

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000484-MR

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET,  
DEPARTMENT OF HIGHWAYS;  
COMMONWEALTH OF KENTUCKY,  
BOARD OF CLAIMS; and  
MICHAEL COUCH

APPELLANTS

v. APPEAL FROM CARROLL CIRCUIT COURT  
HONORABLE STEPHEN BATES, JUDGE  
ACTION NO. 99-CI-00054

AUDREY PHELPS (HAMILTON); Estate  
of DENNIS L. COUCH, Deceased; and  
PATRICIA JOHNSON, Individually and  
as Administratrix of the Estate  
of GARVIN JOHNSON, Deceased

APPELLEES

OPINION  
REVERSING

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BEFORE: GUDGEL, Chief Judge; EMBERTON and SCHRODER, JUDGES.

EMBERTON, JUDGE: The primary issue in this appeal is whether the trial court erred in setting aside a decision of the Board of Claims concluding that the sole and proximate cause of a tragic automobile accident was the negligence of the driver of the vehicle in which appellees were passengers. Because we are

convinced that substantial evidence supported the Board's decision, the judgment of the circuit court must be reversed.

The facts upon which the Board rested its decision were gleaned primarily from the testimony of the driver of the vehicle, Gina Faye Cull. In testimony before the hearing officer, Ms. Cull stated that she took her eyes off the road by looking in the rearview mirror when she heard a "squeal" by a passenger in the back seat. She admitted that her attention was diverted long enough to cause the car to leave the traveled portion of the highway. Ms. Cull described her actions once she realized that the car was off the roadway as follows:

Q 63 Did you feel your steering wheel jerk?

A Yes.

Q 64 What did you do?

A I was trying to hold on to the steering wheel and it was vibrating very bad and I couldn't hold on to it. So I hollered back to everybody and said I'm letting go.

Q 65 All right, and you let go of the steering wheel?

A Yes, because I didn't know what else to do.

Q 66 So you didn't - there wasn't - once you let go, I take it, there wasn't anything you could do to correct what was going to happen?

A No.

The opinion of the Board also notes that Ms. Cull admitted alcohol consumption and to having been up for 17 to 18 hours at the time of the accident which police estimated to be

approximately 3:45 a.m. Based on these facts, the Board concluded that the sole cause of the accident was driver negligence.

The Board also rejected appellees' contention with respect to improper construction and maintenance of the highway shoulder with the following finding:

The Claimant asserts the shoulder was incorrectly built and maintained; however, there must be an effort to use the shoulder to bring the car back on the highway. In this case, the driver steered her car off the roadway, then let go of the wheel. The shoulder of the roadway was never used as a re-entry path to the traveled lane. The driver does mention vibration as the cause of letting go of the steering wheel. . .however, vibration is a natural occurrence when a driver allows a vehicle to leave the roadbed.

On appeal, the Carroll Circuit Court reversed the Board's decision to dismiss the complaint on the basis of the testimony of appellees' expert, Dr. John Hutchinson. Dr. Hutchinson was of the opinion that the excessive slope of the shoulder was a factor in causing the car to more easily leave the road surface and that the sheer drop-off of the shoulder made normal re-entry impossible once the tires dropped off the edge of the pavement. The Commonwealth claims in this appeal that the trial court improperly substituted its view of causation for that of the body charged with responsibility for making that determination. We agree.

The opinion of our Supreme Court in Commonwealth, Transportation Cabinet v. Shadrick,<sup>1</sup> sets out the analysis to be

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<sup>1</sup> Ky., 956 S.W.2d 898 (1997).

utilized in considering alleged negligence on the part of the Department of Highways:

The Department's duty with respect to the maintenance of roads is to maintain them in a reasonably safe condition for those members of the traveling public exercising due care for their own safety. [Citations omitted]. Contrary to the holding below, we can find no duty imposed upon the Department with respect to the maintenance of roads to guard against all reasonably foreseeable and reasonably preventable harm to travelers, including those who are not exercising due care but whose lack of due care is not "so extreme as to be unforeseeable."<sup>2</sup> (Emphasis added).

The Court then cites Dillingham v. Dept. of Highways,<sup>3</sup> for its holding that the state is not liable for failure to keep highway shoulders in reasonably safe condition except for conditions which are obscured from the view of the ordinary traveler and are so inherently dangerous as to constitute traps.

Considering the findings of the Board in light of these directives, we cannot conclude that the Board was bound, as a matter of law, to accept Dr. Hutchinson's view of the condition of the shoulder as being a causative factor in the accident. This is particularly true in light of the driver's admission that she let go of the steering wheel and made no attempt to bring the automobile back onto the roadway. Thus, as did the Shadrick court, we conclude that the circuit court substituted its judgment for that of the Board. In our view, there was ample evidence to support the Board's conclusion with respect to

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<sup>2</sup> Id. at 900.

<sup>3</sup> Ky., 253 S.W.2d 256 (1953).

causation and that conclusion was therefore binding on the circuit court.

Because our resolution of the previous issue results in reinstatement of the Board's decision, there is no necessity to address the Department's contention with respect to admission of the blood test.

The judgment of the Carroll Circuit Court is reversed.

ALL CONCUR.

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