

RENDERED: JULY 16, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000452-MR

JOYCE JOHNSON

APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT  
HONORABLE OSCAR G. HOUSE, JUDGE  
ACTION NO. 05-CI-00453

KENTUCKY STATE POLICE; AND  
COMMONWEALTH OF KENTUCKY  
BOARD OF CLAIMS

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: ACREE, CAPERTON AND THOMPSON, JUDGES.

ACREE, JUDGE: Joyce Johnson appeals an order of the Clay Circuit Court affirming a decision of the Kentucky Board of Claims granting summary judgment

to the Kentucky State Police (KSP). For the following reasons, we reverse and remand.

Johnson was traveling north on U.S. Highway 421 on the evening of November 22, 2003, in Clay County, Kentucky, when her automobile was struck by a vehicle driven by Kentucky State Trooper James C. Smith. In the moments prior to the collision, Johnson had yielded to three other police vehicles by moving her car to the right shoulder of the road. Subsequently, Johnson resumed travel as normal. The vehicle driven by Trooper Smith, with lights and sirens on, approached Johnson's car from behind and attempted to pass in the southbound lane. Unfortunately, as the KSP vehicle approached, Johnson's vehicle turned into the southbound lane, toward a side road, and the police vehicle collided with the left rear of Johnson's car. Johnson filed a claim with the Board for her injuries.

In various pleadings, motions, and sworn statements before the Board, Johnson admitted that at the time of the collision she had been aware of another emergency vehicle somewhere behind her, in addition to the three other KSP cars she had allowed to pass. Johnson also admitted had seen additional emergency lights in the distance; furthermore, she believed other emergency vehicles would be approaching shortly. However, Johnson also stated that she did not see Trooper Smith's vehicle or flashing lights or hear the siren prior to the collision. Johnson's stated reason for turning left was to exit the road entirely to permit additional emergency vehicles easier passage; she also stated she believed she had sufficient time to turn left before any additional emergency vehicles approached her. She

claimed she could not safely move her car off the road to the right because there was no shoulder at that point, only a ditch.

The KSP contended the accident was entirely the result of Johnson's negligence. In support of its position, the KSP presented the traffic collision report for the incident, in which the responding officer reported Johnson had admitted she had seen Trooper Smith's lights approaching her. Trooper Smith also submitted statements that he had seen Johnson tap her brakes prior to turning, which led him to believe she was properly yielding. An important piece of evidence submitted to the agency was a very brief video of the accident recorded from the camera mounted in the KSP vehicle. This video captured the few seconds immediately prior to the collision and ends abruptly as the vehicles collide.

Before the hearing officer, the KSP moved for summary judgment. The hearing officer recommended the Board grant the motion, stating "the sole and proximate cause of the accident" was Johnson's failure to yield to the KSP vehicle in violation of Kentucky Revised Statutes (KRS) 189.930. The Board adopted the hearing officer's recommended order in its entirety. An opinion of the Clay Circuit Court affirmed the Board's decision without elaboration. This appeal followed.

On appeal, Johnson asserts it was improper for the Board to grant summary judgment to the KSP because the issue of negligence cannot properly be resolved on summary judgment. In response, KSP asserts summary judgment was proper given the evidence, because the video recording of the collision was

sufficient to permit the Board to disregard any of Johnson’s evidence. Our review of summary judgments is *de novo*. *Blevins v. Moran*, 12 S.W.3d 698, 699 (Ky. 2000).

The Board of Claims was created pursuant to Section 231 of the Kentucky Constitution, which permits the legislature to waive the Commonwealth’s sovereign immunity to suit. *Commonwealth, Dept. of Parks v. Bergee Brothers, Inc.*, 480 S.W.2d 158, 159 (Ky. 1972). The Board is empowered “to investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth, any of its cabinets, departments, bureaus, or agencies[.]” KRS 44.070(1). It is proper for the Board to grant a motion for summary judgment under the same circumstances it would be proper for a trial court to do so. *Commonwealth, Labor Cabinet v. Morris*, 215 S.W.3d 49, 52 (Ky.App. 2006).

Summary judgment, both before the Board and before a trial court, is warranted when there are no genuine issues of material fact in a case. *Steelvest, Inc. v. Scansteel Service Center, Inc.* 807 S.W.2d 476, 480 (Ky. 1991). Kentucky’s standard for granting summary judgment is more stringent than the federal standard; it should be cautiously applied, and used only “when, as a matter of law, it appears it would be impossible for the respondent to produce evidence at the trial warranting in his favor and against the movant.” *Id.* at 482 (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)). In *Steelvest* the word “ ‘impossible’ is used in a practical sense, not in an absolute sense.” *Perkins*

*v. Hausladen*, 828 S.W.2d 652, 654 (Ky.1992). In considering a motion for summary judgment, “[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Id.* at 480 (citing *Dossett v. New York Mining and Manufacturing Co.*, 451 S.W.2d 843 (Ky. 1970) and *Rowland v. Miller's Adm'r*, 307 S.W.2d 3 (1956)).

Here, the Board improperly weighed the evidence instead of merely determining whether there were genuine issues of material fact; likewise, it did not construe the facts in the light most favorable to Johnson.

There were some facts presented to the Board which were not in dispute. First, the parties agree Johnson had yielded to three KSP vehicles prior to the collision, and that after resuming travel Johnson saw the lights of an emergency vehicle behind her.<sup>1</sup> They also agree the collision occurred in the southbound lane, while Johnson was trying to turn off the main road.

Despite these points of agreement, however, the parties disagree as to some facts important to the resolution of this case. First, they disagree as to whether Johnson saw the KSP car just before it hit her. Johnson has asserted she was not aware the vehicle driven by Trooper Smith was close behind her. On the other hand, statements made by Trooper Smith and the officer who responded to the scene indicate they believed it was unlikely Johnson had not seen the KSP car.

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<sup>1</sup> The parties do, however, dispute whether the lights Johnson saw were in the distance or quite close to her, as well as whether she specifically saw Trooper Smith’s vehicle just prior to the collision.

Whether she was aware of the proximity of Trooper Smith's car is a genuine issue of material fact.

The Board relied upon the video to conclude Johnson did in fact see the KSP vehicle approaching, but this reliance was in direct contradiction to her sworn statement, and the video of the collision is far from conclusive on this point. It does not show Johnson herself; in fact, it appears to have been mounted on the dashboard of the KSP vehicle, and does not show the troopers who were in the vehicle. Any conclusions about what Johnson actually did see or reasonably should have seen based on this video required the Board to make a judgment call, to weigh the strength of Johnson's account of the events against the statements of KSP's witnesses and the very limited perspective of the video camera. The Board's conclusion that the video clearly indicates that either Johnson actually did see the KSP vehicle or reasonably should have seen it is based on a weighing of the relative strength of the evidence, something properly reserved for a hearing.

A second source of disagreement is whether Trooper Smith was exercising due care given the circumstances. While Trooper Smith's affidavit implies he was not driving negligently, Johnson asserts she and other witnesses would testify that the trooper was driving too fast given the traffic and road conditions of that night. This gives rise to the possibility of comparative negligence. *See Hilen v. Hays*, 673 S.W.2d 713, 718 (Ky. 1984)(comparative negligence "calls for liability for any particular injury in direct proportion to fault."). Summary judgment is proper only when it is impossible for the

nonmoving party to present evidence at trial which would allow that party to prevail. *Williams v. City of Hillview*, 831 S.W.2d 181 (Ky. 1992). Here, it was possible for Johnson to prevail if the KSP was even partially responsible for the collision.

Furthermore, the Board was required to view the evidence in the light most favorable to Johnson. *Steelvest*, 807 S.W.2d at 480. That means, for purposes of summary judgment, the Board was required to presume Johnson's evidence was true. If the Board had done so, it would have assumed that Johnson had not seen the approaching KSP vehicle, and that Trooper Smith had been driving too fast. Under these circumstances, Johnson would have been able to recover at least partially, and summary judgment was not warranted.

Instead, the Board impermissibly engaged in the type of fact finding which should have been reserved for a hearing. The Board may have doubted Johnson would prevail following a hearing, and may ultimately have found the video more persuasive than Johnson's testimony, but it should not have granted summary judgment as a substitute for the hearing. *Williams*, 831 S.W.2d at 183.

There were genuine issues of material fact in dispute at the time of the KSP's summary judgment motion. Accordingly, it was improper for the Board to grant summary judgment and improper for the circuit court to affirm the Board's order. We reverse and remand for proceedings consistent with this order.

ALL CONCUR.

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