

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000938-MR

CHARLENE JACOBS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 12-CI-006798

KINGPIN, LLC

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, J. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Charlene Jacobs appeals from the February 29, 2016, and May 25, 2016, orders of the Jefferson Circuit Court granting summary judgment in favor of Kingpin, LLC, and denying Jacobs' motion to alter, amend or vacate its order granting summary judgment, respectively. Following a careful review, we affirm.

On December 28, 2011, Jacobs went with a group to bowl at a Kingpin facility. After waiting approximately thirty to forty-five minutes, Jacobs was the second bowler in her group. She stumbled as she approached her lane to throw her bowling ball. In trying to recover her balance, Jacobs slipped and fell when she stepped across the black foul line onto the oiled portion of the bowling lane. Unbeknownst to her at the time, her fall was captured on video by a member of her party. Prior to her fall, Jacobs failed to notice the presence of three types of warning signs displayed on the fifty overhead monitors and endcaps of each lane warning of potential injury if the foul lines were crossed. After her fall, Jacobs was helped up by members of her group and sat in a nearby chair applying ice obtained from the facility to her leg for another forty-five minutes before seeking medical treatment.

In December 2012, Jacobs sued Kingpin alleging it was negligent, grossly negligent, careless, and reckless. Jacobs alleged Kingpin failed to maintain its premises in a reasonably safe condition and failed to warn of the dangerous and hazardous conditions causing her injuries.

Kingpin served written discovery on Jacobs. When Jacobs failed to timely respond, the trial court compelled her responses. Similarly, because of numerous delays by Jacobs due to scheduling logistics, the trial court ultimately entered an order setting Jacobs' deposition. Even so, Jacobs was approximately two hours tardy.¹

¹ Scheduled to begin at 10:00 a.m., Jacobs did not arrive until approximately 12:00 p.m.

At deposition, Jacobs stated she did not recall encountering any foreign substance or other hazard until she crossed the foul line. She testified, “[t]he reason I fell was because my foot came in contact with the oil on the lane.” Jacobs claimed Kingpin failed to maintain a safe environment by oiling their lanes and failed to make her aware of the oiled lanes prior to her fall. Nonetheless, Jacobs admitted she had no evidence to establish Kingpin had failed to oil their lanes in compliance with industry standards. She also admitted seeing one type of warning sign displayed at least twice after her fall.

Jacobs repeatedly requested extensions from the trial court for filing her expert disclosures and corresponding expert discovery. In spite of the Court’s leniency in granting extensions based on Jacobs’ representations and assurances, she failed to submit proof necessary to support her claims. As a result, Kingpin moved for summary judgment on October 20, 2015. Jacobs petitioned for multiple extensions to respond, but after being granted at least one extension, she still failed to file a response.

The trial court entered its order granting summary judgment on February 29, 2016. On March 9, 2016, Jacobs moved the court to alter, amend or vacate this order, pursuant to CR² 59.05, asserting an expert had been identified and a report was forthcoming. Said expert was not disclosed until May 17, 2016, when Jacobs supplemented her motion to alter, amend or vacate.³ At a subsequent

² Kentucky Rules of Civil Procedure.

³

Jacobs also attached to her supplement an unsigned “interim” report authored by her expert on the same date.

hearing, the trial court found Jacobs had provided “very little information in support of her motion” and summary judgment was appropriate. As a result, the trial court denied the motion. Jacobs now appeals.

In contravention of CR 76.12(4)(c)(v), Jacobs does not demonstrate how or whether she preserved her arguments in the trial court.

CR 76.12(4)(c)[(v)] in providing that an appellate brief’s contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). We require a statement of preservation:

so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

Review of the record shows the issues Jacobs presents on appeal were not presented to the trial court prior to its ruling on Kingpin’s motion for summary judgment, nor were they presented in Jacob’s motion to alter, amend or vacate the court’s grant of summary judgment. It was not until two months after filing her

bare-bones motion to alter, amend or vacate the grant of summary judgment, when she supplemented the CR 59.05 motion, that the arguments raised in this Court were presented to the trial court. Although she presented issues in a motion filed pursuant to CR 59.05, “a party cannot invoke CR 59.05 to raise arguments and introduce evidence that should have been presented during the proceedings before the entry of the judgment.” *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). This failure is fatal to her arguments on appeal.

Because the issues raised on appeal were not properly raised or preserved in the trial court prior to its grant of summary judgment, they cannot serve as the basis for reversal on appeal. Further, even if the issues were properly before us, the record contains no indication of manifest injustice.

Our review of a trial court’s denial of a CR 59.05 motion is limited to whether the court abused its discretion. *Batts v. Illinois Cent. R. Co.*, 217 S.W.3d 881, 883 (Ky. App. 2007) (citing *Gullion*). The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Applying this standard, we hold the trial judge did not abuse his discretion as trier in light of the video depicting Jacobs’s stumble, slip, and fall, together with her failure to produce sufficient evidence of an unsafe condition causing or contributing to her fall or sufficient evidence of any failure to warn to survive summary judgment.

For the foregoing reasons, the orders of the Jefferson Circuit Court are
AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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