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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001709-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 99-CI-00102

BOYCE PHILLIP MILBY, JR., EXECUTOR OF
THE ESTATE OF DOROTHY MILBY AND
COMMONWEALTH OF KENTUCKY
BOARD OF CLAIMS

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: This is an appeal by the Commonwealth
of Kentucky, Transportation Cabinet, Department of Highways,

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

from a judgment of the Green Circuit Court affirming an order of the Board of Claims awarding \$50,000 to Boyce Phillip Milby Jr., as executor of the estate of his deceased wife, Dorothy Milby. We find that the Board of Claims acted within the scope of its authority and that the award is supported by substantial evidence.

Dorothy Milby was killed on May 31, 1998, when she drove into a flooded area on Kentucky Highway 61 in Green County and her vehicle was swept into a creek. Boyce Milby, as executor of the estate, timely filed a claim with the Board of Claims alleging that the Department of Highways had actual or constructive notice of the flooding of Kentucky 61 and failed to give proper warning to motorists or to correct the problem.

On June 17, 1999, the Board dismissed the claim because the estate, Boyce, and Dorothy's daughter received life insurance and other private benefits totaling \$110,610, an amount in excess of the then statutory maximum of \$100,000.² Specifically, Boyce directly, as Dorothy's husband, received the proceeds of a life insurance policy in the amount of \$50,000; insurance benefits from Continental Casualty Company in the amount of \$5,610; and life insurance from the Taylor County Bank in the amount of \$5,000. Dorothy's daughter received directly

² The maximum recoverable on a single claim was \$100,000. In 2000, the statute was amended and the maximum amount for an individual claim is now \$200,000. KRS 44.070(5).

\$5,610 from a life insurance policy issued by Continental Casualty Company. As executor, Boyce received \$40,000 from Benefit Management Services payable to the Estate of Dorothy Milby. The estate also recovered \$10,000 in personal injury protection benefits from Kentucky Farm Bureau.

Boyce appealed and on January 5, 2000, the circuit court reversed and remanded the case to the Board for the taking of evidence and ultimately for a decision in the case. The Cabinet appealed from the January 5, 2000, order and this court dismissed the appeal because the circuit court's order was interlocutory and not a final order.

Following an evidentiary hearing, the Board dismissed Boyce's claim. Boyce appealed to the circuit court and again the case was reversed and remanded to the Board for the purpose of making additional findings on the issue of whether the Cabinet had actual or constructive notice of the flooding at the accident site; whether the flooding caused the highway to become dangerous; and whether adequate safeguards were taken or warnings given.

On December 19, 2002, the Board rendered a final order finding that the Cabinet had actual or constructive notice of the flooding, that the flooding caused the highway to become dangerous, and that no adequate safeguards were taken or warnings given. The Board then determined damages to the estate

by reason of destruction of Dorothy's earning capacity to be \$169,296. Boyce Milby, as executor of the estate, was awarded \$50,000 the maximum recoverable after offsetting the \$50,000 received by the estate from private sources.

The Cabinet appealed and the circuit court affirmed. We now consider the Cabinet's appeal to this court.

The Cabinet argues extensively that the January 5, 2000, interlocutory order contains three errors of law and seeks to have this court correct these alleged errors. In that order, the circuit court held that Boyce and Dorothy's daughter each could recover damages individually. The Cabinet points out that only one claim was filed, that by Boyce for the estate, and that collateral claims for loss to one other than the claimant are excluded under KRS³ 44.070(1).

Following the dismissal of the Cabinet's appeal from the circuit court's interlocutory order the case was remanded and the Board entered a new order. Despite language in the circuit court's order that Boyce and Dorothy's daughter were entitled to seek damages, no award was made to either by the Board. The award was only to Dorothy's estate. Thus, any error in the circuit court's interlocutory order regarding the right to recover damages by either Boyce or Dorothy's daughter in

³ Kentucky Revised Statutes.

their individual capacities is rendered moot by the Board's final order that was affirmed by the circuit court.

The Cabinet raises no issue concerning the correctness of the Board's final award. It is apparently conceded and is recognized by this court that, after a lengthy battle by both the estate and the Cabinet, the Board ultimately reached the correct result. After the circuit court entered its interlocutory order, the Supreme Court rendered Boarman v. Commonwealth⁴, a case that directly addresses the issue of offsetting collateral source payments in excess of the maximum statutory award. The court held that only such payments that are made to the estate are to be offset against the award and those payable to individual beneficiaries of the estate are not offset. Thus, proceeds from a life insurance policy paid to an individual beneficiary are not offset; medical expenses and basic reparation benefits paid to the estate, however, are offset.⁵ The Board in this case precisely followed the law as set forth in Boarman. There is no error.

The order of the Green Circuit Court is affirmed.

ALL CONCUR.

⁴ 37 S.W.3d 759 (Ky. 2001).

⁵ Id. at 762-763.

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