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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002100-MR

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

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 10-CI-00757

PHILIP SCHOENAUER AND
KENTUCKY BOARD OF CLAIMS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, COMBS, AND KELLER, JUDGES.

COMBS, JUDGE: This case arises from a Board of Claims determination of no negligence on the part of the Transportation Cabinet, Department of Highways. On appeal, the Christian Circuit Court reversed the Board and found negligence as

to the Department of Highways, awarding damages to Philip Schoenauer. The Department now appeals that adverse ruling.

In the early morning of May 11, 2009, Schoenauer, a sergeant in the United States Army, was driving to work at Fort Campbell. Schoenauer had lived in southern Christian County (where Fort Campbell is located) for less than one year and had not experienced flooding in the area. On Kentucky Highway 345 (Ky. 345), he encountered a yellow diamond warning sign that read, "High Water." Schoenauer slowed his Land Rover while approaching the gate to Fort Campbell. As he was braking, the vehicle hit water. Schoenauer continued braking, but the water was too high. His Land Rover's engine stalled, and the water floated the vehicle farther down the road toward the entrance of Fort Campbell. After the sun rose, Schoenauer observed several other vehicles that were also stranded in the water. It is important to note that although Schoenauer's vehicle came to a stop on the federal site of Fort Campbell, it stalled out and began floating on Kentucky property.

Fortunately, neither Schoenauer nor his passenger was injured. However, his Land Rover was totalled. Schoenauer was able to sell only two parts from the vehicle for a total of $500. He filed a claim against the Department of Highways in order to recover the remainder of the value of the vehicle, approximately $10,675.00. In his claim, he alleged that the Department acted negligently by its failure to close Ky. 345, which resulted in Schoenauer's loss.

On March 10, 2010, the hearing officer found that the high water warning sign was adequate notice and that the Department had not acted negligently. The Board of Claims accepted the hearing officer's findings on April 19, 2010. Schoenauer filed an appeal in the Christian Circuit Court, which held that the facts did not support the hearing officer's findings and set aside the final order of the Board of Claims. It remanded the case back to the Board of Claims for determination of damages. This appeal follows.

The Department argues that the circuit court exceeded its authority by making new findings of fact in its decision. We disagree.

Kentucky Revised Statute[s] (KRS) 44.140 sets out the procedure for an appeal from an order of the Board of Claims. It provides the standard of review:

> 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.

KRS 44.140(5). The Board's findings of fact may only be overturned if they are not supported by substantial evidence or are clearly erroneous. *Dep't for Human Resources v. Redmon*, 599 S.W.2d 474, 476 (Ky. App. 1980). The circuit court applied the final factor of the statute – whether the findings of fact support the award – in concluding that the Board erred. Accordingly, it found that the findings

of the hearing officer – and, therefore, the Board – were not supported by substantial evidence. By its very nature, a review of this sort requires examination of the facts, which does not imply an unauthorized new finding of facts on our part. After our review, we are satisfied that the circuit court did not act outside its duties as prescribed by statute and precedent.

The Department next argues that the circuit court created a duty that does not exist when it found that Ky. 345 should have been closed and that the warning sign was inadequate. We do not agree.

For a successful claim of negligence against the Department, one must prove that: 1) the Department owed a duty; 2) the Department breached that duty; and 3) the breach caused an injury to the claimant. *Commonwealth, Transp. Cabinet, Dep't of Highways v. Guffey*, 244 S.W.3d 79, 81 (Ky. 2008).

There is no dispute that the Department has the duty "to exercise ordinary care in keeping its highways in a reasonably safe condition for public travel." *Commonwealth, Dep't of Highways v. Higdon*, 383 S.W.2d 331, 332 (Ky. 1964). The question in this case is whether the facts support the hearing officer's finding that the high-water warning sign was a sufficient performance of that duty.

The Department argues that the High Water sign was accurate because it was placed far enough from the water for Schoenauer to stop. It cites *Swatzell v. Commonwealth, Dep't of Highways*, 441 S.W.2d 138 (Ky. 1969). In *Swatzell*, the driver had not seen two signs that said, "Bridge Out" and "Road Closed." A crane that was at the site had flashing colored lights on it. The Board of Claims found

that the Department had provided adequate warning and that the collision was due to the driver's negligence by driving while fatigued. The court affirmed. However, we agree with the circuit court that *Swatzell* is distinguishable from the case at hand. In *Swatzell*, the issue was the *placement* of the signs. In this case, the issue is whether the *information* conveyed by the sign was accurate and adequate.

In a case that is more on point, the predecessor of our Supreme Court stated that, "[a]dequate warning of hazardous conditions in the highway system may be an exercise of ordinary care." *Commonwealth, Dep't of Highways v. Begley*, 376 S.W.2d 295, 297 (Ky. 1964). In that case, a portion of a bridge had collapsed because it could not support the weight of two trucks that met on the bridge. Even though there was a sign that said, "Load Limit 6 Tons" on the bridge, the court found the Department was negligent by not giving adequate warning of precisely the danger posed by the bridge. *Id*. at 298. The court reasoned that it was foreseeable that two vehicles (that were individually in compliance with the weight limit) might conceivably meet on the bridge and that their combined weight could collapse the bridge. It held, "[t]he negligence of the [Department] rests not in creation of the hazardous condition, but in permitting the situation to continue without attempting to remedy, warn, or guard against the danger." *Id*. at 297.

In this case, the court also found that the High Water warning sign did not accurately communicate the severity of the existing hazard to drivers. Kentucky Administrative Regulation[s] (KAR) 603 KAR 5:050 sets forth Kentucky's

adoption of *The Manual on Uniform Traffic Devices*, 2003 Edition, including Revision No. 1, as our state's standard for the governing of traffic control devices, which includes signs. The manual provides that "[w]arning signs alert road users to conditions that might call for a reduction of speed or an action in the interest of safety and efficient traffic operations." Section 2C.01 *Function of Warning Signs*. It also advises that "obstructions that might require a driver to reduce speed or stop might require additional advance warning signs." Section 6F:16 *Position of Advance Warning Signs*.

We agree with the trial court that a warning sign was insufficient in this case. By law, a high-water warning sign indicates that drivers need to slow down. In this instance, the water was high enough to reach the door handles on a Land Rover, a sports-utility vehicle that sits a considerable distance above the ground. Ky. 345 was impassable and unlighted. The National Oceanic and Atmospheric Administration (NOAA) urges drivers *never* to drive on a road covered by water, noting that it only takes eighteen inches of water to float a vehicle. www.norman.noaa.gov/2008/04/flash-flood-safety-in-a-car (last visited on September 16, 2011). Several other drivers had also become stranded in the water. Additionally, a long-time local resident testified that the road is known for its propensity to flood in that area and that the Department usually erects barricades and closes the road.

The Department suggests that it was not responsible for closing the road because the deepest water was on Fort Campbell's property. Nonetheless, the

water was already at a hazardous level *on the state's property* leading up to Fort Campbell. A "High Water" warning sign is indicative of a level of water that renders a road dangerous but *not impassable*. There is no question that Ky. 345 was impassable on the morning of May 11, 2009. The rain had begun falling on May 9, and a highway employee testified that he posted the warning sign on that day. It continued to rain after the sign was placed, and the Department was aware of the tendency for Ky. 345 to flood. As in *Begley*, the potential danger that a vehicle would be swept away was foreseeable. We cannot conclude that the circuit court committed error in finding an absence of substantial evidence to support the Board's finding of no negligence on the part of the Department.

Therefore, we affirm the judgment of the Christian Circuit Court.

ALL CONCUR.

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