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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000005-MR

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 04-CI-003938

SHANNON D. SEXTON AND
COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET, KENTUCKY
BOARD OF CLAIMS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CHIEF JUDGE COMBS, HENRY AND SCHRODER, JUDGES.

HENRY, JUDGE: The Commonwealth of Kentucky, Transportation Cabinet, Department of Highways appeals from an Opinion and Order of the Jefferson Circuit Court affirming a decision of the Commonwealth of Kentucky, Environmental and Public Protection Cabinet, Kentucky Board of Claims, in which the Board awarded damages to Shannon Sexton on his negligence claim against the Department. Upon review, we affirm.

Sexton owns a home in the Okolona community, which is within the city limits of Louisville. His house is situated on a lot adjacent to a vacant lot owned by the Department. According to the hearing officer's Findings of Fact, on October 4, 2002 a large dead tree on the Department's lot fell onto Sexton's property and destroyed his garage and a 1993 Cadillac Deville that it contained. At the time, the Department was working on a road project some 200 feet from the location where the tree fell. The record before us contains no mention of any connection between the road project and the vacant lot where the tree fell. Apparently the Department's ownership of a vacant lot in the vicinity of the road project was coincidental. Although there was some evidence that the view was obstructed, Sexton testified, and the Board found, that the dead tree was "clearly visible" from the site where the Department was working. The hearing officer found no causal relationship between the Department's road-construction work and the tree falling. Sexton did not advise the Department, or anyone else, of the condition of the tree prior to its falling. He was not aware that the Commonwealth owned the vacant lot until after the tree fell.

After a hearing conducted on August 12, 2003 the hearing officer issued Findings of Fact, Conclusions of Law and a Recommended Order awarding Sexton $7,875.00 in damages, which

consisted of an award of $1000.00 for his homeowner's deductible and $6,785 representing the NADA Blue Book value of the Cadillac.

The Board adopted the hearing officer's Findings, Conclusions and Order as its own. The Department appealed to the Jefferson Circuit Court, which affirmed the Board. The Board and the Circuit Court found that the Department breached a duty of ordinary care to Sexton by failing to discover and remove a dangerous or defective condition (the dead tree) from its vacant lot. They concluded that this omission was a ministerial act, and that the Transportation Cabinet is therefore liable in damages to Sexton. This appeal followed.

On appeal, the Department argues that the ruling of the Jefferson Circuit Court should be reversed for any of three reasons: (1) that any acts or omissions by the Department in this case in relation to the vacant lot and the condition of any trees located thereon, were discretionary rather than ministerial in nature, and that therefore, the Commonwealth and all of its agencies are immune from suit for damages resulting from its negligence, (2) that the Board's findings of fact are not supported by substantial evidence and are therefore clearly erroneous, and (3) that the Board and the Circuit Court relied on the wrong legal standard pertaining to the Department's duty

to inspect the lot, and as to whether it could be charged with constructive notice of the condition of trees on the lot.

To the extent that the Commonwealth has waived immunity for the negligent acts of state agencies and their employees acting within the scope of their employment, such actions must be brought in the Board of Claims. See KRS[1] 44.072, 44.073 and Yanero v. Davis, 65 S.W.3d 510, 524 (Ky. 2001).

The standard for our review of the Circuit Court's appellate review of a Board of Claims decision is specifically addressed by KRS 44.150:

> Appeals 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 causes 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.

The "matters subject to review by the Circuit Court", in turn, are found at KRS 44.140(5):

> 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

[1] Kentucky Revised Statutes.

> 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.

In addition, the Board is required by KRS 44.120 to conform its awards to the negligence law of the Commonwealth:

> 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.

A negligence action "requires proof that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the standard by which his or her duty is measured, and (3) consequent injury." Pathways, Inc. v. Hammons, 113 S.W.3d 85, 88 (Ky. 2003). We have held that "the power of the Board of Claims to make awards is limited to those cases in which it finds that the damages were proximately caused by the negligence of the Commonwealth or its agents." Commonwealth of Kentucky, Department of Transportation, Bureau of Highways v. Burger, 578 S.W.2d 897, 898 (Ky.App. 1979).

Findings of fact by the Board are conclusive if they are supported by substantial evidence. Commonwealth of

Kentucky, Department of Highways v. Mason, 393 S.W.2d 133, 134 (Ky. 1965). On the other hand, findings of an administrative body are arbitrary, and clearly erroneous, if they are unsupported by substantial evidence. Thurman v. Meridian Mutual Insurance Co., 345 S.W.2d 635, 639 (Ky. 1961).

When performing discretionary acts or functions, public officers or employees are shielded from liability for negligence by the doctrine of qualified official immunity. Yanero, 65 S.W.3d at 522. But such officials have no immunity from liability for the negligent performance of ministerial acts. Id. Discretionary acts involve the exercise of discretion and judgment, in good faith, within the scope of the employee's authority, while ministerial acts require only obedience to the orders of others or merely involve "execution of a specific act arising from fixed and designated facts." Id. Discretionary acts "involve policy-making decisions and significant judgment" while ministerial acts "are merely routine duties." Collins v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, 10 S.W.3d 122, 126 (Ky. 1999).

The Department contends that "[t]here is no evidence in this case to establish there is any criteria (sic), regulation, statute, manual or recognized standard of care addressing the subject matter. *Without a defined duty on the*

Department to follow relative to the removal of dead trees, the tree removal is discretionary and not ministerial. Negligence in carrying out a discretionary function cannot be the basis for a finding that the Transportation Cabinet is liable for any of the Appellee's damages." Brief for Appellant, p. 8 (italics added)(citations omitted).

The crux of this case is the Department's contention that "[w]ithout a defined duty on the Department to follow relative to the removal of dead trees, the tree removal is discretionary and not ministerial", and that as a result the Department is immune from suit. In our view, the Department has misperceived the central issue of this case. We believe that rather than asking whether the Department's failure to act in this case was discretionary or ministerial, our inquiry should be whether or not the Department owed a duty of care to Sexton, and, if so, whether or not it breached that duty. This is so because, if the Department owed a duty of care to Sexton as an adjoining landowner in a populous area, then a breach of that duty would in fact be a violation of a defined or ministerial duty.

Surprisingly few Kentucky cases have dealt with the liability of a possessor of land for damage caused when a dead or otherwise unsafe tree falls onto the property of a neighbor. The most recent case to discuss the issue, albeit in dictum, is

Schwalbach v. Forest Lawn Memorial Park, 687 S.W.2d 551 (Ky.App. 1985). In that case we applied the "Massachusetts Rule" to hold that a landowner had no liability to his neighbor for damages caused to the neighbor's roof by twigs, leaves or other debris deposited on the roof by a healthy tree. We held that the plaintiff's remedy in such a case is to trim back the offending limbs or roots to the boundary line. Id. at 552. But we carefully limited the application of Schwalbach to "damage resulting from the natural dropping of leaves and other ordinary debris", and emphasized that in that case:

> [w]e [were] not confronted with a dead tree which is likely to fall and cause serious injury. A claim for damages or removal of such a tree might be based on the theory of negligence for damages or nuisance for removal. Although the landowner may have the right to cut back overhanging branches to the boundary line, in the case of a dead and dangerous tree, it may be more sensible to require the owner of the tree to remove it in its entirety, or be liable for damages. It would be futile to require the neighbor to remove a portion of the tree to the boundary line leaving the hazard of a large portion of the total tree to remain in a threatening position.
>
> Id. at 552.

Thus, although we hinted that in a proper case we would abandon the traditional rule in favor of ordinary

negligence principles, no Kentucky case has yet explicitly done so.[2]

The Restatement (Second) of Torts, Section 363, deals with liability for natural conditions to persons outside of the land. That section says:

> (1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.
>
> (2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.

The origin of the traditional rule that a possessor of land has no duty to remedy purely natural conditions on his land, even if they are dangerous to his neighbors, harks back to a time in England and America when most land "was unsettled or uncultivated, and the burden of inspecting it and putting it in a safe condition would have been not only unduly onerous, but out of all proportion to any harm likely to result." Prosser, Law of Torts, § 57, 4th Ed.(1971). In contemporary urban settings, the reason for the rule has little viability.

[2] See Liebson, Kentucky Practice, Tort Law, § 10.68 for a useful discussion of Kentucky law on the liability of owners and occupiers of land for injuries occurring outside the premises.

In Schwalbach we discussed but did not adopt the reasoning of Sprecher v. Adamson Companies, 30 Cal.3d. 358, 178 Cal.Rprt. 783, 636 P.2d 1121 (1981), a landslide case that discusses the traditional common-law rule. In Sprecher, the California Supreme Court rejected the traditional rule in favor of a reasonable care standard. Noting the exception in the Restatement (Second) Section 363(2), that recognizes a standard of reasonable care regarding trees near highways, the Sprecher court criticized the traditional rule as creating "an unsatisfying anomaly: a possessor of land would have a duty of care toward strangers but not toward his neighbor." Sprecher, 30 Cal.3d at 366, 178 Cal.Rprt. at 787, 636 P.2d 1125. We resisted the plaintiff's urging to follow Sprecher in Schwalbach because we were unwilling to make a rule under the facts of that case which would "result in innumerable lawsuits and impose liability upon a landowner for the natural processes and cycles of trees." Schwalbach, 687 S.W.2d at 552. Schwalbach established a sensible, workable rule in a case arising from a factual background different from that in this case. We see no reason to depart from its reasoning as it applies to healthy trees that do not present a threat of injury or serious property damage to neighboring persons or property. But because this case squarely presents the issue, we must now decide whether an urban landowner owes his neighbor a duty of reasonable care to

prevent an unreasonable risk of harm arising from defective or unsound trees on the premises.

The traditional rule that possessors of land are not liable to adjoining landowners for harm resulting from natural conditions has been substantially eroded, especially for damage occurring in urban or populated areas. See Cheryl M. Bailey, Annotation, *Tree or limb falls onto adjoining private property: personal injury and property damage liability*, 54 A.L.R. 4th 530 (1987); Mahurin v Lockhart, 71 Ill. App. 3d 691, 28 Ill. Dec. 356, 390 N.E.2d. 523 (5th Dist, 1979); Barker v Brown, 236 Pa. Super. 75, 340 A.2d. 566 (1975); Cornett v Agee, 143 Ga. App. 55, 237 S.E.2d. 522 (1977); Israel v Carolina Bar-B-Que, Inc., 292 S.C. 282, 356 S.E.2d. 123 (App. 1987).

The Department argues that it is unreasonable to impose upon it a duty to conduct an inspection of trees on its property. While we agree that no such duty exists in rural, sparsely populated settings, in urban areas such a duty is slight in proportion to the potential danger, as evidenced by the facts of this case.

The cases which have discussed a duty of inspection by the Transportation Cabinet or the Department involve conditions along roadways or right-of ways. For example in Schrader v. Commonwealth, 309 Ky. 553, 218 S.W.2d 406 (1949), the Board dismissed claims against the Department of Highways for damages

for injuries suffered by Jean Schrader when a boulder became dislodged from a cliff beside a four-lane highway in Jefferson County and struck the truck in which the Schraders were riding. The Board of Claims found that the Department's inspection of the area from which the boulder fell was adequate, and that it was not foreseeable that the boulder would fall. In affirming, the Court quoted the Board's ruling, stating:

> [T]he Highway Commission even when the State has waived its immunity from suit is not an insurer against accidents arising from defects or dangerous conditions on a public highway. Its duty is merely that of a private corporation or municipality subject to suit, namely to exercise ordinary care to prevent injury, from defects in the highway.
>
> The Highway Department would be liable for the injury in this case if it had notice of the dangerous condition and failed to take reasonable precautions to protect the traveling public from injury as a result of the condition. The Department would also be liable if by the exercise of reasonable care, they could have or should have discovered the dangerous condition and by their failure to exercise that care, did not make the discovery and took no measure to protect the public.

Schrader v. Commonwealth, 309 Ky. at 557, 218 S.W.2d at 408.

The former Court of Appeals faced a similar issue fifteen years later in Commonwealth, Department of Highways v. Callebs, 381 S.W.2d 623 (Ky. 1964). In that case a large sycamore tree broke during a windstorm and fell across U.S. 25E

in Knox County, striking an automobile driven by Cecil Callebs, who was killed. Callebs' administratrix filed an action in the Board of Claims alleging negligence by the Department. The Board denied the claim. On appeal, the circuit court reversed and remanded to the Board with directions to grant an award in the amount of $10,000.00. The Court of Appeals reversed. Finding that the Department did not have actual notice of the condition of the tree, the Court said that "[t]he issue in the case is whether the department was chargeable with constructive notice of the defective condition, or, stated another way, whether a reasonable inspection would have disclosed the condition. This involves the question of how close an inspection was reasonably required." Id. at 623. The Court went on to hold that "we cannot say as a matter of law that the burden of a walk-around inspection of each tree near the highway (perhaps requiring the obtaining of entry permission from the abutting landowners) would not be unreasonable in comparison with the risk." Id. at 624. In so holding the Court cited its earlier holdings in Lemon v. Edwards, 344 S.W.2d 822 (Ky. 1961) and Schrader. Lemon, decided only three years before Callebs, held that "as a matter of law a private owner of forest lands adjacent to a little-used road in a sparsely settled area did not have any duty of inspection to discover whether trees had become dangerous through natural processes of decay." Callebs,

381 S.W.2d at 624. While Schrader, Lemon, and Callebs remain viable as precedent, we believe that each of them is factually distinguishable from this case. Both Lemon and Callebs dealt with rural or sparsely populated areas. In Schrader an inspection had been conducted only a few days before the accident occurred. Although the Court in Lemon rejected, as too burdensome, a duty of inspection by a private owner of heavily wooded land bordering a little-used road, the other cases recognized and discussed a duty of ordinary care owed by the Commonwealth to the traveling public. This duty is not established by statute or regulation but is imposed by the common law, in those areas where the Commonwealth has waived its immunity.

We believe that the time has come for us to recognize the common-sense duty of reasonable care that an urban landowner owes to his neighbor. Indeed, the duty the Commonwealth owed Shannon Sexton in this case was no more, and no less, than that owed him by his other neighbors in a populated, urban or suburban setting such as Okolona. See Schrader, 309 Ky. at 557, 218 S.W.2d at 408; see also 57 Am.Jur.2d Municipal, Etc., Tort Liability, § 107 (2005). Accordingly, we now take the step we foreshadowed twenty-one years ago in Schwalbach v. Forest Lawn Memorial Park, and hold that a landowner in an urban or heavily populated area has a duty to others outside of his land to

exercise reasonable care to prevent an unreasonable risk of harm arising from defective or unsound trees on the premises.

Once we recognize that the Department owed a duty of reasonable care to its urban neighbors, it is plain that the administration of that duty is ministerial. Indeed, even a cursory inspection of the vacant lot should have revealed the presence of dead trees in the boundary line adjoining Sexton's property. And, the fact that some decisions would then have to be made concerning what to do about the trees, and how to do it, does not convert the duty into a discretionary one. "[A]n act is not necessarily taken out of the class styled 'ministerial' because the officer performing it is vested with a discretion respecting the means of (sic) method to be employed." Collins v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, 10 S.W.3d 122, 125-126 (Ky. 1999)(inspection of drainage culvert found to be a ministerial act). See also Jones v. Lathram, 150 S.W.3d 50, 53 (Ky. 2004)(driving a police cruiser found to be a ministerial act).

We have thoroughly reviewed the record before us and the Commonwealth's contention that the Board's Findings of Fact and Conclusions of Law are not supported by substantial evidence and are therefore clearly erroneous. But, we note that the Cabinet and the Department admit that they did not inspect the property adjoining Sexton's premises. Moreover, neither has

disputed Sexton's damages here. Finally, the hearing officer found from testimony that the Department did not inspect its urban property for dead trees and that, as a result, the tree fell outside the boundary of the Department's property, causing Sexton's damages. The hearing officer heard testimony from Sexton and from Cabinet employees, reviewed stipulated facts, viewed videotapes of the condition of the fallen tree and Sexton's garage and automobile, and viewed other documentary evidence and photographs submitted by both parties. As we cannot say that the hearing officer's findings of fact are not supported by substantial evidence in the record, they are therefore conclusive. Commonwealth of Kentucky, Department of Highways v. Mason, 393 S.W.2d at 134.

We mention in passing that the facts of this case presented potential comparative negligence issues due to Sexton's failure to report the threatening condition of the tree and perhaps even due to his failure to move the Cadillac out of harm's way. See Commonwealth, Transportation Cabinet, Department of Highways v. Babbitt, 172 S.W.3d 786 (Ky. 2005); see also Collins, 10 S.W.3d at 127. And, we do not by our ruling approve the method of valuation of the automobile accepted by the hearing officer. The correct measure of damages is not necessarily the NADA Blue Book value, but rather "the difference in the fair market value of the car at the place of

the accident immediately before and immediately after the accident." Vaughn v. Taylor, 288 Ky. 558, 156 S.W.2d 836, 840 (1941); 8 Am. Jur. 2d Automobiles and Highway Traffic § 1313 (2005). We make no ruling on these issues because neither of them was preserved or presented for our review.

The Opinion and Order of the Jefferson Circuit Court is affirmed.

COMBS, CHIEF JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING: Our first inquiry is whether or not the Department owed a duty of care to Sexton. We all agree that under present law, there is no duty. The majority believes it's time to create a duty. I must dissent. The General Assembly could, and probably should consider creating such a duty, but not the courts. Also, the urban/rural distinction invites a number of questions, such as do we classify by city limits, population density, lot size, etc?

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