

RENDERED: OCTOBER 9, 2009; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001958-MR

NELSON COUNTY BOARD
OF EDUCATION

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 08-CI-00625

GENE A. FORTE, INDIVIDUALLY
AND AS ADMINISTRATOR OF
THE ESTATE OF CAROLE FORTE;
AND THE KENTUCKY BOARD
OF CLAIMS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: FORMTEXT COMBS, CHIEF JUDGE; NICKELL AND TAYLOR,
JUDGES.

TAYLOR, JUDGE: Nelson County Board of Education (Board of Education)
brings this appeal from an October 15, 2008, order of the Nelson Circuit Court
which vacated and remanded the Kentucky Board of Claims' final order dismissing

an action filed by Gene A. Forte, individually and as administrator of the Estate of Carole Forte (collectively referred to as appellees). We affirm.

Carole Forte was a teacher at Cox Creek Elementary School in Nelson County, Kentucky. On May 19, 2006, while exiting the school's parking lot, the wind blew a gate into Carole's vehicle. The gate struck Carole in the head, and she died from her injuries.

On May 16, 2007, appellees filed a tort action in the Nelson Circuit Court (Action No. 07-CI-00164 consolidated with Action No. 07-CI-00338) alleging negligence against, *inter alios*, the Nelson County Board of Education. The Board of Education raised the defense of immunity and argued that the tort action should be dismissed. While the tort action was pending in circuit court, appellees also filed an action with the Board of Claims on April 23, 2008. Therewith, appellees also filed a "Motion to Hold in Abeyance Pending Completion of Civil Action in Nelson Circuit Court." In that motion, appellees specifically stated:

If it is ultimately determined in the tort civil action in Nelson Circuit Court that [appellees'] claims are barred by immunity and/or KRS 342.700, a cause of action before this Board would then accrue. However, if it is determined that the tort action is not so barred, [appellees'] claims would continue through that action, with no cause of action accruing before the Board.

In response, the Board of Education filed a motion to dismiss arguing that the statute of limitations had expired and that appellees' action was time-barred. By final order entered June 19, 2008, the Board of Claims dismissed appellees' action.

It reasoned that the action was time-barred under Kentucky Revised Statutes (KRS) 44.110(1) as having been filed more than one year from the date the action accrued.

Thereupon, appellees sought review in the Nelson Circuit Court (Action No. 08-CI-00625). Appellees argued that the Board of Claims improperly dismissed the action as time-barred under KRS 44.110(1). The circuit court agreed. The circuit court vacated and remanded the Board of Claims' final order dismissing appellees' claim as time-barred. The circuit court believed the tolling provision of KRS 413.270 should have been considered by the Board of Claims. This appeal follows.¹

Judicial review of a Board of Claims' decision is controlled by KRS 44.140. Subsection 5 of KRS 44.140 provides:

On appeal no new evidence may be introduced, except as to fraud or misconduct of some person engaged in the hearing before the board. The court sitting without a jury shall hear the cause upon the record before it, and dispose of the appeal in a summary manner, being limited to determining: 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. The court shall enter its findings on the order book as a judgment of the court, and such judgment shall have the same effect and be enforceable as any other judgment of the court in civil causes.

¹ After the notice of appeal was filed in the Court of Appeals, the Nelson Circuit Court entered a summary judgment in Action No. 07-CI-00164 consolidated with Action No. 07-CI-00338, dismissing the tort action against the Nelson County Board of Education (Board of Education) upon the basis of governmental immunity.

KRS 44.140(5). And, our review of the circuit court's decision is guided by KRS 44.150 and shall proceed "under the same conditions and under the same practice as appeals [that] are taken from judgments in civil causes rendered by the Circuit Court[.]" KRS 44.150. As an appellate court, we review legal issues *de novo*. *Allen v. Devine*, 178 S.W.3d 517 (Ky. App. 2005).

The Board of Education contends that the circuit court erroneously vacated the final order of the Board of Claims. The Board of Education argues that appellees' claim was time-barred under KRS 44.110(1) and that the circuit court erred by holding otherwise. For the reasons hereinafter stated, we disagree.

Under KRS 44.110(1), an action in the Board of Claims must be filed within one year from the date the action accrued. In our case, appellees' action against the Board of Education "accrued" on May 19, 2006 (the date of Carole's accident). The record demonstrates that appellees filed the action against the Board of Education in the Board of Claims on April 23, 2008. At first glance, appellees' action would appear to be untimely filed under the statute of limitations contained in KRS 44.110(1). However, our inquiry cannot end with KRS 44.110(1). Rather, we must determine whether the tolling provision of KRS 413.270(1) may operate to save appellees' action in the Board of Claims. Stated differently, we are faced with the singular legal question of whether KRS 413.270 is applicable to an action filed in the Board of Claims.

The interpretation of a statute presents a question of law, and our review proceeds *de novo*. *City of Worthington Hills v. Worthington Fire Prot. Dist.*, 140 S.W.3d 584 (Ky. App. 2004). KRS 413.270 reads:

- (1) If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.
- (2) As used in this section, “court” means all courts, commissions, and boards which are judicial or quasi-judicial tribunals authorized by the Constitution or statutes of the Commonwealth of Kentucky or of the United States of America.

Under KRS 413.270(1), an action that is timely filed in good faith but later dismissed for lack of jurisdiction may be refiled in the proper court within ninety days. KRS 413.270(2) defines “court” as including all “boards” exercising judicial or quasi-judicial authority as authorized by this Commonwealth’s statutory law.

Here, it is axiomatic that the Board of Claims qualifies as a “board” within the meaning of KRS 413.270(2). The Board of Claims was created by legislative enactment and certainly exercises judicial or quasi-judicial authority. Thus, we hold that the term “court” as used in KRS 413.270(1) is broad enough to include the Board of Claims. Concomitantly, we also conclude that the tolling provision of KRS 413.270(1) is applicable to an action filed in the Board of Claims.

In the case *sub judice*, a dismissal of the tort action by the Nelson Circuit Court upon immunity grounds may certainly be tantamount to a dismissal for lack of jurisdiction under KRS 413.270, thus arguably triggering the tolling provision of KRS 413.270(1).² However, the Board of Claims' dismissal of the instant action with prejudice would potentially bar appellees from later refileing an action in the Board of Claims under the tolling provision of KRS 413.270(1).³ As such, the circuit court was understandably troubled by the Board of Claims' dismissal of appellees' action. We, thus, do not believe the circuit court erred by vacating and remanding to the Board of Claims. Upon remand to the Board of Claims, we think the Board of Claims should reconsider its dismissal in light of the tolling provision of KRS 413.270(1).⁴

We view any remaining issues raised by the Board of Education as either moot or without merit.

For the foregoing reasons, the order of the Nelson Circuit Court is affirmed.

² By separate order, this Court granted the Board of Education's Motion for Leave to File Additional Papers. These papers are actually a Summary Judgment entered by the Nelson Circuit Court on August 7, 2009, dismissing the tort action (Action No. 07-CI-00164 consolidated with Action No. 07-CI-00338) against the Board of Education on immunity grounds.

³ Kentucky Revised Statutes 44.160(2) provides that a "final determination of the [B]oard [of Claims] shall be given the same res judicata and collateral estoppel effect as any other judicial determination[.]"

⁴ Although the circuit court relied upon the Court of Appeals' opinion in *Commonwealth v. Douglas* (Appeal No. 2007-CA-000647-MR), we note that the Supreme Court ordered the *Douglas* opinion not to be published by an August 19, 2009, order denying discretionary review (Action No. 2008-SC-000592-D). We, therefore, do not think it proper to consider it when reaching the merits of this appeal under Kentucky Rules of Civil Procedure 76.28(4)(c).

ALL CONCUR.

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