RENDERED: JANUARY 4, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001785-MR

MARIAN C. DEAN, IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTONIO LAMONT ANDERSON AND AS NEXT FRIEND OF SEVEN MINOR CHILDREN NAMELY, ANTONIO LAMONT ANDERSON, III; AHMAD L. ANDERSON; AHMIRE'A ANDERSON; LAMAURY ANDERSON; NIGAL ANDERSON; ANTON MOON ANDERSON; AND ARMANI ANDERSON APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 12-CI-004352

MICHAEL S. ROMAINE, SR., INDIVIDUALLY; MICHAEL S. ROMAINE, SR., D/B/A M. JAY ENTERTAINMENT; JAMES F. ALLEN, INDIVIDUALLY; JAMES F. ALLEN, D/B/A M. JAY ENTERTAINMENT; AND M. JAY ENTERTAINMENT, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: Marian Dean,[1] as representative of the Estate of Antonio Lamont Anderson and as next friend of Mr. Anderson's minor children, appeals from a judgment of the Jefferson Circuit Court. A jury found in favor of Appellees[2] regarding the alleged wrongful death of Mr. Anderson. Ms. Dean argues that the trial court gave an erroneous jury instruction, that the trial court should not have allowed Appellees to utilize Kentucky Revised Statute (KRS) 411.190, and that the court erred in denying a post-trial motion. We find no error and affirm the trial court.

On August 14, 2011, Antonio Lamont Anderson was shot and killed at Shawnee Park in Louisville, Kentucky, during a kickball game organized by Appellees.[3] Mr. Anderson was killed by William Smith and Quentin Wilson. The perpetrators were convicted of killing Mr. Anderson in 2013. The perpetrators were not participating in the kickball game, nor were they spectators. Mr. Anderson was only a spectator.

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[1] Ms. Dean is Mr. Anderson's mother.

[2] Although James F. Allen is named in the notice of appeal, he was dismissed from the case prior to the case going to the jury.

[3] The kickball game was described as being part of a tournament that was to last a number of weeks. This was the second kickball game of the tournament. Over a hundred people were in attendance at the game and concessions were being sold. It was also alleged that alcohol was being sold to spectators.

Ms. Dean brought the underlying lawsuit alleging negligence, premises liability, and fraud. Her primary theory was that Appellees committed fraud when they applied for a permit to reserve the kickball field at the park. She alleged that Mr. Romaine fraudulently obtained the permit by telling officials that he wanted to reserve the field for kickball practice, not for tournament play which would draw a much larger crowd. During the trial in this case, the employee of the Metro Parks Department who issued the permit testified that had he known the permit was being obtained for a tournament and that the public was invited, the police would have been notified and a $1,000,000 insurance policy would have been required. Ms. Dean claimed that had Appellees been truthful in obtaining the permit, security would have been present at the tournament and the shooting may not have occurred.

When the case was ready to submit to the jury, the trial court included the following instruction in the jury instructions:

INSTRUCTION NO. 3-RECREATIONAL USE

> One who leases premises for recreational purposes makes no assurance to those who enter that the premises are safe and, therefore, cannot be held liable for any injury that occurs on the premises unless the lessee willfully or maliciously fails to guard or warn against a dangerous condition, use, or activity on the premises. You will therefore find for the defendants unless you determine from the evidence that they willfully or maliciously failed to guard or warn against the assault on

> Antonio Lamont Anderson that occurred at Harmony Field ball diamond at Shawnee Park.

The jury found that Appellees did not willfully or maliciously fail to guard against the assault on Mr. Anderson. By making this finding, the jury found in favor of Appellees as to all causes of action. After the jury reached this verdict, the court dismissed the case. This appeal followed.

Ms. Dean's first argument on appeal is that the trial court erred in giving instruction number three and raises multiple issues to support her claim. This instruction is based on KRS 411.190 which states in relevant part:

> (1) As used in this section:
> (a) "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty;
> (b) "Owner" means the possessor of a fee, reversionary, or easement interest, a tenant, lessee, occupant, or person in control of the premises;
> (c) "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, bicycling, horseback riding, pleasure driving, nature study, water-skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites; and
> (d) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land but does not include fees for general use permits issued by a government agency for access to public lands if the permits are valid for a period of not less than thirty (30) days.
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> (2) The purpose of this section is to encourage owners of land to make land and water areas available to the public

for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

(3) Except as specifically recognized by or provided in subsection (6) of this section, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for such purposes.

(4) Except as specifically recognized by or provided in subsection (6) of this section, an owner of land who either directly or indirectly invites or permits without charge any person to use the property for recreation purposes does not thereby:
(a) Extend any assurance that the premises are safe for any purpose;
(b) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed; or
(c) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of those persons.

(5) Unless otherwise agreed in writing, the provisions of subsections (3) and (4) of this section shall be deemed applicable to the duties and liability of an owner of land leased to the state or any subdivision thereof for recreational purposes.

(6) Nothing in this section limits in any way any liability which otherwise exists:
(a) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity; or
(b) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for the lease

> shall not be deemed a charge within the meaning of this section.

The standard of review for an allegedly erroneous jury instruction is abuse of discretion. *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015). "[T]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004) (citation omitted).

Ms. Dean argues that the instruction was erroneous because it was an "all or nothing" instruction, meaning that it would be almost impossible for the jury to find in favor of Appellants and the jury would not be able to examine the negligence and fraud instructions. We find no error. KRS 411.190 provides immunity to people who allow land to be used for recreational purposes. *City of Louisville v. Silcox*, 977 S.W.2d 254, 257 (Ky. App. 1998); *Midwestern, Inc. v. N. Kentucky Cmty. Ctr.*, 736 S.W.2d 348, 351 (Ky. App. 1987). The immunity applies unless the conditions of KRS 411.190(6) are met, which is what the instructions in this case made clear. KRS 411.190 was properly applied to Appellees and as KRS 411.190 is an immunity statute, the "all or nothing" wording of the instruction was appropriate.

Ms. Dean also argues that the court erred in requiring the jury to determine if Appellees willfully or maliciously failed to guard or warn against the assault of Mr. Anderson. Ms. Dean claims that the instruction should have been

more general and not require the jury to find that the dangerous activity was the assault of Mr. Anderson. Ms. Dean argues that generally the atmosphere and happenings at the park, namely hundreds of people being in attendance with no security and allegedly being sold alcohol, was a dangerous condition or activity which the jury should have been allowed to address.

It is clear that the "dangerous condition, use, structure, or activity" set forth in KRS 411.190(6)(a) applies to the condition, use, structure, or activity which causes the injury being complained about. Here, that would be the shooting of Mr. Anderson. A more general instruction that did not specifically mention the shooting of Mr. Anderson would have been inappropriate.

Ms. Dean also argues the court should not have given the immunity instruction in the first place due to the doctrines of equitable estoppel and unclean hands. She claims that, because Mr. Romaine obtained the permit via fraud, Appellees should have been estopped from using the immunity statute and had unclean hands. We decline to review either argument. The estoppel theory was not raised in the court below; therefore, it is waived. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989); *see also Shelton v. Commonwealth*, 928 S.W.2d 817, 818 (Ky. App. 1996). "[E]rrors to be considered for appellate review must be precisely preserved and identified in the

lower court." *Skaggs v. Assad, by and through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citation omitted). We similarly dismiss her unclean hands doctrine argument. This argument was raised for the first time in her post-judgment motion for a new trial. A party cannot raise new arguments in a post-judgment motion that should have been raised before judgment was entered. *See*, *e.g.*, *Short v. City of Olive Hill*, 414 S.W.3d 433 (Ky. App. 2013). Accordingly, we are without authority to review it.

Ms. Dean also argues that the immunity instruction should not have been given due to KRS 411.190(6)(b) which states that immunity is not allowed if a cover charge is required to enter the recreational land. Ms. Dean acknowledges that no admission charge was required in this instance, but because concessions were sold and M. Jay Entertainment was promoted, she claims this was not a charitable event and requests that we treat it as if an entry fee were charged. This argument is without merit because KRS 411.190(6)(b) specifically requires an entry fee and no entry fee was required in this case.

Ms. Dean's final argument regarding the instruction is that it should not have been given because Appellees were not the owners of the land on which the tournament was played. KRS 411.190 only gives owners of the land immunity. We find KRS 411.190 was correctly applied. KRS 411.190(1)(b) defines an owner as a "possessor of a fee, reversionary, or easement interest, a tenant, lessee,

occupant, or person in control of the premises[.]" Here, we believe Appellees fit this definition. Appellees obtained a permit allowing them exclusive use of the Shawnee Park field which made them occupants and persons in control of the field; therefore, they were "owners" as defined by the statute. KRS 411.190 was properly applied.

Ms. Dean's last argument on appeal concerns the trial court's denial of her post-trial motion for a new trial. Ms. Dean brought a motion to vacate and for a new trial pursuant to Kentucky Rules of Civil Procedure (CR) 59.01,[4] CR 59.05,[5] and CR 60.02.[6] She claimed that the Appellees purposely withheld photographs of the kickball game, and that those photographs would have helped her case.

Regardless, we are without authority to review this claim. The notice of appeal in this case, filed on November 28, 2016, only includes the October 26, 2016, judgment as the basis for the appeal. This Court entered an order on May 12, 2017, granting Appellants' motion to hold this appeal in abeyance to allow the Jefferson Circuit Court to rule on the pending motion. On May 22, 2017, the circuit court denied the motion, and on June 21, 2018, this Court entered an order

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[4] Grounds [for a new trial or amendment of judgment].

[5] Motion to alter, amend or vacate a judgment.

[6] Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

returning the appeal back to the active docket and ordered briefing. A timely appeal of the denial of the CR 60.02 motion was never filed. Accordingly, review of that denial is now time-barred.

Based on the foregoing, we affirm the judgment of the trial court.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

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