RENDERED: JULY 20, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000678-MR

MICHAEL NEVITT AND
ANGIE D. WILSON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 03-CI-008728

LICIA BARRETT, D/B/A EXTREME DAWGS;
COSNER ICE CREAM COMPANY;
LOUISVILLE PURCHASING DEPARTMENT;
LOUISVILLE HEALTH DEPARTMENT;
METRO PARKS; AND CITY OF LOUISVILLE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

ACREE, JUDGE: Michael Nevitt and Angie Wilson appeal from an order of the Jefferson Circuit Court denying their motion for a new trial. Having reviewed the record and finding no abuse of discretion, we affirm.

On October 11, 2002, Nevitt and Wilson became ill after consuming hotdogs and soda drinks sold by Extreme Dawgs.[1] Extreme Dawgs is owned and operated by Licia Barrett. After the symptoms persisted, Appellants sought medical treatment at Baptist East Hospital in Louisville, Kentucky. Appellants underwent x-rays, blood work, and were given colon relaxers, but were not formally diagnosed with food poisoning or a food-borne illness.[2]

Following their illness, Appellants brought suit against Appellees, Barrett, the City of Louisville, and Cosner Ice Company.[3] The City of Louisville filed a cross-claim against Barrett for indemnity. Appellants claimed each party was responsible for their food poisoning due to its negligence. Appellants separately filed pro se claims, but later retained an attorney to represent them at trial. The individual cases were consolidated and tried before a jury in Jefferson Circuit Court from March 22 through March 24, 2005.

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[1] A third person, a friend of the Appellants, also consumed food and drinks from Extreme Dawgs and became ill, but is not a party to this action.

[2] Appellants were diagnosed with gastroenteritis (more commonly known as the stomach flu). To formally diagnose food poisoning, a stool sample must be taken and tested. The Appellants claim their doctor did not perform a stool test because he was able to deduce food poisoning from symptoms they presented, but this is not borne out by the record.

[3] Cosner Ice Company manufactures and delivers ice to commercial vendors and maintained a distribution center in Louisville. Appellants claimed Cosner failed to adequately secure discarded ice at its Louisville depot to prevent Barrett from taking its ice, and that it purposefully contaminated its own ice by spitting and urinating on it. Appellants believe Barrett stole tainted ice from Cosner which they later consumed and were made ill from. At trial, the owner of Cosner Ice testified that at the end of each day, unsold, bagged ice was discarded in a dumpster, but that the discarded ice was not tainted.

At trial, Appellants testified to their illness and hospital visits, but did not introduce additional evidence to verify their claims of food poisoning. Appellants provided medical records from their hospital visits, but no testimony from hospital physicians or personnel that could establish causation or a diagnosis of food poisoning.

At the close of Appellants' case, all Appellees moved for a directed verdict. The Jefferson Circuit Court determined that based upon the evidence offered by the Appellants, viewed in a light most favorable to them, a claim of negligence could not be sustained. All motions for directed verdict were granted.

Following the dismissal of the case, Appellants terminated their counsel and moved for a new trial pursuant to Kentucky Rule of Civil Procedure 59.01. Appellants alleged irregularities in the proceedings and that each Appellee or the legal counsel representing the litigants, including Appellants' own former attorney, engaged in misconduct. Appellants' motion was denied. This appeal followed.

The standard of review of a trial court's denial of a motion for new trial is abuse of discretion. *McVey v. Berman*, 836 S.W.2d 445, 448 (Ky.App. 1992). The trial court's decision is presumed correct and will not be reversed, absent clear error. *Shortridge v. Rice*, 929 S.W.2d 194, 196 (Ky.App. 1996). This rule recognizes that a decision on a motion for a new trial depends, to a great extent, on factors and impressions not included in the appellate record. *Id*.

Civil Rule 59.01 states in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

> (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.
>
> (b) Misconduct of the jury, of the prevailing party, or of his attorney.
>
> (c) Accident or surprise which ordinary prudence could not have guarded against.
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> . . . .
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> (g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

Appellants make several accusations of misconduct committed by their own attorney, Appellees' attorneys, and the Appellees' themselves. However, they are unable to support these claims with even a scintilla of credible evidence. They provide this court with accusations alone. Appellants' case was originally dismissed because they did not provide the necessary evidence to prove a negligence claim. In their attempt to reopen their case they have again failed to provide the Jefferson Circuit Court and this Court with the basic evidence required to rule in their favor. As such, we find no error in the actions of the circuit court.

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

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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