SUPREME COURT
COMMONWEALTH OF KENTUCKY
2016-SC-000457-D

2015-CA-000762
Jefferson Circuit Court, Division 5, No. 09-CI-006073

RICHARD STORM — APPELLANT

V.

LOUIS MARTIN — APPELLEE

BRIEF OF APPELLEE LOUIS MARTIN

Respectfully submitted,

JONES WARD PLC

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CERTIFICATE OF SERVICE

I hereby certify that the following was served via first-class U.S. mail, postage prepaid and/or Federal Express, on this 1st day of June 2017, to the Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Mary M. Shaw, Jefferson Circuit Court, Division 5, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202; and Michael J. O'Connell, Jefferson County Attorney, and Paul V. Guagliardo and Gregory Scott Gowen, Assistant Jefferson County Attorneys, 531 Court Place, Ninth Floor, Louisville, Kentucky 40202.

Alex C. Davis

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Alex C. Davis

INTRODUCTION

This is a negligence case where Appellee Louis Martin was seriously injured due to the negligence of Appellant, Richard Storm, because Richard Storm failed to comply with the statutorily enumerated duties of his job title, County Engineer, set forth in KRS 179.070. KRS 179.070 states in relevant part:

> (1) The county engineer shall:
>
> . . .
>
> (b) See that county roads and bridges are improved and maintained as provided by law;
>
> (c) Supervise the construction and maintenance of county roads and bridges and other work of like nature undertaken by the fiscal court or a consolidated local government;
>
> . . .
>
> (j) Remove trees or other obstacles from the right-of-way of any publicly dedicated road when the tree or other obstacles become a hazard to traffic.

Despite the statutory mandate, Storm contends that he did not have a duty to remove trees from roadways when they became a hazard. Storm further contends he is in no way liable for the injuries suffered by Martin when he crashed into a downed tree on Phillips Lane on September 17, 2008.

During trial, Appellant Storm conceded he was unaware of the statute setting forth the powers and duties of his job, KRS 179.070, that he had notice of the downed tree blocking the roadway on Phillips Lane, that the tree blocking Phillips Lane was a traffic hazard and that warning signs or barricades would have made the roadway safer, yet none were placed, a direct violation of Storm's statutory duties. Accordingly, the Court of Appeals held that, "either Storm

complied with KRS 179.070(j) or he did not. His own testimony established that he did not." *Martin v. Storm,* No. 2015-CA-000762-MR, 2016 Ky. App. Unpub. LEXIS 521 (Ct. App. July 29, 2016). It was based upon Storm's own testimony, clearly establishing a breach of his statutorily enumerated duties, that the Court of Appeals overturned the jury's verdict.

This is a simple negligence case. The issue here is not whether there was a duty – there was. The issue here is not whether there was a breach of that duty – there was. The issue raised by Appellant is whether the term "shall" is "directory" or "mandatory" in KRS 179.070, such that substantial compliance is sufficient to mitigate Appellant's breach of his statutory duty. Yet this argument ignores the fact that Appellant did not substantially comply with the statute in the first place. Substantial compliance cannot occur where Appellant was unaware of the existence of the statute, and particularly where Appellant's own testimony establishes that someone else was in charge of tree removal.

Interpretation of a statute should neither add to nor subtract from the statute, should not produce an absurd result, and should produce a result that is both practical and reasonable. *Knight v. Spurlin,* 226 S.W.3d 844 (Ky. App. 2007). Appellee respectfully submits that there was no compliance with the statute at issue in this case, and to find otherwise would produce an absurd result, in turn rendering KRS 179.070 entirely meaningless.

Further, it is elemental tort law that a negligence action consists of: (1) a recognized duty; (2) a breach of that duty; and (3) consequent injury. *James v. Wilson,* 95. S.W.3d 875 (Ky. App. 2002). Appellee Martin respectfully submits the elements of negligence are present in this case, and accordingly, asks this Court to affirm the Opinion of the Kentucky Court of Appeals granting Martin a new trial.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee Louis Martin requests that the Court hear arguments from counsel that will likely assist the Court in deciding the issues.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On September 17, 2008, while riding his motorcycle on Phillips Lane in Louisville, Kentucky, Appellee Louis Martin was seriously injured when he collided with a downed tree in the roadway, resulting in $226,000 in medical expenses along with lost wages and other damages. No barricades or warnings were in place to warn motorists of the downed tree, a dangerous traffic hazard. Martin filed suit against numerous defendants, including the Jefferson County Engineer, Richard Storm, alleging negligence due to Appellant Storm's failure to remove the downed tree on Phillips Lane, or to provide any kind of warning of the downed tree to motorists approaching the traffic hazard.

Subsequent litigation spanned nearly six years. Storm filed a motion for summary judgment seeking immunity, which was denied by both the trial court, and the Court of Appeals in an interlocutory appeal. *Storm v. Martin,* 2013 Ky. App. Unpub. LEXIS 649 (Ky. App. Aug. 9, 2013) (affirming *Wales v. Pullen,* 390 S.W.3d 160 (Ky. App. 2009)). In affirming the trial court's denial of immunity to Storm, the Court of Appeals held: "The statutory language and the use of the word "shall" rendered [Storm's] duty ministerial and, therefore, this Court held he was liable for any negligence in failing to remove the trees or improperly removing the trees." *Id.* at *6.

Martin's jury trial in March 2015 lasted eight days, during which Storm conceded he was entirely unaware of KRS 179.070, the statute setting forth the powers and duties of his job title, that of the county engineer. Storm also conceded at trial that he had notice of the tree blocking the roadway on Phillips Lane, that the tree was a traffic hazard for motorists, and that warning signs or barricades would have made the roadway safer for motorists, **yet none were placed.** In fact, Storm's sworn testimony establishes he was in no way involved with the storm cleanup. VR

3/04/15, 10:05:17 ("I was not involved in the storm cleanup."). Storm's defense at trial was that KRS 179.070 is an antiquated law and that Jefferson County has always done things differently. VR 3/04/15, 10:02:03-22. Specifically, he argued that a different branch of the Department of Public Works handled tree removal. VR 3/04/15, 10:04:17 ("It was getting done by the operations and maintenance side, the clearing of roadways, what have you, that was all getting done by a different department.").

The jury returned a unanimous verdict in favor of Appellant Storm, finding that Martin had not proven by a preponderance of the evidence that Storm failed to comply with his duty as set forth in the instruction. Martin moved for judgment notwithstanding the verdict, or alternatively, for a new trial arguing that Storm's testimony conclusively established that Storm failed to comply with his duties as set forth in KRS 179.070(j). Martin's motion for JNOV and alternative motion for new trial were both denied by the trial court on April 30, 2015 without a hearing, and without any written grounds. *See Appellant's Tab 2.* Martin appealed.

The Court of Appeals reversed the denial of Martin's motion for new trial and remanded the case by opinion and order rendered July 29, 2016. *See Appellant's Tab 1.* In so reversing the Court of Appeals explained:

> In any negligence action under Kentucky law, a plaintiff must prove the existence of a duty, breach thereof, causation and damages. Here the issue of duty had been determined by statute. As this Court ruled in the interlocutory appeal . . . KRS 179.070(1)(j) squarely places that responsibility upon the County Engineer. There is no provision in that statute that permits a delegation of that duty to a different entity. Accordingly the element of duty was clearly met. . . . With respect to the element of breach, either Storm complied with KRS 170.070(1)j) or he did not. His own testimony established that he did not.

Id. at *7-8 (internal citations omitted). Accordingly, the Court of Appeals held that Martin is entitled to a new trial based upon Storm's own testimony, which unequivocally

established a violation of his statutory duty, and that"[c]onsequently, the jury's verdict that Storm did not breach his statutory duty clearly indicates that its verdict was not based on the evidence and/or was the result of prejudice in favor of Storm." *Id.*

ARGUMENT

I. "Shall" In KRS 179.070 Is Mandatory And Thus, Storm Had A Duty To Martin.

The Court of Appeals has not, as Appellant contends, created a bright line rule that county engineers have a personal and non-delegable responsibility to remove trees from the roadway. The legislature created this so-called "bright line rule" when it enacted KRS 179.070(1)(j) which squarely places the responsibility of tree removal upon the county engineer. Indeed, the legislature also saw fit to impose a penalty on the county engineer who fails to perform this duty and the other duties of his office. *See* KRS 179.990(12). If Appellant is dissatisfied that the county engineer is responsible for tree removal, he should take that up with the legislature. At the time Louis Martin was injured, the statute required Appellant to be responsible for tree removal, among other, specific, enumerated duties.

Appellant contends the General Assembly could not possibly have intended the county engineer to be responsible for tree removal, yet that contention is nonsensical. The legislature saw fit to enumerate the county engineer's duties, specifically including tree removal, and further, to impose a monetary penalty upon the county engineer who fails to perform his duties. KRS 179.990(12). Surely the legislature would not impose a penalty upon the county engineer for violation of his statutorily enumerated duties if it did not expect that the county engineer indeed be responsible for those duties. It is clear: the county engineer had a duty to the public, specifically, that of tree removal. Other cases interpreting the directory or mandatory nature of the term "shall" support this conclusion.

For example, in *Knight v. Spurlin*,, the statute at issue was KRS 67.710(2) which placed the burden of drafting and submitting an administrative code for approval by the county fiscal court upon the county judge/executive. 226 S.W.3d 844 (Ky. App. April 27, 2007). KRS 67.710 explains the powers and duties of the county/judge executive, much like KRS 179.070 explains the powers and duties of the county engineer. When Judge Knight assumed the office of judge/executive in Todd County in 2003, he and the fiscal court discussed two different versions of an administrative code, however, Judge Knight did not formally propose either. *Id.* at 847. Later, at a fiscal court meeting, a magistrate moved to adopt one of the two versions, but the fiscal court rejected the motion; next, a magistrate moved to adopt the other version and the second version of the administrative code was passed, with Judge Knight voting to reject. *Id.* Thereafter, Judge Knight refused to take the necessary steps to enact the code as an official ordinance. *Id.* The Todd County Attorney filed a petition for writ of mandamus and declaration of rights on behalf of the fiscal court, requesting that the trial court recognize the fiscal court's code as legally binding and force Judge Knight to take the necessary steps to enact the code. *Id.* The trial court entered a final order recognizing the fiscal court's administrative code, and Judge Knight appealed, arguing the "shall" in KRS 67.170 was mandatory thus requiring strict compliance, meaning Judge Knight had to officially propose the code before the fiscal court could adopt it. The Court of Appeals agreed, holding that KRS 67.170 vested the judge/executive with the responsibility to propose and submit an administrative code, and the fiscal court exceeded its responsibilities when it proposed and adopted its own code before Judge Knight formally proposed a code. *Id.* at 849-50. Similarly, KRS 179.070 vests the county engineer with the responsibility of tree removal.

In determining that the term "shall" was mandatory, the *Knight* Court explained it should, "construe the statute in such a way that, if possible, no part of it will be rendered meaningless or ineffectual." *Id.* (internal citations omitted). The Court of Appeals further explained that while the trial court's solution in recognizing the fiscal court's administrative code appeared "reasonable, we disagree with the trial court since its solution would render KRS 67.710(2) meaningless." *Id.* The same is true here. The county engineer's statutory duties are rendered meaningless if the "shall" in the statute is held to be directory such that the county engineer can pick and choose the statutory duties with which he wants to comply. Where a penalty is enforced for failure to comply with the duties set forth by statute, the "shall" is likely mandatory and substantial compliance is not available as an exception. *See Davis v. USAA Cas. Ins. Co.*, 2006 Ky. App. Unpub. LEXIS 46 (Ky. App. 2006).

Moreover, treating "shall" in KRS 179.070 as mandatory is consistent with well-settled Kentucky case law which requires liability to be imposed upon a public officer for the failure or neglect of the officer either to perform his duty at all or to perform it properly. *Cottongim v. Stewart,* 283 Ky. 615, 626 (Ct. App. 1940) ("[I]t is equally well settled that **where the law imposes upon a public officer the performance of ministerial duties in which a private individual has a special and direct interest, the officer will be liable to such individual for any injury. . .")** (emphasis added). Here, during the interlocutory appeal, the Court of Appeals properly held Storm's statutory duties to be ministerial, as they involved "merely execution of a specific act arising from fixed and designated facts." *Storm v. Martin,* 2013 Ky. App. Unpub. LEXIS 649 (Ky. App. Aug. 9, 2013) (*citing Yanero v. Davis*, 65 S.W.3d 510 (2001)).

Holding the "shall" to be mandatory is consistent with statutory interpretation. KRS 446.080(4) states in part that "all words and phrases shall be construed according to the common

and approved usage of the language. . ." *Bowen v. Commonwealth, ex rel. Stidham,* states there is a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd result. Ky., 887 S.W.2d 350, 41 11Ky. L. Summary 8 (1994). *See Knight v. Spurlin,* 226 S.W.3d 844 (Ky. App. 2007) ("Generally, a statute is open to construction only if its language is ambiguous. If the language is clear and the application of its plain meaning would not lead to an absurd result, then further interpretation is unnecessary"); *See also Bailey v. Reeves,* Ky., 662 S.W.2d 832 (1984). It is the court's responsibility "to ascertain the intention of the legislature from the words used in enacting the statute rather than surmising what may have been intended but was not expressed." *Metzinger v. Ky. Ret. Sys.,* 299 S.W.3d 541, 546 (Ky. 2009); *See Revenue Cabinet, Com. of Ky. v. O'Daniel,* 153 S.W.3d 815, 819 (Ky. 2005) ("[T]he plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source"). Certainly here, where the legislature saw fit not only to specifically use the term "shall" in the statute, but also to impose a civil penalty upon the county engineer for his failure to perform these specific enumerated job duties, the term shall is meant to be mandatory.

The safety implications of tree removal in KRS 179.070 are clear, but there are other duties that provide similar protections to citizens of the Commonwealth. If the duties of the county engineer to remove trees are determined to be directory, as Appellant suggests, the real "bright-line rule" will extend in far-reaching fashion to numerous other branches of local government, giving them a similar loophole to ignore their safety obligations. Law enforcement officers will no longer have a mandatory obligation to file accident reports under KRS 189.635(3). Firefighters will not face a mandatory obligation to adhere to regulations adopted in the city where they are employed. KRS 95.015. Building inspectors will not be required to

undergo mandatory training to ensure that their work complies with fire and safety codes. KRS 198B.090(1)-(2). Similar obligations will no longer be mandatory for a wide range of other important safety services that protect the public, from traffic light maintenance and restaurant inspections to disease prevention and animal control.

If this Court accepts Appellant Storm's reasoning that the Director of Public Works, and not the county engineer, is responsible for complying with the tree removal statute, it would deny Martin — and any other plaintiff in a similar position — the chance to pursue recovery because their duties would become discretionary. Martin in fact attempted to pursue this route by naming in his complaint the Director of Public Works, Ted Pullen, in his individual capacity as a defendant. The Court of Appeals affirmed the dismissal of Pullen, finding he was entitled to qualified official immunity. *Storm v. Martin,* 2013 Ky. App. Unpub. LEXIS 649 (Ky. App. Aug. 9, 2013)(quoting *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001)("Public officers and employees are shielded from liability by qualified official immunity for the negligent performance of discretionary acts in good faith and within the scope of their authority.") If this Court were to accept Storm's logic, it would allow Jefferson County or any other local government to escape liability for statutory mandates by neatly shifting these duties to other branches of government. Police reports could be the responsibility of the fire department. Training for building inspectors could be the responsibility of the health department, and restaurant inspections and animal control could fall under the building department. All of these officials would be immune from liability, as their acts would be discretionary under Storm's reasoning.

Appellant attempts to ridicule the Court of Appeals' opinion by interjecting the word "personally" into the holding; the Court of Appeals did not hold that the county engineer must

"personally" "wield a chainsaw" to remove trees from the roadway, but rather, as the plain wording of the statute dictates, that the county engineer is "responsible" for the removal of downed trees from the roadway. The Court of Appeals specifically addressed the non-delegable nature of the statute because Storm's entire defense at trial consisted of pointing the finger at someone else; specifically, blaming the Director of Public Works, Ted Pullen, and the head of Operations and Maintenance, Greg Hicks – employees in different divisions of the Louisville Metro Department of Public Works. *See* VR 3/04/15, 10:04:17 ("It was getting done by the operations and maintenance side, the clearing of roadways, what have you, that was all getting done by a different department"). The Court of Appeals did not hold that the county engineer's staff could not assist in tree removal. In fact, Storm testified at trial that he worked on the same floor as the other managers in the city's Department of Public Works, and that he was aware that up to one-third of his staff participated in efforts to clean up fallen trees after the windstorm. VR 3/04/15, 09:58:26. Yet, instead of complying with his statutory duties, for which he received a taxpayer-funded salary to carry out, Storm testified that he went about other tasks during the week after the windstorm, including attending routine meetings and other business. *Id.*

Likewise, appellant's argument that county judges "may" or "may not" employ a county road engineer is inconsequential, when in this case, Jefferson County, the county where Storm was employed, did in fact employ and pay a county engineer to undertake those specific duties enumerated in KRS 179.070. Simply put: where a county engineer is employed, he is responsible for the duties enumerated in the statute. It is a red herring to point out that other counties can employ a "county surveyor" instead.

Unquestionably, no other entity, government or private, had a duty to remove the tree. Storm was responsible for the duty of tree removal.

II. There Was No Compliance And Storm Breached His Duty.

Even if this Court were to ignore statutory interpretation and precedent, and hold that only substantial compliance is required, the record is clear, and it is undisputed, there was no compliance at all in this case. There is a vast difference between substantial compliance and no compliance at all. *Arnett v. Sullivan,* 132 S.W.2d 76 (1939) ("But in this case the effort at compliance (substantial or literal) was never taken," and "therefore, there has been no 'substantial compliance' with its provisions in the respect here involved. It follows, therefore, that the argument of substantial compliance has no relevancy . . ."). Here, Storm testified that he did not follow KRS 179.070(j), that he took no part in removing the tree from Phillips Lane before or after Martin's crash, and that he did not even know of his statutory obligations until after Martin filed suit. VR 3/04/15, 10:01:25.

It is Storm's noncompliance that serves as the breach of duty in this negligence action. "Storm's compliance with his statutory duties involved 'merely execution of a specific act arising from fixed and designated facts. He either complied with KRS 179.070, or he did not. The circuit court properly ruled that Storm owed a duty to Martin, and that duty was ministerial." *Storm v. Martin,* 2013 Ky. App. Unpub. LEXIS 649, at *7 (Ky. App. Aug. 9, 2013). "With respect to the element of breach, either Storm complied with KRS 179.070(j) or he did not. His own testimony established that he did not." *See Appellant's Tab 1, p. 6.* Thus, Storm breached his duty by failing to comply with (and failing to, at the very least, be aware of) the statutorily enumerated duties of his job.

Appellant's reliance on *Knox County v. Hammons* is misplaced. 129 S.W.3d 839 (2004). *Knox* involved the validity of the Knox County Occupational Tax Ordinance. The issue raised on appeal was the notice and publishing requirements of KRS 67.077(2), which provided that "Prior

to passage, ordinances may be published by summary. Publication shall include the time, date, and place at which the county ordinance will be considered, and place within the county where a copy of the full text of the proposed ordinance is available for public inspection." *Id.* at 842. Knox County published the ordinance by summary but appellees argued that the county failed to "certify" the summary as to its accuracy. The *Knox* court held that the goal of the statute was to ensure no county ordinance is passed in secret. *Id.* Thus, in determining whether the "shall" was mandatory or directory, the Court explained, "if the directions given by the statute to accomplish a given end are violated, but the given end is in fact accomplished, without affecting the real merits of the case, then the statute is to be regarded as directory merely." *Id.* at 843. This makes sense because the summary was published, and the given end (ensuring the public was aware of the ordinance) was accomplished, despite the fact that the summary was not "certified." Likewise, holding that substantial compliance is sufficient does not render the KRS 67.077 meaningless. *Knight, supra.*

In explaining the nature of "shall" in KRS 67.077(2) as directory, the Court in *Knox* relied upon *Skaggs v. Fyffe,* 266 Ky. 337, 98 S.W.2d 884 (1936). In *Skaggs,* this Court explained: "In determining the nature of a statutory provision, the use of the word 'shall' with reference to some requirements is usually indicative that it is mandatory, but it will not be so regarded ***if*** the legislative intention appears otherwise." *Id.* at 886 (emphasis added). "If the language is clear and the application of its plain meaning would not lead to an absurd result, then further interpretation is unnecessary." *Knight v. Spurlin,* 226 S.W.3d at 850. Here, Appellant Storm has provided no evidence that the legislative intention was anything other than placing the responsibility for tree removal upon the county engineer in those counties that employ a county engineer for the safety of motorists such as Appellee Martin. Indeed, the legislative intention to

penalize the county engineer who fails to be responsible for his duties is clearly evidenced by a separate statute (KRS 179.990(12)), and supports Appellee's position that KRS 179.070 is mandatory. Further, *Knox* does not support Appellant's position because as confirmed by Storm's own testimony (and the Court of Appeals' holding) there was no compliance; what's worse, Storm testified that he went about other tasks during the week after the windstorm, including attending "routine meetings" and other business. VR 3/04/15, 09:58:26. Thus, there is no evidentiary basis to find that Storm substantially complied with his duty of tree removal pursuant to KRS 179.070(j).

Unlike *Knox,* where substantial compliance still accomplished the end goal of the statute, here, the given end was not accomplished: the road was not cleared, and pursuant to Storm's own testimony, no warnings or barricades were even placed to ensure the safety of motorists. Thus, Storm breached his duty. The statutory duties of KRS 179.070 bear more of a resemblance to the above-cited safety obligations of firefighters, police officers, and building inspectors who are entrusted with keeping the community safe, than they do with the notice and publishing requirements of *Knox.*

III. Errors By The Trial Court Prevented The Jury From Reaching The Issue Of Causation And Require Reversal.

In oral argument before the trial court, Appellee noted the county engineer's duties flow from KRS 179.070, specifically KRS 179.070(j) which requires Appellant to remove trees from the roadway. VR 3/11/15, 4:05:40. Appellant Storm conceded at trial that he served as the county engineer at the time of Martin's wreck and that he knew of no exception that allowed him to ignore the law. VR 3/04/15, 10:04:32. Thus, it is undisputed that Storm had a duty.

Appellant Storm admitted at trial that he did not follow KRS 179.070(j), that he took no part in removing the downed tree from Phillips Lane before or after Appellee's crash, and that he did not even know of his statutory obligations until after Appellee filed suit. VR 3/04/15, 10:01:25. Appellant also conceded that trees blocking roadways are dangerous for motorists, and that he was aware of trees blocking the roadway because of the storm. VR 3/04/15, 10:0501-20. Appellant further conceded that the tree blocking Phillips Lane was a traffic hazard for motorists, and that warning signs or barricades would have made the roadway safer. VR 3/04/15, 10:12:44. Thus, trial testimony established breach.[1]

As explained by the Court of Appeals, errors at the trial court led to a verdict against the great weight of the evidence, including improper jury instructions that misstated Storm's duties. These errors constitute two independent grounds for reversal. First, "[t]he jury's finding that Storm did not fail to comply with his duty was against the weight of the evidence presented." *Appellant's Tab 1, p. 9. See Louisville & N.R. Co. v. Baker's Adm'r,* 183 Ky. 795 (1919) (Where the verdict is flagrantly against the weight of the evidence it is not only the right, but the duty of the court to reverse and remand for new trial). Second, the failure to "comprehensively" instruct the jury "as to the duties of the parties" is reversible error and mandates a new trial. *Risen v. Pierce,* 807 S.W.2d 945 (Ky. 1991).

A. The Court Of Appeals Correctly Held The Verdict Was Against The Great Weight Of The Evidence.

The Court of Appeals' holding was not "based solely on the fact that the jury asked the trial court during its deliberations whether Storm was being sued in his individual capacity," as Appellant contends. In fact, the Court of Appeals' opinion does not even discuss tangentially,

[1] In addition to Storm's testimony, Appellee Martin's causation expert confirmed breach of the ministerial duty, and the expert hired by Appellant's co-defendant, LG&E, also confirmed Appellant's breach of his ministerial duty. VR 3/11/15, 4:05:47. No experts testified on behalf of Storm during trial.

much less rely upon the jury's question as the sole grounds for a new trial. One sentence of the Court of Appeals' opinion mentions the jury's question during deliberations. *See Appellant's Tab 1, p. 5.*

The basis for overturning the trial court came from Storm's own testimony. The existence of Storm's statutory duty, combined with Storm's own testimony that he did not comply with that duty, support the Court of Appeals' holding that: "Whether Storm exercised ordinary care is irrelevant; either he complied with the statute or he did not. It is undisputed herein that he did not. Accordingly, the jury erred in finding that Storm did not breach his duty." *Appellant's Tab 1, p. 8.* The jury's finding that Storm did not breach a duty to Martin cannot be supported by ***any evidence of record*** because it is undisputed that the statute exists, and that Storm failed to comply with his specific duty enumerated by the statute. Storm does not get a "pass" because he was ignorant of his job duties. *See Wales v. Pullen,* 390 S.W.3d 160 (Ky. App. 2009) a factually identical case. The appellate court in *Wales* held that Storm's ignorance of his statutory duty is not an adequate defense for a government official. *Id.* at 166. Nor does Storm get a "pass" because Jefferson County "does things differently." *Id.*

Because there is no evidence of record to support Storm's position that he did not breach his duty to Martin, the Court of Appeals correctly held that the verdict went against the great weight of the evidence, "and/or was the result of prejudice in favor of Storm." *Appellant's Tab 1, p. 9.* Where the verdict is so greatly contradicted by the evidence of record, and is "clearly and palpably against the evidence," reversal is required. *Iseman v. Hayes,* 242 Ky. 302 (Ky. 1932). *See Louisville & N.R. Co. v. Baker's Adm'r,* 183 Ky. 795, (1919) (Where the verdict is flagrantly against the weight of the evidence **it is not only the right, but the duty of the court to reverse and remand for a new trial**) (emphasis added).

In so reversing, the Court of Appeals explained that the jury instruction was inadequate as to Storm's duties. *See Risen v. Pierce*, 807 S.W.2d 945 (Ky. 1991). This failure alone constitutes reversible error, and mandates a new trial. *Id.* Martin did not abandon his challenge to the jury instruction; Martin's statement of issues for appeal includes this precise issue, and it is addressed in both his brief at the Court of Appeals and his Response to Storm's Motion for Discretionary Review. Appellee asked at trial that the jury instruction specifically mention KRS 179.070(j) and include the exact language of the statute. The trial court declined to include this language and Appellee preserved the issue for appeal. Because the issue was preserved by Appellee, the Court of Appeals can rely on it, among other facts of record, in overruling the trial court. *See Priestly v. Priestly,* 949 S.W.2d 594, 596 (Ky. 1997) ("So long as an appellate court confines itself to the record, no rule of court or constitutional provision prevents it from deciding an issue not presented by the parties"); *see also Mitchell v. Hadl,* 816 S.W.2d 183 (Ky. 1991).

B. The Court Of Appeals Correctly Held The Jury Instructions Were Misleading.

When errors regarding jury instructions are questions of law, they must be examined using a de novo standard of review. *Cocanougher v. Atkins,* 2013 Ky. App. Unpub. LEXIS 652 (Ky. App. 2013) (*citing Reece v. Dixie Warehouse and Cartage Co.,* 188 S.W.3d 440, 449 (Ky. App. 2006)).

The Court of Appeals correctly held that after explaining the general duty, the jury instructions should specify the certain enumerated specific duties because the breach of a duty imposed by statute or ordinance is negligence per se if the harm which occurred incident to the violation of statute is the exact type of harm which the statute was intended to prevent. *See Appellant's Tab 1, p. 8; citing Henson v. Klein,* 319 S.W.3d 413, 421 (Ky. 2010) and *Wemyss v.*

Coleman, 729 S.W.2d 174, 180 (Ky. 1987). Instead, the instruction used by the trial court was "subject to misinterpretation that Storm was only required to use ordinary care in complying with his statutory duty. . ." *See Appellant's Tab 1, p. 8.* The instruction explaining the duties of Appellant Storm read:

> It was the duty of Defendant Richard Storm to exercise ordinary care, including the specific duty to remove trees or other obstacles from the right-of-way of any publicly dedicated road when the tree or other obstacles become a hazard to traffic in conducting his business as the Louisville/Jefferson County Metro County Engineer. "Ordinary Care" means such care as a jury would expect an ordinary prudent person engaged in the same type of business to exercise under similar circumstances.

"A proper instruction correctly advises the jury 'what it must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof of on that issue.'" *CSX Transp., Inc. v. Moody,* 313 S.W.3d 72, 82 (2010) (internal citations omitted). A proper instruction **"must state the applicable law correctly and neither confuse nor mislead jurors."** *Id.* at 82 (emphasis added). These jury instructions do not accurately state Storm's duties, and as the Court of Appeals explained, are subject to misinterpretation. "While Storm had a general common law duty to exercise ordinary care, his statutory duty was absolute." *See Appellants' Tab 1, p. 8.*

As such, jurors were misled to believe that Storm was only obligated to exercise ordinary care. "The general duty to exercise ordinary care for one's own safety and the safety of others is universally present and never changes . . . But in the modern world of litigation, most aspects of human conduct and interaction are governed by statutes and regulations that prescribe specific duties." *Henson v. Klein,* 319 S.W.3d at 421. "When a statutory duty is supported by evidence, it must be incorporated into a jury instruction as a 'specific' duty . . . The court obviously is required to instruct the jury regarding that statutory duty because the violation of such a duty,

standing alone, may be sufficient to support a claim of negligence." *Id.* (internal citations omitted).

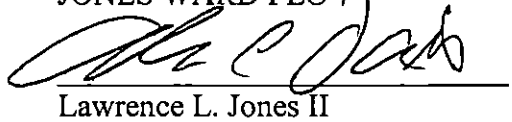
In *Henson*, this Court further explained, "when a statutory duty is applicable, the jury instructions should, after explaining the general duty, specify that it includes certain enumerated specific duties. . ." *Id.* Beginning with, *"The county engineer shall,"* KRS 179.070(1) includes twelve (12) enumerated duties. The jury instructions used by the trial court do not comprehensively instruct the jury as to the parties' duties because they do not specify that in addition to the ever-present duty of ordinary care, Storm had the specific, absolute duties that were enumerated by the statute. The failure to **"comprehensively" instruct the jury "as to the duties of the parties" is reversible error**. *Risen v. Pierce,* 807 S.W.2d 945 (Ky. 1991) (emphasis added).

CONCLUSION

The elements of negligence are present here, and as the Court of Appeals found, a verdict that Storm did not breach his statutory duty to Martin goes against the great weight of the evidence and requires reversal. Additionally, while it is undisputed that there was no statutory compliance in this case, the "shall" present in KRS 179.070 is mandatory. Accordingly, Appellee Martin requests this Court affirm the Court of Appeals' Opinion granting Martin a new trial.

Respectfully submitted,

JONES WARD PLC



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