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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002222-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT B. OVERSTREET, JUDGE
ACTION NO. 01-CI-00327

AMBER KISER AND BRADLEY KISER,
CO-EXECUTORS OF THE ESTATE OF
SEBASTIAN KISER, DECEASED; AND THE
KENTUCKY BOARD OF CLAIMS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: The Commonwealth of Kentucky, Cabinet for Health and Family Services, (hereinafter “the Cabinet”), appeals from an order of the Scott Circuit Court affirming the Kentucky Board of Claims opinion awarding Amber Kiser and Bradley Kiser, co-executors of the estate of Sebastian Kiser (hereinafter “the Kisers”), the sum of one hundred thousand dollars ($100,000.00)

for damages resulting from the death of Sebastian Kiser. We affirm.

Amber Kiser and Bradley Kiser are the natural mother and maternal grandfather of Sebastian Kiser. Sebastian was born on November 28, 1992. Sebastian died on May 6, 1993, while in the care of Martha Johnson when she left the infant unattended in a car for an hour. Sebastian had been placed in Johnson's home by Bradley Kiser for daytime child-care services. Johnson's home was certified by the Cabinet as a family child-care home at the time of Sebastian's death. Following Sebastian's death, the Kisers filed a claim with the Kentucky Board of Claims on April 21, 1994, seeking $1,500,000.00 in damages. Their claim alleged that "[t]he Cabinet for Human Resources failed to comply with its own regulations and the statute by [failing to] investigat[e] the complaints against Mrs. Johnson. Had [the Cabinet] made their (sic) investigations, they (sic) would have discovered [Mrs. Johnson] was violating the law and closed her center. Sebastian would not have died." The claim also noted that a claim had been filed against Johnson in the Scott Circuit Court and that Johnson's professional liability policy had paid into the court its policy limits of $500,000.00.

The claim was placed in abeyance pending the outcome of the civil case filed in Scott Circuit Court. That case was

apparently resolved since a hearing was held on the Board of Claims action on January 8, 1998, before hearing officer, Kurt Meier. Following the hearing, the claim was eventually assigned to another hearing officer, Scotty Baesler, who on May 17, 2001, issued his Findings of Fact, Opinion, Conclusions of Law and Judgment. In the fourteen page report, hearing officer Baesler made detailed findings as to facts surrounding the Cabinet's certification of Johnson's home as a family child-care home, her numerous violations of the Cabinet's regulations prior to being certified and her continuous violations thereafter and the facts leading to Sebastian's death. Included in his findings are the following which are necessary to an understanding of this matter:

> 23. The requirements found in the Kentucky Administrative Regulations, 905 KAR 2:100E, Section 2, for certification of small family child-care homes at the time of Martha Johnson's application in March of 1992 consisted of the following:
>
> A provider making application for certification shall:
>
> Complete the DSS-78, Application for Family Child-Care Certification, incorporated by reference herein;
>
> Complete the DSS-79, Self-Check List, incorporated by reference herein;
>
> Meet the minimum requirements as governed by S.B. 211;

Submit a criminal records check for adult persons living in the home;

Comply with provisions set forth in Section 3 and Section 4; and

Within three months of the date of preliminary permission to operate, demonstrate completion of training as governed by S.B.211 and comply with deficiencies cited during the inspection of the home specified in section 2(2).

The minimum requirements as governed by S.B. 211 as referenced in 905 KAR 2:100E, Section 2(1)(c) subsequently were codified as KRS 199.8982(2)(a) effective as of July 14, 1992; they required the following of an applicant:

Submit two written character references;

Provide a written statement from a physician that the applicant is in good health;

Submit to a criminal record check as provided by KRS 17.165;

Provide smoke detectors, a telephone, an adequate water supply, sufficient lighting and space, and a safe environment in the residence in which care is provided;

Provide a copy of the results of a tuberculosis skin test for the applicant administered within thirty days of the date of the application for certification;

Demonstrate completion of a total of at least six hours of training in the following areas within three months of application for certification:

a. Basic health, safety, and sanitation;

b. Recognizing and reporting child abuse;

c. Developmentally appropriate child-care practice.

24. DSS revoked Johnson's certification after the death of Sebastian Kiser, based upon charges that had occurred subsequent to Johnson's certification as a family child-care home for four to six children, and included charges that on the day of Sebastian's death, Johnson was caring for eight or nine children without a license to do so.

25. Apparently the Cabinet for Human Resources viewed this as a violation of the restraining order, even though the Cabinet for Human Resources, through DSS, had issued her a license to operate as a family chi[l]d-care home. On May 10, 1993, four days after Sebastian Kiser's death, DSS revokes Martha Johnson's certification to operate a family child-car[e] home. This was done in accordance with 905 KAR 2:100.

26. Subsequent to Sebastian Kiser's death, Johnson was indicted for reckless homicide in the death of Sebastian, and subsequently entered a guilty plea to the charge.

27. An internal review of circumstances surrounding the care was conduc[t]ed and included within the findings and conclusion were the following:

1. The narrative of the September 9, 1991[,] report is skillfully detailed. No DSS 115, 116 were found in the record. The narrative demonstrates that a finding of neglect was warranted on all children present. The parents

of these children were never contacted although attempts to reach them by phone were vaguely documented.

2. Two different dates are listed as the point of initiation of the November 12, 1991[,] report. The investigation is adequately documented, although there is no notation that Licensing and Regulation was notified. The child's mother reported neglect of her other child but this was never investigate[d].

3. There is an undated sheet of notebook paper in the record documenting a call from another parent making clear allegations of abuse and neglect. Identifying information was given. These allegations were never investigate[d].

4. The parents of the children who were found to be in a neglectful situation on September 9, 1991, were never notified. The narrative states that the worker "attempted unsuccessfully to contact each parent at the numbers given" but does not delineate what actions were taken. Therefore, this worker was interviewed regarding this issue. Home phone numbers were provided by Ms. Johnson for the parents of three children and a work phone was provided for two more. No home visits were attempted nor were letters sent. This is particularly problematic. Two of these children were also found at the residence on May 6, 1993. Another was the victim in the neglect report of November 12, 1991. These parents deserved the opportunity to assess the quality of their child care having the benefit of the information gathered in our investigation. All reasonable efforts

should have been made to contact these parents.

5. On five occasions allegations were reported to the Department which were never investigated. Regarding the anonymous call to Ms. Dailey, Policy #202 allows for this as the caller would not provide the victim's name. However, the location of the center was known to staff so a home visit could have been made in an attempt to investigate. Minimally, documentation of this call should have been made for the record. Most local offices, including this one, do not have their system set up on such a way that the names of day care centers in which investigations have been completed can be cross-referenced with the names of victims. Information is filed by the child's parents' name making it difficult to find all reports that have been investigated regarding a particular center, especially if different child care workers are listed as perpetrators on the DSS 150's. If special files were kept on Day Care Center[s], this would be of great assistance to investigating workers. Notation of this call, at a minimum, could have been placed in such a file. In the other examples (the call from Kathy Flick, separate allegations of neglect of a sibling made by Alishia Bell's mother during the November 12, 1991, investigation and reports made [by] Alexandria Rogers and Robin Baucom) no justification can be given for failure to investigate. Statute does not provide us with a limitation which would allow us to choose not to investigate allegations of past abuse or neglect. While some discretion should be allowed regarding very old reports, staff will be completing investigations on those incidents

> occurring within a year of the date of the fatality.

After making these and other detailed findings, the hearing officer opined that the Cabinet had breached its duties to the Kisers and that that breach was a substantial factor in Sebastian's death. In relevant part, the hearing officer stated the following in the opinion portion of his judgment.

> The Respondent argues as a matter of law, DSS employees were authorized and, in fact, required by existing statutes and regulations to issue a certification to Johnson to operate a[n] FCCH center for four to six children, despite the fact Johnson had numerous violations before and during the application process, and despite the fact her license to operate had been revoked and an injunction entered against her.
>
> The Board disagrees because the Respondent owes a duty to parents (including Claimant) and others who may place their children in a licensed day care center to use at least ordinary care to determine whether the license should be issued.
>
> Further, the Respondent owed a duty to parents and others (including Claimant) to properly investigate any complaints against Johnson's facility to determine, among other things, whether she was meeting the licensing standards.
>
> The Respondent breached their [sic] duty on both counts.
>
> First, regarding the issuance of the license on September 30, 1992, Respondent maintains that all Johnson had to do was to fill out the application, answer all of the questions, including the self-check list, be inspected, and the license had to be issued.

However, the Cabinet at least should have reviewed the answers, checked the references, and asked if anyone in the Cabinet knew anything about Johnson.

This was not a situation where Johnson had been complained of on only one or two occasions. On the contrary, the records show over 100 such incidents. It is inconceivable that with all the history of trouble and investigation, no one would advise Ms. Sheets of the history before she approved the license.

On the self-check list there is a category asking whether any of the staff had been convicted of child abuse or neglect. Obviously, no one from the Cabinet reviewed this list or asked Ms. Johnson about it. Further, if anyone had reviewed the references of Jane Lunsford, questions might have arisen of why there were so many qualifiers in her recommendation.

Claimant had a right to expect more from the Cabinet considering the circumstances. The Cabinet owed a duty to Claimant of treating the license request from Johnson as just another application.

This breach of duties did contribute to the death of Sebastian Kiser and did result in damages to the estate.

However, Mrs. Johnson's negligence in leaving Sebastian Kiser in the car in excessive heat resulting in his death was the major contributing cause of Sebastian's death and to the damages to the estate.

Sebastian Kiser died as a result of the negligence of two parties: Martha Johnson and the Respondent[].

So, K.R.S. 411.82 applies as explained in **Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984)** on page 718, "'Comparative negligence' calls

> for liability for any particular injury in any direct proportion to fault . . .", and page 720, ". . . trier of fact must consider both negligence and causation in arriving at proportion that negligence and causation attributable to claimant bore to total negligence that was a substantial factor in causing the damages . . . ." Kentucky has adopted the comparative negligence doctrine:
>
> > ". . . The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant . . ." K.R.S. 411.182(1)(b).

Having so found the hearing officer then concluded that the total damages to Sebastian's estate was $1,702,231.00. Damages were then apportioned 85% to Johnson and 15% to the Cabinet, leaving the Cabinet responsible for $255,334.65 in damages. Based upon this apportioned amount of liability, the hearing officer entered judgment in favor of the Kisers in the sum of $100,000.00, the maximum recovery permitted by KRS 44.070 at that time.

The Cabinet petitioned the Scott Circuit Court for review of the Board's decision on June 29, 2001. In its petition for review, the Cabinet set forth its position as to why the Board erred in permitting the Kisers to recover in this matter. The Cabinet stated:

> This is an appeal of a decision of the Board of Claims that held the Cabinet liable for damages, the proximate cause of which was the alleged negligence by the Cabinet in

> granting a[n] FCCH certificate, a prerequisite to the lawful operation of a[n] FCCH, to Ms. Johnson. In its decision, the Board of Claims arbitrarily and capriciously extended the Cabinet's duties to investigate a child care provider prior to issuance of a license or certificate and to investigate complaints concerning compliance with licensing or certification standards. The Board of Claims' decision, in essence, requires the Cabinet to ignore the confines of its statutory authority. Because the judgment of the Board of Claims is clearly contrary to fact and law, the Cabinet seeks this appeal and reversal of the board's judgment.

The petition then listed numerous instances where the Cabinet claimed the hearing officer committed error in stating the facts or imposing non-existent duties upon the Cabinet. Following extensive briefing by the parties, on September 17, 2003, the Scott Circuit Court entered an order affirming the findings of fact, conclusions of law and judgment entered by the Board in its May 17, 2001, opinion. An appeal to this Court followed.

On appeal,[1] the Cabinet raises the same five issues it had presented to the circuit court in its petition for review. The Circuit Court's order addressing these issues is set forth in its entirety below:

> This matter presents on this Court's Docket for a decision Affirming or Overruling the opinion of the Commonwealth

[1] This Court entered an order on September 21, 2004, placing the appeal in abeyance pending the Supreme Court of Kentucky's ruling in Stratton v. Commonwealth of Kentucky, Cabinet for Families and Children. The Supreme Court rendered its opinion on January 19, 2006. See Stratton v. Commonwealth, 182 S.W.3d 516 (Ky. 2006).

of Kentucky Board of Claims rendered on May 17th, 2001, awarding Respondents the sum of ONE-HUNDRED THOUSAND ($100,000.00) for negligent damages incurred in the death of young [Sebastian] Kiser.

EXCEPTIONS

Petitioner has set out a number of Exceptions in its petition for review of the Boards Opinion, and these will be discussed individually below.

THE HEARING OFFICER ERRONEOUSLY APPLIED an EMERGENCY REGULATION THAT WAS NOT IN EFFECT AT THE TIME OF [SEBASTIAN] KISER'S DEATH

The exception here is that the hearing officer acted arbitrarily, capriciously, and erroneously in applying an emergency regulation (905 KAR 2:100[E]), not in effect at the time of the negligence herein. While this assertion is true this Court opines that the regulation which was in effect before the one complained of was not materially different than the later one in its application to this case. This Court finds no irregularity in the hearing officer[']s opinion regarding this exception.

THE HEARING OFFICER INCORRECTLY APPLIED KRS 620.050

Nowhere in the hearing officer[']s opinion is there direct evidence that he applied KRS 620.050 at all to the detriment of Plaintiff so this Court cannot say he misapplied same. This Court [f]inds no irregularity in the hearing officer[']s opinion regarding this exception.

THE HEARING OFFICER INCONSISTENTLY AND ERRONEOUSLY OPINED THAT THE CABINET BREACHED TWO SEPARATE DUTIES, THAT HE ARBITRARILY and CAPRICIOUSLY IMPOSED ON THE CABINET

Petitioner excepts to the hearing officer[']s opinion "that the Cabinet owes a duty to a child's parents, and others who may place their children in a licensed daycare center to use at least ordinary care to determine whether the license should be issued." The hearing officer here merely imposed a requirement on the Cabinet to use ordinary care in the granting of licenses for any level of child care facility as well as in its investigatory procedures. This standard is no more restrictive than the "ordinary man" standard that all persons, and entities are subject to in any litigation. This Court [f]inds no irregularity in the hearing officer[']s opinion regarding this exception.

THE HEARING OFFICER FAILED TO APPLY THE DOCTRINE OF SOVEREIGN IMMUNITY TO THE NON-NEGLIGENT MINISTERIAL ACTS OF THE CABINET

Plaintiff excepts to the hearing officer[']s failure to apply the doctrine of Sovereign Immunity to this case claiming that the non-negligent ministerial acts of the Cabinet are thereby exempted from liability. The hearing officer found negligence as the basis for liability, so the Cabinets action was not a non-negligent ministerial act, and is therefore not subject to exception as an application of Sovereign Immunity.

ORDER

Finding no irregularities in any of the Exceptions filed by Petitioner, and finding that the hearing officer[']s opinion was otherwise supported by substantial evidence, and not clearly erroneous this Court does AFFIRM the hearing officer[']s FINDINGS of FACT, CONCLUSIONS of LAW, and JUDGMENT entered on May 17th, 2001.

In Parrish v. Kentucky Bd. of Med. Licensure, 145 S.W.3d 401 (Ky.App. 2004), this Court set forth the standard of review when addressing an administrative agency's decision. Parrish stated:

> [T]his statute essentially reiterates the tripartite test for arbitrariness to be applied in all cases of judicial review of an administrative agency's actions set forth in American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, (379 S.W.2d 450, 456 (Ky. 1964)). This tripartite test requires us to determine whether the agency exceeded its statutory powers, whether it employed proper procedures to provide adequate due process, and whether there is substantial evidence to support the agency's decision. So long as the Board's findings of fact are supported by substantial evidence, they are binding on the reviewing court, even if there is conflicting evidence in the record. (Urella v. Kentucky Bd. of Med. Licensure, 939 S.W.2d 869, 873 (Ky. 1997)). However, matters of statutory construction are subject to *de novo* review. Because statutory interpretation is a matter of law reserved for the courts, we are not bound by the Board's interpretation. (Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327, 330 (Ky.App. 2000)).

Parrish, 145 S.W.3d at 408. With this standard in mind we address the Cabinet's appeal in this matter.

The Cabinet contends the circuit court erred in affirming the Board's opinion because the hearing officer erroneously applied an emergency regulation that was not in effect at the time of Sebastian's death. The Cabinet argues

that Johnson's application for a family child-care home met the regulatory requirements of 905 KAR 2:100E in effect between July 24, 1992, and November 9, 1992. As such, the Cabinet states it was without lawful authority to deny Johnson a certificate to operate an FCCH. Based upon the regulations in effect, the Cabinet contends it had no discretion and was required to grant certification.

We do not accept this blanket proposition set forth by the Cabinet. We believe the Cabinet has discretion in granting a certification based upon the regulations and statutes applicable to issuing certifications and licenses. To hold otherwise would be to deny the Cabinet its basic function in providing protection to the children, including the most vulnerable children, it is mandated to protect. Although the regulations were amended several times in the early nineties (and several times thereafter) the regulations and statutes clearly provide discretion to the Cabinet in the certification process. For example, according to the Cabinet, 905 KAR 2:070 effective, August 16, 1989 through July 24, 1992, speaks in terms of "the application [having] been received and deemed acceptable by the Cabinet" and "the certificate, if issued." 905 KAR 2:100E effective July 24, 1992, through November 9, 1992, relied on the minimum requirements of SB 211 which were subsequently codified in KRS 199.8982, which replaced the

emergency regulation noted above. Both SB 211 and KRS 199.8982(1)(a) require that an FCCH applicant meet several conditions including meeting the minimum requirements of demonstrating under Section 6 "the completion of a total of at least six (6) hours of training in the following areas within three (3) months of application for certification: a. Basic health, safety, and sanitation; b. Recognizing and reporting child abuse; c. Developmentally appropriate child-care practice." At a minimum under 6(c), the Cabinet is given great leeway in assuring any applicant is trained and capable of providing appropriate child care. This determination cannot be based upon any of the previous regulations but is determined by personal observation and review of past behavior. Had the Cabinet insisted that Johnson be able to provide appropriate child care practice, her past actions, which the Cabinet was acutely aware of, would have spoken volumes for denying her application. We believe the Cabinet's arguments to the contrary are both disingenuous and possibly an abdication of its statutory authority.

The Cabinet next argues that the hearing officer's finding that a Georgetown Police Officer reported an incident of abuse or neglect was clearly erroneous. First, we note that the circuit court did not address this issue in its order and therefore it is not properly before this Court. However, we

have reviewed the Cabinet's arguments on this issue and believe that if any error occurred, it was harmless and did not effect the judgment in this matter. The police officer's report whether filed before or after Sebastian's death was just one of many bits of information which led the hearing officer to conclude Johnson's home was unfit and should not have been certified by the Cabinet. In any case, the police officer testified that he was 95% sure he notified the Cabinet of the allegation. Based upon this statement, it was not clearly erroneous or an abuse of discretion for the hearing officer to find that the Cabinet had been notified of the alleged incident.

Next, the Cabinet argues the hearing officer incorrectly applied KRS 620.050. The hearing officer did, in fact, cite to a more recent version of KRS 620.050(4) than was in effect at the time of Sebastian's death. But as the circuit court found there is no "evidence that [the hearing officer] applied KRS 620.050 at all to the detriment of [the Cabinet] so this Court cannot say he misapplied same. The Court [f]inds no irregularity in the hearing officers (sic) opinion regarding this exception." (Emphasis in original). The Cabinet argues that somehow the hearing officer placed additional duties upon the Cabinet by citing the inappropriate version of the statute. However, a clear review of the two versions in question finds little difference between the two. And more important, we find

no basis for the Cabinet's argument that the hearing officer placed additional duties upon it. In fact, the hearing officer agreed with the Cabinet that the statute expressly prohibits Cabinet employees from divulging information about child abuse and neglect investigations except pursuant to KRS 620.050(4). In this regard, the hearing officer found that the Cabinet should have used "at least ordinary care to determine whether the license [to Johnson] should [have been] issued" and the Cabinet had a duty to "properly investigate any complaints against Johnson's facility to determine, among other things, whether she was meeting the licensing standards." In view of our determination in the first argument that the Cabinet did not fully comply with its duty to properly investigate and require an applicant be able to provide a safe environment for children, we believe the hearing officer correctly stated that the Cabinet does have duties and obligations to the citizens of Kentucky when issuing certifications and licenses and is not mandated (as the Cabinet argues) to blindly approve an application if it is merely filled out correctly. The hearing officer and the circuit court did not err on this issue.

The next argument by the Cabinet is similarly flawed. The Cabinet insists on arguing that the hearing officer erred in placing "an extra-statutory duty on the Cabinet." The Cabinet points out and emphasizes a technical error in the findings when

the hearing officer refers to a licensed day care center as opposed to a certified FCCH that Johnson was operating. Again, the problem is that the hearing officer determined, despite the Cabinet's arguments to the contrary, that the Cabinet was mistaken in relying on its position that it had to issue the certification because Johnson's application met all the criteria for certification. As explained previously, the hearing officer determined that the Cabinet was required by statute and its own regulations to do more. As the hearing officer found "[the Cabinet] maintains that all Johnson had to do was fill out the application, answer all the questions, including the self-check test, be inspected, and the license [certificate] had to be issued. However, the Cabinet at least should have reviewed the answers, checked the references, and asked if anyone in the Cabinet knew anything about Johnson." Although the Cabinet attempts to present its argument under three different theories, it is basically the same argument and quite simply the hearing officer, the circuit court and this Court have not been convinced by its position.

Finally, the Cabinet contends the doctrine of sovereign immunity should apply and the claim dismissed. In this regard, the Cabinet again argues:

> [t]he Cabinet properly performed its ministerial act of reviewing Ms. Johnson's application to become a[n] FCCH. When she

> met the certification standards and, in the absence of any grounds upon which the Cabinet could lawfully deny her certification, certification was properly granted. The Cabinet is immune from liability for non-negligent ministerial acts.

In that the Cabinet admits its actions were ministerial in nature and not discretionary, the only question becomes, were they performed negligently or not. The hearing officer found the Cabinet's actions were negligent and the circuit court affirmed that conclusion. We believe the Kisers presented substantial evidence to the hearing officer that the Cabinet was negligent in certifying Johnson's home as an FCCH.

Collins v. Commonwealth of Kentucky Natural Resources, 10 S.W.3d 122 (Ky. 1999), sets forth when an injured party can recover against the Commonwealth under the Board of Claims Act. KRS 44.073(2) "clearly establishes that any negligence claims against the Commonwealth or its subdivisions must be for the negligent performance of 'ministerial acts.'" Id. at 125. In that the Cabinet admits that its acts herein were ministerial in nature and the hearing officer and circuit court found sufficient evidence was presented that the Cabinet negligently performed those ministerial acts, the doctrine of sovereign immunity is inapplicable in this case. The Kisers were entitled to recovery under KRS chapter 44.

For the foregoing reasons the order of the Scott Circuit Court affirming the Board of Claims judgment is affirmed.

DYCHE, JUDGE, AND McANULTY, JUDGE, CONCUR IN RESULT ONLY.

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