

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-002063-MR

EUGENE SISCO

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 08-CI-01640

COMMONWEALTH OF KENTUCKY,
JUSTICE AND PUBLIC SAFETY CABINET;
AND COMMONWEALTH OF KENTUCKY,
BOARD OF CLAIMS

APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND NICKELL, JUDGES.

CAPERTON, JUDGE: The Appellant, Eugene Sisco, Jr., appeals the November 1, 2011, judgment of the Pike Circuit Court in favor of the Appellee, Commonwealth of Kentucky, Justice and Public Safety Cabinet (The Commonwealth), concerning

an automobile accident which occurred on December 19, 2006. The order of the Pike Circuit Court denied Sisco's motion to alter, amend, or vacate a prior final order of the court which affirmed a final order entered by the Co-Appellee in this matter, the Kentucky Board of Claims.¹ Following a review of the record, the arguments of the parties, and the applicable law, we affirm in part, vacate in part, and remand this matter for additional proceedings consistent with this opinion.

On December 19, 2006, Sisco was traveling south on US 119 when Trooper Jonathan Leonard pulled in front of his vehicle, resulting in the accident which was the subject of this claim. An accident reconstruction was completed by Trooper Eddie Crum which concluded that Trooper Leonard was completely at fault, a fact which is not disputed herein. Trooper Leonard did not survive the accident, and Sisco sustained several injuries.² Following the accident, Sisco spent a month at the University of Kentucky Hospital, and was thereafter transferred to Knoxville, Tennessee, for physical rehabilitation. Sisco states that in total, his medical expenses as a result of the accident totaled nearly 1.3 million dollars.

Trooper Leonard carried his own personal automobile insurance, which was not paid for or subsidized by his employer, the Kentucky State Police (KSP). At that time, KSP did not maintain fleet liability insurance coverage on its vehicles. Leonard's vehicle was insured by means of a "rider" on his personal

¹ Entered on October 16, 2008 (BC-2007-00425).

² These included a left clavicle fracture, bilateral rib fractures, liver laceration, renal laceration with acute renal failure status post-ERCP, with splinctorotomy and a serosal colon tear. Sisco received a kidney transplant in June of 2007.

motor vehicle insurance policy. All KSP-owned vehicles were then insured by such personal riders, the expense of which was reimbursed to the employee by KSP. Leonard's insurance carrier offered to settle the claim prior to litigation by extending its total amount of coverage, which was \$100,000.

Sisco initially entered into settlement of his personal injury claim arising from the accident with Trooper Leonard's estate. That agreement was executed on April 11, 2007. Of note, the release executed by Sisco with Trooper Leonard's estate provided as follows:

[T]he undersigned hereby releases and forever discharges JONATHAN LEONARD, his heirs, executors, administrators, agents, and assigns, and all other persons, firms, or corporations liable, or, who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the 19th day of December, 2006 at or near SIDNEY, KY.

Of note, the release makes no mention of state or governmental entities and does not mention the Commonwealth or any of its agencies by name.

On June 6, 2007, after settling with Trooper Leonard's estate, Sisco filed a claim with the Board of Claims in accordance with Kentucky Revised Statutes (KRS) 44.070. That claim was denied because of the release that Sisco had executed with Leonard's insurance company. Sisco then sought judicial review of the final order of the Board of Claims in the Pike Circuit Court. The

court affirmed the ruling of the Board of Claims in its order of June 9, 2011. On August 24, 2011, Sisco filed a motion for leave to file a notice of appeal with the Pike Circuit Court. As grounds for relief, the motion states that Sisco did not learn of entry of the June 9, 2011, judgment until August 24, 2011, and further, that the Pike Circuit Court Clerk's office advised Sisco that he had not received notice because his address was not listed in its records.

Sisco subsequently filed a motion to alter, amend, or vacate the June 9, 2011, final order. That motion was denied, and the decision of the circuit court became final on November 1, 2011. It is from this order that Sisco now appeals to this Court.

As his first basis for appeal, Sisco argues that the decision violates the legislative intent set forth in KRS 44 and KAR Title 108. He argues that these provisions are specifically intended to allow individuals to recover damages as a result of the negligent acts of employees of the Commonwealth.

Sisco argues that it is undisputed that at the time of the accident, Trooper Leonard was an employee of the Kentucky State Police Department, and that he was entirely responsible for the accident. Thus, he asserts that the ruling of the court to uphold the Board's decision denying recovery was arbitrary and contrary to the legislative intent of KRS Chapter 44 and specifically violates the provisions set forth in KRS 44.070. Sisco asserts that neither the Commonwealth, the Kentucky State Police Department, or the Justice and Public Safety Cabinet were a party to the contract entered into between Leonard and his insurance carrier.

Accordingly, he asserts that the court and Board erroneously determined that since Sisco executed a release with the insurance company, he was barred from any claim he might have had through the Board of Claims. Sisco argues that KRS 44.070 clearly anticipates that an injured party may recover from various insurance sources.³

In making his arguments to this Court, Sisco attempts to distinguish this case from *Commonwealth of Kentucky Labor Cabinet v. Morris*, 215 S.W.3d 49 (Ky. App. 2006), which was relied upon by the Board of Claims and the court below in dismissing his claim. Sisco asserts that the issue in *Morris* was one of vicarious liability, in which the claimant filed a case with the Board of Claims and the Board postponed its decision pending a decision in a circuit court case filed against the insurance carrier of the negligent party, who at the time was employed by the transportation cabinet. Sisco argues that *sub judice*, there was no suit filed and that the policy limits were offered and accepted. Thus, he asserts that the holding in *Morris* effectively removes the possibility of a full recovery for individuals who sustain injuries because of the acts of an employee of the Commonwealth, and thereby runs afoul of the public policy adopted by the Board of Claims Act. Finally, Sisco argues that the decision of the court below to uphold

³ Sisco also notes that his claim application specifically states, on Page 3, that, "Pursuant to KRS 44.070(1), the Board of Claims is required to reduce damage claims by the amount that the claimant can recover through his or her insurance. In order to process your claim as submitted, provide all information below that relates to the damages you incurred (car damage #1-5, personal injury #6-7, and home damage #8-9)." Moreover, he notes that the application provides spaces for the claimant to list his or her insurance company, their agents, and coverage limits. Thus, he argues that it is undeniable that the legislature specifically intended and provided the opportunity for potential claimants to recover damages from various insurance sources.

the Board will have a “chilling effect” on all future settlements. Sisco argues that upholding the court below will effectively halt any future settlement negotiations involving the Commonwealth or any of its agents.

In response to the arguments made by Sisco, the Commonwealth asserts first that the merits of the June 9, 2011, final order of the Pike Circuit Court are not properly before this Court. The Commonwealth asserts that it is undisputed that Sisco did not file a motion seeking Kentucky Rules of Civil Procedure (CR) 59.05 relief within ten days of entry of the June 9, 2011, final order, nor did he file a notice of Appeal within 30 days thereof. The Commonwealth notes that, instead, Sisco sought leave from both the Pike Circuit Court and this Court to file a belated Notice of Appeal. That request was denied by both the Pike Circuit Court and this Court. Sisco then filed a motion with the Pike Circuit Court for an extension of time to file a motion to alter, amend, or vacate, which the court below granted.

In reliance upon *Marrs Electric Co., Inc. v. Rubloff Bashford, LLC*, 190 S.W.3d 363, 367 (Ky. App. 2006), the Commonwealth argues that the trial court lost control of its judgment ten days after entry, and therefore lacked authority to grant Sisco’s motion for an extension of time to file a motion to alter, amend, or vacate. While the Commonwealth acknowledges that the court did have the authority to grant relief to Sisco pursuant to CR 60.02, it asserts that the November 1, 2011, order denying Sisco’s motion to alter, amend, or vacate, contains neither findings of fact nor a basis for denial. Accordingly, the

Commonwealth asserts that there were no findings by the court as to whether Sisco had established sufficient grounds to warrant CR 60.02 relief.

While acknowledging that Sisco claims that he did not receive actual notice of entry of the June 11, 2009, judgment until August 24, 2011, the Commonwealth asserts that this claim overlooks the fact that Sisco's name and address appear on the distribution list for the June 9, 2011, order. Regardless, it asserts that Sisco did not file his CR 60.02 motion within a reasonable time.⁴

Alternatively, the Commonwealth argues that the judgment of the court below should be affirmed on its merits. The Commonwealth argues that an executed release acts as a binding contract, and that the release entered into between Sisco and Leonard's estate specifically released "all claims against all persons." The Commonwealth argues that the release in question unambiguously and unequivocally releases "All other persons, firms, or corporations liable, or who might be claimed to be liable ... from any and all claims, demands, damages" The Commonwealth argues that the court below correctly relied on the holding in *Morris*, noting that in this case, as in *Morris*, Sisco failed to identify or articulate any fact in support of an independent theory of negligence. Thus, the

⁴ In his reply brief to this Court, Sisco argues that the merits of his appeal are properly before this Court. He argues that his appeal is timely because it was filed within thirty days of the November 1, 2011, final order, in compliance with CR 73.02. Sisco thus argues that although he was not given notice of the June 9, 2011, order, he properly appealed from the November 1, 2011, order since it was designated a "final and appealable order." Sisco argues that it is undisputed that he did not receive notice of the entry of the June 9, 2011, order, and directs the attention of this Court to the affidavit of Kristi Hall, Deputy Clerk of the Pike County Circuit Court, wherein Hall stated that Sisco would not receive a copy of any pleadings in this matter since he was not listed as attorney of record in the Clerk's computer system. Accordingly, Sisco urges that his appeal was filed within a reasonable time, and requests that it be heard by this Court.

Commonwealth asserts that Sisco's claim is clearly one based on vicarious liability, and is therefore barred by the release that he executed. The Commonwealth asserts that even if the consequence of a settlement agreement is unforeseen, it must still be enforced.

Finally, in reliance upon KRS 44.160(1),⁵ the Commonwealth argues that the Board of Claims Act specifically reflects that the General Assembly did not intend to allow for separate recovery from both the Commonwealth and an individual employee. The Commonwealth asserts that in this case, Sisco chose to pursue a settlement and release of his personal injury claim prior to initiating his administrative claim before the Board of Claims, and that he cannot now recover additional monies from the Commonwealth for the same claim.

In reviewing the arguments of the parties, we note that the standard of review of a final order of an administrative agency is limited to a determination of whether the agency's decision is supported by substantial evidence. *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003). Substantial evidence is that of a sufficient probative value to induce conviction in the minds of reasonable people. *Owens-Corning Fiberglas v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Under this standard, if there is any substantial evidence to support the

⁵ Providing that,

Any action prosecuted to award, judgment, or final decision, including dismissal, under the provisions of KRS 44.070 to 44.160 shall preclude the right of a claimant to sue the Commonwealth, its cabinets, departments, bureaus, or agencies, or its officers, agents, or employees in the Board of Claims or any other forum, except as provided in KRS 44.073(5), when the board determines that it has no jurisdiction over the claim.

action of the administrative agency, it cannot be found to be arbitrary and will be sustained. *Kentucky Unemployment Insurance Co. v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 579 (Ky. 2002).

Likewise, a reviewing court must give due deference to the rationale adopted by the agency, and must refrain from substituting its judgment for that of the agency. *Smith v. O'Dea*, 939 S.W.2d 353, 355 (Ky. App. 1997). A reviewing court, however, determines questions of law decided by the Board *de novo*. *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky Transportation Cabinet*, 983 S.W.2d 488, 490 (Ky. 1988). We review this matter with these standards in mind.

We turn first to the arguments of the parties as to whether this appeal is properly before this Court. CR 60.02 is clear that the motion shall be made “within a reasonable time.” We are in agreement with the assertion of the Commonwealth that Sisco’s motion was properly considered as a motion pursuant to CR 60.02 because the court did not possess jurisdiction to consider the motion pursuant to CR 59.05 more than ten days following the entry of the final judgment. Further, in *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002), the Court approved the use of CR 60.02 as a mechanism to seek otherwise untimely relief from an order in which the trial court acknowledged that the party had not been served.

Sisco claims that he did not receive notice of the June 9, 2011, order, a claim which he supports with the affidavit of Hall, Deputy Clerk of the Pike

County Circuit Court.⁶ He did, however, timely appeal the November 1, 2011, order, in accordance with CR 73.02. Accordingly, we believe this appeal to be properly before our Court, and now turn to a review of the merits of the arguments before us.

Sub judice, there is no question that Sisco executed the release at issue knowingly and voluntarily. There is also no question as to the language of the release, only as to its scope. Having reviewed *Morris*, we are ultimately in agreement with the Commonwealth that it is applicable to the matter *sub judice* and is controlling. In *Morris*, the claimant settled with the employee's insurance carrier and executed a release, which included language reserving any and all claims against the Commonwealth. Therein, this Court held that the release of the primary tortfeasor, the employee, acted as a bar to any subsequent claim against the alleged secondary tortfeasor, the Commonwealth, based on vicarious liability despite the reservation of claims against the Commonwealth.

Sub judice, Sisco argues that this case is distinguishable from *Morris* because the issue in *Morris* was one of vicarious liability, in which the claimant filed a case with the Board of Claims and the Board postponed its decision pending a decision in a circuit court case filed against the insurance company of the negligent party who at the time was employed by the transportation cabinet. Sisco

⁶ While the Commonwealth correctly notes that Sisco's name and address do appear on the distribution list of the order, given the undisputed affidavit of Hall, this Court assumes that the order may not have actually been mailed, or was never received by Sisco.

argues that because he did not file an action and that the case was settled for the policy limits, *Morris* does not apply.

We cannot agree, and simply do not find the facts of *Morris* to be sufficiently distinguishable from the facts *sub judice*. The law is clear that any defense, “which would have been available if the action could have been brought in circuit court is available in an action brought in the Board of Claims.”

Commonwealth v. Morris at 56. In this case, as in *Morris*, Sisco failed to identify or articulate any fact in support of an independent theory of negligence. Thus, the Commonwealth asserts that Sisco’s claim is clearly one based on vicarious liability and, therefore, barred by the release that he executed. We believe this is a conclusion supported by the holding in *Morris*, which is ultimately determinative of this issue. Certainly, in the circuit court the Commonwealth would have been able to assert a defense based upon the release executed by Sisco insofar as it could assert that a claim based on vicarious liability could not stand in light of Sisco’s release of Leonard, the primary tortfeasor. *Morris* is clear that the same defense should be equally available before the Board of Claims.

In *Commonwealth of Kentucky, Department of Highways v. Cardwell*, 409 S.W.2d 304 (Ky. 1966), our Supreme Court held that a general release barred a subsequent litigation arising from the accident even though it may not have been intended to release the subject defendant in the subsequent case. Such is the situation in the matter *sub judice*. Though Sisco may not have intended to release the Commonwealth by executing the release, our law is clear that the explicit terms

placed in settlement agreements can have unforeseen but still enforceable consequences. *See Crime Fighters, Inc. v. Hiles*, 740 S.W.2d 936 (Ky. 1987). *Sub judice*, the unforeseen consequence was the application of *Morris* to bar a claim on the ground of vicarious liability. Therefore, we believe that the result reached below in affirming the Board's dismissal of the claim against the Commonwealth on the grounds of vicarious liability was ultimately correct.

As we have repeatedly held, however, we as an appellate court may affirm the trial court for any reason sustainable by the record.” *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991). We do not affirm on the basis of the language contained in the release itself because it does not explicitly name the Commonwealth, the State of Kentucky, or any of its agencies. While the release certainly includes persons, corporations, and firms, we do not believe the Commonwealth to fit within any of those parameters.

Ultimately, *supra*, our affirmation is based squarely on the holding of *Morris* and its effect on a claim of vicarious liability against the Commonwealth after releasing the primary tortfeasor, Trooper Leonard.

In his reply brief to this Court, however, Sisco argues that his case is distinguishable from one asserting vicarious liability, because he made claims against both Leonard and the Kentucky State Police. He asserts that he has argued since the inception of this case that the KSP was also negligent, and that he made a separate argument against the KSP because of its training which includes driving, conduct on the roadways and traffic laws. As previously set forth herein, our

review of the release does not indicate that it specifically released the Commonwealth or its agencies.

While Sisco's claim is barred by *Morris* insofar as vicarious liability is concerned, we believe that he should be afforded the opportunity to develop his claim against KSP for negligence. However, we do not opine on the success of such a claim. Accordingly, we believe it is appropriate to remand this matter for additional discovery and other proceedings in accordance with the holding contained herein.

Wherefore, for the foregoing reasons, we hereby affirm the November 1, 2011, judgment of the Pike Circuit Court in favor of the Appellee, Commonwealth of Kentucky insofar as it dismissed Sisco's claim for vicarious liability, vacate in part, and remand this matter for additional proceedings consistent with this opinion.

COMBS AND NICKELL, JUDGES, CONCUR IN RESULT ONLY.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE, JUSTICE
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