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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000712-MR

PHILLIP PERKINS, ADMINSTRATOR OF
THE ESTATE OF ANDREW PHILLIP PERKINS — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 2013-CI-001923

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF PARKS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; D. LAMBERT AND MAZE, JUDGES.

D. LAMBERT, JUDGE: The Appellant seeks review of a Fayette Circuit Court order affirming a Board of Claims grant of summary judgment against the Appellant, which found no common law duty for a landowner or easement holder to control vegetation at a railroad crossing. Upon review, we affirm.

This appeal arises out of a train collision involving motorist Andrew Phillip Perkins and a train operated by Norfolk Southern Corporation, d/b/a Norfolk Southern Railroad Company (hereinafter, "Norfolk Southern"). On Wednesday, June 3, 2006, Perkins was driving a vehicle across the railroad crossing on Waveland Museum Lane, a crossing located less than a mile from his home. Perkins was traveling in a westerly direction on a county road in Fayette County, Kentucky, as the train approached from the north. He was then struck by the train and he died later that day, with the official cause of death being blunt force trauma.

The Appellant, Phillip Perkins, in his capacity as the administrator of the Estate of Andrew Phillip Perkins (hereinafter, "Perkins") filed a complaint on January 26, 2007, against the Commonwealth of Kentucky, Department of Parks (hereinafter, "Commonwealth") with the Kentucky Board of Claims, alleging that the Commonwealth failed to remove overgrown vegetation from its property which affected the visibility of the railroad tracks and the railroad warning signals. Perkins also filed suit in Fayette Circuit Court against both Lexington Fayette Urban County Government (hereinafter, "LFUCG") and Norfolk Southern on June 21, 2007. Perkins asserted that LFUCG failed to clear trees from its property and that Norfolk Southern failed to ensure adequate visibility at the crossing.[1] This case was heard in the Fayette Circuit Court, Division 9, as Civil Action No. 07-CI-

[1] There were no crossing arms at this particular crossing, and that may have contributed to the accident, but due to a federal presumption regarding railroad crossing signals, no claim was bought against Norfolk Southern in that regard.

002898. During the pendency of that action, the Board of Claims held its case in abeyance.

The Fayette Circuit Court issued an order on August 8, 2007, releasing LFUCG from the suit on the basis of sovereign immunity. Then, on August 10, 2011, the Fayette Circuit Court granted summary judgment to Norfolk Southern. Neither decision was appealed.

After the conclusion of the action between Perkins and LFUCG and Norfolk Southern, the Board of Claims lifted its stay on the wrongful death action. The Commonwealth filed for summary judgment and a hearing was held in front of Board of Claims hearing officer Mike Wilson. Both the Estate and the Commonwealth relied on discovery and expert opinions from the Fayette Civil Action No. 07-CI-002898.[2]

The Board of Claims hearing officer issued a Recommended Findings of Fact, Conclusions of Law and Recommended Order on December 11, 2012, in favor of the Commonwealth. Some of the facts found were undisputed, including: how and when Perkins died; that the claim was brought by Phillip Perkins as Administrator of the Estate of Andrew Perkins; that the railroad at the crossing consisted of a single set of tracks running north/south and that Waveland Museum

[2] In addition to expert witnesses, there was testimony from three eyewitnesses. According to testimony from Mr. Jeremy Coyle, the train conductor, he observed that after approaching the crossing, Andrew Perkins briefly slowed down then continued onto the tracks. There was also testimony from another driver who saw the collision from across the tracks. The driver, Mr. James McKendree, stated that Andrew Perkins's van approached the tracks at approximately ten miles per hours per hour without slowing. A local resident, Mr. Waldon Hager, testified that the view of the tracks has been obscured for years due to overgrown vegetation. He also testified that he had observed the railroad signal devices activate without any trains present on over fifty occasions.

Road was a two-lane, two-way paved roadway of about 18 feet in width and running essentially east/west; and that it was approximately 11:30 a.m. on a day with clear conditions, dry pavement and there was daylight. He also found that while the visibility of the signs and warning signals was at issue, it was not disputed that the crossing was equipped with active warning devices installed on both sides of the crossing and on cantilever arms extended over both approaches to the crossing. There were two signals in both directions on each support pole and cantilever arm, resulting in a total of eight signals toward each oncoming driver. The crossing also had the required crossbuck signs. There was no dispute as to whether the devices were consistent with the standards for traffic control devices at public railroad crossings.

Regarding the activity of the signals, the hearing officer relied on the testimony of opposing driver Mr. James McKendree who indicated that the signals were working in his direction and found that while Mr. McKendree was facing the other direction, there is no evidence that the signals were not working in Andrew Perkins's direction on the other side of the crossing.

The hearing officer found that Andrew Perkins either saw or should have seen the railway advance pavement marking, located 278.5 feet from the crossing. Citing the Collision Reconstruction Unit Press Release from June 3, 2006, the officer found that the railroad advance warning sign was visible from 631.7 feet before the crossing sign, one set of warning lights was visible 650 feet from the crossing, two sets of warning lights could be observed from 457 feet from

the crossing, there was a railroad crossing marking on the roadway 278.5 feet from the crossing and that the first full view of the crossbuck was 195 feet from the crossing. The officer acknowledged the conflicting testimony of Waldon Hager, who said that the railroad advance warning sign was obscured by vegetation and that the tree canopy prevented approaching drivers from seeing the warning lights until they were 30 feet from the crossing. However, the officer found that it would be impossible for any tree canopy or overgrown vegetation to cover the marking on the roadway pavement 278.5 feet from the crossing.

Perhaps most importantly, the hearing officer found that the Commonwealth's ownership of the land was subject to a right-of-way owned by LFUCG extending 75 feet on one side of the road and 100 feet on the opposite side of the road. Therefore, according to the hearing officer, there was no evidence that the Commonwealth had any control over this portion of the property.

The hearing officer found that the Fayette Circuit Court, in the original case, had found that the crossing was not extra-hazardous. Perkins filed an exception to that finding and the Board of Claims, in its final order, rejected that portion of the recommended order which concluded that collateral estoppel applies because that conclusion was not essential to its decision. However, the hearing officer pointed to the engineering report of Joseph D. Blaschke, and found that if a driver were to stop in advance of the crash site, there is over 585 feet of available sight distance. He also pointed to the testimony of Perkins's expert William Coltharp, who stated that at a point 23 feet from the railroad rack, there was no

sight impediment allowing a driver to see well beyond 500 feet up the track. He also found that, in concordance with Perkins's expert, that at a distance of 20 feet from the track, Andrew Perkins increased his speed. Finally, the hearing officer found that this was the first crash at this crossing involving a southbound train and westbound vehicle.

Also, the hearing officer found that the Commonwealth owed no common law duty to provide Perkins with any sight triangle by removing trees and vegetation on any property it owned but which was under control of LFUCG, via easement,[3] and that regardless, creating any sight triangle would be a discretionary act rather than a ministerial[4] one, as no evidence was presented indicating that there were any guidelines for sight triangles in the Federal Highway Administration's publication "Guidance on Traffic Control Devices at Highway-Rail Grade Crossings."

Therefore, the hearing officer recommended that the Board of Claims adopt his findings of facts and conclusions of law and that Perkins was not to

[3] The hearing officer did state that some courts have departed from the traditional rule not requiring a landowner to control vegetation on its property for the benefit of public highway users. However, he found that Perkins's case law supporting these current deviances all resulted from a situation where the property owner created a situation where it was not possible to exit the property owner's property safely. He found that in this case, Perkins crossed a railroad track without stopping to see if a train was coming, and when doing so was acting in direct conflict with Kentucky law. Furthermore, citing *CSX Transp., Inc. v. Moody,* 313 S.W.3d 72 (Ky. 2010), the officer found that common-law negligence requires proof that the defendant "knew or should have known that its conduct created a reasonable likelihood of injury," and that a prudent landowner would not think that his failure to create a sight triangle would result in an accident when there were adequate warning devices and signals to alert drivers of an oncoming train.

[4] Under *Yanero v. Davis*, 65 S.W.3d. 510, 522 (Ky. 2001), a ministerial act is "one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from mixed and designated facts."

receive any award from the claim. Pursuant to the entry of his recommendations, the Board of Claims issued a final order on January 17, 2013, accepting and adopting the hearing officer's recommendation. However, after Perkins filed exceptions to the Board of Claims' decision, the Board of Claims issued another final order on March 27, 2013. The Board of Claims then rejected the hearing officer's recommendation regarding collateral estoppel on whether the crossing was extra-hazardous and then accepted and adopted the remainder of his recommendations.

Perkins then appealed that order to the Fayette Circuit Court in Civil Action No. 13-CI-001923. On April 2, 2014, the Fayette Circuit Court entered an order affirming the decision of the Board of Claims. The trial court found that the Commonwealth had no common law duty to maintain any vegetation obscuring the warning signs on the right-of-way, and that any duty to maintain remained with the holder of the right-of way, in this case LFUCG, a party previously adjudged to have sovereign immunity.[5] This appeal follows.

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[5] The circuit court, acknowledging the lack of case law on this subject, relied on a plethora of case law from different jurisdictions in making its decision, including *Berman v. Sitrin,* 991 A.2d 1038, 1048 (R.I. 2010), where that court held that "a public easement is the responsibility of the governmental agency that undertakes the control and maintenance of the easement." See also *Driggers v. Locke*, 913 S.W.2d 269, 272-274 (Ark. 1996)(owner owes no duty to users of highway to trim holly bushes on his property growing close to intersection); *Nichols v. Sitko*, 510 N.E2d 971, 974 (Ill. App. Ct. 1987)(property owner was not liable for injuries from a collision where the driver's vision was impaired by his failing to trim overgrown vegetation); *Hefferman v. Reinhold*, 73 S.W.3d 659, 667 (Mo. App. E. Dist. 2002)(landowner has no duty to maintain or repair easement); *Krotz v. CSX Corp*., 115 A.D.2d 310 (N.Y. App. Div. 1985)(no common law duty to control vegetation on property to the benefit of other public highway users).

When appealing an order from the Board of Claims, both the circuit court, serving as the first appellate court, and any further appellate court are statutorily limited in the scope of their review. Pursuant to Kentucky Revised Statutes (KRS) 44.140, the appeal shall be made in the county where the hearing was conducted, in the present case, Fayette, and that:

> [o]n 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 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.

KRS 44.140(5). Further, KRS 44.150 specifically addresses this court's duty in regards to reviewing cases from the Board of Claims. Under KRS 44.150,

> [a]ppeals may be taken to the Court of Appeals under the same conditions and under the same practice as appeals are taken from judgments in civil cause rendered by the Circuit Court, but no motion for a new trial or bill of exceptions shall be necessary. The Court of Appeals shall review only the matters subject to review by the Circuit Court and also errors of law arising in the Circuit Court and made reviewable by the Rules of Civil Procedure, where not in conflict with KRS 44.070 to 44.160.

KRS 44.150. Additionally, case law is clear that the Board of Claims' findings must be approved if they are supported by substantial evidence. *Commonwealth v. Mudd*, 255 S.W.2d 989 (Ky. 1953).

Kentucky Rules of Civil Procedure 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "The 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." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). However, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482. The moving party bears the burden of demonstrating entitlement to judgment as a matter of law; the burden then shifts to the opposing party to produce facts warranting a finding in its favor. *Hubble v. Johnson,* 841 S.W. 2d 169 (1992); *James Graham Brown Foundation vs. St. Paul Fire & Marine Insurance Company,* 814 S.W. 2d 275 (1991).

First, Perkins claims that summary judgment was improperly granted because a genuine issue of fact remains as to whether the crossing was extra-hazardous, thus giving rise to a greater standard of care by the landowner where the railroad crossing is located. This court disagrees. After a comprehensive review of the case law of both Kentucky and the Sixth Circuit as a whole, this court fails to find any precedent that labeling a crossing as "extra-hazardous" creates any heightened duty on anyone but the railroad company in question or the

operator of the motor vehicle. Perkins relies on the holding in *Citizens State Bank v. Seaboard*, 803 S.W.2d 585 (Ky. App. 1991), where the court found that a warehouse obstructing the view of a railroad track created an extra-hazardous crossing. However, the court in *Citizens*, quoting *Piersall's Adm'r v. C&R Ry. Co*, 180 Ky. 659 (1918), held that "a greater degree of care is required at such crossing by both the railroad and the traveler." 803 S.W.2d at 585. There is no indication that the greater degree of care extends beyond the railroad and the operator of the vehicle, here, Andrew Perkins.

Additionally, Perkins cites to *Illinois Cent. R. Co. v. House*, 352 S.W.2d 819 (Ky. 1961), in its assertion of the need to determine whether the crossing is extra-hazardous. However, the court in *Illinois* held that "evidence as to whether view of approaching train was obstructed was insufficient to take the jury question whether crossing was so unusually dangerous as to require additional precautions by [the] **railroad**." *Id* (emphasis added).[6] Therefore, without any indication that a judicial finding by the Board of Claims that the crossing is extra-hazardous would have any effect on an adjacent landowner's duty to motorists, it is insufficient to give rise to a material question of fact.

Second, Perkins states that the circuit court's interpretation of the prevailing Kentucky law was erroneous with respect to the Commonwealth's duty to the decedent because the present case involves neither private railroad crossings,

[6] A further investigation into the law regarding extra-hazardous crossings in this jurisdiction shows that neither Kentucky courts nor the Sixth Circuit has ever extended duties for such crossings beyond the railroad and traveler.

nor highway easements. Kentucky case law regarding the removal of vegetation from railroad crossings is at best scant. In *Calhoun v. CSX Transportation, Inc.,* 331 S.W.3d 236 (Ky. 2011), the Kentucky Supreme Court discussed the duty of a landowner to remove vegetation from private crossings, holding that a railroad has no duty to clear vegetation at private crossings, and that rather that duty fell on the landowner. Specifically, the court said that the railroad, as the servient easement holder, "had no duty 'to maintain in any way the safety of the private passway for travel.'" *Id* at 242, citing *Spalding v. Louisville & N.R. Co.,* 136 S.W.2d 1 (1940). At first glance, the case would seem to lean in favor of Perkins by creating a duty on the Commonwealth to remove the vegetation from its property. However, the vegetation in question was found by the hearing officer to be on the easement held by LCUFG, who was previously dismissed due to sovereign immunity.

Third, Perkins asserts that the hearing officer improperly ignored Kentucky law setting forth a duty to exercise greater care at an extra-hazardous grade crossing. However, as discussed above, there is no case law in this jurisdiction that indicates that an extra-hazardous grade crossing creates a higher duty of care to anyone but the railroad, not an adjoining landowner or easement holder.

Fourth, Perkins asserts that the conclusion that the Commonwealth had no common law duty to remove vegetation on its property was in error. We disagree. Here, both the hearing officer, as the trier of fact, and the circuit court found that the vegetation was on the right-of-way controlled by LFUCG. If, as

Perkins claims, "where a governmental entity knowingly maintains an intersection right-of-way which dangerously obstructs the vision of motorists using the street not readily apparent to motorists, it is under a duty to warn of the danger or make safe the dangerous condition." Appellant's Brief at 19, citing *Whitt v. Silverman*, 788 So.2d 210, 221 (Fla. 2001). Even if this court finds merit in the holding of the Florida Supreme Court, that duty would fall to the LFUCG as the party responsible for maintaining the county road as the owner of the right-of-way. Here, Perkins is trying to assert that because the Commonwealth is a governmental entity, it should be held to a higher standard than the traditional landowner. We decline to find a heightened duty of care as to the Commonwealth. Here, the Commonwealth is merely the landowner, who yielded control of a right-of-way to a different municipal government, no different than if a private person yielded control of a portion of his property for a county road.

Fifth, Perkins argues that the hearing officer erroneously concluded that Andrew Perkins's failure to stop at the grade crossing precluded liability by the Commonwealth. To support his argument, Perkins points to *Commonwealth v. Guffey*, 244 S.W.3d 79 (2008), arguing that Andrew Perkins's actions were foreseeable due to a dangerous grade crossing lacking crossing arms to impede travel and a history of automobile collisions and that comparative fault should be applied. In regards to comparative negligence generally, "fault is determined by breach of duties and that is the sole factor upon which liability is fixed." *Regenstreif v. Phelps*, 142 S.W.3d 1, 6 (Ky. 2004). Here, we have already

discussed that the Commonwealth owed no duty to Perkins, therefore whether comparative fault should have been applied is irrelevant.

Sixth, Perkins argues that the hearing officer erroneously concluded that a prudent landowner would not anticipate that the failure to create a sight triangle could result in a collision where railroad warning devices were in place. Again, we have already determined that the Commonwealth was under no duty to provide a sight triangle to Perkins, thus there is no genuine issue of material fact as to this argument. Perkins points to the testimony of nearby resident Mr. Hager who claims that the signals were often not working correctly. However, in the present case the Board of Claims is serving as the fact-finder and we will not substitute our judgment for that of the hearing officer who had the opportunity to review the testimony and give proper weight to his testimony.

Seventh, Perkins alleges that the hearing officer erroneously based his conclusions, at least in part, on extraneous evidence that was not relevant to whether the Commonwealth's conduct was a substantial factor in causing Andrew Perkins's death, particularly to the fact that Andrew Perkins could not have ignored the warning signal on the pavement. Perkins argues that the finding is simply not relevant to his claim, as it provides no information on the presence of an approaching train. However, even if it might be irrelevant to his claim, it was one of many factual findings of the Board of Claims hearing officer and was not a central fact in any of the hearing officer's conclusions of law. Therefore, there is

no indication that the relevance of that specific fact had any outcome on the hearing officer's decision, and thus does not create a genuine issue of fact.

Eighth, Perkins argues that the hearing officer erroneously ignored expert testimony that indicated a plausible reason why the decedent would not have seen the approaching train. Again, pursuant to KRS 44.140, the Board of Claims serves as the fact-finder in all such cases, and both the circuit court and this court are limited in review of their claims. It is not our duty to determine the weight of the expert testimony, that is reserved for the board of claims and we will not substitute our judgment for that of the Board.

Finally, Perkins asserts that the hearing officer erroneously held that the creation of a sight triangle is a discretionary rather than ministerial act. In his argument, he points to an unpublished Court of Appeals opinion, *Com., Trans. Cabinet, Dept. of Highways v. Nash*, 2006 WL 2382730, *3-4 (Ky. App. Aug. 18. 2006), which states that roadway maintenance by the Commonwealth is a ministerial act, and to *City of Frankfort v. Byrns,* 817 S.W.2d 462 (Ky. App. 1991), which holds that building of a drainage system is a ministerial act. Here, neither of these cases are relevant in that they rely on the Commonwealth being a governmental entity, with heightened duties and responsibilities. Here, the Commonwealth, though a governmental entity, is merely the owner of a piece of property, not acting in any official governmental capacity, so there is no genuine issue of material fact as to this issue. Had LFUCG not been dismissed as a party,

an analysis of whether acts it undertook or failed to undertake in maintaining its control of its highway easement, may have been of issue.

For the foregoing reasons, the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Lexington, Kentucky

BRIEF FOR APPELLEE:

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