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Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001355-MR

THOMAS D. ISAAC AND DON
McCORMICK IN THEIR
PERSONAL CAPACITY AND
AS REPRESENTATIVES OF
GROUP 151

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 16-CI-00440

COMMONWEALTH OF KENTUCKY;
SECRETARY OF
TRANSPORTATION, IN HIS
OFFICIAL CAPACITY; KENTUCKY
CABINET FOR TRANSPORTATION;
KENTUCKY DEPARTMENT OF
HIGHWAYS; REPUBLIC SERVICES
OF KENTUCKY, LLC; BENSON
VALLEY LANDFILL GENERAL
PARTNERSHIP; R.C. CUTTS, INC.;
AND CUTTS SPECIALIZED
TRANSPORTATION, INC.

APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Thomas D. Isaac and Don McCormick, in their personal capacities and as representatives of 200 home owners and residents along Kentucky State Highway 151 (Group 151) appeal from a summary judgment granted by the Franklin Circuit Court to the Commonwealth of Kentucky; the Secretary of Transportation, in his official capacity; the Kentucky Cabinet for Transportation; the Kentucky Department of Highways; Republic Services of Kentucky LLC; Benson Valley Landfill General Partnership; R.C. Cutts, Inc.; and Cutts Specialized Transportation, Inc. Group 151 sought a declaratory judgment, temporary restraining order and permanent injunctive relief against the Cabinet regarding the authorization of heavy commercial motor vehicles along Highway 151 (KY 151). At issue is whether the circuit court correctly decided that Group 151 failed to exhaust its administrative remedies, and that the Cabinet has primary jurisdiction over the matter.

This case involves the interplay of federal and state statutes and regulations governing the travel of trucks and trailers on national roadways. At the federal level, the Surface Transportation Assistance Act of 1982 (STAA), as amended by the Tandem Truck Safety Act of 1984, 49 United States Code (U.S.C.)

§ 31111 *et seq.*, establishes “uniform, national standards for the maximum size and weight of trucks and trailers used in interstate commerce.” *New Hampshire Motor Transport Ass’n v. Town of Plaistow*, 67 F.3d 326, 329 (1st Cir. 1995). “This statute was originally enacted by Congress ‘[i]n order to eliminate problems caused by inconsistent state regulation of highway use.’” *Keck v. Commonwealth ex rel. Golden*, 998 S.W.2d 13, 16 (Ky. App. 1999) (quoting *A.B.F. Freight System, Inc. v. Suthard*, 681 F.Supp. 334, 337 (E.D. Va. 1988)). In furtherance of this goal, the STAA forbids states from enacting or enforcing laws that prohibit trucks and trailers of approved length and weight from travelling on the National Truck Network, the system of interstate highways and other federally funded primary routes designated by the Secretary of Transportation. *Plaistow*, 67 F.3d at 329. The STAA “also prohibits states from denying approved trucks and trailers ‘reasonable access’ between the national network and ‘terminals.’” *Id.* (citing 49 U.S.C. § 31114).

Federal regulations provide for additions, deletions, exceptions and restrictions from the National Network. The Federal Highway Administration (FHWA) retains the authority to rule on requests for any of these and its “approval or disapproval will constitute the final decision of the U.S. Department of Transportation.” 23 Code of Federal Regulations (CFR) § 658.11.

At the state level, regulations promulgated by the Kentucky Transportation Cabinet establish the maximum dimensions for a motor vehicle or combination motor vehicle on Kentucky roadways. 603 Kentucky Administrative Regulations (KAR) 5:070 § 3. In accordance with the federal scheme discussed above, the regulations also provide that motor vehicles that exceed these dimensions may operate on roads designated to be part of the National Truck Network and in areas of access to the Network. 603 KAR 5:070 § 4(2).

KY 151 is a two-lane road stretching from Franklin County to Anderson County. It has been part of the National Truck Network under the STAA for over thirty-six years. It is classified by the Transportation Cabinet as an “[o]ther state primary highway.” These are defined as routes “which are considered to be long distance, high volume intrastate routes that are of statewide significance. The routes have mobility as their prime function and are distinguished by high traffic-carrying capacity. These routes link major urban centers within the state and/or serve as major interregional corridors.” 603 KAR 3:030 § 1 (1)(c). The portion of KY 151 at issue in this case runs between Lawrenceburg and Interstate 64 and is regularly used by heavy commercial vehicles.

On March 17, 2016, in response to local residents’ concerns about commercial motor vehicle crashes on KY 151, the Acting Secretary of the

Kentucky Transportation Cabinet contacted the FHWA, in accordance with 23 CFR § 658.11, requesting the emergency removal of the highway from the National Truck Network. The letter stated that KY 151 experienced single vehicle accidents involving large trucks and buses six times as often as US 127 (the alternate route) during the same time period, with half the accidents involving one vehicle running off the roadway. The letter also stated that the typical width of the lanes of KY 151 was only eleven feet and the shoulders from one to two feet, which the letter described as inadequate for larger vehicles like trucks and buses.

On April 25, 2016, Group 151 filed a complaint against the Commonwealth, the Secretary of the Transportation Cabinet, the Transportation Cabinet, and the Department of Public Highways, seeking declaratory judgment, a temporary restraining order and permanent injunctive relief. The complaint contended that Highway 151 is unsuitable for heavy commercial traffic such as trucks, trailers and semi-trailers, as evidenced by the numerous crashes occurring on the roadway as well as incidents involving trucks running off the road into private residences or spilling loads such as grain alcohol or gasoline onto private property adjacent to the roadway. Group 151 sought to remove the classification of KY 151 as an “[o]ther state primary highway” pursuant to 603 KAR 3:030 on the grounds it was arbitrary and unconstitutional, and also claimed KY 151 should

not be excluded from classification as an exempted roadway under 603 KAR 5:070 § 7.

On April 26, 2016, the FHWA sent a reply to the Cabinet agreeing that Kentucky's request met the requirements to pursue an emergency deletion from the National Network of the relevant segment of KY 151. The letter also stated that "[a]lthough the approval of this emergency deletion enables the State to take immediate action to notify the public, establish signage reflecting the deletion, and enforce new requirements, this is not a final action. This emergency deletion will be published in the Federal Register to provide formal notice and offer an opportunity for the public to comment."

Upon receipt of this letter, the Cabinet Secretary issued Official Order No. 110134, temporarily removing the specified portions of KY 151 from the Kentucky National Truck Network. The order stated that the removal of the route from the Network was justified because Interstate 64 and US 127 provided a safer route for vehicles with 102-inch-wide trailers while further promoting the safety of the travelling public. The order removed STAA motor vehicles (truck, tractor trailer and semi-trailer combinations from 97 to 102 inches in width) from regular traffic along the relevant portion of KY 151. The maximum width and length of any motor vehicle or combination motor vehicle permitted is 96 inches wide and 65 feet long. These are the default maximum dimensions for travel on any public

roadway in Kentucky not on the National Truck Network. *See* 603 KAR 5.070 § 3.

In June 2016, a notice was published in the Federal Register by the FHWA regarding the emergency deletion of the relevant portion of KY 151 from the National Network. Comments were due on July 15, 2016. The permanent deletion of KY 151 from the National Truck Network has not been finalized.

On September 27, 2016, the Cabinet Secretary signed Official Order 110454 amending the earlier order to retain the first 1.3 miles of KY 151 north of the junction with US 127 as part of the National Network so that oversized vehicles could access the trucking facilities located there, which include a maintenance, repair and service shop for heavy haul and STAA trucks owned and operated by R.C. Cutts, Inc. and Cutts Specialized Transportation, Inc. (Cutts).

R.C. Cutts, Inc. and Cutts Specialized Transportation, Inc., and Republic Services and Benson Valley Landfill filed motions to intervene in Group 151's lawsuit which were granted on October 27, 2016, on the grounds that their business interests depend on the operation of STAA and larger motor vehicles along KY 151 and would be adversely affected by the removal of the route from the National Truck Network. The circuit court directed the parties to brief jurisdictional issues, directed the Cabinet to file a motion for summary judgment

and the intervenors to file a motion to dismiss. They did so, and Group 151 filed a consolidated response.

The circuit court entered an order dismissing Group 151's petition without prejudice on the grounds that Group 151 failed to exhaust its administrative remedies and that the Cabinet had primary jurisdiction over the matter. This appeal by Group 151 followed.

In reviewing a grant of summary judgment, our inquiry focuses on “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing Kentucky Rules of Civil Procedure (CR) 56.03). Summary judgment may be granted when “as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his [or her] favor and against the movant.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotation marks and citation omitted). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his [or her] favor.” *Id.* at 480. “An appellate court need not defer to the trial court’s decision on summary judgment and will review the issue *de novo* because only legal questions and no

factual findings are involved.” *Hallahan v. The Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

“A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. . . . [T]he court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court’s determination; instead, an appellate court reviews the issue de novo.” *Skeens v. University of Louisville*, 565 S.W.3d 159, 160 (Ky. App. 2018), *reconsideration denied* (Nov. 19, 2018) (quoting *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010)).

On appeal, Group 151 contends that the Cabinet’s classification and designation of KY 151 as an “other state primary highway” endangers the safety of the public and is therefore contrary to the aims of 603 KAR 3:030 and Kentucky Revised Statutes (KRS) 189.222, which govern the weight and dimensions of vehicles on state-maintained highways. The appellants argue that the Cabinet retains the authority to provide for the safety of the public, so the pendency of the Cabinet’s application for the removal of KY 151 from the National Network does not render it powerless or without authority to act or continue to act when safety considerations are in issue.

“As a general rule, exhaustion of administrative remedies is a jurisdictional prerequisite to seeking judicial relief.” *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 625 (Ky. 2001). In its order, the circuit court dismissed this action primarily because Group 151 had failed to exhaust its administrative remedies before filing suit. Group 151 argues that dismissal on these grounds was unwarranted because neither the statutes and regulations of the Cabinet nor the pertinent federal regulation, 23 CFR 658.11, provide an available administrative remedy.

KRS 189.222(11) empowers the Transportation Cabinet to “promulgate administrative regulations pursuant to KRS Chapter 13A, relating to the implementation of 23 C.F.R. Part 658 as it relates to state-maintained or locally maintained roads.” Pursuant to this statutory authority, the Cabinet has promulgated 603 KAR 5:250, which is entitled “Selection of National Truck Network highways and reasonable access to these highways.” Section 2 of that regulation provides that “Selection of the National Truck Network highways and access to terminals and services by STAA vehicles shall be governed by 23 CFR Part 658.”

Thus, under Kentucky law, matters relating to the National Truck Network are governed by 23 CFR § 658.11, which provides an administrative process for those seeking deletion of a roadway from that Network. According to

Group 151, however, this administrative procedure is not available to private individuals, only to states and their local transportation departments which have received public grants from the U.S. Department of Transportation. The plain language of 23 CFR § 658.11 states that those seeking to make additions to the National Network shall have the endorsement of the Governor or the Governor's authorized representative. 23 CFR § 658.11(1). Requests for deletion from the National Network do not include this requirement, however, with the regulation only specifying that such requests must be made in writing. *Id.* at (b). Any proposed additions or deletions must be published in the Federal Register where they are available for public comment. *Id.* at (a)(2) and (b). The FHWA notice relating to the emergency deletion of KY 151 from the National Network specifically states that the FHWA “seeks public comments and information to assist in assessing” the impacts of the deletion.

The Cabinet formally applied to remove KY 151 from the National Network before Group 151 filed its complaint in circuit court. Group 151 was free to file comments and further information to assist the FHWA in determining the status of the highway although apparently it did not do so. The Cabinet's application is still pending before the FHWA. The Cabinet is not empowered to address the concerns of Group 151 because a state may not unilaterally withdraw a roadway from the National Network. 23 CFR § 658.11 plainly decrees: “To

ensure that the National Network remains substantially intact, FHWA retains the authority to rule upon all requested additions to and deletions from the National Network as well as requests for the imposition of certain restrictions.”

Group 151 nonetheless argues that the FHWA’s authority does not preempt the police powers of the state to safeguard public safety by restricting traffic on KY 151. It points to an exception contained in the STAA from the prohibition against states enacting or enforcing laws denying commercial motor vehicles reasonable access to the National Network. 49 U.S.C. § 31114. This exception allows state or local governments to impose “reasonable restrictions, based on safety considerations” on such vehicles. Group 151 argues that this provision permits the Cabinet to act independently from the FHWA. In *Keck*, *supra*, the Kentucky Supreme Court held that a local noise ordinance barring heavy traffic at night did not fall within the STAA exception because it did not sufficiently implicate safety considerations. The Court described the operation of the exception as follows: “Essentially, Congress has authorized a sliding scale test for the availability of an access route: the greater the risk to the safety of the public posed by the use of a route by an STAA vehicle, the more leeway the state has to deny or even temporarily deny the use of that route pursuant to the reasonable exercise of its police powers.” *Keck*, 998 S.W.2d at 17 (quoting *Consolidated Freightways Corp. v. Larson*, 647 F.Supp. 1479, 1484 (M.D. Pa.

1986)). But the Cabinet in this case did act to protect public safety precisely by seeking the emergency deletion of KY 151 from the National Network and securing the emergency restriction on STAA vehicles. Any further restrictions on KY 151 would be futile until its status as part of the National Network is determined at the federal level.

Group 151 further argues that the circuit erred in deferring to the Cabinet's primary jurisdiction over this matter on the grounds it has the expertise and resources to evaluate the safety of state-maintained roadways. It argues that deference to an agency's administrative expertise is not required when assessing the "reasonableness" of an agency action which does not have a technical or peculiar meaning. The doctrine of primary jurisdiction "clearly recognizes that the court has subject-matter jurisdiction but as a matter of judicial policy should not exercise it in instances where proper judicial administration requires that action be deferred by the court until the agency has acted and the court may then review its action." *Preston v. Meigs*, 464 S.W.2d 271, 274-75 (Ky. 1971). The Cabinet has acted and is still awaiting the FHWA's final decision regarding the emergency order. Under these circumstances, when the status of KY 151 as part of the National Network remains unresolved, the circuit court correctly declined to exercise jurisdiction until the Cabinet's administrative action is completed.

The Cabinet cannot alter the status of KY 151 until its application to the FHWA to have the highway removed from the National Network is resolved and the administrative process is complete. Group 151 was provided with an administrative remedy to express its safety concerns to the FHWA under the public comment provision of 23 CFR § 658.11. Its petition for declaratory relief in state court was premature and the circuit court correctly held as a matter of law that it lacked jurisdiction over the matter.

For the foregoing reasons, the order of the Franklin Circuit Court granting summary judgment and dismissing this action without prejudice is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEES
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