

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001469-MR

RICKY WALLACE, A MINOR
BY AND THROUGH HIS MOTHER,
JOYCE BOGGS

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, JUDGE
ACTION NO. 01-CI-00007

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET;
DEPARTMENT OF HIGHWAYS; AND
KENTUCKY BOARD OF CLAIMS

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, COMBS, AND JOHNSON, JUDGES.

BARBER, JUDGE: We are asked to overturn the decision of the Kentucky Supreme Court in Haney v. Transportation Cabinet, Ky., 958 S.W.2d 310 (1997), which holds that KRS 44.070(1) requires a Board of Claims award to be reduced by Social Security disability benefits. Being bound by this precedent, we must affirm.

The appellant is Ricky Wallace ("appellant"), a minor, by and through his mother, Joyce Boggs. On May 8, 1993, appellant was severely injured in a motor vehicle accident on

Kentucky Highway 805 in Letcher County. On May 4, 1994, appellant filed a claim with the Board of Claims against the Transportation Cabinet, Department of Highways, alleging that the "claimant was a passenger in an automobile being operated by Richard Wallace, which skidded when coming into contact with gravel and debris left upon the highway by the agents of the Commonwealth of Kentucky" On December 21, 2000, an "Agreed Facts, Stipulation and Judgment Dismissing Claim," was entered in the Board of Claims action. The parties agreed that under Haney, "the right to receive social security payments, even though not received at the present time, operates as a collateral set-off," The parties further agreed that the claimant would not receive any money from the Transportation Cabinet under current law, despite any finding of liability. The parties agreed to a dismissal and that in the event of appellate review and reversal, the issue of liability and any defenses thereto, could be fully and finally determined without any waiver.

On January 5, 2001, appellant filed a "Petition for Review/Appeal from Judgment Dismissing Claim," in the Letcher Circuit Court. On July 6, 2001, the circuit court entered a judgment affirming. On July 11, 2001, appellant filed a notice of appeal to this Court.

On appeal, appellant urges us to overturn Haney, a 4-3 decision. In Haney, the Supreme Court, citing its earlier decision in Commonwealth of Kentucky, Transportation Cabinet, Bureau of Highways v. Roof, Ky., 913 S.W.2d 322 (1996), reiterated that the Commonwealth is not obligated to make payment

to injured parties because of the protections provided by the doctrine of sovereign immunity. Ky. Const. § 231. The General Assembly may waive immunity, if at all, to the extent it sees fit. At the time Haney was decided, the maximum award available in the Board of Claims was \$100,000.00,¹ regardless of actual loss.

KRS 44.070(1): provides, in pertinent part, that:
"[A]ny damage claim awarded shall be reduced by the amount of payments received or right to receive payment from . . . social security programs"

The Supreme Court explained that:

In *Roof*, we held that the clear language of KRS 44.070(1) required reduction from the maximum [Board of Claims] award available (\$100,000) for basic reparation benefits and sums received from private insurance. This Court now holds that the clear language of the statute ("payments received or right to receive payment from ... social security programs") requires reduction from the maximum award available for Social Security disability payments.

Id. at 311.

The dissent stated that "[i]nterpreting this statute to require a reduction in an award when there is no double recovery, leads to an unjust result that is neither necessary or in accord with legislative intent. We wrongly decided Roof, and we compound our error here." Id. at 312.

¹ KRS 44.070(5) was amended effective 7-14-2000, and now provides that "a single claim for the recovery of money or a single award of money shall not exceed two hundred thousand dollars (\$200,000)"

On appeal, appellant argues that the set off for Social Security benefits should apply to the *total amount of damages sustained*; any remaining damages should be paid by the Board of Claims, not to exceed the \$100,000.00 statutory cap (in effect at the time). We are bound to follow Haney, under SCR 1.030(8)(a) which provides that "[t]he Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." Thus, we affirm.

We affirm the Letcher Circuit Court's judgment.

JOHNSON, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS BY SEPARATE OPINION IN WHICH
JOHNSON, JUDGE JOINS.

COMBS, JUDGE, CONCURRING: Sadly, I am compelled to concur due to the mandate of SCR 1.030 (8)(a), which allows this court no option to deviate from the Haney precedent. It is my fervent hope that the Supreme Court will re-visit this issue and abandon the harsh reality inevitably flowing from Haney and that it will reverse the Haney reasoning.

JOHNSON, JUDGE, CONCURS IN THIS OPINION.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE.

Lawrence R. Webster

Pikeville, Kentucky