

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002056-MR

LORI LINK

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 01-CI-00019

HAROLD FASS

APPELLEE

AND

NO. 2001-CA-002096-MR

HAROLD FASS

CROSS-APPELLANT

v. CROSS-APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 01-CI-00019

LORI LINK; AND AMY LINK

CROSS-APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal and a cross appeal from a verdict entered by the Wayne Circuit Court, after a jury found in favor of appellee/cross-appellant, Harold Fass.

Appellant/cross-appellee, Lori Link, claims that the court erred in its instruction to the jury because it failed to give an apportionment instruction regarding herself and her co-defendant, Amy Link. In addition, Fass asserts on cross appeal that the court erred when it refused to give an instruction for punitive damages. We affirm as to both claims of error.

Fass and his fiancé, Marsha Folks, answered an advertisement for the sale of some real estate in Wayne County, Kentucky which had been posted on the Internet by sisters, Amy and Lori Link. The Links' father had originally owned the home, but shortly after his death, they put the house on the market. In August 2000, Fass and Folks decided to travel to Kentucky from North Dakota to look at the property. They liked what they saw, and Fass immediately decided to purchase it.

Although Fass and Folks had been shown the property by Amy, who was residing on the property, it was necessary for Fass to meet with Lori because she was the administratrix of her father's estate. Thus, after viewing the property with Amy, Fass and Folks immediately drove to Lori's home in Cincinnati, Ohio, where they executed an offer of purchase contract.

Fass did not attend the closing in mid-December 2000, but was instead represented by Folks, to whom he had granted a limited power of attorney. Because Folks was running late for the closing when she arrived in Wayne County from North Dakota, she went directly to the site of the closing without first stopping at the property, which neither she nor Fass had seen since August 2000.

After the closing of the transaction Folks went to the property, where she claims she discovered for the first time that extensive damage had occurred since she and Fass had viewed the property four months earlier. This damage included holes in the walls, urine stains and cigarette burns on the carpet, soot in the heating and cooling vents, and damage to the garage. In addition, missing from the house were certain light fixtures that were part of the house when the parties entered into the contract, as well as a pool table that was included in the purchase contract. Fass incurred significant expenses in repairing the damage to the property, and he subsequently filed the underlying action against Lori and Amy in January 2001.

At trial, the sisters were represented by the same attorney, and neither filed a cross-claim against the other. The jury returned a verdict awarding \$20,775.00 in damages to Fass. This appeal and cross appeal followed.

Lori's sole contention on appeal is that the trial court erred because it failed to instruct the jury as to apportionment of the damages between Lori and Amy, and instead held them jointly and severally liable. However, as we conclude that this issue was not properly preserved for appeal, we affirm.

Objections to jury instructions are addressed in pertinent part by CR 51(3), which provides:

No party may assign as error the giving or 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.

At trial, Lori tendered jury instructions which were subsequently rejected by the court. These instructions included provisions by which the jurors could decide if Amy, individually, caused any of Fass's damages, and in separate provisions, they could decide whether Lori, individually, caused any of Fass's damages. However, none of these provisions contained any instruction as to apportionment between Lori and Amy. Specifically, there was no request that the jury decide what percentage of any damages each sister was responsible for paying. Instead, the proposed instructions simply stated after each provision, without reference to who was at fault, that if

answered affirmatively, Fass was entitled to "\$_____." There was no instruction as to who was responsible for paying any amount awarded to Fass. Thus, although Lori's tendered jury instructions proposed to allow the jury to make separate findings regarding whether Amy or Lori was individually at fault, they did not contain any provisions apportioning an award of damages between them.

Further, Lori's oral objection to the court's jury instructions was inadequate to preserve this issue on appeal because she failed to specifically state that she objected to the court's instruction on joint and several liability and that she instead wished for an apportionment instruction. Our review of the record shows that the only objection that could even remotely be construed as pertaining to this issue was the following statement by defense counsel:

"Instruction one, the instructions only allows the jury to find/return a verdict against both defendants. Only one defendant signed a contract and of course, our position is she signed as administrator, so there was no contract. Yet the court instructs the jury that there was a contract that plaintiff signed and that the defendants intended for plaintiff to rely upon the truth of the representation in deciding to buy the home."

However, this objection referred to defense counsel's argument that Amy could not be held liable for breach of the contract because she never signed it. In no way can this objection be

construed as a request for an instruction regarding apportionment of damages between Lori and Amy. In the absence of a more specific written or oral request for the desired instruction, we must conclude that this issue was not properly preserved for review.

On cross appeal, Fass asserts that the trial court erred by failing to instruct the jury as to punitive damages. We disagree.

Punitive damages are generally reserved for cases involving oppression, fraud, or malice, which must be proven by clear and convincing evidence. KRS 411.184(2). Further, KRS 411.184(4) clearly states: "In no case shall punitive damages be awarded for breach of contract." In this case, there is some dispute as to whether Fass's claim is based on the law of torts or the law of contracts.

Fass claims that this action was never based on a breach of contract theory, but that damages were requested because the conduct of Lori and Amy was both tortious and fraudulent. Specifically, he alleges that they misrepresented and concealed the true condition of the property. However, it is clear from our review of the record that the sole basis for this action was the allegation that Lori and Amy breached the contract between the parties. There is no dispute that any damage to the home occurred between the time the offer of

purchase contract was signed by the parties and the closing date. As such, it is clear that any damage to the property must have occurred when Amy and Lori were still the owners of the property. In other words, since Fass was not the property owner when the damage occurred, the Links owed him no duties which could give rise to a tort claim. Instead, any duties which the Links owed to Fass arose as a result of the contract between the parties and the alleged breach thereof.

Although Fass argues that punitive damages may still be awarded because there was separate tortious conduct by Amy and Lori, we find no merit in this argument as we believe that any damages suffered by Fass arose as a result of the Links' breach of the contract. We therefore conclude that the court did not err by failing to instruct the jury as to punitive damages.

The judgment is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE/CROSS-
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