed under the contract, and it is speculative as to whether the Darbys would have eventually exercised their purchase option. With the exception of excessive tire blow-outs, for which the Darbys have been elsewhere compensated in this action, the trailer was apparently otherwise a functional trailer and permitted the Darbys to operate an effective coal hauling business up until the time of the accident. As this was a lease, and not a purchase, we cannot agree that the Darbys were entitled to a judgment compensating them for the full reduction in the fair market value of the trailer as a result of the prior wreck of the trailer.

In order to compensate the Darbys for the negligent misrepresentations of the appellants, we conclude that the proper measure should be the difference between the actual lease payments paid for the one year use of the trailer under the actual lease and the fair rental value for the one year lease of the trailer based upon its actual value taking into consideration

that it had been previously wrecked. We accordingly vacate that portion of the judgment relevant to this award and remand for a determination of damages consistent with the foregoing.

The appellants' final argument is that the trial court submitted the wrong burden of proof to the jury. The burden is on the party asserting fraud to establish it by clear and convincing evidence. Wahba v. Don Corlett Motors, Inc., Ky. App., 573 S.W.2d 357, 359 (1978). The trial court, instead, gave a preponderance of the evidence instruction. The standard of proof jury instruction was therefore incorrect.

Glockner and Quality correctly assert that the trial court submitted the wrong burden of proof to the jury. However, the appellants did not object to the preponderance of the evidence instruction nor did they offer a clear and convincing instruction. "No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or 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." CR 51(3). A party must object specifically to an omission in jury instructions, and must provide alternate instructions on that issue for an objection to be reviewable by this Court. Burke Enterprises, Inc. v. Mitchell, Ky., 700 S.W.2d 789, 792 (1985). Hence we may not review this error.

On cross-appeal, the Darbys contend that the trial court erred in giving an apportionment of damages instruction.

The instruction was modeled on the comparative negligence instruction approved in Hilen v. Hays, Ky., 673 S.W.2d 713 (1984), and permitted the jury to apportion fault to the Darbys if they failed to exercise ordinary care in inspecting the trailer and such failure was a substantial factor in causing the formation in the lease/purchase agreement.

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 as would place him in the same position as he would have occupied had he not been defrauded. Johnson v. Cormney, Ky. App., 596 S.W.2d 23 (1979), *overruled on other grounds by* Marshall v. City of Paducah, Ky. App., 618 S.W.2d 433, 434 (1981).

However, negligent misrepresentation is a tort. See Restatement (Second) of Torts, § 552 (1977). Our comparative fault statute, KRS 411.182, provides that in all tort actions tried by a jury involving fault of more than one party to the action, a comparative fault instruction should be given. It was obviously the jury's determination that the Darbys were contributorily at fault, apparently because of their failure to more closely inspect the trailer, as the jury assessed them 50% of the fault under the comparative fault instruction. As more than one party to the action was at fault, the instruction appears to have been consistent with our comparative fault statute.

Restatement of Torts (Second) § 552A, comment a. states, in pertinent part, as follows:

> . . . when the misrepresentation is not fraudulent but only negligent, the action is founded solely upon negligence, and the ordinary rules as to negligence liability apply. Therefore contributory negligence of the plaintiff in relying upon the misrepresentation will bar his recovery.

(Emphasis added.)

Under the ordinary rules of negligence in Kentucky, however, contributory negligence is not a bar to the plaintiff's recovery, but, rather, the plaintiff is allowed to recover his damages less those damages apportionable to him because of his comparative fault in causing the losses. See Hilen v. Hays, supra.

In summary, we believe the submission of a comparative fault instruction to the jury in this particular negligent misrepresentation action was consistent with our comparative negligence statute, Restatement of Torts (second) § § 552 and 552A, and Hilen v. Hays and its progeny.

For the foregoing reasons we affirm in part, reverse in part, and remand for a redetermination of damages consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS APPELLEES:	BRIEF FOR APPELLEES/CROSS-APPELLANTS:
John D. Meyers Lexington, Kentucky	Bradley F. Wallace Louisa, Kentucky