

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001620-MR

JOHN P. ROTH, JR.

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 05-CI-01220

CITY OF NEWPORT,
NEWPORT POLICE DEPARTMENT
AND DIVISION OF CODE ENFORCEMENT

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

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

CAPERTON, JUDGE: John P. Roth Jr. appeals the order and judgment entered by the Campbell Circuit Court pursuant to a jury verdict and the subsequent denial of his motion to alter, amend, or vacate, or in the alternative, for a new trial.

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 KRS 21.580.

Roth's rental property was inspected by the City of Newport (hereinafter the City), found to be in violation of the City's property maintenance code (code), and subsequently condemned. After Roth's appeal of the condemnation was heard and denied in his absence, the City demolished the property. Roth then sued the City and at trial presented two claims; one, that his due process rights were violated by the City when they demolished his rental property; and two, that the City negligently supervised its employees. The basis of Roth's claims rested upon whether the City adequately provided notice to Roth prior to his property's demolition.

The jury returned a verdict that Roth's due process rights were not violated as the City sent adequate notice to Roth prior to the demolition of the property. Based on the jury instructions, the jury did not consider the second claim, negligent supervision, as the basis for the negligent supervision claim was whether notice was given as required by the Due Process Clause. Roth's motion to alter, amend, or vacate or, in the alternative, for a new trial was denied by the trial court. Roth now appeals.

The City received a complaint about the condition of Roth's property and on September 9, 2003, Roth was notified that his property suffered structural defects in violation of code and that his property had been condemned. Roth was ordered to repair the defects. Roth did not repair the property. On October 10, 2003, a demolition order was issued with a twenty day window in which to appeal. Roth appealed timely and on November 17, 2003, notice of his appeal hearing

before the Existing Structures Board, which was set for January 21, 2004, was sent to Roth via certified mail. Roth claimed that he then contacted the City via telephone to reschedule the hearing date, which the City disputed.²

On January 8, 2004, the City again sent Roth a notice of the hearing set for January 21, 2004. Roth did not attend the January 21, 2004, hearing as he claimed to be out of the country. At the hearing, Roth's appeal from the October 2003, demolition order was denied and a letter was sent to Roth confirming the decision to deny. No action was then taken until August 2004, when two City officials were unsuccessful at contacting Roth either in person or over the phone to discuss the property.³ In November 2004, Roth's property was demolished.

Roth sued the City alleging a violation of his due process rights, asserting that the City failed to provide him with adequate notice to apprise him of the pendency of the action and to afford him an opportunity to present his appeal, relying on *Dusenbery v. U.S.*, 534 U.S. 161, 167, 122 S.Ct. 694 (2002). Roth further asserted that the City negligently supervised its employees and thus caused the violation of Roth's rights. The City denied both claims.

At trial, the jury instructions submitted required a finding that Roth's due process rights were violated before the jury could consider the negligent supervision claim, as the court reasoned that the negligent supervision claim was

² Roth claims that the City informed him that the hearing date would be rescheduled and that he would receive notice of the new hearing date. This is disputed by the City.

³ We note that Roth does not argue that he failed to receive notice of the denial of his appeal. No actions were taken by Roth after the denial of his appeal. Roth fails to provide an explanation for his inaction.

premised on inadequate notice, i.e., a due process violation. Jury Instruction Number Four stated, “Mr. Roth claims that the City of Newport did not give him notice reasonably calculated, under all the circumstances, to apprise Mr. Roth of the pendency of the action and afford him an opportunity to present his appeal.”

Jury Instruction Number Five stated:

Mr. Roth must prove, by a preponderance of the evidence that (A) a person or persons employed by the City of Newport violated Mr. Roth’s right to procedural due process; (B) The City knew, or should have known, that its employees previous action or omissions made the violation of Mr. Roth’s rights foreseeable; (C) The City failed to supervise the employees in an effort to prevent the violation of Mr. Roth’s rights; and (D) The City’s failure to supervise its employees caused the violation of Mr. Roth’s right to procedural due process.

The Special Verdict Question One asked the jury to determine if “you find by the preponderance of the evidence that the City of Newport did not take efforts reasonably calculated under all the circumstances to apprise Mr. Roth of the pendency of the action and afford him an opportunity to present his appeal?” If the jury answered “no” then they were instructed to return to the courtroom. If the answer was “yes” then the jury was required to proceed to Special Verdict Question Two, which required the jury to undertake an analysis of the negligent supervision elements given in Special Instruction Number Five.

The jury found in favor of the City by answering “no” to Special Verdict Question One, thereby finding in favor of the City that Roth had received adequate notice and an opportunity to present his appeal.

On appeal, Roth disagrees with the trial court's reasoning, and claims that the trial court erred when it prevented the jury from considering and deciding his claim for negligent supervision based on the jury instructions and that the court erred by denying his motion to alter, amend, or vacate, or in the alternative, for a new trial.

The City argues that the trial court properly instructed the jury and properly denied the motion to alter, amend, or vacate, or in the alternative, for a new trial. Further, the City argues that Roth's brief should be stricken for failure to cite to the appellate record⁴ and that the issues raised on appeal were not properly preserved for review.

The City is correct in Roth's argument that the trial court failed to properly instruct the jury was not properly preserved for review. Under CR 51, the time to object to jury instructions is prior to the court instructing the jury.⁵ As stated in *Harris v. Thompson*, 497 S.W.2d 422, 431 (Ky. 1973) "if the appellants were not satisfied with any phase or portion of the instructions the time to speak was before they were given to the jury." A review of the record shows that the trial court provided Roth ample time in which to object and/or tender jury

⁴ Pursuant to CR 76.12(8)(a) we may strike a brief "for failure to comply with any substantial requirement of this Rule 76.12."

⁵ CR 51(3) states

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

Id. See also *Harris v. Thompson*, 497 S.W.2d 422 (Ky. 1973).

instructions. Roth failed to object until after the court began to instruct the jury. Therefore, the error was not preserved for our review under CR 51(3).

Even if we assume the objection to the jury instructions was timely and the error was preserved, then the City is correct that Roth has failed to adequately cite to the appellate record as required by CR 76.12(4) (c) (iv) and (v). In *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky.App.1990), we established the principle that, where an appellant fails to comply with CR 76.12(4)(c)(iv), a reviewing court need only undertake an overall review of the record for manifest injustice. Thus our review will be one for manifest injustice.

In *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 442 (Ky.App. 1998), this Court pronounced that “the established law in this Commonwealth recognizes that an employer can be held liable when its failure to exercise ordinary care in hiring or retaining an employee creates a foreseeable risk of harm to a third person.” Thus, an employer can be liable for negligent retention/supervision when the employee commits a negligent or intentional act resulting in injury to the plaintiff.

Liability on the employer is derivative of the employee's commission of a compensable act. As stated in *Scelta v. Delicatessen Support Services, Inc.*, 57 F.Supp.2d 1327, 1348 (M.D.Fla.1999), “the underlying wrong allegedly committed by an employee in a *negligent supervision or negligent retention claim must be based on an injury resulting from a tort* which is recognized under common law.” (emphasis supplied).

We are not aware of any tort, nor was it argued by Roth that a tort existed, upon which Roth's claim of negligent supervision could be based.

Assuming arguendo that the negligent supervision claim was based on a common law tort claim and, as pled by Roth, that the negligent supervision deprived him of the notice required under the Due Process Clause, then his claim is necessarily premised on whether the City provided adequate notice to him. As the jury found in favor of the City by finding adequate notice under the Due Process Clause to Roth, his claim based on a violation of the Due Process Clause must fail. It then follows, necessarily, that the negligent supervision claim based on failure of the employees of the City to give notice as required by the Due Process Clause to Roth must also fail.

The trial court properly instructed the jury. The jury found there was no violation of due process regarding notice. We find that Roth's negligent supervision claim, based on the lack of such notice, failed. It must follow, and we so find, there was no manifest injustice based on the alleged failure of the City to give notice to Roth.

Last, we disagree with Roth's argument that the trial court improperly denied his motion under CR 59.01⁶ to alter, amend, or vacate, or in the alternative, for a new trial, based upon the inappropriate formulation of instruction to the jury. We review the denial of a motion for a new trial under the abuse of discretion standard. Consequently, we will not disturb the trial court's decision unless it was

⁶ We note that Roth cites to CR 59.05 but our analysis is more properly under CR 59.01.

clearly erroneous. *See McVey v. Berman*, 836 S.W.2d 445, 448 (Ky.App. 1992).

As the court properly instructed the jury based on both our established jurisprudence and Roth's failure to timely object, the court's denial of the CR 59.01 motion was not an abuse of discretion.

For the foregoing reasons, we find no error in the reasoning or decision of the court below, and therefore, affirm the order and judgment of the Campbell Circuit Court.

ALL CONCUR.

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