

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.

REPLY 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 June 23, 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.

Counsel for Richard Storm

Doubling down on his position that “shall” is mandatory as used in KRS 179.070, Martin asks this Court to affirm the Kentucky Court of Appeals’ creation of a bright line rule that county engineers have the sole, non-delegable duty to remove trees from the roadway regardless of the circumstances. Tellingly, Martin ignores the entire statutory scheme of KRS Chapter 179 and fixates on the General Assembly’s use of the word “shall” in KRS 179.070. However, this Court has previously held that “shall” is not always mandatory.

Martin’s position that the General Assembly intended the county engineer, and only the county engineer, to be responsible for tree removal is not consistent with the entire statutory scheme of KRS Chapter 179. That position and the Court of Appeals’ Opinion endorsing it results in absurdity especially in light of the fact that there is not even a statutory mandate requiring the appointment of a county engineer. What’s more, KRS 179.020(1)-(6) provides six (6) alternatives for handling the various responsibilities set out in KRS 179.070.

One of those options, KRS 179.020(5), allows the county judge/executive to supervise the construction and maintenance of roads. That is how it works in Louisville, despite the fact that there was also a county engineer. Upon the establishment of the consolidated local government in 2003, the Mayor of Louisville/Jefferson County Metro Government (“Metro Government”) was invested with the authority of both the Mayor of the City of Louisville and the Jefferson County Judge/Executive pursuant to KRS 67C.105(4). The Mayor, through the Director of Public Works, delegated the responsibility of road maintenance, including tree removal, to the Operations & Maintenance Division of Public Works. In unanimously finding that Storm had not breached his duty to Martin, the jury heard proof that this delegation of responsibility for tree removal had been in place since, at least, 2003. (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).

Martin acknowledges this Court's distinction between a "directory shall" and a "mandatory shall" in *Knox County v. Hammons*, 129 S.W.3d 839 (Ky. 2004). Martin Brief at pp. 9-11. In fact, Martin concedes that the holding in *Knox County* "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." Martin Brief at p. 10.

Likewise, Metro Government accomplished the "given end" of removing trees from the roadway. The Mayor, through his Director of Public Works, assigned that responsibility to the Operations & Maintenance Division of Public Works. The county engineer had many of the other responsibilities set out in KRS 179.070. Tree removal was not one of them. The jury heard eight (8) days of proof regarding the delegation of duties within the Department of Public Works and unanimously concluded that Storm did not breach his statutory duties. This is because the job of removing trees from the roadway was getting done.

The jury also heard proof that the Operations & Maintenance Division of Public Works, outside contractors, utility companies (the jury also found in favor of Louisville Gas & Electric at trial, but that judgment was not appealed), and local, state, and federal governmental agencies were all engaged in cleaning up after the devastating effects of the Windstorm. It is fair to surmise that the jury concluded that no one, including the county engineer, breached any duties to Martin during the days after the Windstorm.

Martin complains that if this Court reinstates the jury's unanimous verdict in Storm's favor, Martin and other similarly situated plaintiffs will not be able to recover damages because

the Director of Public Works enjoys qualified official immunity for discretionary duties. Martin Brief at p. 7. This logic seems flawed for at least two reasons:

1. In enacting KRS Chapter 179, the General Assembly's concern was that certain responsibilities be performed, not with who performed those responsibilities. That is why the General Assembly provided several alternatives in KRS 179.020. The General Assembly's intent was not to create a cause of action against any one person.

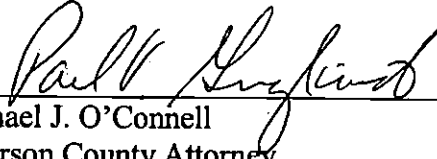
2. As the jury heard, Hicks was the Assistant Director in charge of the Operations & Maintenance Division and had the responsibility for removing trees from the roadway. Martin failed to name Hicks as a defendant in this matter.

Despite Martin's failure to address the issue in his brief or reply brief to the Court of Appeals, that Court gratuitously opined "that the instruction setting forth Storm's duty likely contributed to the jury's erroneous verdict." Opinion at p. 7. But, there was nothing wrong with the trial court's instruction. It contained the specific duty set out in KRS 179.070(1)(j). What's more, Martin never challenged the wording of the instruction before the Court of Appeals. *Com. v Pollini*, 427 S.W.3d 144, 148 (Ky. 2014) ("[G]enerally, appellate courts will decline to reach issues an appellant raised in a lower court but failed to brief on appeal."); *Com. v. Bivins*, 740 S.W.2d 954, 956 (Ky. 1987) ("Normally, assignments of error not argued in an appellant's brief are waived.")

Finally, to avoid confusion amongst the bench and bar, this Court should address the extent to which a question from a juror about a defendant's capacity to pay may be deemed unduly prejudicial to a plaintiff.

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

Respectfully submitted,



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