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COURT OF APPEALS

SUPREME COURT OF KENTUCKY
2007-SC-0678-D
(2006-CA-1512)

FILED
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SUPREME COURT CLERK

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

MOVANT

VS.

KNOX CIRCUIT COURT
2004-CI-00606

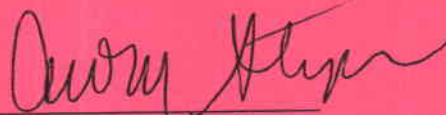
BILL JOHNSON, INDIVIDUALLY;
AND BILL JOHNSON, AS ADMINISTRATOR
OF THE ESTATE OF ANGELA JOHNSON; AND
THE KENTUCKY BOARD OF CLAIMS

RESPONDENTS

BRIEF FOR MOVANT

CERTIFICATE OF SERVICE

I, Andrew M. Stephens, hereby certify that a true and accurate copy of this Brief has been served as required, under the rules as follows: The original and ten copies filed in the Supreme Court of the Commonwealth of Kentucky; the Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40622; the Trial Court, Honorable Gregory A. Lay, Knox Circuit court, Division One, Knox County Courthouse, Barbourville, Kentucky 40906; the Kentucky Board of Claims, by and through its counsel, Honorable G. Mitch Mattingly, 130 Brighton Park Blvd., Frankfort, Kentucky 40601, Hon. Denise M. Davidson, 264 E. Main Street, Hazard, Kentucky 41702, all on this the 5 day of August, 2008. I further certify that the record in this case has not been removed by the undersigned.



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INTRODUCTION

The Kentucky Board of Claims granted a Judgment in favor of Bill Johnson, as Administrator of the Estate of Angelia Johnson, deceased, in the amount of \$150,250.00 and a Judgment for Bill Johnson, individually, in the amount of \$500.00. The Knox Circuit Court and the Kentucky Court of Appeals affirmed both the finding of a duty and a breach thereof by the Movant and this Court accepted Discretionary Review of that decision.

STATEMENT CONCERNING ORAL ARGUMENT

The Movant, Transportation Cabinet, believes that issues codifying the current status of law regarding duty in negligence cases and specifically in those of the Board of Claims, is worthy of oral argument and so requests.

STATEMENTS OF POINTS AND AUTHORITIES

ARGUMENT ONE: The Finding of the Board of Claims, as Affirmed that the location of the tree constituted a dangerous condition, was error.	p. 7
<u>Commonwealth. Transportation Cabinet, Department of Highways vs. Shadrick</u> , 956 S. W. 2d 898 (Ky. 1997)	p. 11
<u>Commonwealth of Kentucky, Transportation Cabinet, Department of Highways vs. Babbitt</u> , 172 S. W. 3d 786 (KY. 2005)	p. 11
<u>Commonwealth of Kentucky, Transportation Cabinet, Department of Highways vs. Guffey</u> , 2006-SC- 436-DG (2007)	p. 12
<u>Dillingham vs Department of Highways</u> , 253 S. W. 2d 256 (KY 1952)	p. 14
<u>Schrader vs. Commonwealth</u> , 218 S. W. 2d 406 (Ky. 1949)	p. 14

STATEMENT OF THE CASE

On September 6, 1999, Bill Johnson was driving a 1995 Chevrolet Blazer with his wife in the passenger seat returning to Hazard from Corbin. Mr. Johnson was proceeding in a westerly direction along Kentucky 1304 in Knox County, between mileposts three and four. It was dark and the Johnson vehicle left the traveled surface of Kentucky 1304 and hit a tree off the traveled surface of the highway, killing Mrs. Johnson almost immediately. An Action was brought in the Kentucky Board of Claims, No. 00-777-00-778, 00-779, alleging negligence on the part of the Transportation Cabinet in allowing the tree which the Johnson vehicle hit, to be present, holding that tree, in its then location, created a danger, then known to the Transportation Cabinet, which therefore created a duty which the Cabinet breach by its failure to remove the tree.

A hearing was held on January 5, 2004, in Knox County before the Kentucky Board of Claims.

In its recommended Judgment, the Hearing Officer granted a Judgment in the favor of the Claimant, Bill Johnson, in his capacity as Administrator of the Estate of Angelia Johnson, in the amount of \$150,250.00; a Judgment against the Cabinet in favor of Bill Johnson, individually, in the amount of \$500.00 and the remaining claims were dismissed with prejudice.

By Final Order of the Kentucky Board of Claims, those Judgments were sustained and from that the Commonwealth has appealed to both the Knox Circuit Court, which opined on June 22, 2006 that the Kentucky Board of Claims did not err.

Lastly, the Kentucky Court of Appeals on August 24, 2007, in a “not to be published” opinion, essentially adopted the language of the Knox Circuit Court’s affirmation of the Kentucky Board of Claim’s Judgment and Affirmed.

This case has therefore been accepted for Discretionary Review by the Kentucky Supreme Court.

ARGUMENT ONE

THE FINDING OF THE BOARD OF CLAIMS, AS AFFIRMED, THAT THE LOCATION OF THE TREE CONSTITUTED A DANGEROUS CONDITION, WAS ERROR.

What happened on the evening of September 6, 1999 is that Bill Johnson was driving a four year old Blazer on Kentucky 1304 in Knox County and that some event occurred causing Mr. Johnson to leave the traveled surface of that two lane roadway and to strike a tree without breaking or swerving, which striking caused the immediate death of his wife. The loss to Mr. Johnson and to his wife's estate is astronomical and obviously well within the jurisdictional limits of the Kentucky Board of Claims. The loss and affect on the family of the Johnson's is also incalculable and irrespective of any result, a death at near or related to a highway is a grievous loss for which the Commonwealth has regret.

However, based on the finding of the Kentucky Board of Claims, that body, as affirmed twice, by the Circuit Court and the Court of Appeals, has misstated the duty owed in the particular facts and therefore, acted outside the scope of its authority, in that the record does not support the award of the Board of Claims, and therefore, the specifics and particulars of the wreck need to be examined very closely.

The Johnsons had spent a long day, after work, including dropping off their son going to Corbin to shop. They had eaten a meal and were traveling back on a roadway that they were fairly familiar with. Kentucky 1304 was dark with no ambient lighting and according to both the testimony and the facts, the roadway is of appropriate length and width and contains no sight distance

problems at this particular point, and was in fact, maintained by the Transportation Cabinet.

There is also no question that in the direction of travel on this roadway, that a side road intersected at a modified "T" at Kentucky 1304, known as Paynes Branch Road, close in space with Kentucky 1304 where the tree was located.

There is also no question that the Blazer that Mr. Johnson was driving had plenty room within his own lane to operate the motor vehicle. Further, the Board of Claims opined correctly, since there was no evidence to the contrary, that there was no effort to brake or to swerve, even though Mr. Johnson testified that he "flinched" when he allegedly saw the headlights of an oncoming vehicle cross over into his travel lane. While there is not one scintilla of proof, other than Mr. Johnson's recollection, of that vehicle, it is without contest that there was no swerve of his vehicle or any braking, which sits contrarily to that of a human reaction when an oncoming vehicle approaches in ones mind's eye.

Despite the fact that the tree stopped Mr. Johnson's vehicle and the collision therewith caused the death of his wife, it is respectfully submitted that the Board's finding that the tree constituted a danger which was known to the Cabinet for persons on Kentucky 1304 is clearly an error.

The Cabinet recognized that the tree was a potential danger to those coming from Paynes Mill Road, turning right or left, onto Kentucky 1304. In fact, the tree, at the time of the Johnson's collision, had been marked for removal by the Cabinet because neighbors on Paynes Mill Road had complained that turning

either direction onto to Kentucky 1304, that people could not see the travel way of Kentucky 1304, as traffic approached Paynes Mill Road. It is important to understand that Paynes Mill is an inferior road and requires traffic on it to stop prior to traveling either east or west on Kentucky 1304. That stop would mandate persons looking to the right and left to determine if traffic was coming from either direction so that person's coming from Paynes Mill on to Kentucky 1304, could make the right or left hand turn safely. Thus, the tree did pose a danger in that limited capacity. However, the tree for those traveling east or west on Kentucky 1304 did not create a danger, nor was it reasonably foreseeable that someone would travel completely off the traveled surface of Kentucky 1304 into the tree, which was located way off of the right-of-way and off the traveled surface, the shoulder, and off in the dirt. See, Shadrick.

At paragraph 16 of the Board of Claim's findings, the Board of Claims used the following physical facts as a factual basis that a duty had been breached by virtue of its conclusion that the tree, in its position off of Kentucky 1304, created a dangerous condition:

"Narrowness of the roadway within the proximity of the scene of the accident.

The curvature of the roadway in proximity of the accident...

The proximity of the edge of the roadway to the location of the tree on the shoulder..."

All of which the Board of Claims then opined "constituted a dangerous condition in the shoulder of the roadway – tantamount to a trap – about which the Defendant knew or should have known,"

The Board of Claims then went on to determine that this was a known danger to the Transportation Cabinet and created the duty.

It called the tree to trap and held the Cabinet's failure to remove same, a 100% causative factor of the injury suffered by the Claimants.

As to these holdings, the narrowness of the roadway in proximity to the scene of the accident seems a far-fledged finding necessary to create the duty. Roads all over Eastern Kentucky are narrow. In this case the Board of Claims opined that the lane of travel that Mr. Johnson was in was 9 feet and that his vehicle was 6 feet. Therefore, Mr. Johnson had 3 feet, left or right, to be well within his lane and there was no proof introduced to the contrary that this road was anything but well within the limitations for width requirements of any highway in the Commonwealth. Mr. Johnson had ample room to escape the phantom driver – if there was one – without exiting the roadway 3 feet.

Further, the Board of Claims opined as to the curvature of the roadway in proximity of the accident. This conclusion is also inconsistent with the physical evidence in that at the approximate place of the wreck, the roadway was straight in that the Board of Claims opined that there were no line of sight problems and that Mr. Johnson could clearly see the road ahead and that which was coming and that there was nothing of an obstruction in his travel lane that would keep him from being in the travel lane, other than the phantom vehicle over which the Commonwealth of Kentucky would have had no control.

Lastly, the Board of Claims opined that the proximity of the edge of the roadway, vis-a-vie, the location of the tree on the shoulder, also contributed to

the finding of the duty. The Board of Claims made a finding, correctly, that the left edge of the tree was 32 inches from the paved edge of the roadway. Thus, the vehicle would have to travel almost 3 feet off of the a 9 foot travel lane, along with a small shoulder, before it would be caused to strike the tree adjacent to Kentucky 1304's traveled pathway. With this contention, the Cabinet takes great issue. As opined by the Board of Claims, generally, Kentucky 1304 is a rural two lane, dark country road, which the Johnson's were intimately familiar with. The tree and its placement did not create any line of sight problems for the road ahead for either east or west traveling vehicles. In fact, the only line of sight problem that this particular tree caused was from those traveling off of Paynes Branch Road on to the State Highway. Thus, the finding that this position of this tree created a trap is clearly in error and subject to review.

Basic negligence law in the Commonwealth, as codified in Commonwealth, Transportation Cabinet , Department of Highways v. Shadrick, 956 S. W. 2d 898 (Ky. 1997) and then as modified in Commonwealth of Kentucky, Transportation Cabinet, Department of Highways v. Babbitt, 172 S. W. 3d 786 (Ky. 2005) require a Claimant to prove in the affirmative, that there is duty on the part of the Cabinet, a breach of that duty, and a consequential injury. The duty has generally been held to be "the public authority having control over a highway has the duty to keep it in reasonably safe condition for travel, to provide proper safeguards, and to give adequate warning of dangerous conditions in the highway. ... However, it is the duty to furnish adequate protection for the general traveling public and users of the highway facilities". In Babbitt, noting that in

Shadrick, the same Court reaffirmed the Departments duty to exercise ordinary care to maintain the Commonwealth's highways in reasonably safe condition with the traveling public, the portion of Shadrick which eliminated all duties for those actions that were reasonably unforeseeable to the Commonwealth, limits the duty that when an activity suffered by people not within the responsibility of the Commonwealth, is the direct causal factor in a loss. Shadrick dealt with an obstruction off the travelled portion of the highway.

In the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways v. Guffey 2006-SC-436-DG, the Supreme Court held that stringing a cable across a highway was a clearly foreseeable act, even if the Commonwealth did not string the cable. Therein, actual notice of the existence of the cable was imputed to the Cabinet, which in affect defined what is necessary for the Board of Claims to determine that a "trap" had been created and was known by the Cabinet. The facts herein are easily distinguishable from Guffey.

Herein, the "trap" as improperly defined by the Board of Claims, was a tree by which thousands of persons traveled each day without danger or limitation of those persons traveling safety. If the tree created a danger known to the Commonwealth, it was for those persons only entering on to Kentucky 1304 from Paynes Branch Road. The Board of Claims made no finding of a line of sight problem nor that the tree was too close to the road by virtue of some administrative regulation or rule. Quite to the contrary, the Board of Claims found that the tree was in excess of 2 ½ feet off from Kentucky 1304 which was a highway of appropriate length and width.

Lastly, while the Board of Claims, as a trier of fact, is given due deference as to which facts it chooses to opine are true, it is interesting to note that no other proof was made available at the trial of the case as to the phantom vehicle approaching Mr. Johnson's vehicle which allegedly caused him to swerve "without skid marks" into the tree out of his travel lane. Further, the Board of Claims chose to disbelieve the investigating Kentucky State Trooper named William Elliot, who testified that the speedometer was stuck at 65. The Board of Claims, in an effort to discount Trooper Elliot's testimony, stated that he was "foggy" as to other issues. The particular facts that the Board of Claims opined that the Trooper was "foggy" concerning were whether or not photo's had been taken (it was dark), who was at the scene (he did not arrive first), measurements that he either did or did not take at the scene but that he was completely certain that the speedometer in the Johnson vehicle was stuck at 65. While again it is the purview of the Board of Claims to review such testimony and make conclusions as to same, it is respectfully submitted that since the Board of Claims requires a litigant to affirmatively prove facts that both create the duty and show a causal relation between the breach and a consequential injury, that a finding of a speedometer being at 65 is inconsistent with the driver's testimony that he was only going 55; that the phantom vehicle, while believe to be in existence by the Kentucky Board of Claims, is subject to great doubt and that the alternative theory of Mr. Johnson simply falling asleep is one which the Board of Claims should have found as probative.

All that having been said, the Commonwealth agrees that it is to prohibit traps from ensnaring unwary travelers from those types of defects which are obscured from the view of the ordinary traveler. See Dillingham v. Department of Highways, 253 S. W. 2d 256 (Ky. 1952). Dillingham involved shoulders of the highway which are within the purview of that which the Commonwealth must exercise due and ordinary care in regards to. However, again, the finding of the Board of Claims was that this particular tree was 32 inches off of the traveled and shoulder portion of the highway and therefore, not a part of the shouldered system. Shadrick has specifically limited imposing a duty for all obstructions at or near the roadway, including the shoulders, when the Shadrick Court "declined to extend the law to guaranteeing that every right-of-way will be completely free of all obstructions, whether or permanent or transitory, for motorist who operate their vehicles into that area of the roadway". The Court correctly opined there that the Cabinet cannot be an insurer against all accidents which occur from defects or dangerous conditions on a public highway, but that its duty is to exercise ordinary care to prevent injury. See also Schrader v. Commonwealth, 218 S. W. 2d 406 (Ky. 1949). Thus, the Board of Claims has plenty of law to determine whether or not a tree, which had existed in that location for a substantial period of time, and which the Claimant could not prove had been the instrument of any other single car crash or accident previously, actually created a dangerous trap or defect within the highway, for which the Cabinet should be held responsible.

The Cabinet believes that the tree was not even an obstacle in the shoulder of the road because it was 32 inches off the shoulder of this particular roadway. The Cabinet grants and admits that the tree created a dangerous condition but only for those approaching Kentucky 1304, not those traveling on Kentucky 1304.

The duty as set forth by the Cabinet was incorrect.

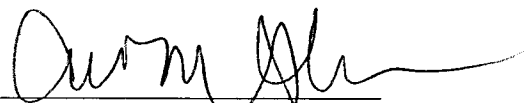
Therefore, this Court as a Reviewing Court, just like the Knox Circuit court in Kentucky Board of Appeals, is free to determine whether or not the record and findings are substantiated as set forth in the appellate limitations in KRS 44.1 40(5).

It is respectfully submitted therefore, that the Judgment of the Kentucky Board of Claims was in error and that this Court should review that legal conclusion based on the facts and determine that the findings are not supported by the record herein.

CONCLUSION

It is respectfully submitted that all Reviewing Courts are permitted to determine whether or not the imposition of the duty in a particular case was error and not supported by substantial evidence within the record. It is Therefore respectfully submitted that the duty as imposed by the Kentucky Board of Claims and as affirmed by two review courts therein, was clearly erroneous, not supported by the facts, and misstated by all previous Courts and that therefore, the Judgment of the Kentucky Board of Claims should be vacated.

Respectfully Submitted,



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