

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000026-MR

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET,  
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT  
HONORABLE JERRY WINCHESTER, JUDGE  
ACTION NO. 97-CI-00108

JAMES H. TAYLOR,  
ADMINISTRATOR OF THE ESTATE  
OF JAMES H. TAYLOR, II;  
BOARD OF CLAIMS,  
COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: EMBERTON, McANULTY AND SCHRODER, JUDGES.

McANULTY, JUDGE: This is an appeal by the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways (Transportation Cabinet) from an order of the Whitley Circuit Court. The circuit court's order reversed a determination of the Kentucky Board of Claims (Board) as to the proper method of calculating the Transportation Cabinet's comparative fault liability in an accident which claimed the life of the appellee's decedent, James H. Taylor II. We affirm.

On May 20, 1991, Taylor was killed in a one car accident on Kentucky Highway 204 in rural Whitley County. Taylor was killed when his vehicle traveled off the road and over a steep embankment. The side of the embankment was supported by a large wooden piling. Taylor was killed by the support piling piercing the passenger compartment of the vehicle and crushing his skull.

There were no guardrails on the curve where the vehicle left the roadway. Expert testimony established that, based upon the steepness of the side slope of the embankment, standard practice clearly required guardrails at the accident site. It is uncontested that the Transportation Cabinet constructed the support piling.

On May 7, 1992, Taylor's estate filed an action with the Board of Claims against the Transportation Cabinet. On January 16, 1997, the Board issued its Findings of Fact, Conclusions of Law, and Order. The Board determined that Taylor was 50% at fault in causing the accident for failing to keep his vehicle under control and for not seeing the apparent dangers that existed at the accident site. The Board further determined that the Transportation Cabinet was 50% at fault because it failed to comply with the safety requirements as they pertain to the erection of guardrails; because it failed to erect a warning sign at the curve; and because it constructed the hazardous support piling.

Taylor was only 18 at the time of his death, and the Board determined that Taylor's estate had proven damages of at

least \$406,640.00 based upon lost wages if Taylor had earned the minimum wage until he was sixty-five. In calculating the Transportation Cabinet's comparative fault liability damages, the Board applied the Transportation Cabinet's 50% comparative fault apportionment to the \$100,000.00 statutory cap, see KRS 44.070(5), and determined the Transportation Cabinet's comparative fault liability damages to be \$50,000.00. Taylor's estate received collateral source payments of \$10,000.00 from Taylor's automobile insurance company as basic reparation benefits. Pursuant to KRS 44.070(1), the Board deducted the collateral source payments from the Transportation Cabinet's comparative fault liability, resulting in a net award to Taylor's estate of \$40,000.00.

Taylor's estate thereafter appealed to the Whitley Circuit Court. On December 2, 1998, the trial court entered a Judgment reversing the Board. The trial court held that the Board had erred in determining Taylor's award. Specifically, the trial court determined that the Board had incorrectly applied the Transportation Cabinet's 50% fault apportionment to the \$100,000.00 statutory cap rather than to the total damages of \$406,640.00. The trial court determined that the Board should have, instead, first applied the apportionment to the total award, and only then applied the statutory cap. Pursuant to this method, the Cabinet's uncapped comparative fault liability is \$203,320.00 ( $406,640.00 \times 50\%$ ). However, pursuant to KRS 44.070(5), the Cabinet's liability is thereafter capped at \$100,000.00. Finally, the award is reduced by \$10,000.00

received from collateral source payments, resulting in a net award of \$90,000.00. Because we agree with the trial court's method of calculating an award in a comparative fault case, we affirm.<sup>1</sup>

First, the Transportation Cabinet contends that the Board's award of damages to Taylor's estate was not supported by substantial evidence. As a procedural matter, Taylor's estate contends that this issue is not preserved for review because the Transportation Cabinet did not cross-appeal this issue to the circuit court and, further, responded in its circuit court brief that "[t]here is obviously substantial evidence to show a failure of duty by both parties and the Board's assignment of equal responsibility to each party should not be disturbed." Issues not presented to the trial court cannot be raised for the first time on appeal. Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225 (1989); Kentucky Milk Marketing and Antimonopoly Com'n v. Kroger Co., Ky., 691 S.W.2d 893 (1985). "[A]ppellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). We agree with the appellee that the Transportation Cabinet has not properly preserved this issue for our review; nevertheless, we will briefly address the issue on the merits.

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<sup>1</sup>On June 25, 1999, because the cases share common issues, this case was ordered to be consolidated with Easenbock v. Board of Claims, 1999-CA-000543-MR and Estate of Juanita Easenbock v. Board of Claims, 1999-CA-001080-MR.

We may not disturb the Board's findings if they are supported by substantial evidence. Commonwealth of Kentucky, Transportation Cabinet, Department of Highways v. Shadrick, Ky., 956 S.W.2d 898, 901 (1997). "If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained." Transportation Cabinet, Department of Highways, Commonwealth of Kentucky v. Thurman, Ky. App., 897 S.W.2d 597, 599-600 (1995) (quoting Taylor v. Coblin, Ky., 461 S.W.2d 78, 80 (1970)). Substantial evidence is evidence which, when taken alone or in light of all of the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Id. "Although a reviewing court may arrive at a different conclusion than the trier of fact in its consideration of the evidence in the record, this does not deprive the agency's decision of support by substantial evidence." Id. "Simply put, 'the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes.'" Id. (quoting Commonwealth, Transportation Cabinet, Dept. Of Vehicle Regulation v. Cornell, Ky. App., 796 S.W.2d 591, 594 (1990)).

It is uncontested that there were no guardrails on the curve where Taylor's vehicle left the road. In its decision, the Board cited and relied on the testimony of professional engineer John W. Hutchinson, a professor of civil engineering, emeritus, from the University of Kentucky. In its decision, the Board quoted Professor Hutchinson as follows:

Standard practice requires roadside  
restraining structures (guardrails) for side

slopes steeper than 3.5:1 and greater than 10' in height, Clearly applicable to his accident site. Not only did the Transportation Cabinet fail to provide the required guardrail, but they built in the lethal post hazard.

Dr. Hutchinson's findings were:

There was a fatal intrusion into the involved vehicle by a fill slope stabilizing wooden pile (post) just off the inside of a right-hand curve near the top of a roadside slope so extremely steep (2:0) and extensive that I could not even see the bottom (toe of the slope) from the pavement edge. I estimated the drop-off to be 50' or more to the bottom of the slope.

Dr. Hutchinson's expert testimony was substantial evidence to support the Board's finding of negligence by the Transportation Cabinet. Further, the damages calculation was based on minimum-wage earnings until retirement at age 65. This calculation was likewise supported by substantial evidence by way of expert testimony.

Next, the Cabinet contends that it did not owe a duty to Taylor based upon the Supreme Court's holding in Commonwealth, Transportation Cabinet, Department of Highways v. Shadrick, supra. Again noting that the Transportation Cabinet did not cross-appeal the Board's decision and, in the trial court, sought only to defend the Board's method of calculating its liability, Taylor's estate contends that this issue is unpreserved. The Transportation Cabinet did cite Shadrick to the trial court, but did not cross-appeal to seek a reversal of the Board's determination that it owed a duty to Taylor. In the trial court, the Transportation Cabinet summarized its Shadrick argument by asserting that "the Department likely did not owe a duty to

[Taylor] and any apportionment of fault for the accident to the Department is generous." We again note that it is not proper for the Transportation Cabinet to decline to challenge an adjudication by the Board of Claims in the circuit court and thereafter seek reversal of the Board in this court. Nevertheless, we will briefly address the Transportation Cabinet's Shadrick argument.

In Shadrick,

on a cold, rainy night in February 1989, Angela Shadrick lost control of her Chevette automobile while rounding a curve on Kentucky Highway 122 in Pike County, Kentucky. The vehicle left the roadway and impacted with a dump truck that was parked in the Department's right-of-way in front of a junkyard. The truck had been in the location for several months. In fact, some nine months before the accident, the Department had sent a notice to the junkyard owner to clear the right-of-way of 'improper recycling material.' This notice referred to a vehicle of some sort. While it was not proven with certainty that the dump truck was the same vehicle referred to within the notice, it may have been the subject of the notice.

Shadrick at 899.

Angela Shadrick's estate brought an action against the Transportation Cabinet in the Board of Claims. The Board dismissed the complaint, finding that there was "no causal connection between the conduct of the Department and the resulting losses[,] " and that "the only negligent participants were Angela Shadrick and the owner of the dump truck." The circuit court affirmed the Board, but this court reversed, holding that comparative negligence principles applied and that

the case should be remanded to the Board for a determination of the percentage of fault attributable to the respective parties.

The Transportation Cabinet appealed to the Supreme Court, which reversed our decision, noting that (1) "The Department's duty with respect to the maintenance of roads is to maintain them in a reasonably safe condition for those members of the traveling public exercising due care for their own safety." Shadrick at 900 (citing Commonwealth of Kentucky, Transportation Cabinet, Bureau of Highways v. Roof, Ky., 913 S.W.2d 322 (1996); Commonwealth of Kentucky, Department of Highways v. Automobile Insurance Co., Ky., 467 S.W.2d 326 (1971); Commonwealth of Kentucky, Department of Highways v. General and Excess Insurance Co., Ky., 355 S.W.2d 695 (1962); and Swatzell v. Commonwealth, Ky., 441 S.W.2d 138 (1969)); (2) "[T]he state is not liable for failure to keep highway shoulders in reasonably safe condition for travel, except as to defects which are obscured from the view of ordinary travelers and are so inherently dangerous as to constitute traps." Shadrick at 900-901 (citing Dillingham v. Dept. of Highways, Ky., 253 S.W.2d 256 (1952)); and (3) that "[A]n 'inherently dangerous' situation or a 'trap' is nothing more or less than a condition not 'reasonably safe'." Shadrick at 901 (quoting Falender v. City of Louisville, Ky., 448 S.W.2d 367, 370 (1969)). The Supreme Court noted that the Board's decision was supported by substantial evidence and that we had improperly substituted our judgment for the Board.

In the present case, the Board determined that the Board violated its duty and created an unusually dangerous



condition in three respects: (1) by failing to install a guardrail at a location where its own regulations would dictate such an installation; (2) by failing to warn an approaching motorist of the impending curve; and (3) by constructing the protruding lethal piling. These factors distinguish this case from Shadrick in that they illustrate the existence of a "trap." The Board's findings insofar as they relate to the Transportation Cabinet's breach of a duty, is supported by substantial evidence in the record.

Finally, the Cabinet contends that its comparative fault apportionment should be applied to the statutory cap of \$100,000.00, and not to the total damages. As previously noted, upon determining that the Cabinet was 50% comparatively at fault, even though Taylor's estate had proved damages of at least \$406,640.00, the Board, applied the apportionment to the \$100,000.00 statutory cap prescribed by KRS 44.070(5). The trial court rejected the Board's approach and determined that, first, the Cabinet's uncapped liability should be determined by applying its 50% percentage fault to the total damages of \$406,640.00 and, second, because this calculation produces an uncapped liability of \$203,320.00, the \$100,000.00 statutory cap of KRS 44.070(5) should be applied thereby producing a comparative fault liability of \$100,000. We agree with the trial court.

The issue of comparative negligence as it applies to the statutory cap in a Board of Claims case was resolved by this court in Truman v. Kentucky Board of Claims, Ky. App., 726 S.W.2d 312 (1986). In Truman, Commodore Lewis Truman died as a result

of injuries sustained in a roof fall at a coal mine owned by the C & T Mining Co. in Floyd County, Kentucky. Truman's estate filed a claim with the Board, and the trial court determined that the Department of Mines and Minerals, because of inadequate inspection practices, was 50% at fault in causing the accident. At the time, KRS 44.070(5) capped a Board of Claims recovery at \$50,000.00. The parties stipulated that the lost earning capacity of Truman was in excess of \$100,000.00. The trial court in Truman applied the 50% fault apportionment to the \$50,000.00 cap and awarded Truman's estate \$25,000.00. Truman's estate appealed. We resolved the issue as follows:

The sole issue on appeal is whether the appellant should recover one-half of the \$50,000.00 limitation on awards as set forth in KRS 44.070(5) or whether she should recover one-half of the stipulated damages up to the \$50,000.00 limitation on awards as stated above.

This issue, although being one of first impression in this Commonwealth, is fairly simple to resolve. The statute with which we are concerned in pertinent part states:

Regardless of any provision of law to the contrary, the jurisdiction of the board is exclusive, and a single claim for the recovery of money or a single award of money should not exceed fifty thousand dollars (\$50,000.00), exclusive of interest and costs.

This language clearly deals with the limitation on the amount of money one can recover on a claim. There is no logical relationship between such limitation and damages which are proven by a party in a law suit. As the above noted stipulation stated, the decedent suffered damages in excess of \$100,000.00 in lost earnings alone. Under that stipulation, appellant's damages award under the comparative negligence doctrine

would be at least \$50,000.00 or one-half of at least the damages stipulated of \$100,000.00. The comparative negligence doctrine applies to damages rather than to limitation of recovery. Therefore, the trial court was in error in awarding the appellant one-half of the statutory limitation of \$50,000.00. Rather her award should have been one-half of the damages stipulated but not to exceed \$50,000.00, the statutory recovery limitation.

The present language of KRS 44.070(5), except insofar as it has been modified to increase the cap, is unchanged since Truman was rendered. In light of Truman, clearly the Board was incorrect in applying the Transportation Cabinet's comparative fault apportionment to the \$100,000.00 statutory cap rather than to actual damages.

In this case, Taylor's estate proved damages of at least \$406,640.00. Application of the Cabinet's 50% apportioned fault produces an uncapped liability of at least \$203,320.00. Application of the statutory cap reduces the Transportation Cabinet's liability to \$100,000.00. The parties do not appear to dispute that the \$10,000.00 received by the estate in collateral source payments should be deducted as the final step pursuant to Transportation Cabinet v. Roof, supra. Therefore, the proper award in this case is, as determined by the trial court, \$90,000.00.

For the foregoing reasons the judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Clayton B. Patrick

BRIEF FOR APPELLEE:

Steven J. Moore  
Corbin, Kentucky

Boyd, Watkins, Patrick &  
Sparks  
Frankfort, Kentucky