

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000096-MR

TERRY MULLINS AND JEANIE MULLINS,
HUSBAND AND WIFE; AND TERRY MULLINS
AS FATHER AND GUARDIAN OF GENTRY
MULLINS, A MINOR

APPELLANTS

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 06-CI-00222

NARCISSUS LUTTRELL AND GUY HENSON
LUTTRELL, HER HUSBAND; LAWRENCE JANIS
HAMILTON AND SHIRLEY HAMILTON, HIS
WIFE; SHIRLEY ROY AND LEWIS ROY, HER
HUSBAND; WANDA LOUISE CARMAN AND
RAY CARMAN, HER HUSBAND; GERALD C.
HAMILTON AND JANE HAMILTON, HIS WIFE;
JOYCELENE SUE ASHLEY AND JAMES
ASHLEY, HER HUSBAND; DONNIE HAMILTON
AND DONNA HAMILTON, HIS WIFE; JUDY WELLS
AND CURTISS WELLS, HER HUSBAND; AND
ESTATE OF MERTIE HAMITLON, BY AND THROUGH
ITS PERSONAL REPRESENTATIVES, LAWRENCE
JANIS HAMILTON AND DONNIE HAMILTON

APPELLEES

OPINION
VACATING AND REMANDING

** **

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Terry Mullins and Jeanie Mullins (collectively referred to as the Mullins) bring this appeal from a December 18, 2006, summary judgment of the Casey Circuit Court dismissing their negligence action. We vacate and remand.

Jeanie Mullins was involved in a motor vehicle accident at the intersection of Calvery Ridge Road and Kentucky Route 837 in Yosemite, Kentucky. Jeanie turned her vehicle onto Kentucky Route 837 and into the path of an oncoming motor vehicle. She claimed that an old abandoned store building and adjoining line of trees at the corner of the intersection obstructed her view.

Consequently, the Mullins filed a complaint in the Casey Circuit Court against the owners of the abandoned store Narcissus Luttrell, Guy Henson Luttrell, Lawrence Janis Hamilton, Shirley Hamilton, Shirley Roy, Lewis Roy, Wanda Louise Carman, Ray Carman, Gerald C. Hamilton, Jane Hamilton, Joycelene Sue Ashley, James Ashley, Donnie Hamilton, Donna Hamilton, Judy Wells and Curtiss Wells² (the landowners). In the complaint, the Mullins specifically alleged:

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² During the pendency of these proceedings, Mertie Hamilton, who held a life estate in the store, passed away and the administrators of her estate were substituted as parties.

On or about November 8, 2005, in Casey County, Kentucky, the defendants were negligent thus causing an accident/incident that caused injury to plaintiff, Jeanie Mullins and her daughter Gentry Mullins at or near real estate owned by defendants at the intersection of Calvary Ridge Road and Kentucky 837. Defendants negligently maintained their real estate causing injury to plaintiffs.

Subsequently, the landowners filed a motion to dismiss for failure to state a claim upon which relief could be granted. Ky. R. Civ. P. (CR) 12.03. Therein, the landowners claimed they owed no duty to the Mullins. As the circuit court considered matters outside the pleadings, the court dismissed the Mullins' complaint by summary judgment. *See Moss v. Robertson*, 712 S.W.2d 351 (Ky.App. 1986). This appeal follows.

The Mullins argue that the circuit court erred by entering summary judgment dismissing their complaint. Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. CR 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). In determining whether summary judgment is appropriate, the court views all facts and reasonable inferences therefrom in a light most favorable to the nonmoving party. *Id.*

In their complaint, the Mullins claimed that the landowners "negligently maintained their real estate causing injury to plaintiffs." More particularly, Jeanie alleged that the old store and "line of trees" abutting the store "limited my sight distance" and "blocked my view" at the time of the accident. The Mullins essentially claim that the landowners were negligent for not removing the old store and abutting trees. To

successfully maintain a negligence action, the claimant must demonstrate that defendant owed claimant a duty, breached that duty, and a consequent injury resulted therefrom. *Sparks v. Re/Max Allstar Realty Inc.*, 55 S.W.3d 343 (Ky.App. 2000). Resolution of this appeal centers upon the question of duty.

The Mullins maintain that both statutory law and common law impose a duty upon a landowner to a passing motorist to safeguard against hazardous conditions emanating from the owner's property. In support of thereof, the Mullins cite to Kentucky Revised Statutes (KRS) 179.240(1), KRS 177.106(1), *Postal Telegraph Cable Co. v. Young*, 172 Ky. 576, 189 S.W. 707 (1916), *Harris v. Thompson*, 497 S.W.2d 422 (Ky. 1973), and *Kentucky Utilities Co. v. Sapp's Adm'r*, 60 S.W.2d 976 (Ky. 1933). We shall initially examine the Mullins' statutory basis for imposition of a duty and then examine the common law basis.

It is well-established that interpretation and construction of a statute is a matter of law for the court. *See Worthington Hills v. Worthington Fire Protection District*, 140 S.W.3d 584 (Ky.App. 2004).

KRS 179.240(1) reads:

The owner or occupant of land situated along a public road shall remove from the right-of-way, all obstructions, including fences and buildings, which have been placed there either by himself or by his consent.

KRS 179.240(1) places a duty upon a landowner to remove from the right-of-way any obstruction placed there either by himself or with his consent. We interpret KRS 179.240(1) as requiring a landowner to remove obstructions placed “within” the right-of-way. Here, the record contains a deed dated May 17, 1958, between Lawrence and Mertie Hamilton (the Hamiltons) and Casey County, Kentucky. Therein, the Hamiltons conveyed to Casey County a strip of land some thirty feet wide which ran from the “center line of existing road on the west side thereof” Specifically excepted therefrom was “the ground and store house sitting thereon.” Thus, under the 1958 deed, the store is clearly not located within the right-of-way. Additionally, the Mullins made no allegation that the line of trees protruded into the right-of-way. As such, we do not believe that KRS 179.240(1) placed a statutory duty upon the landowners.

KRS 177.106(1) provides:

Before any person shall proceed to cause or continue or allow to remain in existence any encroachment under, on or over any part of the right-of-way of a state highway he shall first obtain from the Department of Highways a permit so to do. Any encroachment heretofore or hereafter placed or allowed to continue or remain under, on or over any road which is found by the Department of Highways to be interfering in any way with the safe, convenient and continuous use and maintenance of such road shall upon thirty (30) days notice to the person or to his chief agent by the Department of Highways be removed or relocated by such person at his own expense.

Under KRS 177.106(1), a person must obtain a permit before allowing an encroachment “under, on or over any part of the right-of-way” In this case, as hereinbefore discussed, the store and abutting line of trees were not located “under, on or over . . . the right-of-way.” Hence, we do not believe KRS 177.106(1) is applicable.

We shall now address the Mullins argument that the common law placed a duty upon the landowners in this case. Under the common law, it has been long ago recognized that “[p]ublic highways belong to the public, from side to side and from end to end,’ and must be kept safe for the purposes for which they were created.” *Endicott v. Triple State Natural Gas & Oil Co.*, 25 Ky.L.Rptr. 862, 76 S.W. 516, 517 (1903). To further such purpose, the common law imposes a duty upon an individual not to place obstructions in or so close to a right-of-way so as to endanger the safety of ordinary travelers. *Kentucky Utilities Co. v. Sapp’s Adm’r*, 249 Ky. 406, 60 S.W.2d 976 (1933). Thus, under the common law, a landowner has a duty not to place or locate obstructions in or near a right-of-way.

In the case *sub judice*, the store was not placed in or located near the highway. Rather, as demonstrated by the 1958 deed, the store preexisted the right-of-way, and, in fact, the Hamiltons’ conveyed property to the county for development of Kentucky Highway Route 837. Thus, we do not believe there existed a duty upon the landowners to remove the store. However, the record is not developed as to whether the line of trees was “placed” by the landowners close to Kentucky Route 837 on their

property or within the right-of-way so as to endanger the safety of ordinary travelers. Upon remand, we believe additional discovery should take place upon this issue. We would also note that if the evidence reflects that the thirty foot width from the centerline of the roadway touches the store building, then the landowners would have no liability as a matter of law unless it can be conclusively established that they placed trees in the state right-of-way. Of course, if the thirty foot width does not reach the store building, then the Mullins must prove that the landowners placed trees so close to the state right-of-way as to create a danger to the traveling public.

The Mullins also allege that “all appellees should remain as defendants upon remand of this case.” A review of the record reveals that the landowners filed a motion to dismiss certain landowners as parties. They claimed that these particular landowners only held a remainder interest in the property and could not be held negligently liable. The circuit court never ruled on this motion but, instead, granted summary judgment dismissing the Mullins’ complaint in its entirety. As an appellate court, our role is to review the decision of the lower court for reversible error. In this case, the circuit court has not rendered a decision on this issue. As such, we have nothing to review. Accordingly, we are of the opinion that appellate review of the issue concerning dismissal of the remainderman as parties is premature.

We view the remaining arguments to be without merit.

For the foregoing reasons, the summary judgment of the Casey Circuit Court is vacated and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANTS:

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BRIEF AND ORAL ARGUMENT
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