

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000762-MR

LOUIS MARTIN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 09-CI-006073

RICHARD STORM

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: ACREE, DIXON, AND J. LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, Louis Martin, appeals from the Jefferson Circuit Court's denial of his motion for a directed verdict at the close of evidence in his personal injury action, as well as the denial of his post-trial motion for a judgment notwithstanding the verdict. For the reasons stated herein, we reverse and remand for further proceedings.

On September 14, 2008, a significant windstorm resulted in downed power lines and trees across the Louisville area. Three days later, Martin was driving his motorcycle on Phillips Lane in Louisville when he collided with a downed tree in the roadway and was injured. Martin suffered significant injuries as a result of the accident. At the time of the accident, Appellee, Richard Storm, was the Metro Louisville County Engineer and an Assistant Director of Public Works. He reported directly to Ted Pullen, the Director of Public Works.

On June 17, 2009, Martin filed an action in the Jefferson Circuit Court against Pullen, in his individual and official capacities, as well as Louisville Gas and Electric Company, alleging negligence due to defendants' failure to remove the tree on Phillips Lane or to warn motorists of the hazard. Subsequently, Martin amended his complaint to name Storm, also in his individual and official capacities.¹ Following discovery, Pullen and Storm filed a joint motion for summary judgment on the grounds that they were entitled to qualified official immunity in their individual capacities. By order entered January 31, 2012, the trial court held that Pullen was entitled to qualified immunity and dismissed the claims against him. However, it denied the motion with respect to Storm.

Storm thereafter filed an interlocutory appeal on the issue of immunity. A panel of this Court noted that KRS 170.070, which sets forth the powers and duties of a County Engineer, specifically states that “(1) [t]he county

¹ Recognizing that both Pullen and Storm were entitled to governmental immunity in their official capacities, Martin filed a second amended complaint in January 2010, naming them both in their individual capacities only.

engineer shall: . . . (j) 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[.]” Rejecting Storm’s argument that he was not aware of the statute and that the operations and maintenance division of the Department of Public Works was the entity that was responsible for tree removal, the panel cited to the recent decision in *Wales v. Pullen*, 390 S.W.3d 160 (Ky. App. 2012), which also involved Storm:

During the pendency of this appeal, this Court rendered its decision in *Wales v. Pullen*, 390 S.W.3d 160 (Ky. App. 2012), where a motorcyclist was injured when a downed tree allegedly caused him to crash on September 20, 2008, in Louisville. The motorcyclist filed an action against Storm in his individual capacity and, as here, Storm asserted qualified official immunity and argued that he was not responsible for removing trees from the roadways. This Court rejected his contention and held despite that the Louisville Metro Government Department of Public Works may have chosen to structure its department differently, “based on the statutes as written, a member of the public ... would expect the County Engineer to remove trees, as evidenced by the clear statutory mandate and power to do so.” *Id.* at 166. Storm's ignorance of his statutory duty was inconsequential. *Id.* at 167. The statutory language and the use of the word “shall” rendered his 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.*

We are compelled to reach the same conclusion in this case. Storm's compliance with his statutory duties involved “merely execution of a specific act arising from fixed and designated facts.” *Yanero*, 65 S.W.3d at 522. 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, 2012-CA-000378 (August 9, 2013).² Accordingly, this Court ruled that Storm was not entitled to qualified immunity.

An eight-day trial was subsequently held in March 2015. During his testimony, Storm explained that as County Engineer, he and his staff were a division of the larger Department of Public Works. Storm testified that the County Engineer had never been responsible for the removal of trees and that such task had always been performed by the operations and maintenance division. Storm conceded that he was unaware of KRS 179.070, and that he had never been told that tree removal was part of his job responsibilities. In fact, Storm commented that his division did not even have the equipment to undertake tree removal. Similarly, Greg Hicks, the Assistant Director in charge of the operations and maintenance division of Public Works, testified that it had always been his division's responsibility to remove trees from the roadway.

At the close of all evidence, Martin moved for a directed verdict, arguing that Storm admitted that he was unaware of his statutory obligation under KRS 179.070(j), and that he took no part in removing the tree from Phillips Lane before or after Martin's accident. The trial court denied the motion. The jury returned a unanimous verdict in favor of Storm, finding that Martin had not proven by "a preponderance of the evidence that Richard Storm failed to comply with his duty as set forth in the instruction."

² 2013WL4036466.

Martin thereafter filed a motion for JNOV/new trial arguing that despite the fact that Storm's testimony conclusively established that he failed to comply with KRS 179.070(j), the jury nonetheless found that he did not breach any duty owed to Martin. Martin pointed out that the jury's question to the trial court during deliberations 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. By order entered April 30, 2015, the trial court denied Martin's motion without a hearing and without any written grounds. Martin thereafter appealed to this Court.

In reviewing evidence supporting a judgment entered upon a jury verdict "the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for a directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact." *Bierman v. Kalpheke*, 967 S.W.2d 16, 18 (Ky. 1998). This Court's review of the trial court's denial of a directed verdict and a motion for JNOV is the same. *Prichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky. App. 1987). Either motion should only be granted if there is "a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Dollar General Partners v. Upchurch*, 214 S.W.3d 910, 915 (Ky. App. 2006) (quoting *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985)).

Martin argues on appeal that the trial court erred in denying his motion for a directed verdict because the evidence unequivocally proved that Storm failed to comply with his statutory duty and that such breach was the proximate cause of Martin's injuries. Furthermore, Martin argues that the trial court erred in denying the motion for JNOV/new trial because the jury's verdict was not in conformity with the evidence and thus, must have been the result of passion or prejudice in favor of Storm. After reviewing the evidence and trial video, we are of the opinion that while Martin was not entitled to a directed verdict, he is entitled to a new trial.

In any negligence action under Kentucky law, a plaintiff must prove the existence of a duty, breach thereof, causation, and damages. *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 686 (Ky. App. 2009). *Illinois Central Railroad v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967); *Mullins v. Commonwealth Life Insurance Co.*, 839 S.W.2d 245, 247 (Ky. 1992). Here, the issue of duty had been determined by statute. As this Court ruled in the interlocutory appeal, regardless of whether the Louisville Metro government has placed the responsibility of tree removal on the operations and maintenance division of Public Works, KRS 179.070(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(j) or he did not. His own testimony established that he did not. However, "[t]he violation of a statute does not necessarily create liability. The statute must

have been specifically intended to prevent the type of occurrence that took place, and the violation must have been a substantial factor in causing the result.” *Hargis v. Baize*, 168 S.W. 3d 36, 46 (Ky. 2005); *Isaacs v. Smith*, 5 S.W. 3d 500, 502 (Ky. 1999). Certainly, KRS 179.070(j) was intended to prevent injury caused by “trees or other obstacles [in] the right-of-way of any publically dedicated road when the tree or other obstacles become a hazard to traffic[.]” *Id.* Consequently, 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.

We are of the opinion that the instruction setting forth Storm’s duty likely contributed to the jury’s erroneous verdict. If a plaintiff, as here, bases his or her claim upon proof of the negligent failure to comply with a statutory duty, the trial court obviously is required to instruct the jury regarding that duty because the violation of such a duty, standing alone, may be sufficient to support a claim of negligence. *Humana of Kentucky, Inc. v. McKee*, 834 S.W.2d 711, 722 (Ky. App. 1992). “[T]he jury instructions should, after explaining the general duty, specify that it ‘includes’ 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 violation of the statute is that type of harm which the statute was intended to prevent.” *Henson v. Klein*, 319 S.W.3d 413, 421 (Ky. 2010). *See also Wemyss v. Coleman*, 729 S.W.2d 174, 180 (Ky. 1987).

With respect to Storm’s duties, the jury was then instructed, in relevant part, as follows:

- 1) 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 care as a jury would expect an ordinary prudent person engaged in the same type of business to exercise under similar circumstances.

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. Although “[t]he general duty to exercise ordinary care for . . . the safety of others is universally present and never changes, . . . [w]hen a statutory duty is supported by evidence, it must be incorporated into a jury instruction as a ‘specific duty.’” *Henson*, 319 S.W. 3d at 421. While Storm had a general common law duty to exercise ordinary care, his statutory duty was absolute. 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.

Nevertheless, as previously noted, “the violation must have been a substantial factor in causing the result.” *Hargis*, 168 S.W. 3d at 46. Stated differently, “in an action for damages, the violation of the statute must be the proximate cause of the injury to permit recovery.” *Peak v. Barlow Homes, Inc.*, 765 S.W.2d 577, 578 (Ky. 1988). It has been held that “[t]o constitute proximate cause, an act must be such that it induced the accident and without which the

accident would not have occurred.” *Gerebenics v. Gaillard*, 338 S.W.2d 216, 219 (Ky. 1960). Proximate cause has also been found to be “that which, in a natural and continual sequence, unbroken by any new, independent cause produces the injury, and without which the injury would not have occurred.” *Newton v. Wetherby's Adm'x*, 287 Ky. 400, 153 S.W.2d 947, 949 (1941). “When the original negligence is remote and only furnishes the occasion of the injury, it is not the proximate cause thereof.” *Peak*, 765 S.W.2d at 579.

Because the jury herein found that Storm did not fail to comply with his duties, it never reached the element of causation. We are of the opinion, however, that there exists a disputed issue of fact as to whether Storm’s failure to comply with KRS 179.070(j) was the proximate cause of Martin’s injury. The evidence at trial was undisputed that the task of tree removal had been handled by the division of operations and maintenance. While this fact is insufficient to relieve Storm of his duty under the statute, it certainly goes to the issue of causation. For that reason, we conclude that Martin was not entitled to a directed verdict. *See Upchurch*, 214 S.W.3d at 915.

For the reasons set forth herein, we conclude that the trial court erred in denying Martin’s motion for JNOV/a new trial. The jury’s finding that Storm did not fail to comply with his duty was against the weight of the evidence presented. As such, Martin is entitled to a new trial.

The judgment of the Jefferson Circuit Court is reversed and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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