

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001341-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 99-CI-00892

ROBIN L. BABBITT, SPECIAL ADMINISTRATOR
OF THE ESTATE OF MICHAEL ROY BENDER;
JANE FOLEY NASH, SPECIAL ADMINISTRATOR
OF THE ESTATE OF CECILIA ANN BENDER;
LARRY LOGSDON; AND
KENTUCKY BOARD OF CLAIMS

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BAKER, BARBER, AND JOHNSON, JUDGES.

BARBER, JUDGE: The Appellant, Commonwealth of Kentucky, Transportation Cabinet, Department of Highways ("the Cabinet"), seeks review of a Judgment and Order of Remand of the Madison Circuit Court, in this Board of Claims appeal, arising out of a 1989 motor vehicle accident. The Appellees are Robin L.

Babbitt, Special Administrator of the Estate of Michael Roy Bender, Jane Foley Nash, Special Administrator of the Estate of Cecelia Ann Bender, Larry Logsdon, and The Commonwealth of Kentucky Board of Claims ("the Board"). Finding no error, we affirm.

On June 5, 2002, the trial court entered Judgment and Order of Remand:

This matter is before the Court by way of Plaintiff's appeal from a decision of the Board of Claims. The Court having reviewed the record, the relevant law, and having had the opportunity to review memorandum of counsel, hereby ORDERS, ADJUDGES, and RULES as follows:

This action involves a single vehicle accident which occurred on I-75 in Madison County, Kentucky. The driver, Judy Logsdon, lost control of the vehicle, left the road and crashed into a rock embankment. Several passengers were either severely injured or killed. There was a factual finding that both Judy Logsdon and the Commonwealth was negligent in not placing a guardrail to protect drivers and passengers from just such an occurrence. The hearing officer also apparently found that the vehicle manufacturer was negligent due to the construction of the motor home. This finding seemed to be based more on conjecture than evidence in the record. Despite the finding of negligence on the part of the Commonwealth, the hearing officer also found that there was no duty owed the Plaintiffs by the Commonwealth. A review of the record makes it clear that the hearing officer improperly relied upon an intervening cause analyses [sic] and the factors listed in NKH Hospitals, Inc. v. Anthony, Ky., 849 S.W.2d 564 (1993).

Insomuch as Judy Logsdon's negligence was the original act of negligence, the Commonwealth's

failure to guard against and mitigate the Plaintiffs' injuries was a supervening cause, i.e., it exacerbated the injuries. NKH at 568; See also Denney v. Buckeye Gas Products, Ky. App., 695 S.W.2d 427 (1985). The application of law by hearing officer was clear error and as such, the Board of Claims acted without or in excess of its power by not making the findings sought herein.

The hearing officer's attempt to blame the injuries sustained on the structure of the vehicle itself are unpersuasive. He seemed to believe that the vehicle was defective because it did not survive the impact with the rock embankment. That finding as well is not supported by substantial evidence. Even though the driver's action was the initial act of negligence, it is almost an absolute certainty that injuries will be greater from colliding into a rock embankment, than if the vehicle had been restrained by guardrail. In fact, the evidence in the record was that the death occurred from the crushing of the vehicle as it impacted the rock. Moreover, to the extent that the statement, "the total cause of the accident was the inattentiveness of the driver" may be considered an apportionment, it is not supported by substantial evidence. Clearly, the cause of the accident is separate from the cause of the injuries.

Therefore, an apportionment of damages is required pursuant to KRS 411.182 and Denney, supra. The Plaintiffs have put sufficient proof in the record to support a claim for damages, and the Board of Claims shall make a factual finding as to the amount of those damages and then apportion them accordingly, pursuant to KRS 411.182. The Board of Claims is bound by the previous finding of negligence on the part of the driver, the Commonwealth, and to the extent the record justifies, of the vehicle manufacturer. Therefore, the Board of Claims shall make a factual finding as to the amount of those damages and then apportion them accordingly, pursuant to KRS 411.182.

Upon review of Defendant's Reply Brief and Cross-Appeal, the Court finds the arguments unpersuasive and each are summarily overruled.

WHEREFORE, this matter is remanded to the Board of Claims. The Board shall make factual findings as to the damages sustained by each Plaintiff herein, and make an apportionment of the percentage of total fault allocated to the responsible party.

On appeal, the Cabinet argues that the circuit court generally ignored the limitations imposed upon it by KRS 44.140(5) in reviewing the Board of Claims' decision, namely: "Whether or not the board acted without or in excess of its powers; the award was procured by fraud; the award is not in conformity to the provisions of KRS 44.070 to 44.160; and whether the findings of fact support the award."

In particular, the Cabinet argues that the circuit court ignored the "correct reasoning of the Kentucky Board of Claims with respect to the duty of the Transportation Cabinet. . . ." as outlined in *Commonwealth of Kentucky, Transportation Cabinet v. Shadrick*.¹ We disagree. *Shadrick* is distinguishable upon its facts. There, the Board determined that *the only negligent participants* were Ms. Shadrick (the decedent and driver) and the owner of a dump truck, who had left it parked in the Highway Department's right-of-way in front of a junkyard, for several months. The Supreme Court held:

¹ Ky., 956 S.W.2d 898 (1997)

We are of the opinion that the Board was not bound, as a matter of law, to conclude that the presence of the truck on the side of the highway in this case, eight and a half feet from the traveled area, violated any duty imposed upon the Department. The truck was in view of the traveler and not so inherently dangerous as to constitute a trap. The truck did not impede the flow of normal traffic. An obstruction in plain view of passing motorists simply does not constitute "a condition not reasonably safe." [Citation omitted].²

By contrast, in the case *sub judice*, the Board specifically found that the "Roadside Design Guides," in effect at the time of the accident, *required* guardrails to be installed in front of the rock embankment, "and the failure to have installed the guardrail is negligence." Moreover, the Board noted that the area of highway in which Logsdon was traveling was "a very dangerous location because of the construction. . . ."

Next, the Cabinet argues that the circuit court erred "by finding actionable negligence" on the part of Cabinet. The circuit court did not "find" negligence, the Board did. The circuit court determined that the Board misapplied the law to the facts in making an intervening/superseding cause analysis. The hearing officer incorrectly identified the Commonwealth's failure to provide a guardrail as the original act of negligence, then erroneously concluded that Judy Logsdon's driving off the road was an intervening and superseding cause. We agree with the circuit court's analysis that Judy Logsdon's

² *Id.*, at 901.

negligence was the original act of negligence, and that the Commonwealth's negligence "exacerbated the injuries."

The Cabinet also asserts that the circuit court impermissibly substituted its findings for those of the Board. We cannot agree. The circuit court remanded the case to the Board to make apportionment findings, pursuant to KRS 411.182, in light of its previous findings that Judy Logsdon and the Cabinet were negligent.³

The Cabinet also argues that the circuit court and the Board of Claims failed to fully consider KRS 44.073(15). The statute provides:

Neither the Commonwealth nor any of its cabinets, departments, bureaus, or agencies or any officers, agents, or employees thereof shall be liable under a respondeat superior theory or any other similar theory for the acts of independent contractors, contractors, or subcontractors thereof or anyone else doing work or providing services for the state on a volunteer basis or pursuant to a contract therewith.

The Cabinet contends that the accident site was under the direct care and control of an independent contractor, The Allen Company; further, that the "clear mandate" of the statute "bars the Transportation Cabinet from liability for acts of its independent contractors." As Appellees note, their theory of recovery against the Commonwealth is premised upon its own

³ And to the extent that the evidence supports it, the court directed findings against the vehicle manufacturer, as well.

independent negligence, not that of The Allen Company. The statute does not apply here.

We affirm the Madison Circuit Court's June 5, 2002 Judgment and Order of Remand.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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