

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

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SUPREME COURT

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

VS. **KNOX CIRCUIT COURT**
 2004-CI-00606

FILED
SEP 29 2008
SUPREME COURT CLERK

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

APPELLEES

**BRIEF FOR THE APPELLEES, BILL JOHNSON, INDIVIDUALLY, AND
BILL JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF ANGELA JOHNSON**

CERTIFICATE OF SERVICE

I, Denise M. Davidson, hereby certify that the Brief of Appellees, Bill Johnson, Individually and Bill Johnson, as Administrator of the Estate of Angela Johnson, in the above styled case has been served according to rule by placing same, postage prepaid, in the United States mail on the 26th day of September, 2008. The original and ten copies of the Brief to the Supreme Court of the Commonwealth of Kentucky, 209 Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601; one copy to the Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40622; one copy to the Movant, by and through its attorney, Hon. Andrew M. Stephens, 107 Church Street, Suite 200, Lexington, Kentucky 40507; one copy to the Kentucky Board of Claims, by and through its counsel, Hon. G. Mitchell Mattingly, 130 Brighton Park Blvd., Frankfort, Kentucky 40601; and Hon. Gregory A. Lay, Judge, Division One, Knox Circuit Court, Knox County Courthouse, 401 Court Square, Barbourville, Kentucky 40906, this the 26th day of September, 2008.

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DENISE M. DAVIDSON

STATEMENT CONCERNING ORAL ARGUMENT

The Appellees, Bill Johnson, Individually, and Bill Johnson, as Administrator of the Estate of Angela Johnson, do not request oral argument. The prior pleadings and briefs in this case provide sufficient factual information and legal arguments for the court to decide this case without oral argument.

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THE BOARD OF CLAIMS DID NOT ERR IN
THEIR FINDING AND PROPERLY ENTERED
AN AWARD WHICH IS SUPPORTED BY
SUBSTANTIAL EVIDENCE

Commonwealth, Transportation Cabinet, Department of Highways
v. Shadrick, Ky., 956 S.W. 2d 898 (1997) 4, 7, 8

Mullins v. Commonwealth Life Ins. Co., Ky.,
839 S.W. 2d 245, 247 (1992) 4

Commonwealth of Kentucky, Transportation Cabinet,
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COUNTERSTATEMENT OF THE CASE

A. Procedural Background.

This is an appeal from an Order of the Court of Appeals and the Knox Circuit Court Affirming Judgment of the Kentucky Board of Claims. The Court of Appeals in affirming found that there was abundant evidence to support the facts found by the Hearing Officer which were accepted and adopted by the Board. The Court went on to find that there was no basis to disturb these findings. The Court acknowledged that the Transportation Cabinet is not automatically liable every time a motorist drives off the traveled portion of the highway, but agreed with the Board that under the facts of this case, the Commonwealth had a duty to the Johnsons and that the Commonwealth breached that duty.

This appeal addresses three consolidated claims filed with the Board of Claims which arose out of a motor vehicle accident which occurred on Kentucky Highway 1304, Knox County, Kentucky, on September 6, 1999 resulting in the death of Angela Johnson. In Claim No. 00-777, Kelly Jones, as Next Friend of Austin Johnson, a minor child, asserted a claim for the minor child's loss of love, affection and companionship of his mother, Angela Johnson. The appellee, Bill Johnson, individually, asserted a claim for loss of consortium of his wife, Angela Johnson, in Claim No. 00-778. The appellee, Bill Johnson, in his capacity as Administrator of the Estate of Angela Johnson, initiated Claim No. 00-779.

Pursuant to Recommended Order, Findings of Fact, Conclusions of Law, and Judgement, the hearing officer recommended that Claim Nos. 00-777 and 00-778, the claim of the minor, Austin Johnson, and any claim by Bill Johnson, for loss of consortium, be dismissed as a matter of law.

The hearing officer, with regard to Bill Johnson's claim individually, noting that Mr. Johnson had suffered personal injury and property damage as a result of the accident and that there were collateral offsets which covered all damages with the exception of a Five Hundred (\$500.00) Dollar insurance deductible for the loss of his vehicle, recommended a judgment be entered for Bill Johnson, individually, in the amount of Five Hundred (\$500.00) Dollars.

The hearing officer, with regard to the claim filed on behalf of the Estate of Angela Johnson, noted that the total loss of earnings for Angela Johnson was One Million One Hundred Ninety Thousand (\$1,197,000.00) Dollars, in addition to funeral and monument expenses for a total loss of One Million Two Hundred Nine Thousand One Hundred Twenty Two (\$1,209,122.20) Dollars. It was further noted that the maximum amount to be recovered by the Estate of Angela Johnson before the Board of Claims is Two Hundred Thousand (\$200,000.00) Dollars. Thereafter, the statutory cap was reduced by collateral offset of Forty Nine Thousand Seven Hundred Fifty (\$49,750.00) Dollars for the sum received from the insurer of the Johnson's vehicle. The hearing officer recommended that judgment be entered for Bill Johnson, as Administrator of the Estate of Angela Johnson, in the amount of One Hundred Fifty Thousand, Two Hundred Fifty (\$150,250.00) Dollars. The Board of Claims granted

certain requests for payment of damages for the reasons set forth in the recommended Order submitted by the hearing officer and an Award of One Hundred Fifty Thousand Seven Hundred Fifty (\$150,750.00) Dollars was entered.

B. Factual Background.

Bill Johnson ("Mr. Johnson") and Angela Johnson ("Mrs. Johnson") were husband and wife and the parents of Austin Johnson ("Austin"). At the time of the accident, Angela Johnson was five (5) months pregnant with the couples' second child.

On September 6, 1999, Mr. and Mrs. Johnson were traveling on Kentucky Highway 1304 at which time they encountered a vehicle traveling in an easterly direction. Said vehicle crossed the center line of the roadway forcing Mr. Johnson to take evasive action to avoid the oncoming vehicle. This area of the roadway was particularly dark and the only lights were those from the oncoming vehicle and the Johnson vehicle. When Mr. Johnson swerved to avoid colliding with the oncoming vehicle, he left the roadway and struck a large forty-two (42) inch sycamore tree which was located only thirty-two (32) inches from the paved edge of the highway. There is no dispute that Kentucky Highway 1304 is maintained by the Appellants, Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, and that the tree was located in the right-of-way maintained by the Appellants. Mrs. Johnson was killed instantly as a result of the collision and Mr. Johnson sustained several injuries.

Within days of this accident, on September 14, 1999 the Department of Highways had the tree removed. Although the highway employee testified that the tree

had been designated and marked to be removed prior to this accident, he could not explain if the forty-two (42) inch sycamore was added to the letter to the contractor requesting removal before or after the accident. Testimony of Gillis Douglas Barnett, Board of Claims Transcript, pp. 179-193.

Claims were filed in the Board of Claims for damages compensable under KRS 44.070. It is undisputed that the cumulative value of all claims asserted in the Board of Claims exceed the maximum which may be awarded.

ARGUMENT

THE BOARD OF CLAIMS DID NOT ERR IN
FINDING THAT THE COMMONWEALTH
HAD A DUTY AND THAT THE COMMONWEALTH
BREACHED ITS DUTY RESULTING IN
DAMAGES TO THE JOHNSONS

Pursuant to the Board of Claims Act created by statute and as fully set out at K.R.S. 44.070 et seq., it is established that persons may recover damages sustained to person or property where such damage is incurred as a proximate result of an act of negligence on the part of the Commonwealth. Further, to establish actionable negligence on the part of the Department, a claimant must establish: (1) a duty on the part of the Department; (2) a breach of that duty; and (3) consequent injury.

Commonwealth, Transportation Cabinet, Department of Highways v. Shadrick, Ky., 956 S.W. 2d 898 (1997); Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W. 2d 245, 247 (1992).

It is the duty of the Department, with respect to the maintenance of roads, to

maintain them in a reasonably safe condition for the traveling public exercising due care for their own safety. Commonwealth of Kentucky, Transportation Cabinet, Bureau of Highways v. Roof, Ky., 913 S.W. 2d 322 (1996).

Appellant alleges that the Board of Claims acted without or in excess of its power in adopting the findings. The Appellant now is attempting to re-litigate the facts of this case in an attempt to get this Court to act as a fact finder and find facts different than those found by the Hearing Officer.

Appellant contends that the Kentucky Board of Claims acted without or in excess of its powers and that the findings of fact do not support the award in accordance with K.R.S. 44.140. First, a duty on the part of the Commonwealth to maintain Kentucky Highway 1304 most certainly existed in that the tree was located on the right-of-way maintained by the Commonwealth. Secondly, Appellees have clearly established the violation of the duty owed by Appellants to Mr. and Mrs. Johnson. Finally, it is undisputed that Mrs. Johnson suffered fatal injuries as a consequence of the vehicle accident subject of this action. Thus, Appellees submit that the Board did not err in its finding of a duty owed and a breach of that duty.

In the instant action, while traveling in an unlighted section of narrow, curvy roadway, as the Johnson's vehicle was traveling in a westerly direction, an approaching vehicle was rounding out of a left hand curve and crossed the center line into Mr. Johnson's lane of travel. Mr. Johnson testified that he had no choice but to swerve to

his right to avoid the oncoming vehicle. Upon swerving to avoid a collision, he left the roadway and collided with a large forty-two (42) inch sycamore tree which was located only thirty-two (32) inches from the paved edge of the highway. Appellant has attempted to diminish, if not dissolve, the duty owed by the Commonwealth by misstating that Mr. Johnson left the traveled surface of the highway and struck a tree which was located some 8 to 10 feet off the traveled surface of the highway. It was the testimony of Trooper Jeff Anderson that the tree was "exceptionally close to the edge of the roadway" and he agreed that thirty (30) inches sounds fairly accurate as to the distance from the edge of the roadway to the tree. Board of Claims, Transcript of Hearing, p. 96. Mr. Johnson testified that "--it was about nine feet from the edge of the tree to the center line . . ." and that from the pavement to the tree [stump] was thirty (30) inches, thirty-two (32) inches. Board of Claims, Transcript of Hearing, p. 133, 134. The testimony of Kenneth Robert Agent, an accident reconstructionist, was that he measured the distance from the tree to the edge of the pavement to be thirty (30) inches. Board of Claims, Transcript of Hearing, p. 266. Finally, post collision measurements noted that the collision with the tree occurred at the front center of Mr. Johnson's vehicle. The width of Mr. Johnson's lane of travel was approximately nine (9) feet and the standard width of his S10 Blazer was six (6) feet. Behind the tree was a small grassy area which lead to a slight embankment into a small creek bed. This tree was the only impediment on the right-of-way.

The act or omission to act by the Commonwealth in failing to maintain the right-of-way of Kentucky Highway 1304 by not removing the large forty-two (42) inch sycamore tree situated within thirty-two (32) inches off the traveled portion of the highway, coupled with the fact that the tree was located in a particularly dark location and not readily seen by drivers traveling at night, constituted a dangerous condition in the shoulder of the roadway-tantamount to a trap-about which the Commonwealth knew or should have known.

In its brief before the Court of Appeals Appellant concedes under KRS 44.140, the Trier of Fact is better able to determine such issues as facts and whether or not such facts limit themselves to a finding of liability and that unless the Board of Claims acted in excess of its authority that a reviewing court shall not disturb the same. Evans vs. Commonwealth, 459 SW2d 761 (Ky. Ct. App. 1970). But here, Appellant wants this Court to act as the fact finder. (See Appellant's Brief before the Court of Appeals, page 8.) Here, Appellant has eliminated the concession the Trier of Fact is better able to determine the issues as to facts and that the findings of the Trier of Fact the Board of Claims, shall not be disturbed unless the Board of claims acted in excess of its power.

Appellant's arguments were addressed first by the Knox Circuit Court and the second time by the Court of Appeals.

In its brief, the Appellant cites Commonwealth, Transportation Cabinet, Department of Highways vs. Shadrick, 956 SW2d 898 (Ky. 1997) for the proposition that it owes no duty to motorists, such as the Johnsons, who collide with obstructions

that are in plain view in the right-of-way. Appellant's argument is misguided. The Court of Appeals in discussing the Shadrick case along with Dillingham vs. Department of Highways, 253 SW2d 256 (Ky. 1952) and Falender vs. City of Louisville, 448 SW 2d 367 (Ky. 1969) held that Shadrick did not completely exonerate the Cabinet when a hazard is in plain view even when the driver is contributorily negligent. In the case at hand the Hearing Officer, considering the evidence and found that Bill Johnson, was forced off the road by an oncoming vehicle. That as a result the Johnson vehicle collided with the tree which was located only 32 inches from the paved edge of the highway. That Mr. Johnson was unable to see the tree due to the fact that it was dark and the highway was curvy. That the tree located only 32 inches from the pavement represented a "trap".

The Court of Appeals acknowledged that there was substantial evidence to support the Hearing Officer's findings in this case. The Court of Appeals cited Transportation Cabinet vs. Thurman, 897 SW2d 597 (Ky. App. 1995), for the proposition that a finding of the Board will not be disturbed if it is supported by substantial evidence.

This Court, in Shadrick did not hold that the Cabinet could never be liable for conditions on the highway right of way that are in plain view. In fact, this Court held that whether a particular shoulder is "inherently dangerous", a "trap", and/or "not reasonably safe" is subject to a very careful examination of the particular facts of a situation. Shadrick, supra. In this case, the parties acknowledge that the highway was particularly

dark at the time of the accident. That the tree was obscured from the view due to the design of the roadway and darkness of the highway. There is no evidence in the record that Bill Johnson, the driver of the vehicle, saw the tree or that he could have seen the tree before the collision. Accordingly, the Hearing Officer found that given the narrowness of the roadway at the scene, the fact that this was a curvy roadway at or near the scene, given that the tree was in close proximity to the roadway and that this particular area of the roadway was inherently dangerous that the tree constituted a trap to the Johnsons. The Hearing Officer went on to find that the Cabinet knew or should have known of the possibility for the traveling public to leave the roadway, as occurred in this case, at or near the area of the tree based on the layout of the roadway. That the Cabinet should have known that the tree, at this particular location, presented a danger and thus the Cabinet had a duty to remove it or at least warn the traveling public of the danger which is failed to do. The Hearing Officer found that the Cabinet breached the duty owed and that the breach was the proximate cause of the damage sustained by the Johnsons. The Hearing Officer's findings as adopted by the Board of claims and affirmed by Knox Circuit Court and the Court of Appeals are supported by substantial evidence and shall not be disturbed on appeal.

CONCLUSION

Based upon the foregoing, Respondent submits that the Court of Appeals finding that there was abundant evidence to support the facts found by the hearing officer is supported by substantial evidence and, therefore, must be affirmed.

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