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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-01633-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT, DIVISION III
HONORABLE MITCHELL PERRY, JUDGE
ACTION NOS. 11-CI-008304 AND 12-CI-000024

JAMES R. BUNCH; and
COMMONWEALTH OF KENTUCKY,
PUBLIC PROTECTION CABINET,
BOARD OF CLAIMS

APPELLEES

OPINION
REVERSING

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** ** *

BEFORE: ACREE, CHIEF JUDGE; JONES AND MOORE, JUDGES.

JONES, JUDGE: This is an appeal by the Commonwealth of Kentucky,

Transportation Cabinet, Department of Highways, (hereinafter “Department”) from

the judgment of the Jefferson Circuit Court, Division III, affirming the Kentucky

Board of Claims' (hereinafter "Board") Final Order holding the Department liable for creating an unreasonable danger to motorists that resulted in injury to Appellee, James R. Bunch (hereinafter "Bunch."). The issues on appeal concern the sufficiency of evidence the Board and Circuit Court relied on in making their determinations. For the reasons more fully explained below, we reverse.

I. BACKGROUND

On June 5, 2008, Bunch was injured while riding his motorcycle on the Greenbelt Highway in Louisville. Bunch claimed that he struck a section of an improperly repaired pothole patch (hereinafter "patch"), causing him to lose control of his motorcycle and crash. Bunch sustained several physical injuries, including a broken wrist and severe road rash. As a result of the injuries, Bunch had to have surgery on his wrist and sustained some permanent injury.

Bunch filed an action with the Board on December 24, 2008, alleging that the Department was responsible for the faulty pothole patch that caused him to crash his motorcycle. Bunch specifically claimed that the patch was uneven and significantly elevated, making it impossible for him to safely maneuver his motorcycle over it at his estimated speed of 50 mph. A hearing was held in front of Hearing Officer Jan M. West on August 29, 2009.

At the hearing, testimony was presented concerning the condition of the pothole repair at the time of Bunch's accident. The record indicates that there was a persistent problem with potholes in that particular area as a result of broken steel reinforcing bars in the concrete slabs. This particular pothole had been

repaired numerous times in 2008, possibly as late as the week of Bunch's accident.¹ However, the Department maintained that it did not receive any complaints regarding the pothole or the patch between January 4, 2008, and June 5, 2008. There was also no record of other accidents in the area during the time in question.

The height and slope of the pothole patch at the time of Bunch's accident were significant issues at the hearing. Bunch produced a photograph taken of the pothole the day after the accident to support his claim that the pothole patch had a sudden and dangerous three- to three-and-one-half inch rise.

Department employee and avid motorcyclist, Erbie McNutt, agreed with Bunch's assertion regarding the height of the patch, but indicated that he believed it was more of a gradual slope. Mr. McNutt also testified that he had ridden his motorcycle over the patch approximately "a hundred times" and that it was "not a location that you would have to take any preparation to navigate over."

At the conclusion of the hearing, the Hearing Officer issued her Recommended Findings of Fact and Conclusions of Law. She recommended denying Bunch's claim because she did not believe that Bunch established: (1) that the Department negligently maintained the pothole and/or patch; (2) that the patch

¹ There were some discrepancies in the record regarding the last date of repair. One Department employee claimed that the pothole was repaired shortly after a complaint was received on January 4, 2008. Another Department employee stated that the pothole patch was repaired numerous times between January and June 2008. Yet another employee stated that a pothole was repaired in the area of the accident between June 1-5, 2008.

created an unreasonably dangerous condition; or (3) that the Department had notice of an unreasonably dangerous condition.

Ultimately, the Board rejected the Hearing Officer's recommendations. It concluded that the Department was liable because it breached its duty by creating an unreasonable risk of harm to motorists. The Board then remanded Bunch's claim back to the Hearing Officer to conduct a second hearing on apportionment of fault and damages. Thereafter, the Board issued a final order on November 17, 2011, awarding Bunch \$87,496.00 in damages.

The Department appealed to the Jefferson Circuit Court. The Circuit Court affirmed. Specifically, the Circuit Court found: "There is substantial evidence in the record that the Transportation Cabinet was liable to Bunch for certain injuries he sustained from his motorcycle accident and that the amount awarded was proper." This appeal followed.

II. STANDARD OF REVIEW

Pursuant to Kentucky Revised Statutes (KRS) 44.071, the Board is:

vested with full power, authority, and jurisdiction to investigate, hear proof, and compensate persons for damages sustained to either person or property as approximate result of negligence on the part of any municipality, or any of its officers, agents, or employees while acting within the scope of their employment by the municipality, or any agency thereof, relating to the maintenance by the municipality of state-owned traffic control devices pursuant to a contract with the Commonwealth.

To establish actionable negligence on Department's part, a claimant must establish: (1) the Department had a duty; (2) a breach of that duty; and (3) consequent injury. [Commonwealth Transp. Cabinet, Dept. of Highways v. Guffey, 244 S.W.3d 79, 81 \(Ky. 2008\)](#). "The absence of any one of the three elements is fatal to the claim." *Commonwealth Transp. Cabinet Dept. of Highways v. Shadrick*, 956 S.W.2d 898, 900 (Ky. 1997).

When reviewing administrative decisions, such as those by the Board, a reviewing court is limited to a determination of whether the factual findings are supported by substantial evidence and whether the application of the law to the facts is clearly erroneous. *Burch v. Taylor Drug Store, Inc.*, 965 S.W.2d 830, 834 (Ky. App. 1998). It is not the reviewing court's role to reinterpret or to reconsider the claim's merits or to substitute its judgment for that of the agency on factual issues. [American Beauty Homes Corp. v. Louisville and Jefferson Cty. Planning and Zoning Comm'n, 379 S.W.2d 450 \(Ky. 1964\)](#). "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." [Taylor v. Coblin, 461 S.W.2d 78, 80 \(Ky. 1970\)](#).

Substantial evidence is defined as that 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. [Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298, 308 \(Ky. 1972\)](#)(citing [Blankenship v. Lloyd Blankenship Coal Co., Inc., 463 S.W.2d 62 \(Ky. 1970\)](#)). However, we review questions of law *de novo*.

[Bob Hook Chevrolet Isuzu, Inc. v. Com. Transp. Cabinet, 983 S.W.2d 488, 490–91 \(Ky.1998\).](#)

III. ANALYSIS

In general, 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 and to investigate all problems relating to the construction and maintenance of roads in the state. See KRS 176.050 and [Commonwealth of Kentucky, Transportation Cabinet, Bureau of Highways v. Roof, 913 S.W.2d 322 \(Ky. 1996\).](#) However, these duties are somewhat limited.

In *Commonwealth, Dept. of Highways v. General & Excess Insurance Co.*, 355 S.W.2d 695 (Ky. 1962), the court applied municipal laws regarding liability for defects in roadways to the Commonwealth. The court also explained that it is not enough merely to show that a defect in the road existed. Instead, there must be actual or constructive notice of the defect to the city/state in order for there to have been a duty. *Id.* at 697. Further, notice of the defect may be imputed to the Department if it “could have or should have had [actual] knowledge if it had exercised reasonable care in inspecting and maintaining the highway.” *Id.*; see also *Department of Highways v. Thurman*, 897 S.W.2d 597 (Ky. App. 1995).

The Department argues that the Board failed to make a finding regarding the notice element. It explains that the Board could not properly

establish liability without first making a factual determination that the Department had notice of the alleged defect in the road. We agree.

In refusing to adopt the Hearing Officer's proposed findings of fact, the Board concluded that: "the testimonial evidence regarding a three to three and one-half inch rise supports its conclusion that the condition in the roadway, as repaired, created an unreasonable risk of harm to motorists, particularly to motorcyclists. Therefore, the Board concludes that the Respondent breached its duty to make the roadway safe for travel in this case." Notably, the Board did not mention the notice element. In its order affirming the Board, the Circuit Court stated that "the record contains evidence that the pothole patching was defective, that the Transportation Cabinet knew of the problem, and that the problem caused Bunch's accident and injuries."

In essence the Circuit Court excused the Board's failure to make a specific finding regarding the notice element because it believed that substantial evidence existed that the Department did have notice. We believe that the circuit court failed to properly take into account the distinction between notice of a pothole and notice of an allegedly defective temporary pothole patch. In so doing, the Circuit Court abused its discretion.

The only defect we can ascertain that the Department was made aware of as related to this specific portion of the roadway was the existence of a large pothole on January 4, 2008. The evidence is undisputed that the Department: 1) contracted to permanently repair the broken steel reinforcing bars in the concrete

slabs on this portion of the roadway, which it determined were responsible for the persistent potholes; 2) temporarily patched the pothole a few days later using a cold mix; and 3) received no complaints regarding the patch between January 2008 and Bunch's accident in June 2008, even though that portion of the roadway is fairly well traveled by a variety of vehicles, including other motorcyclists.

Having reviewed the evidence we fail to see how either the Board or the circuit court could have reasonably inferred that the Department had notice of the defect that Bunch alleged caused his accident. Again, it is fundamentally important to separate the underlying pothole from the patch. Bunch did not allege that his accident was caused by a pothole depression. Much to the contrary, Bunch alleged that his accident was caused by a steeply elevated pothole patch. Even if we accept Bunch's contention regarding the height and elevation of the patch, a hotly contested issue, we can find no evidence in the record that would support a reasonable inference that the Department had actual or constructive knowledge that the patch was dangerous.

Notice is an indispensable element of Bunch's claims against the Department. The record is simply void of any evidence sufficient to establish that the Department had notice of the allegedly defective patch. As a matter of law, we conclude that it would be impossible for Bunch to prevail because no reasonable inference of notice can be drawn from the evidence of record. It would be futile to address the remainder of the Department's arguments as Bunch cannot prevail without first establishing notice.

IV. CONCLUSION

For the reasons set forth above, we reverse the Jefferson Circuit Court's August 29, 2012, order affirming the November 17, 2011, order of the Kentucky Board of Claims.

ACREE, CHIEF JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

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