

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001136-MR

COMMONWEALTH OF KENTUCKY,  
CABINET FOR FAMILIES & CHILDREN

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 00-CI-01280

DEJUAN STRATTON, ADMINISTRATOR  
FOR THE ESTATE OF SABRINA FELTS

APPELLEE

OPINION  
REVERSING

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BEFORE: BAKER, GUIDUGLI, AND KNOFF, JUDGES.

BAKER, JUDGE. The Commonwealth of Kentucky Cabinet for Families and Children (the Cabinet) brings this appeal from a May 2, 2002, Opinion and Order of the Franklin Circuit Court. We reverse.

The relevant facts are as follows:

This action is a result of the death of Sabrina Destiny Felts Stratton ("Sabrina"), and on behalf of her Estate. Sabrina died

from injuries sustained at the hands of Sherman Dejuan Davis ("Davis"), the mother, Melissa Felts' live-in boyfriend. The Jefferson Circuit Court later convicted Davis of the murder of Sabrina.

Prior to her death, her maternal grandmother, Deborah Thompson, complained to Child Protective Services ("CPS"), a division of the Cabinet for Families and Children ("Cabinet"), that the child exhibited signs of physical abuse. Upon investigation by CPS, the child was shown to have significant injuries that were suffered while she was in the care of Davis. The mother of the child explained that the injuries were due to the child's frequent falling. However, a doctor who examined Sabrina found the injuries to be too extreme to have resulted from a fall. Consequently, abuse was substantiated, and on February 16, 1994, caseworker Amy Lombard filed a petition with the Jefferson Family Court alleging abuse of the child, naming both Davis and Melissa Felts as the alleged perpetrators. On Monday prior to filing the petition, Lombard interviewed Davis who denied involvement.

On February 16, 1994, by agreement of the natural parents, Melissa Felts and Dejuan Stratton, Sabrina was removed from the mother's house and placed in Dejuan Stratton's custody. On April 27, 1994, Judge Mary Corey, based upon the agreement of the natural parents, returned Sabrina to the home of her mother and Davis.

On May 17, 1994, a caseworker made a home visit where he observed additional injuries to Sabrina's face. The mother explained that the injuries occurred as a result of a fall while playing with a playmate. On May 21, 1994, Sabrina suffered severe head injuries, which resulted in her death.

Franklin Circuit Court Opinion and Order at 1-2.

Dejuan Stratton, administrator for the estate of Sabrina Felts, (Stratton), initiated an action against the Cabinet in the Board of Claims. Kentucky Revised Statute (KRS) 44.070 - .165. Therein, Stratton alleged that the Cabinet's negligence contributed to the death of Sabrina.<sup>1</sup> The Board of Claims concluded that the Cabinet was entitled to "sovereign" immunity and that such immunity had not been waived under the Board of Claims Act. KRS 44.073(13). Stratton sought judicial review of the Board's decision in the Franklin Circuit Court. KRS 44.140. On May 2, 2002, the Franklin Circuit Court entered its Opinion and Order reversing the Board of Claims' decision. The circuit court concluded that the Cabinet's immunity had been waived under the Board of Claims Act. KRS 44.073(2). This appeal follows.

As an appellate court, we step into the shoes of the circuit court and review the Board of Claims' decision for arbitrariness. KRS 44.150; see American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). Arbitrariness has many facets, but relevant to this appeal is a question of law - whether the Board of Claims correctly determined that the Cabinet's immunity was preserved under KRS 44.073. Although based upon different

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<sup>1</sup> We recognize that the Commonwealth of Kentucky Cabinet for Families and Children (the Cabinet) may act only through its agents and/or employees. We, however, refer herein to the Cabinet's negligence rather than the Cabinet's employee's negligence purely for the reader's convenience.

reasoning, we must agree with the Board of Claims that the Cabinet may not be sued under the Board of Claims Act as the Cabinet's alleged negligent acts were discretionary.<sup>2</sup>

Under the Board of Claims Act, the Kentucky legislature expressly waived the sovereign immunity of the state, cabinets, departments, bureaus, or agencies with regard to certain negligence claims filed with the Board. KRS 44.072. In Collins v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet, Ky., 10 S.W.3d 122, 125 (1999), the Supreme Court of Kentucky held that under the Board of Claims Act "any negligence claims against the Commonwealth or its subdivisions must be for the negligent performance of 'ministerial acts.' By implication, the negligent performance of non-ministerial, i.e., discretionary, acts cannot be a basis for recovery under the Act." To summarize, the negligent performance of a ministerial act is the only type of conduct for which immunity has been waived under the Board of Claims Act.

To maintain an action in the Board of Claims, Stratton, therefore, must demonstrate that the Cabinet

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<sup>2</sup> Stratton argues that the issue of whether the Cabinet's alleged negligent acts were discretionary or ministerial is not properly before this Court. Stratton points out that the Cabinet did not "appeal" the Board of Claims' decision that the Cabinet's acts were ministerial. We, however, are specifically authorized to review "errors of law arising in the Circuit Court" by Kentucky Revised Statute (KRS) 44.150 and generally may affirm upon any reason sustainable by the record. Bank One, Pikeville v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet, Ky. App., 901 S.W.2d 52 (1995); see also Kentucky Farm Bureau Mutual Ins. Co. v. Gray, Ky. App., 814 S.W.2d 928 (1991).

negligently performed a ministerial act as opposed to a discretionary act. Id. It is said that a ministerial act is "one where the duty is absolute, certain, and imperative, involving merely the performance of a specific task, and the time, mode, and occasion for its performance are defined with such certainty that nothing remains for the exercise of judgment . . ."; whereas, a discretionary act is said to "generally require deliberation, decision, and judgment . . . ." 63C Am. Jur. 2d Public Officers and Employees §§ 324, 325 (1997).

The circuit court agreed with Stratton that the Cabinet's alleged negligence constituted a ministerial act:

Pursuant to 905 KAR 1:330 Section (7) investigators are required to conduct specific investigations and determine if abuse has, in fact, occurred.

. . . .

The Petitioner specifically alleged the investigator did not interview individuals the regulation mandates were to be interviewed. The acts to be performed by the investigator are specifically defined in the regulation. Furthermore the regulation states the investigator shall do these acts. The investigator does not exercise "any significant judgment, statutory interpretation, or policy-making decision" when deciding whether the interviews are to be conducted. *Collins*, 10 S.W. [sic] 124. Instead, the investigations only required attention to specific details. *Id.* Thus, pursuant to *Collins*, the acts are ministerial. Accordingly, sovereign immunity was waived and the dismissal by the Board was in error.

Franklin Circuit Court Opinion and Order at 4-5. As to the ministerial nature of the Cabinet's alleged negligence, Stratton more specifically argues:

Under that administrative regulation, it is clear that the Cabinet's social workers have a clearly defined duty to investigate and interview all persons relevant to allegations of abuse. This regulation does not vest in the case worker discretion as to how to conduct an investigation. It requires that certain minimal acts be done, such as interviewing appropriate household and family members. These duties are ministerial, and must have a minimum requirement of adequacy for the directives in the regulation to have any meaning at all. . . .

. . . In the case at bar, a Courier Journal newspaper article states Sabrina Felts indicated to Detective Randy Meurer that her mother's live-in boyfriend, Sherman Dejuan Davis, was her abuser. See May 29, 1994 Louisville Courier Journal Article, attached as Tab C to the Appendix. Amy Lombard, the original Child Protective Services investigator, also filed a petition with the Jefferson Family Court alleging physical abuse of the child, naming Davis and Melissa Felts as alleged perpetrators on February 16, 1994. On the Monday prior to filing the petition, Lombard conducted a cursory interview of Davis, who denied involvement at that time, assuming the ongoing social worker would follow-up on any additional investigation. CPS performed no further interviews or investigation of Davis beyond the single interview. Jeff Murphy ("Murphy"), the ongoing worker after Lombard, even observed additional injuries to Sabrina's face in a May 17 [sic] 1994, home visit. Yet, Murphy made no further inquiries beyond an explanation from Sabrina's mother that the injuries occurred

as a result of a fall while playing with a playmate. Thus, 905 KAR 1:330 mandated CPS to do further interviews of Sherman Dejuan Davis, as either a household member or alleged perpetrator. Even if CPS did not consider Davis as the perpetrator, then it was still mandated to interview Detective Meurer, as a collateral contact, in order to uncover his allegation that Davis was the perpetrator. . . . In the present case, it is clear that the validity and severity of the abuse report had not been fully established. Likewise, the case worker could not conclusively identify the abuser. Yet, no further inquiry was made as to Davis, a **resident** in the home with Sabrina. Under these circumstances, there is a clear ministerial duty to explore the collateral contacts in the household. However, this was not done. Further, given all the facts available to CPS, Davis was the most likely suspect regardless of further investigation. Therefore, there were fixed and designated facts which mandated the Cabinet to interview Davis and/or Detective Meurer in the Felt's [sic] case. Thus, such actions were absolute, certain and imperative, meaning they were ministerial, even as defined by Appellant.

. . . In the case at bar, the Appellant's actions were mandated by 905 KAR 1:330. Thus, Appellant had no discretion as to whether or not to act. . . . CPS's discretion is limited to the means and methods of each interview, but the interview itself is mandated, leaving CPS with no discretion as to whether or not to act, by doing further interviews. Thus, the Appellant's conduct is clearly not discretionary, but ministerial.

. . . Appellant indicated the social workers only conducted the interviews "they deemed necessary." However, the social workers were mandated, by 905 KAR 1:330, to further interview Davis and/or Detective

Meurer given the clear facts of the Felts case. The social workers had no discretion to deem an interview of Davis and/or Detective Meurer necessary or unnecessary. They had a duty to do so as imposed by 905 KAR 1:330, yet failed to perform that duty.

Moreover, there is a question of fact as to whether Amy Lombard ("Lombard"), the original CPS investigator, knew Sabrina Felts implicated Davis at the outset, further demanding that interviews be done and that Appellant should have informed Judge Corey of these allegations.

Brief for Appellee at 12-16 (citations omitted).

Essentially, Stratton maintains that the Cabinet has no discretion upon whether to conduct the interviews under 905 Ky. Admin. Regs. (KAR) 1:330 Section 7. According to Stratton, the Cabinet's only discretion is the manner in which the interviews are conducted. Thus, Stratton argues that 905 KAR 1:330 Section 7 mandates the Cabinet to conduct certain interviews and that these interviews constitute ministerial acts. Upon a reading of the relevant portions of 905 KAR 1:330 Section 7, we are compelled to disagree.

905 KAR 1:330 Section 7 states in part:<sup>3</sup>

Initial investigation. Information necessary for determining the validity of the report, and if valid, the existence of imminent danger and risk to the child shall be obtained during the investigation.

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<sup>3</sup> We observe that 905 Ky. Admin. Regs. (KAR) 1:330 was amended effective March 23, 1994; however, we only cite to the previous version of 905 KAR 1:330 Section 7, as did the circuit court and the parties. Upon review of the March 23, 1994, amendment to section 7, we think it inconsequential to the disposition of this appeal.

Investigations shall entail face-to-face contact with the alleged victim, if of appropriate age, and if possible, parents or caretakers, appropriate household and family members, and alleged perpetrators shall be interviewed.

(1) When determining if the child or parent or caretaker is interviewed first, consideration shall be given:

- (a) To the nature of the referral;
- (b) Current location of the child;
- (c) Indicated risk to the child; and
- (d) Known violence on the part of the parent.

. . . .

(4) Collateral contacts shall be interviewed if the validity or severity of the report cannot be determined from the interviews. Collateral sources may include:

- (a) Officers of the court;
- (b) School personnel;
- (c) Neighbors;
- (d) Medical personnel;
- (e) Law enforcement officers; and
- (f) Personnel of other agencies.

We interpret 905 KAR 1:330 Section 7 as vesting considerable discretion in the Cabinet upon not only the means of conducting the interviews but upon whether to conduct the interviews in the first instance. The regulation specifically states that face to face contact with the victim is required only if the victim is of appropriate age and that interview with the parents, caregiver, appropriate household and family members, and alleged perpetrator is required only if possible. By utilizing the terms "if possible" and "if of appropriate

age," the regulation clearly vests with the Cabinet great latitude in deciding whether to conduct such interviews. See Collins, 10 S.W.3d 122. We believe such latitude transforms the interviews into discretionary acts. We are buttressed in our interpretation by subsection (1) of 905 KAR 1:330 Section 7, which sets forth factors to be considered by the Cabinet when deciding whether to conduct an interview of the child, parent, or caretaker. Additionally, under subsection (4), collateral contacts are required to be interviewed only if "the validity or severity of the report cannot be determined from the interviews." We think a determination of the validity or the severity of the report necessarily involves the exercise of pure judgment. See Collins, 10 S.W.3d 122.

Upon the whole, we hold that interviews under 905 KAR 1:330 Section 7 are discretionary acts; therefore, the Cabinet is immune from suit for negligent performance of same under the Board of Claims Act.

We consider the Cabinet's remaining arguments moot.

For the foregoing reasons, the Opinion and Order of the Franklin Circuit Court is reversed.

ALL CONCUR.

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