

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002452-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 98-CI-00634

SHERRY HALL AND
THE KENTUCKY BOARD OF CLAIMS

APPELLEES

OPINION
REVERSING AND REMANDING
* * * * *

BEFORE: BUCKINGHAM, McANULTY, and MILLER¹, Judges.

BUCKINGHAM, JUDGE: Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, appeals from an order of the Floyd Circuit Court reversing a decision of the Board of Claims.

We reverse and remand.

The appellee, Sherry Hall, was involved in a single-vehicle accident at approximately 9:00 p.m. on May 13, 1995, on U.S. Hwy. 23 in Pike County, Kentucky. The accident occurred in

¹ This opinion was prepared and concurred in prior to Judge Miller's

the area called Foxcroft near mile marker 22. According to Hall, the accident was caused due to rocks that had fallen from the nearby hillside onto the roadway. In her testimony before the Board of Claims, Hall stated that she attempted to avoid hitting the rocks but was unsuccessful. She stated that the rocks bent the floorboard of her automobile and that she sustained a severe injury to her foot. In fact, Hall had surgery on her foot as a result of the accident.

On January 22, 1996, Hall filed a claim against the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, with the Board of Claims. After hearing testimony and receiving evidence, the Board entered an order on July 16, 1998, dismissing Hall's claim. The Board stated it found that Hall failed to present any evidence that was competent in nature to show that some action should have been taken by the Defendant to alleviate the high rock slide propensity of this particularly high cut wall. Additionally, the Board found that the Plaintiff failed to show that upon receiving due notice of the slide that the Defendant failed to clean it up. Further, the Board held as follows:

Because the Plaintiff failed to provide sufficient proof of an acts of omission to clean up an existing slide, nor failed to show by any reasonable measurable standard whatsoever that the Defendant was negligent in maintaining this particular stretch of highway in a reasonably safe condition, the

retirement effective January 1, 2003.

Board finds that the Plaintiff's claim must be fail.

In denying Hall's claim, the Board also stated that A[t]he mere occurrence of an unfortunate incident does not automatically create the existence of liability on the part of the Defendant, regardless of the financial, emotional or sentimental impact that it might have upon a specific individual or group of individuals.@

In support of its order dismissing Hall's claim, the Board relied on the testimony of John Bowling, an engineer with the highway department who was an authorized representative for the preservation of Transportation Cabinet records. Bowling acknowledged that there had been a high number of complaints of rocks on the roadway in the Foxcroft area. Bowling also testified that once the highway department received notice of rocks on the roadway in this area, it immediately appeared on the scene and cleared the roadway.

Following the dismissal of her claim by the Board of Claims, Hall appealed to the Floyd Circuit Court. See KRS² 44.140(2). The matter was submitted to the circuit court for ruling following the submission of briefs by the parties. In an order entered on October 23, 2001, the circuit court found that Athe Kentucky Board of Claims acted in excess of its powers in violation of the provisions of KRS 44.070, in that the findings

² Kentucky Revised Statutes.

of fact entered by the Kentucky Board of Claims are not supported by evidence in the record.@ In support of its ruling, the circuit court stated that it found that ~~A~~the factual inconsistencies in the Order of Dismissal of the Kentucky Board of Claims, as pointed out by the Plaintiff/Appellant in her brief, are compelling, and serve as grounds to reverse the decision herein.@ No further explanation was given by the circuit court for its ruling. The highway department then appealed that order to this court.

Although the highway department filed a brief herein, Hall did not. Such was required by CR³ 76.12(1). Due to the failure of Hall to file an appellee's brief, CR 76.12(8) is applicable. That rule provides in pertinent part as follows:

If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

CR 76.12(8)(c). Having reviewed the record and considered the highway department's brief, we elect to reverse the order of the circuit court because the highway department's brief reasonably appears to sustain such action. CR 76.12(8)(c)(ii).

KRS 44.140(5) provides in pertinent part that the circuit court was to dispose of Hall's appeal in a summary manner

³ Kentucky Rules of Civil Procedure.

and was to determine whether or not the Board acted without or in excess of its powers, whether or not the award was procured by fraud, whether or not the award was in conformity to the provisions of KRS 44.070 to 44.160, and whether or not the findings of fact by the Board supported the award. The findings and determinations of the Board are conclusive if they are supported by substantial and competent evidence. Pemberton v. Commonwealth, Dept. Of Mental Health, Ky., 398 S.W.2d 487, 488 (1966); Com. of Ky. Transp. Cabinet v. Shadrick, Ky., 956 S.W.2d 898, 901 (1997). Other than to state that the Board's findings were not supported by the evidence in the record, the circuit court did not elaborate and give specific reasons for its ruling.

In Smith v. Commonwealth, Department of Highways, Ky., 468 S.W.2d 790 (1971), the court held that the highway department is not an insurer against accidents arising from defects or dangerous conditions on the public road and that its duty is to exercise ordinary care to prevent injury from defects in the highway. @ Id. at 792. Further, in a similar case involving rocks on the roadway, the court in Evans v. Commonwealth, Ky., 459 S.W.2d 761 (1970), stated that [t]o impose liability, knowledge of the unsafe condition, or that it existed for a sufficient length of time for such knowledge to have been obtained by the use of ordinary care, must be shown. @ Id. at 762.

In the case *sub judice*, the Board made a factual determination that the Department of Highways was not negligent.

This finding of fact was supported by evidence that ~~A~~ROCK FALL AHEAD@signs were present at each end of the entrance to the Foxcroft area, that Hall was familiar with the area and had previously seen rocks on the roadway, and the lack of evidence that the Highway Department was aware of this particular rock slide prior to the accident. Under these circumstances, we conclude that the circuit court substituted its judgment for that of the Board. Pursuant to the Pemberton and the Shadrick cases, such was improper.

Therefore, pursuant to CR 76.12(8)(c)(ii), the order of the circuit court is reversed and the case is remanded for the entry of a judgment affirming the Board of Claims decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE:

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