RENDERED: DECEMBER 30, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000445-MR

JANE FERRIELL, D/B/A J. KEITH
UPHOLSTERY AND DESIGN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 00-CI-005941

SALOMAN PODGURSKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, TAYLOR, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Jane Ferriell, d/b/a J. Keith Upholstery and Design, appeals from a judgment of the Jefferson Circuit Court following a jury verdict. For the reasons stated herein, we affirm.

In 1981, Ferriell began leasing a building located on Frankfort Avenue in Louisville from Salomon Podgursky for the purpose of operating a

furniture upholstery business. Subsequently, Ferriell relocated her business to another Podgursky-owned building on the same street and, later, executed a written lease with him covering the period of April 1, 1994, to March 31, 1996. Within three months of the lease's expiration, the parties began negotiating a lease renewal, which concluded when Ferriell rejected Podgursky's proposed written contract and the parties reached an oral agreement on a month-to-month lease.

During her leasing of Podgursky's building, Ferriell informed him of numerous roof and ceiling leaks, which Ferriell alleged Podgursky failed to properly maintain and repair. In 1997, Ferriell showed Podgursky a new leak and a piece of fallen ceiling plaster. Although Podgursky made repairs, Ferriell contended that the repairs were inadequate and that the building's ceiling and walls continued to deteriorate. In the following year, in late March, Ferriell informed Podursky that a leak in a second floor room had damaged some of her fabric rolls. According to Podgursky, after being informed of the ceiling damage, he was unable to make immediate repairs because of continuous rain in the area.

On or about April 20, 1998, the plaster ceiling of a furniture room collapsed resulting in personal property being covered with wet grit and plaster. After the collapse and the continued water leaking, Ferriell moved her property as well as that of her customers to other areas within the building. During this time, Podgursky presented Ferriell's husband with a "Notice and Release," providing that he was not liable for damage due to ceiling collapses, which Mr. Ferriell signed.

Subsequently, Ferriell terminated her lease and left the premises on July 13, 1998. On September 14, 2000, Ferriell filed a complaint against Podgursky, alleging breach of contract by his failure to provide a safe and usable business premises. She sought damages for loss of her personal property, her customers' property, the interruption of her business, damages to her reputation and goodwill, and for constructive eviction. Subsequently, she filed an amended complaint alleging willful, wanton, and gross negligence. For her negligence claims, she requested attorney's fees and punitive and consequential damages.

After Podgursky filed a motion for summary judgment, the trial court, then-Circuit Court Judge Thomas Wine presiding, dismissed Ferriell's claims for willful, wanton, and gross negligence. Further, the trial court dismissed her claims for loss of her personal property, loss of her customers' property, damage to her reputation and goodwill, punitive damages, and for constructive eviction. Finally, the trial court limited Ferriell's claim to lost profits to the period from her first notification to Podgursky regarding the leaks until she vacated the premises.

Subsequently, following Judge Wine's recusal, Ferriell filed a motion to reconsider Judge Wine's previous orders, which, upon reconsideration, were upheld. When a third trial judge began presiding over the case, Ferriell filed a listing for special damages containing the expenses related to her previous claims, which had been previously dismissed. After Podgursky contested the listing, the trial court excluded evidence relating to these claims. Following a jury trial,

Ferriell was awarded $1,850 for reasonable relocation costs but received no award for lost business profits. This appeal followed.

Ferriell contends that the trial court's finding that she had a month-to-month rather than a year-to-year tenancy or a holdover tenancy was erroneous. Citing the parties' lease agreement, Ferriell contends that she was permitted to extend her lease on an annual basis, requiring a finding that she had a year-to-year tenancy. In the alternative, she contends that the parties' nonverbal actions created a holdover tenancy despite the trial court's adverse finding. We disagree.

The standard of review of a trial court's grant of summary judgment is whether it correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Amos v. Clubb*, 268 S.W.3d 378, 380-81 (Ky.App. 2008). Summary judgments are reserved for cases where the moving party demonstrates that the non-moving party cannot prevail at trial under any circumstances. *Price v. Godby*, 263 S.W.3d 598, 601 (Ky.App. 2008). An appellate court reviews grants of summary judgment *de novo*. *Baker v. Weinberg*, 266 S.W.3d 827, 831 (Ky.App. 2008).

As the trial court noted in its initial order finding a month-to-month tenancy, Ferriell testified at her deposition that she had a month-to-month tenancy following the expiration of the 1994 lease agreement. Although she characterizes her prior testimony as a misstatement due to Podgursky's counsel's labeling of the term, Ferriell's characterization of the lease as month-to-month was voluntary and

was stated several times during her testimony. While Ferriell minimizes this testimony, deposition testimony can support a basis for granting a summary judgment. *Miller v. Hutson*, 281 S.W.3d 791, 793 (Ky. 2009). Here, Ferriell's testimony was clear and unequivocal that there was a month-to-month tenancy.

Further, Ferriell's argument that the parties' written lease provided for a year-to-year tenancy is misplaced. Citing the contract language used in *Khourie Bros. v. Jonakin*, 222 Ky. 277, 300 S.W. 612 (1927), Ferriell argues that her written lease with Podgursky expressly provided that her tenancy was year-to-year. However, in *Khourie Bros.*, the lease contained express terms permitting its extension for a "period of 3 years commencing immediately upon the expiration of this lease...." *Id*. at 613 (internal citations omitted). In pertinent part, Ferriell's lease provided the following:

> The initial term of this Lease shall be for a period of two (2) years, commencing on April 1, 1994, and ending on March 31, 1996, (the "Initial Term"). The term of this Lease may be renewed for such additional terms(s) as may be agreed upon by Landlord and Tenant. Such renewal(s) shall be on the same terms and conditions herein, except that the amount of "Rent" (as defined in Section 4 hereof) shall be increased as agreed by Landlord and Tenant. Tenant shall not have the automatic right to extend the term of this Lease, but may only extend the term if Landlord and Tenant are able to agree on the amount of the increase in Rent for such extension(s). The Initial Term and the foregoing described extension(s) are hereinafter collectively referred to as the "Term."

Clearly, this language is not analogous to the express language found in *Khourie Bros.* Nothing in Ferriell's lease provided that she could extend the

lease for a definite year-to-year period as in *Khourie Bros.* To the contrary, the lease merely permitted the parties to renew "for such additional terms(s) as may be agreed upon by..." the parties. Because the interpretation and legal effect of a contract is a matter of law for the courts, we conclude that the trial court correctly determined that the parties' lease did not create a year-to-year tenancy. *Bank One, Pikeville v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet*, 901 S.W.2d 52, 55 (Ky.App. 1995).

Alternatively, Ferriell contends that the application of Kentucky's holdover statute, KRS 383.160, results in a year-to-year tenancy. Because she possessed the building beyond ninety days after the expiration of her two-year lease and Podgursky did not seek her removal, she contends that her tenancy was converted to year-to-year by virtue of the holdover statute. We disagree.

> KRS 383.160(1) provides the following:
>
> > If, by contract, a term or tenancy for a year or more is to expire on a certain day, the tenant shall abandon the premises on that day, unless by express contract he secures the right to remain longer. If without such contract the tenant shall hold over, he shall not thereby acquire any right to hold or remain on the premises for ninety (90) days after said day, and possession may be recovered without demand or notice if proceedings are instituted within that time. But, if proceedings are not instituted within ninety (90) days after the day of expiration, then none shall be allowed until the expiration of one (1) year from the day the term or tenancy expired...."

However, the holdover statute is inapplicable if the tenant has established either that the landlord consented to her remaining on the premises for a specified time

for a temporary period, or if the parties were engaged in negotiations regarding renewal of the lease when the previous term expired. *Masterson v. DeHart Paint & Varnish Co.*, 843 S.W.2d 332, 334 (Ky. 1992).

Based on Ferriell's testimony, the trial court found that the parties began negotiating a lease renewal within ninety days of the expiration of the 1994 lease. The trial court further found that a month-to-month tenancy was created at the end of these negotiations. Thus, Ferriell's reliance on the holdover statute is misplaced because she was negotiating a new lease when her prior lease expired and, thus, could not convert her expired lease into a year-to-year tenancy. *Id*.

Ferriell next contends that the trial court improperly found that she failed to present adequate evidence to establish that Podgursky acted with willful, wanton or gross negligence. Contending that Podgursky had an affirmative duty to exercise ordinary care to prevent foreseeable injury, Ferriell argues that Podgursky repeatedly failed to heed her advice regarding the constant leaking and structural impairments of his building. Thus, she contends that her willful and wanton, and gross negligence claims should have been submitted to the jury. We disagree.

In *City of Middlesboro v. Brown*, 63 S.W.3d 179, 181 (Ky. 2001), our Supreme Court stated the following:

> This Court has stated that gross negligence is "something more than the failure to exercise slight care. We have stated that there must be an element either of malice or willfulness or such an utter and wanton disregard of the rights of others as from which it may be assumed the act was malicious or willful." *Horton v. Union Light, Heat and Power Co.,* 690 S.W.2d 382 (Ky. 1985), also

> illuminates the gross negligence definition and sets the standard that should be applied. "In order to justify punitive damages there must be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by 'wanton or reckless disregard for the lives, safety or property of others.'" (internal citations omitted).

Moreover, when a claim for gross, reckless, or wanton negligence is made for punitive damages, KRS 411.184(2) provides that a "plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice." Clear and convincing proof can be shown by offering evidence of a probative and substantial nature carrying sufficient weight to convince ordinarily prudent-minded people of its validity. *W.A. v. Cabinet for Health and Family Services, Com.*, 275 S.W.3d 214, 220 (Ky.App. 2008).

Although finding that Podgursky may have negligently repaired the roof, the trial court ruled that negligent work does not necessarily constitute willful, wanton, or gross negligence. Further, it found that Podgursky's presentation of the liability release prior to conducting roof repairs was not evidence of reckless behavior because it related to the recent discovery that the loft area was supported by piping rather than by an I-beam. Properly finding that Ferriell's claims were not limited by the release, the trial court's finding that the release was not proof of willful, wanton, or gross negligence was not erroneous.

Further, the record reflects that Podgursky attempted multiple repairs to his building's roof and ceiling and these repairs permitted Ferriell to continue

operating her business in the building until the ceiling collapsed. Thus, after viewing the entire record in a light most favorable to Ferriell, we conclude that the trial court properly found that Ferriell could not establish that Podgursky's conduct constituted a willful, wanton, or gross disregard for her life, safety or property under the clear and convincing evidence standard.

Ferriell next argues that the trial court erred in dismissing her claim for general damages for breach of the lease agreement, her claim for damages to her personal property, and her claim for damages to her customers' personal property. We disagree.

Kentucky permits wrongly evicted tenants to recover damages for losses that can be ascertained with reasonable certainty, that are the natural result of the breach, and that are reasonably within the contemplation of the parties as the probable result of a breach. *Kearns v. Sparks*, 296 S.W.2d 731, 732 (Ky. 1956). However, if parties have an exculpatory contract, the exemption from liability for negligence, ordinary or gross, is not *per se* invalid, but its terms must be clear and unmistakable and will be strictly construed. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 649 (Ky. 2007).

The trial court's dismissal of Ferriell's claims for damages to her and her customers' personal property was proper. As the trial court found, Paragraph 6.3 of the parties' lease agreement, which terms constituted a part of the parties' oral lease agreement by virtue of Paragraph 3, precluded Ferriell from holding Podgursky liable for her personal property damages. Specifically, Paragraph 6.3

provides that all personal property placed in or on the leased premises by the tenant shall be at the risk of the tenant. While Ferriell contends that this provision is in conflict with the lease's requirement that Podgursky maintain the roof, Paragraph 6.3's express terms clearly and unmistakably address the issue of personal property damage and must be given effect. *Jett v. Doe*, 551 S.W.2d 221, 223 (Ky. 1977).

Ferriell next contends that the trial court improperly excluded the testimony of her expert witness, accountant Glenn Curry, regarding her lost profits. According to Ferriell, Curry calculated the lost sales resulting from the interruption of her business due to the collapsed ceiling. Contending that his testimony met the standard provided in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000), Ferriell argues that Curry's testimony should have been admitted. We disagree.

As stated in *Thompson*, 11 S.W.3d at 577-78, a trial court has broad discretion in ruling on the admissibility of evidence, and our standard of review is limited to whether the trial court abused its discretion. "The test for abuse of discretion is whether the trial judge's discretion was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581.

Applying this standard, we conclude that the trial court did not err in excluding Curry's testimony. The trial court limited evidence of Ferriell's lost profits to the time period from the ceiling collapse until she left the premises, which was April 20, 1998, to July 13, 1998. However, according to his testimony,

Curry believed that his business interruption loss calculations could not be calculated for a short period, including a span of months.

He further testified that analyzing the business interruption loss calculations over a year's time period was preferable because of the many variables and factors occurring every quarter. While Ferriell disagrees, the trial court was in the best position to weigh Curry's testimony and decide if it should be admitted. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky.App. 2006). Accordingly, while Curry may have been a qualified expert, the trial court's decision to exclude his testimony for not being sufficiently probative of the relevant time period was not an abuse of discretion. *Thompson*, 11 S.W.3d at 577-78.

Ferriell next contends that the trial court erred by denying her claim for moving expenses and for lost time. Contending that the collapsed ceiling caused her and her husband significant relocation costs and lost wages, she contends that she should have been permitted to recover on these claims.

We note that the jury awarded Ferriell her reasonable relocation expenses, and, thus, her non-specific claim for relocation costs will not be further addressed. Regarding Ferriell's claims for compensation for lost time, we believe this issue was subsumed by her claim for relocation expenses, because their relocation, costing them time, was a necessary element of their jury award for reasonable relocation expenses.

Ferriell next contends that trial court erred by denying her claim for "Interest on Debts Incurred." In her brief, Ferriell states the following:

> Appellant is not asking for reimbursement of the principle [sic] of any debts incurred but she is asking to recover the expenses that were the result of lost cash flow because of the collapsed ceiling. That would include interest on provable loans for monies that Appellant had to borrow because of disrupted cash flow following the collapsed ceiling.

Ferriell further argues that the trial court's error was to limit her recovery for her business losses to the term of her estate or to her possessory interest, which ended at the termination of her tenancy. We disagree.

"Our courts have established that an alleged error may be deemed waived where an appellant fails to cite any authority in support of the issues and arguments advanced on appeal." *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky.App. 2005). Further, a party's brief must contain citations to the record to support her arguments. *Smith*, 235 S.W.3d at 4-5. In her brief, Ferriell has not cited any legal authority supporting her claim and has not cited to the record regarding her claim for interest. Under the circumstances, we are left to speculate regarding what damages are claimed and what legal authority supports her claim. Consequently, due to her failure to comply with CR 72.12(4)(c)(v), we conclude that Ferriell is not entitled to relief on this issue. *Hadley*, 186 S.W.3d at 759.

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

ALL CONCUR.

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