

RENDERED: OCTOBER 31, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2006-CA-002235-MR

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET,  
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT  
HONORABLE STEPHEN A. HAYDEN, JUDGE  
ACTION NO. 01-CI-00094 & 01-CI-00400

VICTORIA KERN, GUARDIAN OF JASON KERN;  
VICTORIA KERN; SCOTTIE DENTON;  
PAULA SCHRIBER, ADMINISTRATRIX OF  
THE ESTATE OF DELANIA DENTON, DECEASED;  
SCOTTIE DENTON, GUARDIAN OF JEREMY AND  
JOSHUA DENTON

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: The Commonwealth of Kentucky Transportation Cabinet,

Department of Highways (“Transportation Cabinet”), has appealed the judgment of

the Henderson Circuit Court which upheld a Kentucky Board of Claims (“Board”) decision apportioning partial liability to the Transportation Cabinet for a motor vehicle collision resulting in one fatality and serious bodily injury to several other victims. For the following reasons, we affirm.

The pertinent facts are relatively simple and undisputed. On July 8, 1997, a two-vehicle collision occurred at the intersection of Kentucky Highway 812 (“Hwy. 812”) and Kentucky Highway 2099 (“Hwy. 2099”) in Henderson County, Kentucky. These two highways intersect at a “T” crossing. Traffic on Hwy. 2099 is controlled by a stop sign at the intersection and traffic on Hwy. 812 has an unimpeded path of travel. Victoria Kern (“Kern”) was operating her Toyota Tercel eastbound on Hwy. 812. She was accompanied by Delania Denton (“Delania”) and five children. Pearl Dragoo (“Dragoo”) was operating her Chevrolet Caprice Classic northbound on Hwy. 2099. Dragoo had no passengers in her vehicle.

Dragoo stopped her vehicle at the stop sign at the intersection of Hwy. 812 and Hwy. 2099. A large truck driven by Kevin Murphy (“Murphy”) was behind her. Dragoo’s view to the west was partially obstructed by a guardrail and two to three foot tall Johnson grass growing behind it which had not been mowed in several weeks. The stop sign is located approximately forty feet in front of the actual intersection of the two roads. After coming to a complete stop, Dragoo accelerated her vehicle to cross Hwy. 812 and make a left-hand turn. She continued to look left and right as she moved toward the intersection, but did not

stop at the edge of the intersection. As Dragoo entered the eastbound lane of traffic on Hwy. 812, she and Kern saw each other. In an attempt to avoid a collision, Dragoo applied her brakes and came to a halt well into the eastbound lane of Hwy. 812. Kern swerved away from Dragoo's vehicle.

In spite of efforts made by both drivers to miss one another, the front of Dragoo's vehicle struck the right side of Kern's vehicle. The collision caused Kern to lose control of her vehicle, strike the guardrail on the right side of the roadway, flip and tumble down a steep embankment. None of the passengers in Kern's vehicle were wearing seatbelts and all were ejected during the crash. Dragoo was initially confused as to whether she had struck Kern and proceeded with her left turn. She quickly realized there had been a collision and turned her car around to check on the condition of the occupants in Kern's vehicle. Murphy contacted the authorities and attempted to assist the injured passengers.

The Kentucky State Police ("KSP") responded to the scene and oversaw the investigation. Trooper Mark Applin ("Trooper Applin") and several members of the Henderson Police Department and EMS arrived within four minutes of being dispatched. Upon arrival, Trooper Applin assessed the scene and found Delania had died in the crash. After ensuring the other passengers were not in imminent danger, the trooper collected information about events leading up to the collision and completed a standard traffic accident. Trooper R.D. Abrahamson ("Trooper Abrahamson"), a traffic accident reconstructionist, was assigned to evaluate and investigate the matter.

As required by KRS<sup>1</sup> 44.110, within one year of the collision Kern, the occupants of her vehicle and Delania's estate (collectively "Claimants") filed claims<sup>2</sup> with the Board seeking damages from the Transportation Cabinet. The Claimants alleged their losses were partially caused by the Transportation Cabinet's negligence in failing to mow the area behind the guardrail on Hwy. 812. They claimed this failure to maintain the area adjacent to the roadway was a significant cause of the collision.

A hearing was held on February 4, 2000, before a Board Hearing Officer, at which the parties were represented by counsel. On December 21, 2000, the Hearing Officer entered a sixty-six page Findings of Fact, Conclusions of Law, Opinion and Judgment wherein he apportioned eighty percent fault for the accident to Dragoo, fifteen percent to the Transportation Cabinet, and five percent to Kern. The judgment awarded Claimants a total of \$84,481.50 to be paid by the Transportation Cabinet. The Board adopted the Hearing Officer's recommendations. On January 18, 2001, an Order Amending Judgment was entered which corrected some clerical mistakes in the original order.

The Transportation Cabinet moved the Board to reconsider its decision. On April 19, 2001, the Board entered an Order Setting Aside Final Order in Part and a Second Order Amending Judgment. In reducing its prior award to

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<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> Six different claims were filed with the Board of Claims seeking payment for unreimbursed medical expenses, loss of earning capacity, funeral expenses, loss of parental consortium, and Delania's wrongful death. The claims were ultimately consolidated for trial purposes.

\$63,407.82 in light of recent developments in the law, the Board adopted much of the amended order, but vacated the earlier awards for loss of parental consortium to be consistent with *Guliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997).<sup>3</sup> Thus, the final sum awarded by the Board to the Claimants was \$42,407.82. Both the Transportation Cabinet and the Claimants appealed the final ruling to the Henderson Circuit Court. The appeals were consolidated for purposes of judicial economy. Ultimately, the circuit court upheld the Board's decision by order entered on May 30, 2006, but reduced the award to Delania's estate by \$9,000.00 which represented an offset for a payment of survivor's benefits to her estate. This appeal followed.

The Transportation Cabinet contends the Board's judgment imposing liability upon it was clearly erroneous. In support of its contention, the Transportation Cabinet asserts the Claimants failed to prove the required element of causation to sustain a judgment in their favor on the negligence claim, and the Board erred in granting the judgment as a matter of law. After a careful review of the record, we disagree.

Contrary to the assertion of the Transportation Cabinet, our standard of review is not *de novo*. We are aware of no authority supporting the Transportation Cabinet's position, and none is cited to us in the briefs. It is well-settled that the standard of review for appeals from the Board of Claims is limited

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<sup>3</sup> The Claimants conceded the awards for loss of parental consortium were improper in light of *Guliani, supra*. Thus, the dismissal of these claims is not contested in this appeal.

to whether the factual findings are supported by substantial evidence, and whether the conclusions derived therefrom were clearly erroneous. *Department for Human Resources v. Redmon*, 599 S.W.2d 474, 476 (Ky.App. 1980) (citing KRS 44.140(2) [now (5)]<sup>4</sup>; *Commonwealth, Department of Parks v. Bergee Bros., Inc.*, 480 S.W.2d 158 (Ky. 1972); *Commonwealth v. Mudd*, 255 S.W.2d 989 (Ky. 1953)); see also *Pemberton v. Commonwealth, Department of Mental Health*, 398 S.W.2d 487 (Ky. 1966); *Shrader v. Commonwealth*, 309 Ky. 553, 218 S.W.2d 406 (1949). Further, reviewing courts are not to substitute their judgment for that of the Board, even if the court may have reached a different conclusion. *Commonwealth, Department of Highways v. General & Excess Insurance Co.*, 355 S.W.2d 695, 699 (Ky. 1962). These rules hold firm, even if conflicting evidence has been presented to the board. *Secretary, Labor Cabinet v. Boston Gear, Inc.*, 25 S.W.3d 130, 134 (Ky. 2000) (quoting *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981)).

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<sup>4</sup> KRS 44.140(5) states, in pertinent part:

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. . . .

The language of this section has remained virtually unchanged since its original enactment in 1946.

The Transportation Cabinet has acknowledged it is not contesting any of the factual findings made by the Board or the circuit court, nor that any of the findings were unsupported by substantial evidence. Further, the Transportation Cabinet has conceded it had a duty to maintain the highways and shoulders in a reasonably safe condition including mowing the grass behind guardrails; it breached that duty in the instant case because of a failure of its equipment; and the Claimants sustained injuries in the collision. Thus, the sole issue presented is whether the Board erred in finding a causal link between the acknowledged breach of the duty owed by the Transportation Cabinet and the injuries sustained by the Claimants. The Transportation Cabinet alleges the findings do not support the award, and therefore the Board acted without or in excess of its powers.

The Transportation Cabinet argues Dragoo's failure to stop and look for oncoming traffic, and Kern's failure to maintain control of her vehicle, were the only two factors contributing to the collision. It claims its failure to mow and otherwise maintain the shoulder area behind the guardrail which hindered sight lines was inconsequential and irrelevant as each driver had the opportunity to avoid the collision. In so arguing, the Transportation Cabinet asserts Dragoo's failure to stop at the edge of the intersection of the roadways was the primary cause of the collision. Further, the Transportation Cabinet insinuates the Board engaged in speculation when it found the overgrowth of vegetation obscured Dragoo's view. Thus, it claims the Board improperly assigned it any fault for the collision as the

Claimants failed to prove a causative link. A careful review of the record convinces us otherwise.

There is no question Dragoo's negligence was a significant factor in causing the collision. That fact is evident from the Board's apportionment of eighty percent of the fault to her. However, there is ample support in the record supporting the Board's assignment of a portion of the fault to the Transportation Cabinet. Dragoo testified she stopped at the posted stop sign but was unable to clearly see eastbound traffic because of high weeds, brush and trees. She stated, "even before I (sic) get out there to see if anything was coming, you was (sic) in danger by the time you could see." Trooper Abrahamson's report indicated a motorist's view was obstructed even at the edge of the intersection, and listed an obstructed view as a contributing factor to the collision. Trooper Applin testified the high grass, coupled with strong southwest winds, decreased visibility for drivers on Hwy. 2099 attempting to cross Hwy. 812. A videotape of the scene taken the day of the collision showing the swaying grass and obscured view from Hwy. 2099 was admitted into evidence before the Board. The Transportation Cabinet's own expert testified a motorist's view was obstructed when stopped at the stop sign on Hwy. 2099, but improved as the distance to Hwy. 812 was shortened.

In light of this evidence we are unable to conclude the Board was clearly erroneous in concluding the tall weeds were a contributing factor to the collision. The totality of the evidence clearly indicates Dragoo's view was limited



by the unkempt shoulder, as found by the Board. Thus, we hold the Board's factual findings are supported by substantial evidence. Further, its legal conclusion that the Transportation Cabinet's negligence was a contributing factor to the collision is supported by its factual findings. The circuit court did not err in so finding.

Finally, although conflicting evidence was presented at the hearing, the real question is not whether the Board could have reached a different result, nor whether there is evidence in the record to support a different finding. The question is simply whether the Board's legal conclusions are supported by its factual findings. Contrary to the Transportation Cabinet's assertion, the Board properly applied the facts to the controlling law. Having so held, there is no basis for reversing the circuit court's order affirming the Board of Claims' decision as it is supported by the record.

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

ALL CONCUR.

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