

DIVISION IV

SAM BIRD, Judge  
ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION

CA06-432

DECEMBER 13, 2006

JOAN HARPER

APPELLANT

APPEAL FROM THE SEBASTIAN  
COUNTY CIRCUIT COURT  
[NO. CV-2004-263-G]

HON. NORMAN WILKINSON,  
JUDGE

V.

SPARKS REGIONAL MEDICAL  
CENTER

APPELLEE

AFFIRMED

Appellant Joan Harper appeals from the Sebastian County Circuit Court's denial of her motion for a new trial following the court's entry of judgment for appellee Sparks Regional Medical Center in a negligence case. We affirm.

The facts of this case are as follows. As she was walking in the parking garage at Sparks on February 13, 2004, Harper tripped and fell over an electrical box that protruded from a wall. She fractured her hip during the fall and subsequently filed a negligence action against Sparks on August 2, 2004. On December 5, 2005, less than a week prior to trial, Sparks disclosed that it planned to call as a witness Ken Swilling, the inspector of the

premises, who would testify that the location of the box did not violate the building code. Harper then filed an “Objection to Defendant’s Disclosure of Additional Witnesses and Exhibits,” claiming that she did not “have adequate time to prepare and respond and seek or hire rebuttal witnesses” and requesting that Sparks not be allowed to call Swilling. The objection was overruled. Harper did not request a continuance or ask to depose Swilling.

Following a jury trial on December 8, 2005, the jury returned a verdict in favor of Sparks, and the trial court entered judgment for Sparks on December 13, 2005. Harper filed a motion for a new trial on December 19, 2005, on the basis of “surprise which ordinary prudence could not have prevented.” The motion was denied by the trial court on January 18, 2006. Harper now appeals.

A trial judge has broad discretion in determining whether or not to grant a new trial, and his determination will not be disturbed on appeal absent a showing of abuse. *Thorne v. Magness*, 34 Ark. App. 39, 805 S.W.2d 95 (1991). Rule 59(a)(3) of the Arkansas Rules of Civil Procedure provides that a new trial may be granted where a party’s substantial rights are materially affected by “accident or surprise which ordinary prudence could not have prevented.” However, there is a long-standing principle that both an objection and a request for a continuance are prerequisites to appellate review of a claim of surprise in civil cases. *See Jones Rigging & Heavy Hauling, Inc. v. Parker*, 347 Ark. 628, 66 S.W.3d 599 (2002); *see also Thorne, supra*. In *Thorne*, we stated, “One who is surprised by his adversary’s testimony is not entitled to a new trial on that ground if, rather than asking for a

postponement to secure necessary evidence, he reserves his plea of surprise as a ‘masked battery in the effort for a new trial.’” 34 Ark. App. at 44, 805 S.W.2d at 98.

In this case, while Harper objected to Sparks’s plan to call Swilling as a witness, she did not request a continuance. Therefore, based on our existing case law, we need not review her claim of surprise on appeal. Her objection alone was insufficient.

Affirmed.

HART and GRIFFEN, JJ., agree.