RENDERED: MAY 1, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000316-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE KENT HENDRICKSON, JUDGE
ACTION NO. 14-CI-00525

TINA JEWELL, ADMINISTRATRIX
FOR THE ESTATE OF KEVIN JEWELL;
ANGELA BLANTON, ADMINISTRATRIX FOR
THE ESTATE OF BENNY BLANTON; AND
COMMONWEALTH OF KENTUCKY,
BOARD OF CLAIMS APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Commonwealth of Kentucky, Transportation Cabinet,

(Cabinet) brings this appeal from a January 30, 2018, order of the Harlan Circuit

Court reversing and remanding a Final Order of Commonwealth of Kentucky, Board of Claims, (the Board) [1] which denied claims stemming from a fatal automobile accident filed by Tina Jewell, administratrix of the estate of Kevin Jewell, and Angela Blanton, administratrix of the estate of Benny Blanton (collectively the Estates). Because the evidence does not compel a finding in favor of the Estates, we reverse and remand.

In December 2008, Benny Blanton drove himself and three co-workers home from work on icy roads in snowy weather in Harlan County. Blanton's car slid while making a turn onto Kentucky Highway 221 and went over a bridge, which did not have guardrails, into a stream.[2] Tragically, Blanton and passenger Kevin Jewell were killed. Two other passengers survived the crash. The Estates each filed separate claims with the Board in 2009, and soon thereafter each filed actions in circuit court against the Cabinet and some employees thereof, which were consolidated ("*Harlan I*"). The Board actions were stayed until the circuit court determined whether the Commonwealth and/or its employees had

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[1] "Effective June 29, 2017, amendments to the Kentucky Revised Statutes [KRS] concerning the Kentucky Board of Claims changed the name of that entity to the Kentucky Claims Commission and renumbered the applicable statutes from Chapter 44 to Chapter 49. In this opinion, we refer to the Board and the statutes as they existed at the time of the proceedings below." *Commonwealth v. Russell*, 578 S.W.3d 747, 749 n.1 (Ky. App. 2019).

[2] Arguably, the bridge may in fact be a culvert. However, Timothy Ball, a bridge inspector for Commonwealth of Kentucky, Transportation Cabinet, (Cabinet), testified in his deposition that the structure was inspected as a bridge by the Cabinet under the National Bridge Inventory System. Ball Depo. at 6-8, 56.

immunity. In May 2012, the circuit court concluded that both the Cabinet and its employees had immunity, holding in *Harlan I* that "decisions for funding and installation of guardrails [are] a discretionary act[.]" Record on appeal at 76.[3] Neither party appealed this judgment.

Soon thereafter, the stay was lifted on the claims pending before the Board. A hearing officer concluded in September 2014 that the installation of a guardrail at the location of the accident was a discretionary function of the Cabinet, thus precluding any recovery against the Board of Claims. *See Commonwealth, Transp. Cabinet, Dept. of Highways v. Sexton*, 256 S.W.3d 29, 32 (Ky. 2008) ("The Board of Claims Act . . . provides for a waiver of sovereign immunity for negligence in the performance of **ministerial** acts only."). The Board adopted the hearing officer's recommendation by Final Order entered October 16, 2014.

The Estates then immediately filed a joint petition for review of the Board's decision in the Harlan Circuit Court, pursuant to Kentucky Revised Statutes (KRS) 44.140 (now KRS 49.150). In December 2014, the Cabinet filed its answer, in which it did not assert as an affirmative defense, *res judicata*—despite the conclusion of the circuit court in *Harlan I* that the installation of a guardrail was a discretionary act. On January 30, 2018, the circuit court issued an Opinion and Order Reversing and Remanding *sub judice*. The court did not explicitly

[3] Order Granting Summary Judgment, by Harlan Circuit Court in Civil Action No. 10-CI-00161.

conclude that the installation of guardrails was a ministerial act. Instead, the court ruled the Board's conclusion that the Cabinet's acts were discretionary was not supported by substantial evidence. The court did not address the conclusion rendered in *Harlan I*, that the installation of guardrails was a discretionary act, which was written by a different circuit judge. The circuit court abandoned the ministerial/discretionary action analysis in its ruling and applied a common law "duty" analysis to the facts, finding that the Cabinet had a duty to protect and warn the public of dangerous road conditions. Upon reversing and vacating, the court remanded the action back to the Board for additional fact finding. This appeal follows.

To begin, judicial review of a final order of the Board is limited. *Commonwealth, Dept. of Parks v. Bergee Bros., Inc.*, 480 S.W.2d 158, 159 (Ky. 1972). The standard of review is outlined in KRS 44.140(5) (now KRS 49.150(5)) as follows:

> 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.

Under KRS 44.150 (now KRS 49.160), our review is limited to "only the matters subject to review by the Circuit Court" and any legal errors made by that court.

Generally, courts defer to the Board's findings of fact. Under fundamental principles of administrative law, if the claimant with the burden of proof prevails before the Board, its findings of fact are sufficient if supported by substantial evidence of probative value. *Bourbon County Bd. of Adjustment v. Currans*, 873 S.W.2d 836, 838 (Ky. App. 1994). Since the Estates were unsuccessful before the Board, however, "the issue on appeal to the court is whether . . . the total evidence was so strong and persuasive as to compel a finding" in their favor. *Commonwealth, Dep't of Highways v. Hoskins*, 495 S.W.2d 177, 178 (Ky. 1973).

The Board's jurisdiction is also tightly circumscribed. "[T]he Commonwealth and its agencies and subdivisions are immune from suit, unless the Commonwealth has waived its immunity." *Sexton*, 256 S.W.3d at 32. And so, the key question is whether the Cabinet's decision-making regarding the installation of guardrails on the bridge was a ministerial or discretionary function because "[t]he Board of Claims Act . . . provides for a waiver of sovereign immunity for negligence in the performance of **ministerial** acts only." *Id.* Thus, the Estates' ability to pursue a claim against the Cabinet turns entirely upon whether any of the Cabinet's actions that purportedly contributed to Jewell and Blanton's deaths were

ministerial acts. *See Gaither v. Justice & Public Safety Cabinet*, 447 S.W.3d 628, 633 (Ky. 2014).

The Kentucky Supreme Court had held that if an act involves "policy-making decisions and significant judgment" it is discretionary; if it involves "merely routine duties" which "will typically be established by statutes or regulations that very clearly and specifically set forth those actions that the agency must take" it is ministerial. *Sexton*, 256 S.W.3d at 32-33 (citation omitted). A ministerial act "requires only obedience to the orders of others" and a duty that is "absolute, certain, and imperative" whereas a discretionary act requires "the exercise of discretion and judgment, or personal deliberation, decision and judgment." *Gaither*, 447 S.W.3d at 633 (citation omitted).

Before we address this issue, we will consider the Cabinet's argument that the judgment in *Harlan I* that the Cabinet's actions were discretionary in nature is binding in this case under the doctrine of *res judicata*. "*Res judicata* is the Latin term for 'a matter adjudged.'" *Humber v. Lexington-Fayette Urban County Government*, 553 S.W.3d 273, 276 (Ky. App. 2018). The doctrine is best described as follows:

> The doctrine of *res judicata* (also known as the doctrine of the finality of judgments) is basic to our legal system and stands for the principle that once the rights of the parties have been finally determined, litigation should end. Thus, where there is an identity of parties and an identity of causes of action, the doctrine precludes further

> litigation of issues that were decided on the merits in a final judgment.

Slone v. R & S Mining, Inc., 74 S.W.3d 259, 261 (Ky. 2002).

The Cabinet's argument is appealing since the same parties and issue were present before the circuit court in *Harlan I*. However, *res judicata* is an affirmative defense which must be specifically plead under Kentucky Rule of Civil Procedure (CR) 8.03, and "[a]s such, it can be waived." *Bailey v. Bailey*, 231 S.W.3d 793, 800 (Ky. App. 2007). "[A]s a general rule, failure to assert timely an affirmative defense waives that defense and precludes its consideration by the trial court and this Court." *Bowling v. Kentucky Dep't of Corrections*, 301 S.W.3d 478, 485 (Ky. 2009).[4] Indeed, nearly fifty years ago Kentucky's then-highest court held that "the defense of res judicata must be set forth in a responsive pleading . . . which means by answer and not by motion[.] Only in the absence of any issue of fact—where the facts are shown by the record and are not disputed—may the defense be asserted by a motion to dismiss." *Sedley v. City of West Buechel,* 461 S.W.2d 556, 559 (Ky. 1970). The Cabinet did not assert *res judicata* in its answer, nor did it file a motion to dismiss. Therefore, the Cabinet waived the defense. Notwithstanding, this Court cannot ignore that a circuit court in a case involving

[4] Courts may *sua sponte* consider *res judicata* in declaratory judgment actions, *Bowling v. Kentucky Dep't of Corrections*, 301 S.W.3d 478, 485 (Ky. 2009), but that exception is inapplicable here.

the same parties and same issue concluded that the installation of the guardrail was a discretionary act, resulting in immunity for the Cabinet and its employees.[5] Accordingly, we will address directly the question of whether the acts at issue in this case were ministerial or discretionary. *See Patton v. Bickford*, 529 S.W.3d 717, 724 (Ky. 2016).

Federal law requires bridges to be inspected by each state at least every other year. *See* 23 Code of Federal Regulations (C.F.R.) § 650.301 *et seq*. And it is undisputed that the bridge at issue was inspected and rated as substandard by the Cabinet due to its lack of guardrails. But, crucially, the regulations require only an inspection, not remediation of all deficiencies. The Estates have not cited, nor have we independently identified, any statute or binding regulation which mandated the Cabinet was duty bound to repair the substandard bridge (*i.e.*, erect guardrails). We thus must reject the Estates' argument that since this accident happened on a bridge, the Cabinet had a ministerial duty to install guardrails or a warning device.

As previously discussed, our Supreme Court has instructed courts to focus on whether an act is part of an agency's "routine duties" in making the difficult ministerial or discretionary determination. *Sexton*, 256 S.W.3d at 33.

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[5] The parties agree that the Cabinet has sovereign immunity, subject to the waiver provisions of KRS 44.072 (now KRS 49.060).

And *Sexton* emphasized that a routine duty "will typically be established by statutes or regulations that very clearly and specifically set forth those actions that the agency must take." *Id.* The lack of statutes or regulations which required the Cabinet to install warning signs or guardrails at this bridge weighs heavily toward concluding those decisions were discretionary.[6]

Our conclusion is further supported by the evidence and legal precedent. There was uncontested testimony below that the state allots a limited amount of funds for guardrail installation and the Cabinet is forced to use a prioritization system. *See also Commonwealth, Transp. Cabinet, Dep't of Highways v. Babbitt*, 172 S.W.3d 786, 790 (Ky. 2005) ("While guardrails are always installed when highway sections are newly constructed or reconstructed, many more roadside hazards exist on roadways that, like highway 231, were constructed decades ago. Appellant concedes that deficits in both money and

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[6] It is unclear what type of warning device the Estates believe the Cabinet should have installed. Indeed, there is unrebutted testimony from a survivor of the crash that Blanton was driving five miles per hour or less when his car began to slide. Roger Gibson Depo. at 12-13. The survivor also gave unrebutted testimony that the roads were "solid ice and snow" such that "there was no stopping, period." *Id.* at 19. Thus, a warning device, such as a sign stating "caution" or "slow," would have done nothing to prevent the terrible accident or to limit the resulting damage.

Relatedly, we also disagree with the circuit court's statement that the Board ignored the failure to warn argument. Page three of the hearing officer's recommended findings explicitly noted the Estates "believe liability should lie with the Commonwealth due to the absence of guardrails, other guards, *or warnings thereof* on the bridge[.]" *See* Record on appeal at 10 (emphasis added). And the hearing officer also noted the Cabinet's general duty to warn of dangerous conditions. In short, the hearing officer and the Board did not wholly ignore the failure to warn argument.

manpower make it impossible to immediately erect guardrails at all of those sites. . . . To accommodate this fiscal limitation, the Transportation Cabinet attempts to identify and prioritize all existing roadside hazards that could be improved by guardrails and to erect those guardrails piecemeal as funds become available.”). The circuit court considered and presumably rejected testimony from a Cabinet engineer that the Cabinet had created a statewide guardrail replacement system, but that system was underfunded and inadequate to repair all locations in need of a guardrail in the state. Thus, a prioritization system was created by the Cabinet based on greatest need, subject to the limitation of funding. Accordingly, that prioritization system requires weighing alternatives based on need, and so it is, by definition, discretionary.

We would also emphasize that there are at least three published opinions from this Court holding that guardrail and/or warning sign placement by government entities is generally a discretionary decision. *See, e.g., Hammers v. Plunk*, 374 S.W.3d 324, 330 n.3 (Ky. App. 2011) (holding that “determinations involving such things as whether a guardrail or sign should be placed in a certain area of roadway are discretionary”); *Bolin v. Davis*, 283 S.W.3d 752 (Ky. App. 2008) (holding that a county road engineer’s decision to not install a guardrail was discretionary); *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841 (Ky. App. 2003) (holding that a decision to not install a guardrail was

discretionary). Thus, we believe the circuit court erred by declining to follow the established precedent on this issue, which we are duty bound to follow.

Finally, we further hold that the circuit court also erred by concluding that *Babbitt*, 172 S.W.3d 786, creates a duty analysis for the court that circumvents the application of the "ministerial, discretionary dichotomy" to the facts of this case. Although the circuit court's rationale is not entirely clear, it appears the court believed *Babbitt* had rendered obsolete the ministerial/discretionary function determination in sovereign or qualified official immunity cases. However, another panel of this Court recently noted that "[i]n any appeal from a decision of the Board, the critical inquiry is whether the allegedly negligent act is discretionary or ministerial." *Commonwealth v. Russell*, 578 S.W.3d 747, 750 (Ky. App. 2019).

Based on the record before this Court and applicable binding precedent, we find no error in the Board's Final Order adopting the hearing officer's recommendation that the Cabinet's actions in this case regarding the installation of guardrails was indeed discretionary. And, we are mindful that the jurisdiction of the Board is limited solely to claims for the negligent performance of ministerial acts against the Cabinet and its employees. KRS 49.070.

For the foregoing reasons, the Opinion and Order of the Harlan Circuit Court is reversed, and this matter is remanded with instructions to reinstate the decision of the Board of Claims.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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