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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001512-MR

COMMONWEALTH OF KENTUCKY, TRANSPORTATION CABINET, DEPARTMENT OF HIGHWAYS — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 04-CI-00606

BILL JOHNSON, INDIVIDUALLY, AND BILL JOHNSON, AS ADMINISTRATOR OF THE ESTATE OF ANGELA JOHNSON; AND THE KENTUCKY BOARD OF CLAIMS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,[1] SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: This is an appeal from a judgment of the Knox Circuit Court which affirmed an order of the Board of Claims awarding appellee damages arising out of an automobile accident.

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The following facts are taken from the findings of the hearing officer. On the evening of September 6, 1999, appellee Bill Johnson was driving his 1995 Chevrolet Blazer with his pregnant wife, Angela, who was riding in the passenger seat. They were proceeding in a westerly direction on Highway 1304 between Corbin and Hazard when they encountered another vehicle proceeding easterly which crossed the center line into Mr. Johnson's lane of travel, forcing him to swerve to his right to avoid a collision. The Johnson vehicle left the roadway and collided with a forty two-inch sycamore tree which was thirty-two inches from the edge of the paved roadway. It was dark at the time of the collision and Johnson testified he did not see the tree prior to colliding with it. Tragically, Mrs. Johnson was killed instantly and Mr. Johnson suffered personal injury. Highway 1304 in the area of the accident is a rural, curvy roadway with a 55 mph speed limit.

Johnson brought this action in the Board of Claims pursuant to Kentucky Revised Statutes (KRS) 44.070 et seq. The Board awarded him, individually and as the administrator of his wife's estate, damages of $150,750.00. The Commonwealth appealed to the Knox Circuit Court which affirmed the order of the Board. The Commonwealth now brings this appeal, arguing that the Board erred in finding that it owed a duty to the Johnsons and in finding that it breached that duty. We disagree and affirm the well reasoned opinion of the Board as affirmed by the circuit court.

The standard of review that applies under these circumstances was well stated by this Court in *Transportation Cabinet v. Thurman,* 897 S.W.2d 597 (Ky.App. 1995):

> We will not disturb the findings of the Board if they are supported by substantial evidence. If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained. Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all of the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Although a reviewing court may arrive at a different conclusion than the trier of fact in its consideration of the evidence in the record, this does not deprive the agency's decision of support by substantial evidence. Simply put, the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes.

Thurman, 897 S.W.2d at 599-600 (internal citations and quotation marks omitted). If the Board's findings were supported by substantial evidence, those findings were binding on the Knox Circuit Court and are binding on us.

The Commonwealth relies chiefly on *Commonwealth, Transp. Cabinet v. Shadrick,* 956 S.W.2d 898 (Ky. 1997), for the proposition that it owes no duty to motorists, such as the Johnsons, who collide with obstructions that are in plain view in the right of way. For a thorough discussion of the case law that deals with the Commonwealth's duty with respect to the area adjacent to highways and its application to the facts of this case, we turn to the hearing officer's Recommended Order, Findings of Fact, Conclusions of Law, and Judgment.

The duties imposed upon the Cabinet with respect to maintenance of the roadways extends to the shoulders of the roads under certain conditions. In *Dillingham v. Department of Highways,* 253 S.W.2d 256 (Ky. 1952), decided under the now abrogated doctrine of contributory negligence, the Court held that "the State is not liable for its failure to maintain the shoulders of a highway in a reasonably safe condition for travel excepts as to defects which are obscured from the view of the ordinary traveler and are so inherently dangerous as to constitute traps..." However, the holding in *Dillingham, supra* was rather harshly criticized in *Falender v. City of Louisville,* 448 S.W.2d 367 (Ky. 1969). Therein, the Court characterized the *Dillingham* Court's description of the legal duty of the Commonwealth with respect to the shoulders of the highway as "obliquely qualified". *Falender, supra.* The Court went on to cite positively the case of *City of Lancaster v. Broaddus,* 216 S.W 373 (Ky. 1919) (sic) in which it was held that the "duty to exercise ordinary care to keep, not only that part of its streets that has been set apart for and is customarily used by the traveling public in a reasonably safe condition, but that it must also exercise the same degree of care with respect to such parts of its streets as lie immediately adjacent to or in the margin of the traveled part." Citing a treatise on negligence, the *Falender* Court reiterated that "[t]o make a distinction between cases where the excavation is within the true line of the highway or exactly upon it, and cases where it is beyond it, but close to it, presents an unworthy refinement and a judicial trifling with human life."

In fact, the *Dillingham* dissent recognized that "careful and prudent drivers not only may on occasion, but frequently must, use the shoulders to some extent as a part of the highway. Therefore, a pitfall or ditch in a shoulder adjacent to the surface may constitute a defect in the highway..."

In *Shadrick, supra,* a case upon which the Defendant herein relies heavily as a bar to the Claimant's recovery, the Court cited both *Dillingham* and *Falender* with approval, without recognizing the criticism and perhaps even the extension of *Dillingham* by *Falender.* Nevertheless, the *Shadrick* Court clearly draws the line, as it should, at imposing anything remotely similar to strict liability upon the

Cabinet for obstructions in the roadway, including the shoulders, when it states "[w]e decline to extend the law to the point of guaranteeing that every right-of-way will be completely free of all obstructions, whether permanent or transitory, for motorists who operate their vehicles into that area of the roadway." Indeed, the Cabinet is not an insurer against accidents from defects or dangerous conditions on a public road, but its duty is merely that of a private corporation to exercise ordinary care to prevent injury from defects in the highway. *Schrader v. Commonwealth, et al.,* 218 S.W.2d 406 (Ky. 1949). Thus, a determination of whether or not a particular shoulder is "inherently dangerous", a "trap", and/or "not reasonably safe" is subject to a very careful examination of the particular facts of a situation. *Dillingham, supra; Falender, supra; Shadrick, supra.* The mere presence of an obstacle in the shoulder of the roadway, even though the Cabinet is shown to have actual notice of its presence (or imputed notice thereof), is insufficient to find a duty on the part of the Cabinet to remove or warn of the obstacle. *Schrader, supra; Shadrick, supra.*

In the instant case, the fixed object in the shoulder of the roadway was obscured from the view of the public traveling on that portion of the highway during the night. The undisputed testimony revealed that this area of the roadway was particularly dark, and it was found that the driver of the vehicle did not see the tree before colliding with it. Given the narrowness of the roadway at the scene; given the fact that this was a curvy roadway at and near the scene; and given the fact that the fixed object was in such close proximity to the roadway, it is found that the tree in the shoulder of this area of the roadway is inherently dangerous and constituted a trap – unfortunately in this case, a death trap for Mrs. Johnson. The Cabinet knew or should have known that there would have been a propensity for the traveling public to leave the roadway, as occurred in this case, at or near the area of the tree, due to the narrowness of the roadway and given the curvature of the road. The Cabinet should have known that the tree, at this particular location, presented a danger to the traveling pubic and thus the Cabinet had a duty to remove it, or at least warn the traveling public of the danger. It failed to do either.

> It should be stated here that this conclusion does not mean that the Cabinet is under an obligation to remove every tree within a certain proximity to the edge of the roadway. Such a conclusion would be a clear violation of the holding of the Court in *Shadrick* in which it sought to avoid the imposition of a variation of strict liability regarding the shoulders of the roadways. On the contrary, the duty found herein is premised on the unique facts and roadway conditions of this particular case and the application thereto of the law as it currently exists.
>
> The Defendant breached its duty owed to the Estate of Angela Johnson, Individually, and said breach proximately resulted in damages suffered by said Claimants.

After the issuance of the hearing officer's Report, our Supreme Court further construed and refined the *Shadrick* holding in *Commonwealth, Transp. Cabinet v. Babbitt,* 172 S.W.3d 786 (Ky. 2005), which holds that

> [i]n the context of the facts in *Shadrick,* that meant only that the Department was not required to remove vehicles parked by someone else in the right-of-way unless they obstructed the traveled portion of the highway where persons exercising due care for their own safety would be operating their vehicles. It did not mean that the long-discarded doctrine of contributory negligence as a complete defense applies to claims against highway authorities in Kentucky.

Babbitt, 172 S.W.3d at 793. The Court further held that *Shadrick* does not completely exonerate the Cabinet when the hazard is in plain view even when the driver is contributorily negligent. *Id.* at 795. In the case before us, the hearing officer found no negligence on the part of the driver, finding that he was forced off the road by an oncoming vehicle. *Babbitt* supports the analysis and conclusions of the hearing officer and the Board.

There was abundant evidence to support the facts found by the hearing officer which were accepted and adopted by the Board. We have no basis to disturb those findings. We recognize that "a highway authority is not automatically liable every time a motorist drives his vehicle off the traveled portion of the highway and strikes a roadside hazard." *Id.* The determination of whether the highway authority has breached its duty to a motorist who leaves the highway and collides with an obstruction near the road is "a fact-intensive inquiry." *Id.* at 796. We agree with the Board that under the particular facts of this case, the Commonwealth had a duty to the Johnsons and that it breached that duty. There was no basis for the circuit court to disturb the findings of the Board.

The judgment of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Lexington, Kentucky

BRIEF FOR APPELLEE:

Denise M. Davidson
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