

RENDERED: OCTOBER 11, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2018-CA-001488-MR

GINI G. GRACE

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE TIM KALTENBACH, JUDGE  
ACTION NO. 17-CI-01022

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET,  
DEPARTMENT OF HIGHWAYS  
AND COMMONWEALTH OF KENTUCKY,  
PUBLIC PROTECTION CABINET, CLAIMS  
COMMISSION

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

ACREE, JUDGE: Appellant, Gini Grace, appeals the McCracken Circuit Court's order reversing a decision of the Kentucky Claims Commission ("Commission") finding Appellee, Commonwealth of Kentucky, Transportation Cabinet,

Department of Highways (“KYTC”), negligent in removing a tree partially located on her property and dismissing her claim for lack of jurisdiction. After careful review, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

KYTC is responsible for maintaining Kentucky highways in a safe condition. This responsibility requires it to eliminate hazards on public highways. In March of 2012, KYTC removed a tree which it believed to be located, at least partially, on the state right-of-way and encroaching the highway. Grace filed this action with the Commission,<sup>1</sup> alleging KYTC negligently trespassed on her land and removed her tree. KYTC moved to dismiss the claim. The hearing officer, construing the motion as one for summary judgment, recommended the Commission grant summary judgment, finding the tree was encroaching on the state right-of-way and therefore KYTC had a duty to remove it. The Commission accepted the recommendation and entered a final order granting summary judgment to KYTC.

Grace appealed, and the McCracken Circuit Court held there was a genuine issue regarding the material fact whether the tree was located on Grace’s property and whether it was encroaching the highway. The Commission ordered

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<sup>1</sup> The Commission was previously known as the Board of Claims and claims were brought before it pursuant to Kentucky Revised Statutes (KRS) 44.070, *et seq.* (renumbered 2017).

the hearing officer to conduct a hearing for that purpose. Adopting the hearing officer's recommendation, in part, the Commission found two-thirds of the tree was on the state right-of-way and the remaining portion was on Grace's property. It further concluded that KYTC was negligent for failing "to conduct a reasonable inquiry and ascertain where the property lines were before they cut the tree." The commission awarded Grace \$11,666.66 plus the cost of removing the stump.

KYTC appealed and asserted, among other things, that the "Commission acted without or in excess of its powers." The McCracken Circuit Court agreed. It reversed the order of the Commission and dismissed Grace's claim, concluding it was a claim for reverse condemnation, rather than negligence. And, because the Commission only has jurisdiction over "negligence claims for the negligent performance of ministerial acts against the Commonwealth," it lacked subject matter jurisdiction over Grace's claim. Grace now appeals the decision of the McCracken Circuit Court.

### **STANDARD OF REVIEW**

Kentucky Revised Statutes (KRS) 49.160 grants this Court limited jurisdiction when reviewing decisions from a circuit court addressing final orders of the Commission; it states:

The Court of Appeals shall review only the matters subject to review by the Circuit Court and also errors of law arising in the Circuit Court and made reviewable by

the Rules of Civil Procedure, where not in conflict with KRS 49.040 to 49.180.

KRS 49.160. We limit our discussion to the issue addressed by the circuit court – whether the Commission has subject matter jurisdiction over Grace’s claim.<sup>2</sup> “We review determinations on subject-matter jurisdiction *de novo*.” *Basin Energy Co. v. Howard*, 447 S.W.3d 179, 184 (Ky. App. 2014).

### **ANALYSIS**

The Commission has “primary and exclusive jurisdiction over all negligence claims for the negligent performance of ministerial acts against the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any officers, agents, or employees thereof while acting within the scope of their employment.” KRS 49.070(2). Grace asserts her claim is one for negligence and the circuit court abused its discretion by proclaiming it to be a reverse condemnation action. We disagree.

Reverse condemnation is “a suit against a government to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government when no eminent domain proceedings are used.” *Cary v. Pulaski Cty. Fiscal Court*, 420 S.W.3d 500, 517 (Ky. App. 2013) (citing

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<sup>2</sup> Grace asserts KYTC submitted affidavits before the Commission in bad faith, constituting fraud and, therefore, the ruling of the circuit court should be set aside. This issue was not addressed by the circuit court, nor does it have any bearing on the issue of jurisdiction. Therefore, we decline to address this issue.

*Commonwealth, Nat. Res. and Envtl. Prot. Cabinet v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378, 381 (Ky. 1984)). Grace’s claim form, filed with the Commission, alleges, “A tree, 3ft in diameter was cut down by the Highway Dept. [sic] without my permission.” Importantly, this is the only injury asserted. She does not allege, nor does the record indicate, additional damage to her property arising from the negligence of KYTC. Therefore, Grace’s claim to recover the value of the tree is in the nature of a claim for reverse condemnation. *See Commonwealth, Dept. of Highways v. Gisborne*, 391 S.W.2d 714, 716 (Ky. 1965) (determining the plaintiffs’ claim was for reverse condemnation where a subcontractor of the Commonwealth of Kentucky, Department of Highways, cleared trees and shrubbery from their property).

Grace’s assertion that this is a negligence claim rests primarily on the fact that her claim form indicated KYTC “negligently trespassed” onto her property to remove the tree. “A trespasser is one who comes upon the land without any legal right to do so[.]” *Hardin v. Harris*, 507 S.W.2d 172, 174 (Ky. 1974). Although a trespass was necessary to cut the tree, the damages Grace claims do not emanate from the trespass, but from the taking.

We note that the hearing officer determined KYTC was negligent in failing to determine whether the tree was on state right-of-way or on Grace’s

property. But, long standing precedent leads us to the conclusion that her sole remedy is an action for reverse condemnation.

In *Witbeck v. Big Rivers Rural Elec. Co-op Corp.*, the then-highest court in Kentucky noted:

The rule is that where an entity possessing the power of eminent domain prematurely enters upon the premises [sic] of the condemnee, the exclusive remedy of the landowners is based on Kentucky Constitution, Section 242, which provides that 'just compensation for property taken' shall be made. This remedy is frequently referred to as 'reverse condemnation.'

412 S.W.2d 265, 269 (Ky. 1967), *overruled on other grounds by Commonwealth, Dep't of Highways v. Stephens Estate*, 502 S.W.2d 71 (Ky. 1973); *see Big Rivers Elec. Corp. v. Barnes*, 147 S.W.3d 753, 756 (Ky. App. 2004).

The rule articulated in *Witbeck* has been interpreted to preempt claims asserting negligent trespass that result in a taking. In the unpublished opinion of *Lawson v. Central Associated Eng'rs*, a government subcontractor damaged the plaintiff's property, in part, by cutting trees. No. 2001-CA-001789-MR, 2003 WL 1860266, at \*1 (Ky. App. Apr. 11, 2003). This Court held:

The negligence by [the subcontractor] alleged by the Lawsons involved its failure to search the property records to discern the actual legal owner prior to entering onto the land. As indicated by the court in [*Witbeck*,] any recovery for an unauthorized premature entry by a contractor acting on behalf of a condemnor is available only in the condemnation action.

*Id.* at \*3 (citations omitted).<sup>3</sup>

In *Gisborne, supra*, the court faced an issue similar to the one now before the Court, albeit in a different procedural context. The Gisbornes were awarded damages after trees and shrubbery were wrongfully taken from their property by contractors of the Commonwealth of Kentucky, Department of Highways. *Gisborne*, 391 S.W.2d at 715-16. The Department appealed, asserting the Gisbornes' action was premised on negligence and, therefore, should have been adjudicated before the Commission. The court disagreed, concluding the Gisbornes' claim was "a condemnation proceeding in essence" and the proper forum was the appropriate circuit court. *Id.* at 716.

Grace's reliance on another unpublished opinion, *Clemmer v. Rowan Water, Inc.*, which "decline[d] to expand [*Witbeck*] to encompass preclusion of other causes of action which are distinct from the issue of whether a trespass occurred, and which encompass entirely different types of damages" is misplaced. No. 2010-CA-000018-MR, 2011 WL 1733550, at \*6 (Ky. App. May 6, 2011). *Clemmer* dealt with claims of nuisance and fraud, which "remedy a different type of injury" than trespass and reverse condemnation. *Id.* As noted above, Grace's

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<sup>3</sup> We do not cite this opinion as precedent. However, its factual similarity makes it appropriate for discussion and consideration. See Kentucky Rule of Civil Procedure 76.28(4)(c).

claim is truly one for reverse condemnation, which remedies the injury she asserts – the replacement cost of the tree.

Because Grace’s injury arose because KYTC prematurely entered her property and removed the tree, her sole remedy lies in an action for reverse condemnation. Therefore, the Commission lacked subject matter jurisdiction of her claim.

### **CONCLUSION**

Based on the foregoing, we affirm the McCracken Circuit Court’s order reversing and dismissing Grace’s appeal for lack of subject matter jurisdiction.

MAZE, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE  
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