

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001727-MR

DANA RATLIFF,
d/b/a DANA RATLIFF CONSTRUCTION

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 03-CI-01042

RICHARD TRACY POTTER and
DEANA POTTER

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, VANMETER, AND WINE, JUDGES.

DIXON, JUDGE: Dana Ratliff, d/b/a Dana Ratliff Construction (“Ratliff”) appeals from a jury verdict and judgment of the Pike Circuit Court in favor of Richard and Deana Potter (“the Potters”). We affirm.

The Potters own a tract of land at the top of a steep hillside in Pike County, Kentucky. After purchasing the land, the Potters graded part of the hillside and made a

gravel road to reach their home. Sometime thereafter, the Potters paved the road with asphalt.

Randy and Karen Stiltner (“the Stiltners”) own land below the Potters and adjacent to the steep hillside. The Stiltners hired Ratliff to install large drains on their property to dispose of water runoff. Around the time Ratliff began excavating the Stiltners' property, the Potters' driveway developed large cracks and began sliding down the hillside. As time passed, the steep hillside continued to erode, at times obscuring the road adjacent to the Stiltners' driveway. Thereafter, the Stiltners hired Ratliff to build a steel retaining wall at the foot of the hillside to prevent mud and debris from sliding into the road and blocking their driveway.

In July 2003, the Potters filed suit in Pike Circuit Court against the Stiltners and Ratliff, alleging trespass and loss of lateral and subjacent support. The Stiltners, represented by counsel, filed an answer. Ratliff, *pro se*, filed an answer on his own behalf. As discovery proceeded, Ratliff did not file any motions on his behalf with the court. A jury trial was held May 17, 2006. Ratliff represented himself at trial, but he did not call any witnesses or actively defend his case. The jury returned a verdict in favor of the Potters, awarding \$23,250.00 in restoration cost damages.

Following entry of the trial court's judgment, Ratliff retained counsel and filed a motion to alter, amend or vacate pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. The trial court subsequently denied Ratliff's motion on July 21, 2006. This appeal followed.

Ratliff argues on appeal that the trial court submitted incomplete instructions to the jury. He also offers exculpatory legal theories relieving him of liability for damages. Neither of Ratliff's claims are preserved for review by this Court.

While we acknowledge that Ratliff was a *pro se* litigant during the lower court proceedings, he did not tender any proposed jury instructions to the court. He also failed to object to the court's instructions during trial. In fact, Ratliff did not actively participate in the trial, other than testifying as a witness for the Stiltners. Civil Rule 51 is clear:

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

CR 51(3). It is well-settled that, “in order to be considered on appeal, a specific objection must have been raised in the trial court, and a party may not preserve an error relating to the instructions by post-verdict motion.” *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 73 (Ky. 2000) (internal citations omitted).

Likewise, Ratliff raised alternative theories of liability for the first time in his post-judgment motion. “A party cannot invoke [CR 59.05] to raise arguments and introduce evidence that could and should have been presented during the proceedings before entry of the judgment.” *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky.App. 1997), quoting 7 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 59.05, cmt. 6 (5th ed.1995). As Ratliff's claims are unpreserved, we will not further address his arguments.

For the reasons stated herein, the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John J. Davis
Pikeville, Kentucky

BRIEF FOR APPELLEES

Joseph W. Justice
Pikeville, Kentucky