

RENDERED: SEPTEMBER 21, 2001; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002386-MR

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET,  
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NO. 99-CI-00028

SAM'S FARM SUPPLY, INC.,  
AND THE KENTUCKY BOARD OF CLAIMS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: The Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, has appealed from a judgment of the Montgomery Circuit Court entered on September 9, 1999, which affirmed a judgment of the Kentucky Board of Claims in favor of the appellee, Sam's Farm Supply, Inc., in the amount of \$40,000.00. Having concluded that the Board of Claims applied

the correct legal standard of care to this negligence claim and that its findings were not clearly erroneous, we affirm.

The now defunct Sam's Farm Supply, Inc., was a farm supply business located in Camargo, Montgomery County, Kentucky. During its existence, Sam's specialized in selling feed, fencing, gates, medicines for the treatment of animals, and various other farming supplies. Sam's opened its doors in late 1994 and generally showed an increase in its profits from the time of its inception through the first quarter of 1997.

When it first opened, Sam's was located on Gateway Avenue in Camargo. Shortly thereafter, however, Sam's moved to a bigger facility on Estes Lane, which was located just two blocks from its old location. Both Gateway Avenue and Estes Lane intersect U.S. Route 460. While Gateway Avenue is reachable by other roads, Estes Lane can only be accessed via U.S. 460.

In 1996, while Sam's was still a fledgling business, the Commonwealth of Kentucky, through the Transportation Cabinet and the Department of Highways, undertook an improvement project to widen U.S. 460 in Camargo. During the construction period, traffic was frequently delayed and ingress and egress between Estes Lane and U.S. 460 was frustrated. On several occasions, Estes Lane was barricaded, completely preventing access. At other times there were large holes in Estes Lane that either totally precluded access or made access difficult. Further problems were caused by severe traffic backups, preventing left-

hand turns onto Estes Lane. Until the construction project, access to Estes Lane had not been difficult.

In a complaint filed on December 15, 1999, in the Board of Claims, Sam's alleged negligence on behalf of the Commonwealth. More specifically, Sam's claimed the Cabinet was negligent in failing to maintain ingress and egress to and from Estes Lane. As a result of the limited access, Sam's avers it was substantially deprived of customers, which proximately caused its ultimate business demise.

On January 21, 1999, the Board of Claims found in favor of Sam's and granted Sam's a judgment against the Transportation Cabinet "in the amount of \$40,000.00 for property damage/business loss." The Cabinet appealed the decision to the Montgomery Circuit Court, which affirmed the Board of Claims. This appeal followed.

Apparently, the only issues contested by the Cabinet before this Court are whether the Board of Claims applied the proper legal standard of care in finding it liable and whether the findings concerning the foreseeability of the damages were clearly erroneous. The Cabinet seems to assert in its brief that it had no duty to maintain uninterrupted access between U.S. 460 and Estes Lane. It further contends, assuming it did have such a duty, that Sam's business loss was not a foreseeable result of the Cabinet's failure to maintain such access.

However, before resolving the issues raised by the Cabinet on appeal, we feel it important to raise, sua sponte, the

issue of whether jurisdiction was properly before the Board of Claims. Since subject-matter jurisdiction may not be waived or conferred by agreement of the parties,<sup>1</sup> our analysis need go no further unless we first conclude that the Board had the authority to hear Sam's complaint.

The Board of Claims, by statute, may only hear claims grounded in negligence.<sup>2</sup> Other claims similar to Sam's claim have been litigated as reverse condemnation suits.<sup>3</sup> Reverse condemnation suits arise under Section 13 of the Kentucky Constitution<sup>4</sup> and their proper forum lies in the circuit courts.

However, any concern as to the proper pleading of an action must be weighed against the general rule that the plaintiff is the master of his claim.<sup>5</sup> In many cases, the plaintiff has alternate or concurrent claims, which could be

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<sup>1</sup>Cann v. Howard, Ky.App., 850 S.W.2d 57, 59 (1993) (citing Rodney v. Adams, Ky., 268 S.W.2d 940 (1954)).

<sup>2</sup>Kentucky Revised Statutes (KRS) 44.070(1).

<sup>3</sup>See, e.g., Commonwealth, Dept. of Highways v. Davidson, Ky., 383 S.W.2d 346 (1964). In Davidson, plaintiff grocery store owners sued the Commonwealth for depriving them of a suitable entranceway to their store's parking lot due to highway construction. The plaintiffs sued in circuit court under the theory of reverse condemnation.

<sup>4</sup>Section 13 of the Kentucky Constitution states, in relevant part, that ". . . nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

<sup>5</sup>See, e.g., Gafford v. General Electric Co., 997 F.2d 150, 157 (6th Cir. 1993) (quoting Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)).

filed in different courts, even though the facts and theories of each claim are the same.<sup>6</sup>

Speck, supra, is illustrative of this principle. In Speck, the plaintiff was a driver who had been injured in an automobile collision involving a Kentucky State Police cruiser. Since sovereign immunity was not available to the negligent state trooper, this Court held that the injured plaintiff had two concurrent or alternate claims, one in the circuit court and one in the Board of Claims.

Turning to the underlying facts and theories of the case presently before us, it appears Sam's, like the plaintiff in Speck, also had alternate causes of action. Since Sam's alleged that the Cabinet was negligent in failing to maintain access to Estes Lane, it was proper to pursue the claim in the Board of Claims. On the other hand, since Sam's claimed a diminution in the net worth of its business as a result of the Cabinet's actions, it could have sought relief in the circuit court for reverse condemnation.<sup>7</sup>

In any event, we find that Sam's claims are grounded in negligence, which gives the Board of Claims subject-matter jurisdiction to hear the dispute. Having addressed the issue of jurisdiction, we now turn to the Cabinet's contentions that it had no duty to maintain uninterrupted access to Estes Lane, and

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<sup>6</sup>See Speck v. Bowling, Ky.App., 892 S.W.2d 309, 311 (1995).

<sup>7</sup>By contrast, if the negligent construction on U.S. 460 had instead prevented an ambulance from gaining access to Estes Lane, any claim would have lied solely in the Board of Claims.

that, in any event, Sam's business loss was not a foreseeable result of any breach of that duty.

Civil liability, and the very principle of negligence, is predicated on the duty of reasonable care which is owed by each of us to everyone else.<sup>8</sup> That is not to say, however, that the concept of legal duty is limitless. Where and how courts draw those lines is best described by the following commentary from Prosser:

"The statement that there is or is not a duty begs the essential question--whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . It is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . [I]t should be recognized that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."<sup>9</sup>

In other words, the concept of duty is rooted in public policy. Where public policy dictates that the plaintiff should have no rights as against the defendant's conduct, duty will not lie.

By honoring actions for reverse condemnation, our courts have demonstrated that, in Kentucky, the rights of property owners will be protected against encroachment by the government. This includes actions in which the intrusion was a

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<sup>8</sup>Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell, Ky., 736 S.W.2d 328, 334 (1987).

<sup>9</sup>Id. at 330 (quoting Prosser & Keeton, The Law of Torts § 53 (5th ed. 1984)).

result of negligent highway construction.<sup>10</sup> Accordingly, we hold that the Cabinet owes a duty to neighboring property owners to conduct highway construction in a manner that does not unreasonably impede their property rights.

Finally, we turn to the Cabinet's contention that Sam's business injury was not a foreseeable result of its failure to maintain access to Estes Lane. While foreseeability of injury is a well-established component of the negligence analysis,<sup>11</sup> it is only used as a limitation to recovery in rare circumstances. Except in such cases where reasonable minds could not differ, whereby the court must conclude as a matter of law that it would be clearly unreasonable to require a party to foresee the potential harm from the misconduct involved, the standard is whether the misconduct was a substantial factor in causing the plaintiff's injuries.<sup>12</sup>

We hold that there was substantial evidence to support the Board's findings that the Cabinet's negligent construction was a substantial factor in causing Sam's business injuries. A factual finding may not be set aside on appeal unless it is not

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<sup>10</sup>See Commonwealth, Dept. of Highways v. Gilles, Ky., 516 S.W.2d 338 (1974) (holding the Circuit Court did not error in granting the plaintiff's a recovery for crop damage due to negligent highway construction).

<sup>11</sup>Grayson, 736 S.W.2d at 332 (citing M & T Chemicals, Inc. v. Westrick, Ky., 525 S.W.2d 740 (1974); and Greyhound Corp. v. White, Ky., 323 S.W.2d 578 (1959)).

<sup>12</sup>736 S.W.2d at 334.

supported by substantial evidence,<sup>13</sup> and thus, clearly erroneous.<sup>14</sup> We believe the Cabinet's actions in limiting access to Estes Lane, the only inlet to Sam's place of business, should have induced in reasonable minds the expectation that customers would have difficulty in gaining entry to Sam's' parking lot, and that Sam's' injuries should have been reasonably foreseeable by the Cabinet.

For the foregoing reasons, the judgment of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Andrew M. Stephens  
Lexington, KY

BRIEF FOR APPELLEES:

No brief filed.

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<sup>13</sup>"Substantial evidence" has been defined as evidence of "sufficient probative value to induce conviction in the minds of reasonable men." Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

<sup>14</sup>Kentucky Rules of Civil Procedure (CR) 52.01.