

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000201-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 13-CI-00131

ESTATE OF DUSTIN H. FRANKLIN;
AND COMMONWEALTH OF KENTUCKY,
PUBLIC PROTECTION CABINET,
BOARD OF CLAIMS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, KRAMER AND MAZE, JUDGES.

DIXON, JUDGE: Appellant, Commonwealth of Kentucky Transportation

Cabinet, Department of Highways, appeals from a judgment of the Scott Circuit

Court affirming a Kentucky Board of Claims decision in favor of Appellee, the Estate of Dustin Franklin. For the reasons set forth herein, we affirm.

On May 9, 2010, Dustin Franklin died when the 1994 Ford F350 truck he was operating left the roadway while traveling through an s-curve on Highway 922 (Muddy Ford Road) in Scott County, Kentucky, and struck a tree. Pamela Prine, the Administrator of Franklin's estate ("Estate"), brought the current action against the Transportation Cabinet pursuant to the Board of Claims Act, Kentucky Revised Statutes (KRS) 44.070, et seq., claiming that the negligence of the Transportation Cabinet caused the accident. Specifically, the Estate alleged that improper construction of the roadway, insufficient warnings, improper posting of speed, and lack of guardrails all contributed to Franklin's accident.

On September 5, 2012, a hearing was conducted wherein both parties presented testimony from various experts and lay witnesses about the nature of the s-curve. The Estate's expert, John Hutchinson, an accident re-constructionist and engineer, testified that based upon his use of a ball bank indicator, as well as the slope measurement of the road at the curve, he determined that a guardrail should have been placed at the site. Hutchinson further opined that the posted advisory speed of 25 miles per hour was inappropriate. Hutchinson explained that the curve in question was unusually dangerous because the road slopes away from the curve instead of banking into it, thus it is a negative slope instead of a positive slope:

[T]he worst thing about this curve is that it is banked the wrong way on a sharp curve. In other words, this young man was coming uphill around a right-hand curve which

was banked to his left. In other words, that would not only throw him off of the road at the 25 miles an hour advisory speed, but would also be impossible for him to recover from having gone into the drop-off on the right-hand side of the road at the pavement edge

The Estate also presented the testimony of Jeremy Webb, the owner of a farm adjacent to the crash site, who stated that there had been numerous other accidents at the same location where vehicles ran through the s-curve and crashed into his fence. Webb testified that he had attempted on several occasions, both written and orally, to inform the Transportation Cabinet that the s-curve was dangerous. Another fact witness, Trevor Dallas, testified that he was first on the scene of Franklin's accident and was also first on the scene at another fatality at the same location ten weeks earlier. Dallas stated that he lives on the road and had himself run off the road at the s-curve on several occasions.

The Transportation Cabinet claimed that Franklin's inattentiveness and excessive speed were the sole causes of the accident. Craig Price, a traffic engineer with the Transportation Cabinet, testified that the Transportation Cabinet "primarily exclusively" used a ball bank indicator to set safe speeds on its roadways. Based upon the results of his ball bank indicator test, Price concluded that the posted advisory speed of 25 miles per hour and the signage around the s-curve met the minimum requirements of the Manual on Uniform Traffic Control Devices ("MUTCD"). Kenneth Agent, an accident re-constructionist for the Transportation Cabinet, similarly testified that most of the ball bank readings he measured at 25 miles per hour in the curve were at or below the MUTCD

guidelines of 14 degrees, the limit for traveling safely at 25 miles per hour.

Neither of the Cabinet's experts, however, replicated nor refuted Hutchinson's slope measurements. In fact, although Price testified that the slope of a curve is relevant to whether a person stays on the road, he did not know and had not measured the slope of the curve in question. Price further noted that preexisting roads, such as Highway 922, are not evaluated for safety based on the same criteria as roads designed and constructed by the Transportation Cabinet. Both Agent and Price testified that no further signage or traffic control devices were required by the MUTCD and, as such, they recommended no changes to control the speed in the s-curve.

Based upon the evidence that was presented at the hearing, the hearing officer concluded that the fault for Franklin's death was 50% attributable to his own actions and 50% attributable to the Transportation Cabinet. Specifically, the hearing officer found that although Franklin was traveling "at or near the advisory speed" at the time he lost control of his vehicle, there was persuasive evidence he was in an agitated state at the time which likely impaired his ability to concentrate on his driving. However, the hearing officer further found that the Transportation Cabinet's decision to delineate the problems at the curve, i.e., speed advisory signage, rather than reconstruct the road was a discretionary act, and once the discretionary decision was made, the Cabinet had a duty to exercise ordinary care in the ministerial act of carrying out that decision. The hearing officer concluded that the Transportation Cabinet was negligent in failing to evaluate the curve after

it knew or should have known there were a significant number of accidents, notwithstanding the 25 miles per hour advisory speed.

At a minimum, given the number of accidents at the curve [the Cabinet] should have measured the slope and calculated the safe speed, rather than estimating an advisory speed based on ball bank readings. Measuring the slope and performing the [design speed] calculations are ministerial acts. Had [the Cabinet] measured the slope and performed the calculations that [Hutchinson] performed, it would have known that the 25 mile per hour advisory sign was misleading and dangerous and that 15 miles an hour was safe.

.....

[L]ike any other industry standard or code, [the MUTCD] is only a minimum standard . . . and was not intended to be a substitute for engineering judgment No evidence was presented that [the Cabinet] actually conducted an evaluation regarding a guardrail or any other type of evaluation until after the accident The Cabinet should have done more to warn or protect the public from the unreasonable danger presented in the S-curve

On January 17, 2013, the Board of Claims adopted the hearing officer's recommendation and found the Transportation Cabinet 50% liable due to its failure to set a safe advisory speed in the s-curve of Highway 922. The Board awarded the Estate \$200,000¹ in damages.

In March 2013, the Transportation Cabinet filed an appeal in the Scott Circuit Court arguing that (1) the Board acted outside the scope of its powers by finding that the MUTCD sets only the minimum standard of care for the Transportation Cabinet in the management of new and existing roads; and (2) that

¹ The evidence showed that there were \$500,428.50 in damages, but the amount to be paid by the state was reduced to \$200,000 pursuant to the cap set forth in KRS 44.070.

the Board's findings of fact did not support the award because there was not substantial evidence that either the s-curve was unreasonably dangerous or that Franklin was only traveling 25 miles per hour at the time of the accident. On January 16, 2014, the circuit court affirmed the Board of Claims. The court ruled that the Transportation Cabinet was "not only bound by the options set out within the MUTCD . . . but that it must exercise any additional option as determined by its engineers for a given situation." The Transportation thereafter appealed to this Court as a matter of right.

It is well-settled that a board's findings of fact may not be overturned if supported by substantial evidence. *Department for Human Resources v. Redmon*, 599 S.W.2d 474, 476 (Ky. App. 1980). Thus, a reviewing court may not substitute its own judgment for that of the board when the findings of fact are not clearly erroneous. Such is true even if the court may have reached a different decision. *Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 582 (Ky. 2002). However, "[w]hen the outcome of a case turns on an issue of law, appellate review is *de novo*." *Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001). *See also Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky Transportation Cabinet*, 983 S.W.2d 488 (Ky. 1988).

This case involves an action seeking damages from the Commonwealth through one of its governmental agencies. Our courts have long recognized that the Commonwealth and its agencies and subdivisions are immune

from suit, unless the Commonwealth has waived its immunity. *Yanero v. Davis*, 65 S.W.3d 510, 523–24 (Ky. 2001). Section 231 of the Kentucky Constitution provides that “[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.” In other words, the legislature is vested with the power to decide when and how sovereign immunity may be waived. The Board of Claims Act, KRS 44.070, et. seq., provides for a waiver of sovereign immunity for negligence in the performance of ministerial acts only. KRS 44.073(2).

The Manual on Uniform Traffic Control Devices is “the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel[.]” 23 Code of Federal Regulations (C.F.R.) § 655.603 (2010). The sole purpose of the MUTCD is to make uniform all traffic control devices across the various jurisdictions within the United States. KRS 189.337(2) requires the Department of Highways to “promulgate and adopt a manual of standards” for control of traffic devices. It applies to all state, county, and incorporated city roads. In conjunction with implementing this statute, the Department of Highways issued a Kentucky Administrative Regulation, 603 KAR 5:050. Section 1 of the regulation directs that “[t]he standards and specifications set forth in the [MUTCD] shall apply to all traffic control devices ... in Kentucky.”² A panel of this Court in the unpublished decision in *Mobley v. Graves Co.*, 2009-

² 603 KAR 5:05, Section 3 provides: “(1) the Manual on Uniform Traffic Control Devices, 2003 Edition, including Revision No. 1 dated November 2004, is incorporated by reference.”

CA-001074-MR (October 22, 2010),³ noted that because the Department of Highways promulgated the rule that counties must implement the MUTCD in their road maintenance policies, “implementation of the MUTCD by local officials is ministerial—removing the protection of qualified immunity for the exercise of the duty.”

As it did in the hearing below, the Transportation Cabinet argues that the MUTCD specifically sets forth the actions the Cabinet is required to take with regard to all instances of traffic control evaluation. Thus, the Transportation Cabinet contends that after it made the initial decision to erect signage and set the advisory speed limit to warn the public about the dangerous curve, an admittedly discretionary function, it was then bound to comply with the MUTCD guidelines, a ministerial function. The Cabinet cites to the MUTCD Section 2C.46, Advisory Speed Plaque, as evidence that it followed the guidelines. Section 2C.46 provides:

Standard:

The Advisory Speed Plaque shall be used where an engineering study indicates a need to advise road users of the advisory speed for a condition

Except in emergencies or when the condition is temporary, an Advisory Speed plaque shall not be installed until the advisory speed has been determined by an engineering study.

Guidance:

Because changes in conditions, such as roadway geometrics, surface characteristics, or sight distance, might affect the advisory speed, each location should be periodically evaluated and the Advisory Speed plaque changed if necessary.

³ 2010 WL 4137297.

Option:

The advisory speed may be the 85th-percentile of free-flowing traffic, the speed corresponding to a 16-degree ball bank indicator reading, or the speed otherwise determined by an engineering study because of unusual circumstances.

The Transportation Cabinet contends that because it evaluated the s-curve using the ball bank indicator analysis pursuant to the MUTCD guidelines, and the results fell within the safety limits set forth in Section 2C.46, it could not be negligent in the performance of its ministerial functions.

It is undisputed that no studies, ball bank indicator or otherwise, were performed on the s-curve in question until after Franklin's accident. Nevertheless, the Transportation Cabinet argues that even if studies or evaluations of the curve had been performed prior to the accident, no changes would have been made because the ball bank indicator results would have been the same before as they were after the accident, within the safety limits of Section 2C.46. Thus, because the signage and advisory speed met the technical standards set forth in MUTCD, the Transportation Cabinet asserts that it fulfilled its ministerial functions and cannot be liable for negligence. We disagree.

We are of the opinion the circuit court properly held that the Cabinet is not only bound by the provisions set forth in the MUTCD, but must also exercise any additional options as determined by engineers in a given situation. In fact, the plain language of the MUTCD compels such conclusion. Section 1A.09 provides as follows:

Standard:

This Manual describes the application of traffic control devices, but shall not be a legal requirement for their installation.

Guidance:

The decision to use a particular device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment. Thus, **while this Manual provides Standards, Guidance, and Options for design and application of traffic control devices, this Manual should not be considered a substitute for engineering judgment.** Engineering judgment should be exercised in the selection and application of traffic control devices, as well as the location and design of the roads and streets that the devices complement. . . . (Emphasis added).

The 2003 Edition of the MUTCD defines “Engineering Judgment” at Section 1A.13(25) as:

[T]he evaluation of available pertinent information, and the application of appropriate principles, standards, guidance, and practices as contained in this Manual and other sources, for the purpose of deciding upon the applicability, design, operation, or installation of a traffic control device. Engineering judgment shall be exercised by an engineer, or by an individual working under the supervision of an engineer, through the application of procedures and criteria established by the engineer. Documentation of engineering judgment is not required.

Even Section 2C.46, relied upon by the Transportation Cabinet, provides that “[t]he advisory speed may be the 85th-percentile of free-flowing traffic, the speed corresponding to a 16-degree ball bank indicator reading, or **the speed otherwise determined by an engineering study because of unusual circumstances.**”

(Emphasis added)

There can be no dispute herein that the Transportation Cabinet failed to use any engineering judgment. There was substantial evidence presented that the s-curve in question was unreasonably dangerous and that the Transportation Cabinet was on notice of the number of accidents, including two fatalities that had occurred at that location. Clearly, the Transportation Cabinet had a ministerial duty under the MUTCD to conduct an engineering study and reevaluate the existing advisory speed and signage of the s-curve. The hearing officer and Board of Claims properly found that the Transportation Cabinet breached that duty. As such, KRS 44.073(2) provides for a waiver of sovereign immunity for negligence in the performance of ministerial acts.

We agree with the circuit court that the hearing officer's findings of fact were supported by substantial evidence in the record. Accordingly, the Board's adoption of such and the circuit court's subsequent affirmance were proper.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Marlin A. Jones
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BRIEF FOR APPELLEE
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NO BRIEF FILED FOR APPELLEE
COMMONWEALTH OF
KENTUCKY, PUBLIC
PROTECTION CABINET, BOARD
OF CLAIMS