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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001669-MR

JUDY WEBB — APPELLANT

v.

APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE TIMOTHY R. COLEMAN, JUDGE
ACTION NO. 15-CI-00103

THE CEE BEE FOOD STORE, LLC — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Judy Webb has appealed from the Edmonson Circuit Court's July 17, 2017, trial order and judgment entering a jury verdict in favor of The Cee

Bee Food Store, LLC ("Cee Bee"),[1] and the September 18, 2017, order denying her motion for a new trial. Following a careful review, we affirm.

Webb visited Cee Bee on June 26, 2014, to purchase a sheet cake. As she was exiting the store, Webb stumbled and fell, landing on her left shoulder. It is undisputed she suffered a serious and permanent injury as a result of her fall. An eyewitness attributed the fall to inattention and tripping over a well-marked parking stop block.

Webb filed suit, alleging a one-inch elevation change between the sidewalk in front of the store and the parking lot caused her fall. She contended the condition of the premises was unreasonably dangerous. Cee Bee acknowledged the fall and Webb's injuries, but denied liability. At the conclusion of a four-day jury trial, by a vote of 11-1, the jury returned a verdict in favor of Cee Bee. Webb's subsequent motion for a new trial was denied. This appeal followed.

Before this Court, Webb raises three allegations of error in seeking reversal. First, she argues defense counsel usurped the role of the judge when allowed to "improperly instruct the jury" as to the applicable law and compounded the error by misstating the law. Second, she contends defense counsel was allowed

[1] Cee Bee is a grocery located in Brownsville, Kentucky, that is wholly owned by Jeff Rich and his wife, Cindy.

to elicit testimony regarding the wealth—or lack thereof—of Cee Bee. Finally, Webb maintains the trial court erred in not granting a new trial. We discern no error.

As an initial matter, CR[2] 76.12 sets forth the requirements for appellate briefs. Compliance with CR 76.12 is mandatory and failing to comply with its requirements is an unnecessary risk the appellate advocate should not chance. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Appellate courts "have wide latitude to determine the proper remedy for a litigant's failure to follow the rules of appellate procedure." *Krugman v. CMI, Inc.*, 437 S.W.3d 167, 171 (Ky. App. 2014). An appellate brief may be stricken in its entirety "for failure to comply with any substantial requirement of" the rule. CR 76.12(8)(a); *Oakley v. Oakley*, 391 S.W.3d 377, 378-81 (Ky. App. 2012) (citation omitted). And, where a party fails to meet the demands of CR 76.12, appellate courts need not consider the portion of the brief wherein a deficiency occurs. *Pierson v. Coffey*, 706 S.W.2d 409, 413 (Ky. App. 1985).

CR 76.12(4)(c)(iv), relating to the requirement of a concise statement of the facts and procedural history of an appeal, requires "ample references to the specific pages of the record, or tape and digital counter number in the case of

[2] Kentucky Rules of Civil Procedure.

untranscribed videotape or audiotape recordings . . . supporting each of the statements narrated in the summary." Similarly, CR 76.12(4)(c)(v), relating to arguments raised on appeal, requires "ample supportive references to the record and citations of authority pertinent to each issue of law." It is not the job of this or any appellate court to scour a record to determine whether it supports a party's assertions. *Walker v. Commonwealth*, 503 S.W.3d 165, 171 (Ky. App. 2016).

Even so, this Court generally conducts a thorough review of the record, especially those portions specifically cited by the parties as supportive of their respective arguments. In its brief, Cee Bee urges this Court to undertake an even more careful review than normal in the present appeal.[3] We take this opportunity to remind the bar that counsel must exercise care and diligence to ensure the accuracy of pinpoint citations provided to the appellate court in support of every argument pursuant to CR 76.12, pertaining to both location and substance.

Webb's briefs contain numerous pinpoint citations to the record allegedly supporting arguments advanced in the trial court and before this Court. Review of the cited portions, however, suggests Webb misapprehends the record in relation to several arguments.

[3] Cee Bee's brief asserts Webb's "**gross mischaracterization of the record, and of the defendant's 'theme' at trial, is itself a theme throughout Webb's Brief, and something this Court should pay very careful attention to.**" (Emphasis original).

For example, Webb argues witnesses and opposing counsel inappropriately alluded to Cee Bee's lack of wealth by referencing "the declining business or decreased customers of the Cee Bee," providing a string citation to seven locations in the video record. Our review of these cited portions of the record reveals five are unrelated to the stated subject matter and the other two citations, while technically referencing a decline in the number of daily sales during certain years, actually relate to Cee Bee's point that vast multitudes of patrons traversed the elevation change for numerous years without incident.

In another example, Webb argues defense counsel inappropriately identified Jeff and Cindy Rich as their clients on eight occasions rather than their business, Cee Bee. Our review of the cited portions of the record fails to bear out this broad assertion.

In yet another example, Webb asserts opposing counsel inappropriately usurped the role of the trial judge when counsel "testified to and misstated Kentucky law at least ten times." However, Webb provides citation to only five portions of the record to support the assertion. Webb proceeded to assert seven occasions demonstrating "improper and irrelevant legal conclusions by Appellee's counsel," yet merely cited the same five portions of the record in support of this argument. Again, our review of each citation reveals each is, at best, only tangentially related to, or supportive of, her arguments.

Exercising our discretion relative to counsel's noncompliance with CR 76.12, we have elected to undertake no analysis of unsupported portions of Webb's arguments. Instead, our review will be limited to Webb's arguments directly supported by the cited record. Counsel is admonished to exercise greater attention in future briefs when providing appellate courts supportive citations to the certified record.

In her first allegation of error, Webb contends the trial court improperly permitted Cee Bee to usurp its role by "instruct[ing] the jury" on Kentucky law. She asserts this impropriety was compounded by counsel's misstatement of applicable law. Webb takes umbrage with Cee Bee's "theme" of focusing on provisions of the Kentucky Building Code ("KBC") as the "mandatory" law of the case, notably in its cross-examination of her safety expert, David Johnson. She complains Cee Bee completely ignored principles of common law, thereby confusing the jury. It is unclear from Webb's arguments how defense counsel allegedly "instructed" the jury. Our review of the record reveals Cee Bee's counsel did not misstate the law; did not "inform," "instruct," or "testify" as to legal conclusions; and never implied the jury should follow anything but the instructions given by the trial court. We discern no error.

Webb's theory of the case was Cee Bee's property was unreasonably dangerous and caused her fall, using Johnson's opinion as an expert to bolster her

position. Understandably, the opposing defense theory was the condition of the premises where Webb fell was not unreasonably dangerous. In attempting to undermine Johnson's contrary testimony, defense counsel inquired into the basis of his opinion. Specifically, defense counsel challenged Johnson's reliance on and application of ASTM[4] F1637, a "consensus safety standard" that has never been adopted into the KBC nor otherwise codified in Kentucky. Defense counsel sought to have Johnson explain why he believed property owners must comply with ASTM F1637. Though Johnson acknowledged the consensus safety standards were not mandatory under Kentucky statutory law, he explained such standards are specifically intended to address safe walking surfaces, a topic not covered in the KBC or codified elsewhere. Because Kentucky property owners are required to maintain reasonably safe premises, he opined adherence to the consensus safety standards was therefore mandatory.

In short, Cee Bee stressed non-codification of the consensus safety standards while Webb vehemently insisted to jurors compliance with the standards was required. Cee Bee established its compliance with the KBC and the absence of any violations during the ten years preceding Webb's injury. Nowhere in the

[4] ASTM International, formerly known as American Society for Testing and Materials, is an international standards organization that develops and publishes voluntary consensus technical standards for a wide range of materials, products, systems, and services.

record is there any indication Cee Bee offered any improper or irrelevant legal conclusions. Cee Bee reasonably focused on the KBC to undermine the basis for Johnson's opinion the premises were unreasonably dangerous.

In closing statement, Cee Bee urged jurors to follow the trial court's instructions related to ordinary care and to disregard any other standard. In contrast, Webb sought to establish Cee Bee's liability by presenting expert testimony regarding the mandatory nature of the consensus safety standards and the inapplicability of the KBC to this case. During closing statement, Webb informed jurors Cee Bee's assertions related to the KBC were "red herrings" meant to distract them from the consensus safety standards, stating Johnson and Jeff Rich agreed the KBC did not apply to the matter. Webb asserted noncompliance with the consensus safety standards—as referenced by Johnson—equated to Cee Bee not exercising ordinary care, thereby rendering it liable for Webb's injuries.

After receiving an unfavorable verdict, Webb argues Cee Bee's theory of the case "completely ignored" common law, confused the jury, misrepresented the jury instructions, and led the jury to believe the absence of a KBC violation required a finding of no liability on behalf of Cee Bee. She believes these issues entitled her to a new trial. We disagree.

"Our legal system generally relies on the contending parties to represent, through the presentation of evidence and legal argument, their own

interests." *Morgan v. Getter*, 441 S.W.3d 94, 103 (Ky. 2014) (citation omitted). In the instant case, both parties had ample opportunity to fairly and adequately represent their interests.[5] The trial court instructed the jury as to the law it was to apply to the evidence presented in determining liability. The instruction given by the trial court on Cee Bee's duty did not present any alternative theories of liability or make any reference to the KBC. "The jury is presumed to follow any instruction given to them." *Owens v. Commonwealth*, 329 S.W.3d 307, 315 (Ky. 2011) (citing *Johnson v. Commonwealth*, 105 S.W.3d 430, 436 (Ky. 2003)). Our review of the record reveals no inappropriate argument, no misrepresentation or misstatement of the law, and therefore no opportunity for jury confusion. As the trier of fact, the jury simply rejected Webb's version of events and her legal theory of the case which was the jury's prerogative. It was not error. Thus, we conclude Webb is not entitled to a new trial based on this allegation.

Next, Webb argues the trial court erred in permitting Cee Bee to mischaracterize itself and allude to its declining wealth and profitability. In

[5] Although Webb asserts she was prohibited from "rehabilitating" her expert witness and denied the opportunity to "clarify the erroneous and confusing testimony," these contentions are not borne out by the record. The trial court correctly sustained Cee Bee's objection to Webb's attempt to question Johnson regarding Cee Bee's legal duties. "It is not the province of witnesses to inform the jury regarding questions of law; that is the function of the judge." *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 624 (Ky. App. 2003). Webb rephrased her question and received the affirmative answer she sought. She was permitted to assert her legal position throughout trial without improper restriction.

particular, she contends Cee Bee intentionally misled jurors into believing any verdict in her favor would be paid by its owners, Jeff and Cindy Rich, and alluded to their lack of wealth to elicit juror sympathy. In support, Webb asserts Cee Bee's counsel: incorrectly told jurors they represented Jeff and Cindy Rich rather than Cee Bee; referred to Cee Bee as a "local" or "small" business on five occasions; elicited testimony from Jeff Rich that business had been declining over the past few years; and told jurors it was a "very important day" for Jeff and Cindy Rich and implored them to give "justice" to Jeff and Cindy Rich.

Our review of the cited portions of the record do not support Webb's contention defense counsel told jurors they represented Jeff and Cindy Rich. Although counsel referred to Jeff and Cindy Rich as the owners of Cee Bee on several occasions, nowhere does counsel insinuate they represent any person or entity in the action other than Cee Bee. Counsel for Cee Bee did not mischaracterize the identity of their client.

Defense counsel did refer to Cee Bee as a local or small business on several occasions. However, even a small business can be quite profitable for its owners and nowhere did counsel correlate the number of shoppers to the amount of revenue produced or the store's profitability. Webb's assertion to the contrary is unsupported and based on nothing more than mere supposition and conjecture.

Contrary to Webb's argument, the challenged "decline in business" testimony was not elicited by defense counsel to invoke juror sympathy by implying Cee Bee was "going downhill fast." Rather, the brief reference to a reduction in daily average customers demonstrated Cee Bee remained a thriving business with hundreds of daily customers, none of whom had any difficulty traversing the area Webb claimed was unreasonably dangerous and caused her to fall. In fact, the challenged testimony established over 1.3 million customers had made purchases at Cee Bee in the nine and one-half years it had been owned by the Rich family without a single injury near the location of Webb's fall. Utilizing these figures, defense counsel noted in closing Webb's injuries resulted from "literally a one-in-a-million shot; an unfortunate accident."

Moreover, any reference to a reduction in the number of daily customers would not necessarily equate to declining revenues or profits. This is especially true where, as here, no testimony was elicited about Cee Bee's past or present income or profitability. The testimony and references to customer counts and sales numbers were introduced for a legitimate purpose wholly unrelated to establishing Cee Bee's poverty or wealth. The testimony was plainly offered to demonstrate that for nearly a decade, without issue, a very large number of customers had navigated the area where Webb claimed to have fallen on an

"unreasonably dangerous" elevation change between the sidewalk and parking lot. There was no error in permitting its admission.

Finally, counsel did ask jurors for justice for their client, Cee Bee, its owners and employees and told the panel it was "an important day" for them. But, in so doing, counsel was parroting Webb's opening statement wherein Webb's counsel told the venire it was "an important day" for all the parties and asked the jury for "justice for Judy." Again, there was no error.

While not presented as a separate argument, Webb also asserts a potential juror's comments during *voir dire* left the jury believing Cee Bee had no insurance, thereby resulting in prejudice to her case. The challenged statements occurred when Webb's counsel inquired of the venire whether "anybody work[s] for an insurance company, or have in the past, have a family member who works for insurance?" In response, a potential juror expressed his negative thoughts about insurance companies, indicating if insurance was involved he was absolutely on Webb's side. The juror was subsequently stricken from the venire based on these statements. Interestingly, however, although Webb now contends the venireman's statements were prejudicial to her case, during a bench conference in which Cee Bee moved to strike this juror, Webb urged the trial court *not* to strike him, stating her belief he had been rehabilitated and could be fair and impartial. Webb's divergent positions are plainly incompatible. "Our jurisprudence will not

permit an appellant to feed one kettle of fish to the trial judge and another to the appellate court. *See Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012) (citing *Kennedy* [*v. Commonwealth*], 544 S.W.2d [219, 222 (Ky. 1976)]." *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017) (footnote omitted).

Based on the foregoing, we conclude Cee Bee did not improperly inject the financial status of the parties into trial. Webb has failed to convince us otherwise.

Having weighed Webb's assertions of error and discerning none, it cannot be said the trial court's decision to deny Webb's motion for a new trial based on the same allegations was incorrect. There was no error. For these reasons, the judgment of the Edmonson Circuit Court is AFFIRMED.

ALL CONCUR.

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