

RENDERED: JULY 18, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000910-MR

JUSTIN WALLIN AND ZACHARY BROUN

APPELLANTS

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 13-CI-00001

CARRIAGE FUNERAL SERVICES OF
KENTUCKY, INC., d/b/a STEEN
FUNERAL HOME; AND BENJAMIN GIBSON

APPELLEES

AND

NO. 2013-CA-000953-MR

BENJAMIN GIBSON

CROSS-APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 13-CI-00001

CARRIAGE FUNERAL SERVICES OF
KENTUCKY, INC., d/b/a STEEN
FUNERAL HOME; JUSTIN WALLIN;
ZACHARY BROUN; AND KENTUCKY
FARM BUREAU

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

CLAYTON, JUDGE: Justin Wallin and Zachary Broun appeal the Lawrence Circuit Court’s April 22, 2013 order denying their motion to alter, amend, or vacate its March 14, 2013 order, which granted the motion of Carriage Funeral Services of Kentucky, Inc., d/b/a as Steen Funeral Home (hereinafter “Steen Funeral Home”) to dismiss the appellants’ complaint against them. In addition, Benjamin Gibson cross-appeals that portion of the April 22, 2013 order that denied his motion to file a cross-claim against Steen Funeral Home.

The trial court held that Kentucky Revised Statutes (KRS) 189.378 did not impose a duty on the funeral home to place flags or other identifying objects on vehicles or to illuminate the headlights of vehicles traveling as part of a funeral procession and, accordingly, dismissed the complaint against the funeral home and denied permission for cross-appellant to file a cross-complaint against the funeral home. After careful consideration, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 5, 2011, Justin Wallin and Zachary Broun attended the funeral of a friend at the Steen Funeral Home in Ashland, Kentucky. At the

funeral home, the mother of the deceased friend asked Justin, Zachary, and another friend, Mark Christian,¹ to be pallbearers.

Since the three friends had driven separately to the funeral home, Zachary offered to drive them in the funeral procession and, consequently, Justin and Mark were passengers in his vehicle. Funeral home employees directed Zachary to pull his vehicle into the line for the funeral procession. However, according to Zachary and Justin, no one from the funeral home put a flag on Zachary's vehicle or asked him to turn on his headlights or flashers. The lead vehicle in the funeral procession was the hearse.

While driving to the cemetery, the vehicles in the funeral procession went through several intersections with traffic lights. As the funeral procession headed toward Louisa, Kentucky, where the cemetery was located, it approached the intersection of KY 645 and U.S. 23. Several vehicles in the procession, including the hearse, drove through the intersection and turned left onto KY 645. Nonetheless, when Zachary prepared to turn his vehicle left onto KY 645 from the southbound lane of U.S. 23, an oncoming vehicle, driven north on U.S. 23 by Benjamin Gibson, allegedly struck Zachary's vehicle. Apparently, Zachary's vehicle was the last one in the funeral procession and about 200 feet behind the preceding vehicle.

Justin and Zachary filed suit against Steen Funeral Home and Gibson in Boyd County. Later, the case was transferred to Lawrence Circuit Court where

¹ A companion case has been filed by Mark Christian. It is styled *Mark Christian v. Steen Funeral Home*, No. 2013-CA-001296.

Justin and Zachary filed an amended complaint. Steen Funeral Home filed a motion to dismiss arguing that it did not owe a duty to Justin and Zachary under KRS 189.378 because the statute does not place a responsibility on a funeral home to place flags on vehicles or illuminate the headlights of the vehicles which are being driven in a funeral procession.

Justin and Zachary responded to the motion and argued that not only did the funeral home owe them a duty, but material facts existed for a jury to decide regarding the incident. Further, they maintained that a judgment on the pleadings, pursuant to Kentucky Rules of Civil Procedure (CR) 12.03, was improper. On March 14, 2013, the trial court entered an order granting Steen Funeral Home's motion for dismissal. Shortly thereafter, Justin and Zachary filed a motion to vacate the March 14 order dismissing their complaint against Steen Funeral Home.

Meanwhile, Gibson, on March 19, 2013, proffered a motion seeking permission to file a counterclaim against Zachary and a cross-claim against Steen Funeral Home. Gibson claims that he never saw the funeral procession or any other vehicles besides Zachary's vehicle making the left turn. According to him, as his vehicle drove toward the intersection of KY 645 and U.S. 23, Zachary negligently made a left turn onto KY 645 directly in front of Gibson's vehicle, which caused the vehicles to collide.

After Gibson filed the motion to make a cross-claim against Steen Funeral Home, it filed a "special entry" response to the motion and argued not only

did it not have a duty but that because it had previously been dismissed from the action, Gibson could not file a cross-claim against them.

On April 22, 2013, the trial court entered an order denying Justin and Zachary's motion to vacate, denying Gibson's motion to file a cross-claim against Steen Funeral Home, and granting Gibson's motion to file a counterclaim against Zachary. Zachary and Justin now appeal, and Gibson cross-appeals from this portion of the order, which was designated "final and appealable" with "no just cause for delay."

On appeal, Justin and Zachary argue that the trial court erred when it granted the motion to dismiss their claim against Steen Funeral Home. It is their contention that Steen Funeral Home violated KRS 189.378 by failing to place flags on the vehicles or clearly mark the vehicles driven in the funeral procession, which, they allege, was responsible for Zachary's collision with Gibson's oncoming vehicle. In the cross-appeal, Gibson agrees with Justin and Zachary that the trial court erred when it dismissed Steen Funeral Home from the action. He, too, maintains that KRS 189.378 imposes a duty on Steen Funeral Home.

Steen Funeral Home responds to Justin and Zachary's line of reasoning by contending that the parties failed to state a cause of action for which any relief could be provided. The funeral home admits, for the purposes of the motion, that a funeral procession was formed. But under the requirements of KRS 189.378, Steen Funeral Home claims it did not violate the statute and, therefore, it owed no duty to Justin or Zachary. Further, Steen Funeral Home maintains that

Justin and Zachary's claim of common law negligence was not preserved for appellate review.

With regard to Gibson's arguments, Steen Funeral Home contends that because it was dismissed from the action on March 14, 2013, Gibson could not file a counterclaim against it on March 19, 2013. Further, since Gibson did not properly preserve the issue in the prehearing statement or by motion for good cause to hear the issue, the issue is not preserved and, thus, is precluded from filing a cross-claim. Further, Steen Funeral Home maintains that Gibson failed to state a cause of action against it because it had no duty under KRS 189.378.

STANDARD OF REVIEW

Steen Funeral Home's motion to dismiss was filed pursuant to CR 12.02(f); that is, it argued that the action filed against them should be dismissed for failure to state a claim. "Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (citing *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009)).

ANALYSIS

"It is well settled in this jurisdiction when considering a motion to dismiss under [Kentucky Rules of Civil Procedure (CR) 12.02], that the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Mims v. Western-Southern Agency*,

Inc., 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987)). Further, a motion to dismiss for failure to state a cause of action should not be granted unless it appears that the plaintiff would not be entitled to relief under any set of facts that could be used to support the claim. *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002).

The case at bar involves negligence. Common law negligence requires

proof that the defendant owed the plaintiff a duty of care, that the defendant breached that duty, and that an injury proximately resulted from the breach.

Pathways, Inc. v. Hammons, 113 S.W.3d 85, 88-89 (Ky. 2003)(citing *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992); *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001)). Moreover, the standard of care applicable to a common-law negligence action is that of ordinary care—that is, “such care as a reasonably prudent person would exercise under the circumstances.” *Slusher v. Brown*, 323 S.W.2d 870, 872 (Ky. 1959).

But the situation herein involves negligence per se. Negligence per se is a negligence claim with a statutory [or regulatory] standard of care substituted for the common-law standard of care. *Real Estate Mktg., Inc. v. Franz*, 885 S.W.2d 921, 927 (Ky. 1994) (citation omitted), *overruled on other grounds by Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 741 (Ky. 2011). KRS 446.070 codifies the doctrine of negligence per se, and provides: “[a] person injured by the violation of any statute may recover from the offender such damages

as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.”

The complaint and cross-complaint filed by the parties herein relied on KRS 189.378 to support negligence per se against Steen Funeral Home. Both the appellees and cross-appellant argue that KRS 189.378 established a statutory duty for the funeral home when a funeral procession occurs.

Whether a duty exists is a legal question for the court. *Mullins*, 839 S.W.2d at 248. Justin and Zachary maintain that several factual issues need to be resolved, including whether a funeral procession was purchased, the funeral home’s role in the procession, and the funeral home’s instruction to the drivers in the procession. Yet, these factual issues are not relevant to the question of duty because duty is a legal question.

To begin our analysis, we evaluate the negligence per se claim by reviewing the portion of KRS 189.378 that is pertinent to our discussion. Section (1) of the statute reads as follows:

“Funeral procession,” as used in this section, means two (2) or more vehicles accompanying the body of a deceased person when each vehicle has its headlights on or is displaying a pennant attached in such a manner as to be clearly visible to approaching traffic.

Section (2) of the statute states that a funeral procession has the right-of-way at an intersection and may proceed through the intersection if it is led by an escort vehicle displaying flashing yellow, red, or blue lights, except in some cases that are not relevant in this case. Section (3) of the statute requires a person who is

driving in a funeral procession to exercise due caution before assuming the right-of-way described in Section (2). Sections (4) and (5) prohibit vehicles that are not a part of the funeral procession from interfering with the progress of the funeral procession or from appearing to be a part of the funeral procession.

The trial court agreed with Steen Funeral Home that the provisions of the statute do not create a duty for the funeral home. The trial court is correct. Contrary to the assertions of the appellees and cross-appellant, the language of KRS 189.378 does not mandate that a funeral home place pennants on vehicles or illuminate the headlights of vehicles in funeral processions. Rather, Section (1) merely says that a funeral procession is created when two or more vehicles accompany the body of the deceased with either the vehicles' headlights illuminated or with a pennant on the vehicle. Nothing in Section (1) mandates any action on the part of funeral homes.

Section (3) does impose a duty but the duty is imposed upon the driver of a vehicle in a funeral procession. The duty is to exercise due caution before entering a right-of-way. The duty falls directly on Zachary, who was driving into the right-of-way, when the accident occurred. In fact, the driver of a vehicle in a funeral procession is not given an absolute right to disregard traffic rules and is, indeed, under a "duty to exercise ordinary care for the safety of appellant and for those persons in her own car." *Newman v. Lee*, 471 S.W.2d 293, 296 (Ky. 1971).

Within the legal parameters of negligence per se, a person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation. *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 99 (Ky. 2000). KRS 446.070 merely codifies the common-law concept of negligence per se. It only applies if the alleged offender has violated a statute and the plaintiff was in the class of persons which that statute was intended to protect. *Id.* at 100.

Since no statutory duty was imposed upon funeral directors within the language of KRS 189.378, it follows that Steen Funeral Home was not in the class of entities whose conduct was intended to be regulated by the statute. Contrary to the assertions in the complaints, no duty of care existed for Steen Funeral Home. The intent of the statute is to regulate both the drivers of vehicles in a funeral procession and drivers of vehicles coming into contact with funeral processions. Therefore, the trial court's decision to grant Steen Funeral Home's CR 12.02(f) motion to dismiss on its pleadings was proper since it was clearly entitled to a judgment. *Wood v. Wyeth-Ayerst Laboratories, Div. of American Home Products*, 82 S.W.3d 849, 851 (Ky. 2002)(citing *Pari-Mutuel Clerks' Union of Ky. v. Ky. Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977)).

Having decided that negligence per se is not involved here, we move on to address Justin and Zachary's line of reasoning in their brief that regardless of a statutory duty, based on *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328, 333-334 (Ky. 1987), Steen Funeral Home owed

a duty of reasonable care. The issue of whether a funeral home director has a common-law duty of care when organizing or implementing a funeral procession has not been addressed in the Commonwealth.

However, the issue was not preserved for our review. In numerical paragraph 5 of the complaint, Justin and Zachary allege:

. . . the Defendant Steen Funeral Home negligently and carelessly, and in clear violation of KRS § 189.378, failed to place flags on vehicles that were part of a funeral procession, or clearly mark that the vehicles were being driven by the Plaintiffs were part of the funeral procession causing the Plaintiffs [sic] vehicles to collide with an oncoming vehicle causing serious bodily injury to the Plaintiffs.

The complaint only references negligence per se. At no point in the complaint or in arguments to the trial court did Justin and Zachary indicate that they are also making a common-law negligence claim. An appellate court will not address an argument that is raised for the first time on appeal. *Raisor v. Raisor*, 245 S.W.3d 807, 808 (Ky. App. 2008).

Finally, with regard to Gibson's appeal of the denial of his cross-claim against Steen Funeral Home, obviously, since his reasoning regarding negligence per se is similar to Justin and Zachary's, and we have determined that this reasoning is incorrect, the trial court correctly denied his cross-claim. Second, the filing of his cross-claim was after Steen Funeral Home had been dismissed from the case.

For the reasons stated herein, the order of the Lawrence Circuit Court

is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS-
APPELLEE:

Sebastian M. Joy
Catlettsburg, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLEES:

Patrick M. Hedrick
Ashland, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Jennifer L. Conner
John C. Collins
Salyersville, Kentucky