

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-002051-MR

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET,  
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT  
HONORABLE VERNON MINIARD, JR., JUDGE  
ACTION NO. 04-CI-00165

AMANDA GUFFEY (NOW MELTON), IN  
HER CAPACITY AS ADMINISTRATRIX  
OF THE ESTATE OF JEREMIAH GUFFEY,  
DECEASED; AND THE KENTUCKY BOARD  
OF CLAIMS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND JOHNSON, JUDGES; POTTER, SENIOR JUDGE.<sup>1</sup>

JOHNSON, JUDGE: The Commonwealth of Kentucky, Transportation Cabinet, Department of Highways has appealed from a judgment of the Wayne Circuit Court entered on September 10, 2004, which reversed the final order of the Kentucky Board of Claims

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<sup>1</sup> Senior Judge John W. Potter, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

dismissing Amanda Guffy's (now Melton's) claim for damages resulting from the death of her husband, Jeremiah Guffey, and awarded Jeremiah's estate \$197,292.64. Having concluded that the circuit court correctly reversed the Board on the issues of duty and foreseeability, we affirm.

On or about March 11, 2001, Jeremiah and his friend, Josh Bennett, participated in an All-Terrain Vehicle (ATV) safety course held in the Cooper Community of Wayne County, Kentucky. Both Jeremiah and Josh were relatively new owners of ATVs and they participated in this safety course, in part, in order to receive cash incentives. Subsequently that day, the two men rode their ATVs on State Highway 167. With Jeremiah in the lead, they proceeded along State Highway 167 for approximately 100 feet, to the intersection of State Highway 167 and Old Highway 167. Jeremiah made a left hand turn onto Old Highway 167 and accelerated down the slight incline of the road. After traveling approximately 70 feet down Old Highway 167, Jeremiah was knocked off his ATV when he was struck across the neck by a suspended cable, which was relatively thin and difficult to see. Initially, Jeremiah was rendered unconscious; however, he regained consciousness for a short period of time and was able to stand before collapsing. He was then transported by ambulance to the Wayne County Hospital. Jeremiah

died as a result of his injuries, consisting of traumatic airway disruption as a result of blunt force trauma to his neck.

Old Highway 167 is owned by the Commonwealth of Kentucky. For approximately 20 years prior to the date of the accident, this highway had not been used as a regular thoroughfare by the traveling public of the Commonwealth. However, the Transportation Cabinet continued to retain ownership of Old Highway 167 for the purpose of upkeep of a guardrail. Old Highway 167 is paved; however, the road leads to a dead end at the guardrail where an old bridge has been removed. The cable causing Jeremiah's injury had been stretched across Old Highway 167 between two wooden posts by the previous adjacent landowner and was maintained by the current adjacent landowners to prevent access to their private property. Although the Cabinet did not erect the cable, it is undisputed that it knew, or should have known, that the cable was stretched across Old Highway 167.<sup>2</sup> Further, it is undisputed that the presence of the inconspicuous cable stretched across Old Highway 167 constituted a dangerous condition on the roadway, and that Jeremiah's striking of the cable was a substantial factor in causing his death.

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<sup>2</sup> The Cabinet had actual notice of the cable through its right-of-way agent, David Smith, who personally observed the stretched cable prior to the accident when he met with the current adjacent landowners in connection with their inquiry into the possibility of their acquiring title to this section of Old Highway 167.

Jeremiah's widow, Amanda, filed a claim with the Board in her capacity as the administratrix of Jeremiah's estate. Following a hearing and the review of several depositions, the Board's Hearing Officer entered his recommended findings of fact, conclusions of law, and order. The Board found that Jeremiah's estate incurred medical expenses in the amount of \$6,191.00, funeral expenses in the amount of \$9,662.00, and the destruction of earning capacity in the amount of \$1,275,752.00, for a total of \$1,291,605.00. However, the Hearing Officer recommended denying the claim for two reasons. First, he concluded as a matter of law that the Cabinet owed no duty to Jeremiah because the accident did not occur on a public roadway and because Jeremiah could not be considered a member of the traveling public.<sup>3</sup> Second, he concluded that the accident was not foreseeable because the Cabinet could not have expected that someone would operate an ATV on a public roadway in violation of KRS 189.515(1).<sup>4</sup> No exceptions were filed, and the Board entered its final order on March 25, 2004, adopting the recommended order of the Hearing Officer and denying Jeremiah's estate's request for damages.

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<sup>3</sup> KRS 189.515(1) prohibits the operation of an ATV on a public roadway.

<sup>4</sup> The speed at which Jeremiah was traveling was not a relevant factor in the accident, nor was the fact that he was not wearing a helmet, as a helmet would have in no way prevented the injuries which he sustained.

Amanda timely petitioned the Wayne Circuit Court for review of the Board's final order. In the brief filed in support of her petition, Amanda argued that the Board erred as a matter of law in neither concluding that the Cabinet owed Jeremiah a duty to remove or to warn of the cable nor concluding that his injury was foreseeable. In its judgment entered on September 10, 2004, the circuit court reversed the Board, stating that "[t]he issue of what duty one party may owe to another is a question of law."<sup>5</sup> The circuit court further stated:

[T]he Transportation Cabinet, as owner of Old Highway 167, owed Jeremiah (and the general public as a whole) the duty to keep the roadway in a reasonably safe condition, to provide proper safeguards, and to give adequate warning of any dangerous condition in the roadway.<sup>6</sup> Further, as the owner of the roadway, the Transportation Cabinet had a duty to refrain from setting traps for any licensees or trespassers who may enter upon the roadway.<sup>7</sup>

The circuit court also stated "[t]he Board's Hearing Officer correctly identified these duties, but then failed to apply these precedents to the facts of the case." It concluded, as a

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<sup>5</sup> See Mason v. City of Mt. Sterling, 122 S.W.3d 500, 505 (Ky. 2003); and Osterndorf v. Clark Equipment Co., 122 S.W.3d 530, 533 (Ky. 2003).

<sup>6</sup> See Commonwealth, Department of Highways v. Automobile Club Insurance Co., 467 S.W.2d 326, 328 (Ky. 1971) (overruled on other grounds, Commonwealth, Transportation Cabinet, Department of Highways v. Babbitt, 172 S.W.3d 786 (Ky. 2005)); and Commonwealth, Department of Highways v. General & Excess Insurance Co., 355 S.W.2d 695 (Ky. 1962).

<sup>7</sup> See Kirschner v. Louisville Gas & Electric Co., 743 S.W.2d 840, 844 (Ky. 1988).

matter of law, that "Jeremiah's accident was foreseeable" and stated:

A thin, indiscernible cable spanning a roadway is an obvious hazard, and the Transportation Cabinet had notice of the existence of this dangerous condition prior to Jeremiah's accident, but failed to remove the cable or warn of its presence. While Jeremiah was operating an ATV on a public road, in violation of K.R.S. §189.515, his violation of that statute does not preclude his estate from recovering for his death. The doctrine of contributory negligence was abolished in this Commonwealth 20 years ago, in favor of comparative negligence. Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984). The Board is statutorily charged to apply a comparative negligence standard to the cases before it. K.R.S. §44.073(10).

Finally, as to the award of damages, the circuit court stated:

Given the amount of damages suffered by Jeremiah's estate and the limited amount of recovery that is available in this action, Jeremiah would have to be 84.52% at fault and the Transportation Cabinet only 15.48% at fault, to preclude Jeremiah's estate from [maximum] recovery in this action.<sup>8</sup> Given the facts as stated above, which have not been appealed, this Court finds as a matter of law that no more than 50% of the fault can be attributable to Jeremiah's own conduct. Therefore, Jeremiah's estate is [ ] entitled to the full statutory award of \$200,000.00 in this action,<sup>9</sup> less the

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<sup>8</sup> 15.48% of Jeremiah's total damages of \$1,291,605.00 equals \$200,000.00.

<sup>9</sup> See KRS 44.070(5).

applicable setoff,<sup>10</sup> for a total award of \$197,292.64.<sup>11</sup>

This appeal by the Cabinet followed.

The Cabinet argues before this Court that the circuit court impermissively substituted its judgment for that of the Board and went beyond the limitations imposed upon it by KRS 44.140(5).<sup>12</sup> In her reply brief, Amanda argues that the Cabinet owed a duty to Jeremiah, that his damages were foreseeable, and that the Board failed to apply the correct law to the undisputed facts.

Because the factual findings are not in dispute, this Court's review is limited to questions of law. Specifically, we must determine whether the Cabinet owed a duty to Jeremiah and whether Jeremiah's damages were foreseeable. Such issues are questions of law to be reviewed by this Court de novo.<sup>13</sup> Having

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<sup>10</sup> KRS 44.070(1); and Transportation Cabinet v. Thurman, 897 S.W.2d 597, 600 (Ky.App. 1995).

<sup>11</sup> His estate received payment of \$2,707.36 from health insurance, and this payment is the only collateral offset to any award of damages in this matter.

<sup>12</sup> The Cabinet also contends that the circuit court erroneously entered its judgment without reviewing the entire record of the Board and prior to the entry of the order submitting the case for its consideration. We agree with Amanda that any irregularities in the procedures followed by the circuit court in arriving at the judgment in this case did not constitute reversible error.

<sup>13</sup> Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Transportation Cabinet, 983 S.W.2d 488, 490 (Ky. 1998). The Cabinet argues that our standard of review in this case is the clearly erroneous standard and that there was substantial evidence in the record to support the Board's ruling and thus it should not have been reversed by the circuit court. However, this standard only applies to review of the Board's findings of fact, which were not disputed in this case.

reviewed the applicable law, we affirm the circuit court's ruling that the Cabinet owed a duty to Jeremiah and that Jeremiah's damages were foreseeable.

In KRS 44.070, et seq., the Legislature partially waived the Commonwealth's sovereign immunity by creating the Board of Claims. The Board was vested with "full power and authority 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[.]"<sup>14</sup> Pursuant to KRS 44.120:

An award shall be made only after consideration of the facts surrounding the matter in controversy, and no award shall be made unless the board is of the opinion that the damage claimed was caused by such negligence on the part of the Commonwealth or its agents as would entitle claimant to a judgment in an action at law if the state were amenable to such action.

An adverse decision may be appealed by an aggrieved party to the circuit court in the county in which the hearing was conducted.<sup>15</sup> The circuit court sitting without a jury is specifically limited in its review 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

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<sup>14</sup> KRS 44.070(1).

<sup>15</sup> KRS 44.140(1).



award."<sup>16</sup> Further, appeal is also permitted in the Court of Appeals.<sup>17</sup>

In Automobile Club Insurance Co.,<sup>18</sup> our state's highest court stated:

[T]he public authority having control over a highway has a duty to keep it in a reasonably safe condition for travel, to provide proper safeguards, and to give adequate warning of dangerous conditions in the highway. This includes the duty to erect warning signs and to erect and maintain barriers or guardrails at dangerous places on the highway to enable motorists, exercising ordinary care and prudence, to avoid injury to themselves and others. . . . [I]t is [the Department of Highway's] duty to furnish adequate protection for the general traveling public and users of the highway facilities [citations omitted].

Almost three decades later, the Supreme Court addressed this issue in Commonwealth, Transportation Cabinet, Department of Highways v. Shadrick,<sup>19</sup> and restated that the Commonwealth has a duty to exercise ordinary care to maintain its highways in a reasonably safe condition for the traveling public.<sup>20</sup>

Our Supreme Court in Babbitt stated that the law of Automobile Club Insurance "remains sound (except for the

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<sup>16</sup> KRS 44.140(5).

<sup>17</sup> KRS 44.150.

<sup>18</sup> 467 S.W.2d at 328.

<sup>19</sup> 956 S.W.2d 898 (Ky. 1997).

<sup>20</sup> Shadrick, 956 S.W.2d at 900; Automobile Club Insurance, 467 S.W.2d at 328.

implication that the duty is owed only to persons who are not contributorily negligent) and is in accordance with the general rule."<sup>21</sup> Further, our Supreme Court stated that Shadrick did not reinstate the "long-discarded doctrine of contributory negligence as a complete defense . . . to claims against highway authorities in Kentucky."<sup>22</sup> In characterizing the elements necessary to prove a claim against the Cabinet, our Supreme Court described causation as, not a percentage of causation of the accident, but rather a "percentage of causation of each claimant's damages" [emphasis original].<sup>23</sup> Further, our Supreme Court stated that while failure of the Cabinet to perform a duty, e.g., to erect a barrier or, as in this case, to warn of a cable across a road "'might not cause the accident, such a failure might be a substantial factor in aggravation of the injuries and, in that event, with proof of causation and negligence, the State will be liable'".<sup>24</sup>

In summary, our Supreme Court stated the test to determine whether the Cabinet breached its duty to a traveler of a public road as follows:

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<sup>21</sup> Babbitt, 172 S.W.3d at 794.

<sup>22</sup> Babbitt, 172 S.W.3d at 793.

<sup>23</sup> Id. at 792.

<sup>24</sup> Id. at 795 (quoting 60A C.J.S. Motor Vehicles § 457 (2005)).

Whether the failure to provide warnings . . . at a particular location constitutes negligence on the part of the highway authority is a fact-intensive inquiry for which the various designed guidelines, as well as available funds and cost effectiveness, may be considered. If a determination is made that the failure to provide warnings . . . constitutes negligence, the factfinder must then determine from the evidence whether the presence of warnings . . . would have prevented or reduced the damages sustained by the claimant and apportion liability in accordance with KRS 411.182. . . .

[T]he Board misinterpreted Shadrick as completely exonerating the Cabinet when the hazard is in plain view and the driver is contributorily negligent, compelling the erroneous conclusion that [the vehicle operator's] own negligence obviated any need to consider whether the Cabinet had a duty to [warn] and, if so, whether its failure to do so contributed to cause [the vehicle operator's] death, which would require an apportionment of damages.<sup>25</sup>

In the case before us, the Dissent argues that Jeremiah cannot be deemed a member of the traveling public because KRS 189.515(1) prohibits the operation of an ATV on a public roadway. However, the damages resulting from the riding of an ATV on a public highway obstructed by an indiscernible cable were certainly foreseeable;<sup>26</sup> and under the doctrine of comparative negligence the rule is that while a plaintiff's own

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<sup>25</sup> Babbitt, 172 S.W.3d at 795.

<sup>26</sup> We take judicial notice of the fact that there are frequent prosecutions under the statute forbidding the riding of an ATV on the public highway.

illegal conduct which directly contributed to his damages may limit his recovery, it does not bar recovery.<sup>27</sup> The Board of Claims found that although Old Highway 167 was not used as a regular thoroughfare, the Cabinet owned the portion where the accident occurred for the purpose of maintaining a guardrail put in place for the new bridge, and the highway was accessible for use by the general public. Under these circumstances, the law is settled that the Cabinet owed Jeremiah the duty to keep the highway in a reasonably safe condition for travel, to provide proper safeguards, and to give adequate warning of dangerous conditions in the highway.<sup>28</sup>

While the Cabinet and the Board do not specifically base their view as to the Cabinet's lack of liability on the doctrine of superseding cause, essentially this is the basis for their position. The law of superseding cause "use[s] [the] scope of liability to prevent a modestly negligent tortfeasor from being held liable for the entirety of another's harm when the tortious acts of other, more culpable persons were also a cause of the harm" [citations omitted].<sup>29</sup> Our Supreme Court addressed this argument in Babbitt and stated that "the doctrine of superseding cause has been substantially diminished by the

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<sup>27</sup> Babbitt, 172 S.W.3d at 795.

<sup>28</sup> Automobile Club Insurance, 467 S.W.2d at 328. See also Rentschler v. Lewis, 33 S.W.3d 518 (Ky. 2000).

<sup>29</sup> Babbitt, 172 S.W.3d at 793.

adoption of comparative negligence."<sup>30</sup> Thus, we conclude that the fact that Jeremiah was using an ATV to unlawfully travel a public road did not render the Cabinet free of fault for its negligence, but rather Jeremiah's negligence was a factor which the circuit court properly considered in apportioning the liability between the parties.

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

POTTER, SENIOR JUDGE, CONCURS IN RESULT ONLY.

GUIDUGLI, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, DISSENTING. Respectfully, I dissent from the majority opinion because I believe that the Cabinet did not owe a duty to Jeremiah, as he was not a member of the traveling public, and accordingly Amanda is not entitled to any recovery.

In Commonwealth, Transportation Cabinet, Dept. of Highways v. Shadrick,<sup>31</sup> the Supreme Court of Kentucky set out a three-part test to establish negligence on the part of the Department of Highways: "[A] claimant must establish: (1) a duty on the part of the Department; (2) a breach of that duty; and (3) consequent injury."<sup>32</sup> The issue in Shadrick, as in this

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<sup>30</sup> Babbitt, 172 S.W.3d at 793.

<sup>31</sup> 956 S.W.2d 898 (Ky. 1997).

<sup>32</sup> Id. at 900.

case, was whether a duty was owed by the Department of Highways to the claimant. In Commonwealth, Department of Highways v. Automobile Club Insurance Co.,<sup>33</sup> the former Court of Appeals stated:

[T]he public authority having control over a highway has a duty to keep it in a reasonably safe condition for travel, to provide proper safeguards, and to give adequate warning of dangerous conditions in the highway. This includes the duty to erect warning signs and to erect and maintain barriers or guardrails at dangerous places on the highway to enable motorists, exercising ordinary care and prudence, to avoid injury to themselves and others. . . . [I]t is [the Department of Highway's] duty to furnish adequate protection for the general traveling public and users of the highway facilities.

The Commonwealth is to exercise ordinary care to maintain its highways in a reasonably safe condition for the traveling public.<sup>34</sup> In the present case, the Board of Claims found that although Old Highway 167 was not used as a regular thoroughfare, the Cabinet owned the portion where the accident occurred for the purpose of maintaining a guardrail put in place for the new bridge. However, the question of whether Old Highway 167 is a roadway becomes a non-issue in light of my belief that the Cabinet did not owe Jeremiah any duty of care.

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<sup>33</sup> 467 S.W.2d 326, 328 (Ky. 1971).

<sup>34</sup> Shadrick, 956 S.W.2d at 900; Automobile Club Insurance, 467 S.W.2d at 328.

KRS 198.515(1) prohibits a person from operating "an all-terrain vehicle upon any public highway or roadway or upon the right-of-way of any public highway or roadway." Because ATVs are prohibited from being driven on a public roadway, drivers operating ATVs are necessarily not members of the traveling public. Because the Cabinet's duty requires it to maintain public highways and roadways in a reasonably safe condition for the traveling public, its duty cannot extend to a person who by statute could never be a member of the traveling public. Regardless of what Old Highway 167 is determined to be (public roadway or right-of-way), the Cabinet's duty would not extend to Jeremiah while he was operating an ATV. Had Jeremiah been operating some other mode of transportation that would allow him to be considered a member of the traveling public, the Cabinet would then owe him a duty of care and would be subject to liability for its negligence in failing to protect him from a hazardous condition. Furthermore, the Board of Claims specifically found that Old Highway 167 was not used by the traveling public and had not been so used for twenty years.

Because in my opinion the Cabinet did not owe Jeremiah any duty of care, it is not necessary to address whether the accident was foreseeable, as the majority holds. Also, I do not agree with the majority that this result would run afoul of the doctrine of comparative negligence. Certainly, had Jeremiah at

the time of the accident been engaged in some illegal conduct, but had at the same time been a member of the traveling public, he would have been permitted to recover, albeit limited by the extent his illegal conduct contributed directly to his damages. In this case, however, the duty found in the statute flows only to members of the traveling public, which specifically excludes Jeremiah. Because there was no duty to be breached, there can be no recovery. Therefore, I would reverse the circuit court's decision and reinstate the Final Order of the Board of Claims denying relief.

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