

RENDERED: OCTOBER 30, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000688-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANTS

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 11-CI-00350

SYCILLA COLLINS,
Individually and as Administratrix
of THE ESTATE OF LEONARD E.
COLLINS, JR., Deceased

APPELLEES

OPINION
REVERSING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; DIXON AND KRAMER, JUDGES.

KRAMER, JUDGE: At the conclusion of the administrative proceedings
underlying this appeal, the Board of Claims dismissed a claim of negligence
asserted by Sycilla Collins, the administratrix of the Estate of Leonard E. Collins,

Jr. (collectively the “Estate”), against the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways (“Transportation Cabinet”). Following an administrative appeal, the Letcher Circuit Court reversed. For the reasons discussed herein, the Board of Claims correctly dismissed the Estate’s negligence claim. We therefore reverse the circuit court.

In the afternoon of September 20, 2000, Leonard E. Collins, Jr. (“Mr. Collins”) was operating a school bus traveling in the southbound lane of US Highway 119 in Letcher County, Kentucky, and was fatally injured in a collision with a tractor-trailer traveling in the northbound lane. The area of US Highway 119 where the accident occurred is a “non-designated” highway and by statute is restricted to vehicles 96 inches in width or less and 53 feet in length or less. However, the tractor portion of the vehicle that collided with Mr. Collins’s bus measured 99 inches in width; the trailer portion was 102 inches in width; and, in total, the tractor-trailer was 68 feet and 3 inches in length. In short, absent a permit—which the operator of the tractor-trailer did not have—the tractor-trailer that collided with Mr. Collins’s bus was not authorized to be on that part of US Highway 119.

At the time of the accident, the Transportation Cabinet’s division of vehicle enforcement, working together with local law enforcement and state police, was charged with the responsibility of enforcing state and federal laws with respect to vehicle sizes. Mr. Collins’s Estate filed suit against it in the Kentucky Board of Claims. The theory of the Estate’s case was that if the Transportation Cabinet had

enforced the length and width restrictions applicable to commercial vehicles more vigorously, the accident involving Mr. Collins might not have occurred.

After a period of motion practice, the Board of Claims found that the Transportation Cabinet had a ministerial duty to enforce length and width regulations on US Highway 119, but that the Transportation Cabinet could not be expected to prevent every violation of those regulations; the Transportation Cabinet had otherwise carried out its enforcement duty in a reasonable manner; and, consequently, that the Transportation Cabinet had not breached any duty. Following the Estate's administrative appeal to the Letcher Circuit Court, the circuit court disagreed with the metric the Board of Claims had utilized in determining whether the Transportation Cabinet had reasonably carried out its duties relative to enforcing length and width restrictions. On remand, the circuit court essentially directed the parties and the Board of Claims to conduct a survey of how often citations for length and width violations were issued in Letcher County, as opposed to other counties throughout the Commonwealth.

Upon doing so, the Board of Claims found that the degree of the Transportation Cabinet's enforcement of its length and width regulations in Letcher County did not substantially differ from the degree of its enforcement of those same regulations in any other county. Thus, once again, the Board of Claims determined that Transportation Cabinet had not breached any duty.

Thereafter, the Estate filed another administrative appeal with the circuit court. This time, the circuit court determined that the overwhelming

evidence of record demonstrated, to the contrary, that the Transportation Cabinet had breached its enforcement duties regarding the aforementioned length and width restrictions at the time of Mr. Collins's accident. Accordingly, it reversed the Board of Claims and remanded solely for a determination of the Transportation Cabinet's comparative liability.

The Transportation Cabinet now seeks our review of the circuit court's Order and Judgment. *See* Kentucky Revised Statutes (KRS) 44.150.

To begin, judicial review of the final order of the Board of Claims is limited and is governed by 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 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.

As the Estate was unsuccessful before the Board of Claims, the Board's findings of fact will only be set aside if the evidence compels a finding in its favor. And, as an appellate court, we review errors of law *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006); *see also* KRS 44.150.

Before addressing the substance of this appeal, we pause to address a procedural issue the Estate has raised in its brief. The Estate has argued this appeal

should be dismissed based upon what it alleges are several deficiencies in the Transportation Cabinet's brief. Specifically, the Estate asserts that the Transportation Cabinet has violated Kentucky Civil Rule (CR) 76.12(4)(c)(v) by failing to include specific statements at the beginning of each of its arguments regarding where it preserved its contentions of error.

However, violations of CR 76.12(4)(c)(v) do not warrant automatic dismissal. Nothing of record indicates the Estate was prejudiced by any such violation. And, to the extent that the Transportation Cabinet's brief did violate CR 76.12(4)(c)(v) in any way, the Transportation Cabinet filed a reply brief curing any such violations by including the requisite preservation statements. *See Hollingsworth v. Hollingsworth*, 798 S.W.2d 145, 147 (Ky. App. 1990) (“[A] reply brief may be used to both supplement an appellant's original brief and to correct a procedural defect related to CR 76.12(4)(c)(iv) [now (v)]”). Accordingly, we disagree with the Estate's argument regarding dismissal.

We now proceed to the merits of this appeal. The Transportation Cabinet argues that the circuit court committed error by setting aside the Board of Claims' Final Order. For the following reasons, we agree.

In general, the Transportation Cabinet is a state agency ordinarily entitled to sovereign immunity. *See, e.g., Transp. Cabinet, Dept. of Highways v. Sexton*, 256 S.W.3d 29, 35-36 (Ky. 2008). There is a limited waiver of that immunity with regard to negligence claims filed with the Board of Claims, which

possesses jurisdiction over the negligent performance of ministerial acts by the Transportation Cabinet, as well as other state agencies. See KRS 44.073(2).

However, the tort of negligence requires a duty owed directly to an injured party.^{1, 2} Thus, if a state agency is being sued for the negligent performance of an obligation that merely runs to the public as a whole rather than a specific individual, the Board of Claims lacks jurisdiction and the action must be dismissed. KRS 44.073(13)(d).

Here, both the Board and the circuit court held or assumed that the Transportation Cabinet, through its vehicle enforcement division, was charged with a ministerial duty to enforce restrictions with respect to the size and weight of vehicles upon particular roadways, per KRS 189.221. Both the Board and the circuit court further assumed that this ministerial duty had been owed directly and individually to Mr. Collins.

However, the general rule of thumb, in the absence of some “special relationship,”³ is that a municipality or a law enforcement agency or official does not owe

¹ To prove negligence, it was incumbent upon the Estate to demonstrate duty, breach of duty, causation, and injury. See *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003). The bases of the Board’s and circuit court’s respective decisions in this matter were the “breach of duty” and “causation” elements. However, any analysis relative to either “breach of duty” or “causation” was ultimately irrelevant. The dispositive element in this matter was “duty.”

² The Estate argues that because the Transportation Cabinet did not appeal the first decision of the circuit court, the Transportation Cabinet is now estopped from disputing that it owed a duty directly to Mr. Collins. As explained, however, the nature of the duty owed by the Transportation Cabinet in this matter implicated the Board of Claims’ subject matter jurisdiction. And, subject matter jurisdiction cannot be acquired by estoppel, consent, or waiver. *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005).

³ This “special relationship” exception has no application in this matter. As enunciated in *Commonwealth, Corr. Cabinet v. Vester*, 956 S.W.2d 204, 206 (Ky. 1997), it applies when the injured party is in state custody or is otherwise restrained by the state at the time of injury.

individual citizens a duty to protect them from crime. Thus, courts generally will not consider the “reasonableness” of actions taken to protect individual citizens from crime. *See, e.g., Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1990); *Sorichetti v. City of New York*, 65 N.Y.2d 461, 492 N.Y.S.2d 591, 595, 482 N.E.2d 70, 74 (1985); *Santy v. Bresee*, 129 Ill.App.3d 658, 84 Ill.Dec. 853, 473 N.E.2d 69 (1984). This limitation both reflects the judgment that the duty to protect is owed to the public as a whole rather than to a particular individual or class of citizens, and recognizes the existence of questions of resource allocation. *See, e.g., Raucci v. Rotterdam*, 902 F.2d 1050 (2d Cir. 1990); *Siddle v. City of Cambridge*, 761 F.Supp. 503 (S.D. Ohio 1991); *Santy, supra*.

Ashby v. City of Louisville, 841 S.W.2d 184, 190 (Ky. 1992).

To similar effect, the following was stated in *City of Russellville v.*

Greer, 440 S.W.2d 269, 271 (Ky. 1968):

The regulation of traffic is a function of government, initiated and implemented for the protection of the general public, similar to fire protection, police protection or flood protection. But a municipality [and, by parity of reasoning any other governmental agency] owes no legal duty to individual members of the public to fully perform that function. Therefore, a failure of performance does not constitute a tort committed against an individual who may incidentally suffer injury or damage, in common with others, by reason of such default.

See also City of Florence, Kentucky v. Chipman, 38 S.W.3d 387, 392 (Ky. 2001)

(“In order for a claim to be actionable in negligence, there must be the existence of a duty and unless a special relationship was present, there is no duty owing from any of the police officers to Black to protect her from crime or accident”); *Grogan*

v. Commonwealth, 577 S.W.2d 4, 5–6 (Ky.1979) (determining a city could not be liable for failing to enforce its public safety laws).

The fact that the Transportation Cabinet owes a general duty to the public to enforce size and weight restrictions of vehicles upon particular roadways does not establish that it owed any direct duty to Mr. Collins to prevent, by way of more vigorous enforcement of those traffic regulations, the accident that resulted in his untimely death. The Estate has failed to establish any special relationship between Mr. Collins and the Transportation Cabinet. As a matter of law, there was no duty to be breached. Therefore, the Board of Claims acted appropriately in dismissing this case. In light of the foregoing, the Letcher Circuit Court is REVERSED and directed to dismiss the Estate’s administrative appeal.

ALL CONCUR

BRIEF FOR APPELLANTS:

Bridget L. Dunaway
John Michael Carter
London, Kentucky

BRIEF FOR APPELLEE:

Darrell Hall
Whitesburg, Kentucky