Circuit Court for Baltimore County
Case No. 03-C-18-002124

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2090

September Term, 2019

JACKIE GEIMAN

v.

SPORTS PALACE, INC.

Reed,
Beachley,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: March 3, 2021

A new year is not always a new slate. To ring in 2017, Jackie Geiman attended a New Year's Eve party at her regular bar. While she was talking to one of her friends, Dwayne[1] Knick walked over and grabbed her arm. Geiman fell to the ground, suffering various injuries.

Geiman sued Sports Palace, Inc., the bar's operating entity, under a theory of vicarious liability. She alleged that Knick was an employee during the incident. The parties went to trial in November 2019, and the jury ultimately found in favor of Sports Palace. Geiman moved for a new trial a few weeks later. The trial court denied her motion without a hearing.

Geiman presented us with two questions on appeal,[2] which we rephrased:

> 1. Did the trial court err by allowing the jury to consider whether Knick's actions were within the scope of his employment?
>
> 2. Did the trial court abuse its discretion by denying Geiman's Motion for New Trial?

We answer both questions in the negative.

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[1] We believe this is the correct spelling of his first name. We note that it appears as "Dwayne" and "Duane" in the briefs and record.

[2] Geiman's questions are as follows:

> 1. Whether the Circuit Court committed plain error by allowing Appellee to argue and the jury to consider whether Duane Knick's "actions", assuming he was found to be Appellee's employee, were "beyond the scope of his employment"?
>
> 2. Whether the Circuit Court abused its discretion by not granting Appellant's Motion for New Trial?

FACTS AND LEGAL PROCEEDINGS

On December 31, 2016, Geiman attended a New Year's Eve party with some friends at Howard's Pub & Deli, a bar operated by Sports Palace. It was not her first time there—Geiman had been a customer at the bar for around twenty years. Knick approached and grabbed her arm, causing her to fall to the ground. Geiman suffered ankle injuries as a result of the fall.

Knick was not a stranger. Geiman knew her assailant from his job at the bar—it was "very seldom [she] didn't see [Knick] in there." She usually saw him "mopping the floor or getting cases of beer for the bartenders, just doing . . . whatever they need[.]" Geiman sued the bar[3] for her injuries, alleging that Knick "was an employee and/or agent and/or servant of [Sports Palace] and acting within and during the course of his agency and/or employment." Her complaint had two counts: negligence and battery. Sports Palace claimed that it fired Knick on May 25, 2016—seven months before the incident.

The parties had a three-day jury trial in November 2019. During opening statements, Geiman's counsel framed the issue of vicarious liability as the primary question in the suit: "[t]he whole issue that's going to come down to you is, is he an employee at the time?" Sports Palace went one step further: "you got to prove that what was done . . . was within the scope of the employment[.]"

At the close of trial, the court asked the parties to look over the proposed jury instructions, and Geiman's counsel stated he was "fine with the instructions." The court

[3] We could not ascertain Knick's whereabouts during the suit.

then instructed the jury on the doctrine of vicarious liability, including instruction about the scope of employment. Geiman did not seek any additional instructions.

The court provided the jury with a verdict sheet, which began with question one—whether Knick was an employee on New Year's Eve. Question two asked if Knick's actions were within the scope of his employment. The following questions asked whether Knick was negligent, if he battered Geiman, and whether Geiman was entitled to any damages.

The court queried if the parties had any objection to the court's version of the verdict sheet. Geiman's counsel stated that there were no objections "from the Plaintiff." The court then asked if there were "any objections to any instructions given[,] be it after the lunch break or before the lunch break?" Geiman's counsel responded, "[n]o, Your Honor, not by the Plaintiff." The court again questioned whether there were "[a]ny additional instructions sought," to which Geiman's counsel replied, "[n]ot by the Plaintiff, Your Honor."

After deliberating, the jury found that Knick was an employee of Sports Palace on New Year's Eve. It did not, however, find that Knick's actions were within the scope of his employment. Thus, the jury ultimately found Sports Palace not liable for Geiman's injuries.

Geiman filed a Motion for New Trial on November 18, 2019. She took issue with the verdict sheet, stating that "it was error to let the jury consider the second question"—whether Knick's actions were within the scope of his employment. Geiman asserted that

"there is no way to interpret the jury's verdict in any way other than it believed that the Defendant had repeatedly 'lied' about the employment status of Dwayne Knick on New Year's Eve 2016." She claimed that "it is factually and legally impossible" for Sports Palace's trial position to be true—that Knick was not an employee, but, if he was found to be one, that his actions were outside the scope of his employment. Geiman declared that Sports Palace "should not be allowed to take advantage of its 'lies' to the jury and be allowed to argue a hypothetical false position[.]" She saw "this situation as akin to the equitable 'slayer rule'" because Sports Palace allegedly took advantage of its lies to the jury.

In her motion, Geiman included some specific demands for the new trial. She requested that the court "eliminate from any new trial [Sports Palace's] ability to argue the non-employment status of Dwayne Knick because the jury resolved that question in [her] favor." She also wanted to remove the scope of employment question from future consideration, leaving only the "questions left unresolved on the Verdict Sheet regarding negligence, battery and damages." The court denied the motion in December 2019 without a hearing. This appeal followed.

DISCUSSION

The Jury Question

Geiman contends that it was plain error for the trial court to submit the scope of employment issue to the jury. Sports Palace counters that Geiman failed to preserve this issue for appeal because she never objected to the verdict sheet at any point in trial.[4]

We, ordinarily, "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but [we] may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a).

There are two rules dispositive of Geiman's request. First, Maryland Rule 2-520 addresses jury instructions: "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection."

Second, Maryland Rule 2-522 addresses jury verdicts:

> No party may assign as error the submission of issues to the jury, the instructions of the court, or the refusal of the court to submit a requested issue unless the party objects on the record before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection.

[4] Sports Palace also argues that, even if Geiman preserved her challenge, it was not an abuse of discretion to use the selected verdict sheet because jurors were presented with an accurate statement of the law. Because Geiman failed to preserve, we need not reach this issue.

Geiman and her counsel explicitly assented to the jury instructions and verdict sheet. Both the jury instructions and verdict sheet included the scope of employment issue. We see no objection, at any point, to any instructions given or the submission of the issue to the jury. Thus, Geiman failed to preserve the issue on appeal.

Geiman does not address preservation, instead asking us "to exercise [our] discretion and decide whether the jury was properly allowed to deliberate on the second question of the Verdict Sheet" regarding the scope of Knick's employment. She contends—without any authority—that our review is under a plain error standard. Geiman is partially correct; we may, in our discretion, review unpreserved issues. *See Gittin v. Haught-Bingham*, 123 Md. App. 44, 48 (1998) ("In limited circumstances, the appellate court in its discretion may rule on issues not raised at trial. . . . The decision of when to review an issue not raised at trial, however, is within the discretion of the appellate court."); Md. Rule 8-131(a).

In *Gittin v. Haught-Bingham*, an appellant asked us to review unpreserved issues under a plain error standard. *Gittin*, 123 Md. App. at 47–49. He sought review of the sufficiency of the evidence, despite not moving for judgment at trial. *Id.* at 48. The appellant also challenged jury instructions, despite not objecting to them at trial. *Id.* at 49. In an almost identical manner to Geiman, he requested that we "entertain his appeal on the basis of 'plain error' in order to avoid a 'manifest miscarriage of justice.'" *Id.* at 49.

We declined to adopt Gittin's standard: "no Maryland court has adopted the 'plain error' approach" for reviewing unpreserved issues under Rule 8-131. *Id.* at 50. We held:

> Whatever limited discretion an appellate court may have to consider unpreserved issues pursuant to Md. Rule 8-131(a) such discretion should be exercised only in extraordinary circumstances and within the bounds of fairness to both parties and to the court, not just to the party seeking the exercise of that discretion.

Id. at 51. We saw no circumstances or facts that persuaded us to consider unpreserved issues and affirmed the judgment of the trial court. *Id.*

Just as in *Gittin*, we see no extraordinary circumstances or facts to justify exercising our discretion. We affirm the trial court.

The Motion For New Trial

Geiman contends that the trial court abused its discretion in denying her Motion for New Trial. She takes issue with the "sufficiency of the evidence" at trial. She also perceives "obvious lies and fabrication made out by [Sports Palace] to the detriment of [Geiman]." Sports Palace responds that the trial court was well within its discretion, and that Geiman attempts to relitigate her unpreserved issues on appeal.

Geiman does not limit herself to legal arguments; she includes the same requests from her Motion for New Trial. She does not want Sports Palace to argue "the non-employment status of Dwayne Knick because the jury resolved that question in [Geiman's] favor." She wants the question regarding the scope of Knick's employment removed "from any future consideration."[5] If we reverse, she explicitly asks "that any new trial be limited

[5] Because we rule against Geiman on preservation grounds, we need not address the argument by Sports Palace that even if Knick was an employee, he was not acting within the scope of employment.

to the three (3) questions left unresolved on the Verdict Sheet: negligence, battery and damages."

We review denials of motions for new trial "using an abuse of discretion standard." *Mason v. Lynch*, 151 Md. App. 17, 28 (2003). Trial judges have "the broadest range of discretion . . . whenever the decision has necessarily depended upon the judge's evaluation of the character of the testimony and of the trial when the judge is considering the core question of whether justice has been done." *Id.* (cleaned up). Further:

> The breadth of a trial judge's discretion to grant or deny a new trial is not fixed or immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice.

Id. (cleaned up).

We have addressed requests for a new trial based on the sufficiency of the evidence:

> In reviewing appellants' record extract of this case, we discovered that the first time [appellant] contended that appellee had not adduced sufficient evidence to prove his claim for loss of earning capacity was in its post-trial motion. A trial court may grant a new trial on the basis of an issue that could have been, but was not, raised at trial. When a trial court denies such a motion, however, the Court of Appeals has indicated that the movant is precluded from raising those substantive issues on appeal.

Anderson v. Litzenberg, 115 Md. App. 549, 578–79 (1997) (internal citations omitted).

Anderson is particularly instructive here. Geiman could have raised her contentions about the sufficiency of the evidence at trial but did not. She also could have raised her objections regarding the jury instructions or verdict sheet at trial but did not. Geiman raised

both issues for the first time in her Motion for New Trial, which the trial court promptly denied. She is precluded from raising these contentions on appeal.

Geiman's only other basis for a new trial is her repeated allegation of Sports Palace's lies and fabrication. She refers to Sports Palace's strategy of arguing alternative theories as a miscarriage of justice, asserting that Sports Palace "should not, thereafter, be able to take advantage of its lie" regarding Knick's employment status. In her motion, she alleged that when the jury found that Knick was an employee of Sports Palace, it "necessarily meant that the jury believed [Sports Palace] was untruthful and had lied" when it asserted that Knick was no longer an employee. Geiman does not cite any authority preventing a party from arguing in the alternative. Alternative arguments are a customary and legitimate tool for litigants, and we see no rationale for rejecting this one as fraudulent or a miscarriage of justice.

The trial court had every opportunity to analyze whether justice had been done. *See Mason*, 151 Md. App. at 28. Geiman cites no authority to support her claim that the trial court abused its discretion. We see no indication that the trial court abused its discretion; we simply see a litigant unhappy with the results of a fair trial. We affirm the trial court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.