IN THE SUPREME COURT
OF THE COMMONWEALTH OF KENTUCKY

2016-SC-000457-D
(2015-CA-000762)
(Jefferson Circuit Court, Division 5, No. 09-CI-006073)

RICHARD STORM — APPELLANT

vs.

BRIEF OF APPELLANT, RICHARD STORM

LOUIS MARTIN — APPELLEE

* * * * *

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed on April 7, 2017, via first-class U.S. mail, postage prepaid to: Hon. Samuel P. Givens, Jr., 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, KY 40202; and Lawrence L. Jones II and Alexander Cubb Davis, JONES WARD PLC, The Pointe, 1205 E. Washington Street, Suite 111, Louisville, KY 40206.

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INTRODUCTION

This is a personal injury case in which the jury unanimously found for the defendant/appellant, Richard Storm, and the trial court entered judgment in his favor. Storm asks this Court to reinstate the judgment of the trial court and reverse an Opinion of the Kentucky Court of Appeals granting plaintiff/appellee, Louis Martin, a new trial.

STATEMENT CONCERNING ORAL ARGUMENT

Storm requests that the Court hear arguments from counsel. Oral arguments will likely aid the Court in deciding the issues raised in this appeal.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On September 13, 2008, Hurricane Ike made landfall on the coast of Texas. The following day, Sunday, September 14th, remnants of Hurricane Ike slammed the Louisville area ("Windstorm"). Throughout the afternoon hours, winds increased to speeds reaching 75 miles per hour. The Windstorm caused what was then the largest electrical power outage in Kentucky's history. (VR: 3/6/15; 2:29:30-2:43:31, 2:45:30-2:45:44).

In Louisville alone, the Windstorm resulted in nearly 7,000 calls to 911, 301,000 households without electricity, 9,600 downed power lines, 550 snapped telephone poles, 130 impassable roads, 1,200 runs by the Louisville Fire Department on downed wires and trees. Louisville was declared a disaster area and the National Guard was deployed to assist in what would ultimately be classified as a FEMA event. The power was not fully restored for nine days after the Windstorm and the debris cleanup took much longer. (VR: 3/11/15; 2:45:21-3:19:57).

Three days after the Windstorm, Wednesday, September 17th, Appellee, Louis Martin ("Martin") was injured after he struck a downed tree while riding his motorcycle at night on Phillips Lane in Louisville. Martin filed suit against multiple defendants, including Ted Pullen ("Pullen") and Louisville Gas and Electric Company, alleging negligence in failing to remove that particular tree from Phillips Lane. Subsequently, Martin amended his complaint to name Appellant, Richard Storm ("Storm"), as a defendant.

At the time of Martin's accident, Storm was Jefferson County Engineer and an Assistant Director in the Louisville Metro Department of Public Works and Assets ("Public Works"). As the Court of Appeals previously noted, Public Works "consists of nearly 800 employees working in eight divisions. Each division has either an assistant director or

manager who supervises the division and reports directly to" the director. *Wales v. Pullen,* 390 S.W.2d 160, 163 (Ky. App. 2012). Storm reported directly to Pullen, the Director of Public Works, as did other assistant directors, including Greg Hicks ("Hicks"). (VR: 3/4/15; 10:38:15-10:43:18, 2:59:48-3:04:05). Hicks headed up the Operations & Maintenance Division and managed the Public Works' employees responsible for removing trees and other obstacles from the roadway. (VR: 3/4/15; 10:58:59-11:05:33, 3:01:13-3:04:05; VR: 3/9/15; 3:51:49-3:53:50; VR: 3/10/15; 11:46:25-11:50:17; VR: 3/11/15; 3:19:58-3:21:47).

Following discovery, Storm filed a motion for summary judgment seeking qualified official immunity, which was denied by the trial court. Storm then filed an interlocutory appeal. In affirming the trial court's denial of qualified official immunity, the Court of Appeals held that the General Assembly's use of the word "shall" in KRS 179.070 rendered Storm's duties ministerial, the legal significance of which meant that Storm was not entitled to qualified official immunity and would have to stand trial so that a jury could determine whether he was negligent in failing to remove the downed tree that Martin ran into on Phillips Lane. *Storm v. Martin,* No. 2012-CA-000378-MR, 2013 WL 4036466 at *2-3 (Ky. App. 2013).

That jury trial was conducted over eight days in March 2015 during which the jury heard proof from multiple witnesses, who described the organization and operation of Public Works. (VR: 3/4/15; 10:58:59-11:05:33, 3:01:13-3:04:05; VR: 3/9/15; 3:51:49-3:53:50; VR: 3/10/15; 11:46:25-11:50:17; VR: 3/11/15; 3:19:58-3:21:47). These witnesses testified that as part of a long-standing practice it was the responsibility of the Operations & Maintenance Division, not Storm as County Engineer, to remove trees from the roadway. *Id.* Pullen testified that he assigned the duty of removing trees from the roadway to Hicks. (VR:

3/10/15; 11:48:54-11-11:50:17). Pullen further testified, and Storm confirmed during his testimony, that Storm's duties involved sitting as Public Works' representative on the Planning & Zoning Commission, coordinating road engineering projects with the Kentucky Department of Transportation, reviewing development and transportation plans, overseeing the Traffic Engineering Division, and overseeing road resurfacing. (VR: 3/4/15; 10:43:19-10:50:30, VR: 3/10/15; 11:46:25-11:48:54). Storm testified that he had never been responsible for removing trees from the roadway during his tenure as County Engineer and that no one person could possibly perform all of the duties set out in KRS 179.070. (VR: 3/4/15; 11:01:25-11:02:40).

Hicks explained to the jury that it had been "his job" under four different directors to remove trees from the roadway, and never the County Engineer's job. (VR: 3/4/15; 3:01:13-3:04:05). With respect to removing trees from the roadway, Hicks testified that the "buck stop[ped]" with him. (VR: 3/4/15; 3:28:22-3:28:42).

The jury also heard testimony from Doug Hamilton ("Hamilton"), the Director of Louisville Metro's Emergency Management Agency, who described the coordinated efforts of federal, state, and local governments and how the cleanup progressed during the days and weeks following the Windstorm. Hamilton testified that on Wednesday, September 17th, the day of Martin's accident, there were still 23 confirmed streets in Jefferson County, including Phillips Lane, that were still blocked by trees or utility wires. Hamilton testified that the public was warned about the presence of downed trees and utility wires via television and radio during the days after the Windstorm. (VR: 3/11/15; 2:45:21-3:19:57).

After hearing all of the proof, the jury unanimously found that Storm had not breached his duties and judgment was entered in Storm's favor on March 24, 2015. (R.A.

880-895; 943). Martin moved for judgment notwithstanding the verdict, or in the alternative, for a new trial, which the trial court denied on April 30, 2015. (R.A. 896-942; *See* Appendix at Tab 2: Order Denying Plaintiff's Motion for Judgment Notwithstanding the Verdict entered April 30, 2015.[1])

Martin appealed the trial court's denial of his motions for directed verdict and judgment notwithstanding the verdict. Setting aside a unanimous verdict in favor of Storm, the Court of Appeals rendered an Opinion[2] holding that Martin is entitled to a new trial because "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." *See* Appendix at Tab 1 at 7-8.

The Court of Appeals held that the jury's verdict was "erroneous" and "not based on the evidence," thus entitling Martin to a new trial, based on the following reasoning:

1. KRS 179.070(1)(j) states in relevant part that the County Engineer "shall" remove trees from the roadway.
2. Storm was the County Engineer at the time of the accident.
3. Storm played no role in actually removing trees from the roadway following the accident.
4. Therefore, Storm breached his duty.

The Court of Appeals characterized the duty enumerated in KRS 179.070(1)(j) as "absolute." *See* Appendix at Tab 1 at 8. What's more, the Court of Appeals held that "[t]here is no provision in that statute that permits a delegation of that duty to a different entity." *See* Appendix at Tab 1 at 6. Put simply, the Court of Appeals created a non-

[1] This Order does not appear in the Certification of Record on Appeal.
[2] The Kentucky Court of Appeals Opinion was rendered July 29, 2016. *See* Appendix at Tab 1.

delegable, absolute duty based on its interpretation of KRS 179.070(1)(j).Although Martin did not address the issue of the trial court's instructions in his principal or reply brief, the Court of Appeals also held that "the instruction setting forth Storm's duty likely contributed to the jury's erroneous verdict." *See* Appendix at Tab 1 at 7.

Finally, the Court of Appeals concluded that "the jury's verdict ... was not based on the evidence and/or was the result of prejudice in favor of Storm." *See* Appendix at Tab 1 at 7. The only prejudice alleged by Martin and alluded to by the Court of Appeals is a reference to a question posed by the jury during its deliberations, which the trial court did not answer, concerning Storm's "capacity to withstand the financial impact of a judgment against him." *See* Appendix at Tab 1 at 5.

ARGUMENT

I. The use of "shall" in KRS 179.070 is directory, requiring only substantial compliance.

With no precedent or guidance from this Court, the Court of Appeals has set aside a unanimous jury verdict and created a bright line rule that county engineers have the sole responsibility for removing trees from the roadway. To compound matters, the Opinion has made that "absolute" duty non-delegable regardless of the circumstances.

If the Court of Appeals' interpretation of KRS 179.070 is allowed to stand, it will mean that the county engineers in Jefferson County and the other 119 counties are charged with removing each and every tree from the roadway personally.

The General Assembly cannot have possibly intended that a county engineer must personally remove every tree from the roadway. It simply does not make sense. That would be practically impossible in the best of circumstances. And as set out above, the Windstorm

was not the best of circumstances. In this case, the Public Works Director, Pullen, assigned the responsibility of removing trees from the roadway to Hicks, an Assistant Director in Public Works. (VR: 3/4/15; 10:58:59-11:05:33, 3:01:13-3:04:05; VR: 3/9/15; 3:51:49-3:53:50; VR: 3/10/15; 11:46:25-11:50:17; VR: 3/11/15; 3:19:58-3:21:47). After hearing testimony from Pullen, Hicks, and Storm, the jury was satisfied from the evidence that Storm did not breach his duty to Martin under the circumstances.

The Court of Appeals' disregard for the jury's unanimous verdict is based on the existence of one word, "shall," in KRS 179.070(1). But in fixating on that one word, the Court of Appeals failed to take into account that KRS 179.020 does not even require that there be a county engineer.[3]

KRS 179.020(1) provides that the county judge "may" employ a county road engineer. The only relevant qualification is that the person be a licensed engineer in accordance with KRS Chapter 322. However, the duties of the county road engineer may also be performed by a county road supervisor with experience and training approved by the Commonwealth Department of Highways. KRS 179.020(2). As a third alternative, KRS 179.020(3) allows the local government to use the county surveyor to perform road engineering responsibilities if he/she possesses the qualifications in subsections (1) or (2) of KRS 179.020. As yet a forth alternative, KRS 179.020(4) allows for a "temporary" supervisor who is not even required to possess the qualifications in KRS 179.020(2).

If the permissiveness of Chapter 179 is still in doubt, KRS 179.020(5) allows the county judge executive or the fiscal court to supervise the construction and maintenance of roads if they decide not to establish the position of road engineer or road supervisor.

[3] KRS 179.010(2) provides: "'County engineer' means county road engineer."

The General Assembly was obviously not locked into only one person performing the duties of a county engineer. It is therefore reasonable to conclude that local government officials may split up some of the county engineer's duties ... or merge others ... or have two or more persons capable of performing the role of a county engineer. Any one of those scenarios is consistent with a reading of the whole chapter.

What is the significance of KRS Chapter 322 then? Merely that when performing jobs requiring engineering education, training and experience, a person must be licensed as an engineer as required by KRS Chapter 322. Of all the duties listed in KRS 179.070(1) that may arguably require an engineering degree to perform, one clearly does not: (j) removing trees and obstacles from the roadway. Knowing how to wield a chain saw would certainly be a critical skill, but the General Assembly has not seen fit to require a license for that task.

In its Opinion, the Court of Appeals has elevated what is a directory "shall" into a mandatory "shall" and created an "absolute" duty that cannot be performed by, or delegated to, another official or group of employees. This Court has previously recognized the distinction between a directory "shall" and a mandatory "shall." *Knox Co. v. Hammons,* 129 S.W.3d 839 (Ky. 2004). In *Knox Co.*, this Court reversed the Court of Appeals requirement of strict compliance and held:

> In order to determine whether strict compliance or substantial compliance is sufficient to satisfy a statutory provision, it first must be determined whether the applicable provision is **mandatory or directory.**
>
> * * *
>
> In considering whether the provision is mandatory or directory, we depend 'not on form, but on the legislative intent, which is to be ascertained by interpretation from consideration of the entire act, its nature and object, and the consequence of construction one way

> or the other.' In other words, '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 842-843 (citing *Skaggs v. Fyffe,* 266 Ky. 337, 98 S.W.2d 884, 886 (Ky. 1936)). (Emphasis added).

The Court of Appeals creation of an "absolute" duty ignores the legislative intent of KRS Chapter 179 and misinterprets "shall" to be mandatory, therefore requiring strict compliance. If the "shall" in KRS 170.070(1) is directory, however, the county engineer does not have an absolute duty and the test is substantial compliance. After hearing all of the proof, the jury determined that Metro Government officials substantially complied with the duty to remove trees from the roadway under the circumstances.

In disregarding the jury's unanimous verdict, the Court of Appeals has elevated the concept of "form over substance" to new heights. This Court should overturn the Court of Appeals and reinstate the judgment entered upon the jury's verdict because the Court of Appeals' new "absolute," non-delegable duty is not consistent with the flexibility authorized by Chapter 179.

II. Martin abandoned, and therefore waived, any challenge to Storm's duty instruction, and is therefore not entitled to a new trial.

"The question to be considered on an appeal of an allegedly erroneous instruction is whether the instruction misstated the law. It is within the trial court's discretion to deny a requested instruction, and its decision will not be reversed absent an abuse of that discretion." *Olfice v Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005) (internal citations omitted).

In his brief to the Court of Appeals, Martin did not allege an erroneous jury instruction. Yet, the Court of Appeals seemed to blame an instruction for an outcome with which it disagreed: "We are of the opinion that the instruction setting forth Storm's duty ***likely*** contributed to the jury's erroneous verdict." *See* Appendix at Tab 1 at 7. (Emphasis added). The Court of Appeals found it necessary to be critical of the instruction: "We believe that the wording of the instruction herein is subject to a misinterpretation that Storm was only required to use ordinary care in complying with his statutory duty." *See* Appendix at Tab 1 at 8.

Relying on *Henson v. Klein,* 319 S.W.3d 413, 421 (Ky. 2010), the Court of Appeals correctly notes that "[w]hen a statutory duty is supported by evidence, it must be incorporated into a jury instruction as a 'specific duty.'" And that is exactly what the trial court did. In fact, Storm conceded that Martin was entitled to specific duty instruction setting out the language in KRS 179.070(1)(j). (VR: 3/11/15; 5:17:10).

To be clear, the specific duty set out in KRS 179.070(1)(j) was included in Storm's duty instruction given by the trial court:

> It was the duty of the Defendant Richard Storm to exercise ordinary care, ***including the specific duty to remove trees or other obstacles from the right-of-way of any publically 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 case as a jury would expect an ordinary prudent person engaged in the same type of business to exercise under similar circumstances.

See Appendix at Tab 1 at 8. (Emphasis added); (R.A. 882); (VR: 3/11/15; 5:07:36-5:35:37).

Storm's duty instruction was correct. The highlighted language above is identical to KRS 179.070(1)(j). At trial, Martin got all that he was entitled to with respect to the jury

instructions. As such, Storm's duty instruction was proper and does not warrant a new trial, even if Martin had properly challenged the instruction at the Court of Appeals, which he did not do.

Any objection Martin might have had to the jury instruction has been abandoned, and therefore waived, on appeal. In the absence of a challenge to the instruction, it was gratuitous for the Court of Appeals to speculate that Storm's duty instruction "likely contributed to the jury's erroneous verdict." *See* Appendix at Tab 1 at 7. The Court of Appeals erred in remanding the case for a new trial.

III. The mere fact that the jury asked whether Storm was being sued in his individual capacity does not mean that any subsequent verdict in Storm's favor was the result of prejudice.

With no citation to case law or other legal authority in support of its holding, the Court of Appeals concluded that the jury's verdict "clearly indicates" that it "was the result of prejudice in favor of Storm." *See* Appendix at Tab 1 at 7. This holding is based solely on the fact that the jury asked the trial court during its deliberations whether Storm was being sued in his individual capacity. On appeal, Martin argued and the Court of Appeals seems to have given some credence to the argument that the jury's question "indicated that it was less concerned with Storm's duty and more concerned with his capacity to withstand the financial impact of a judgment against him." *See* Appendix at Tab 1 at 5.

The notion that the jury's question, without something more, necessarily means that the verdict was based on prejudice is nothing more than speculation and conjecture by Martin and the Court of Appeals. The question posed by the jury is not unlike questions that are routinely asked by juries throughout the Commonwealth in multiple cases each year about a party's ability to pay a judgment, the existence of insurance, or whether certain elements of

damages were paid by insurance. There is no authority in Kentucky law for the proposition that a verdict was necessarily reached as a result of prejudice simply because the jury was curious about whether a defendant would be on the hook personally for any judgment. Other jurisdictions have considered the same argument and declined to make that leap. *Figueroa-Torres v. Toledo-Davila,* 232 F.3d 270, 276 (1st Cir. 2000) (Jury question regarding consequences of an adverse verdict does not establish that verdict was reached as a result of passion or prejudice.); *Gibson Appliance Co. v. Nationwide Ins. Co.,* 20 S.W.3d 285, 292-293 (Ark. 2000) (The sole fact that the jury asked questions in regard to potential liability of a former party does not prove that the jury's verdict was based on passion or prejudice.)

To the extent that the Court of Appeals has concluded that a single, unanswered question from the jury regarding Storm's ability to pay a judgment necessarily means that the verdict in Storm's favor was reached as a result of prejudice, this Court should correct that erroneous interpretation of Kentucky law.

CONCLUSION

Richard Storm asks this Court to reverse the Kentucky Court of Appeals and reinstate the trial court's judgment entered upon the jury's unanimous verdict in his favor.

Respectfully submitted,

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