

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000185-MR
AND
NO. 2011-CA-000199-MR

VIRGINIA GAITHER, ADMINISTRATRIX
& PERSONAL REPRESENTATIVE OF THE
ESTATE OF LEBRON GAITHER,
DECEASED

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-00023

JUSTICE & PUBLIC SAFETY CABINET,
COMMONWEALTH OF KENTUCKY AND
DEPARTMENT OF KENTUCKY
STATE POLICE

APPELLEES/CROSS-APPELLANTS

AND

COMMONWEALTH OF KENTUCKY,
BOARD OF CLAIMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, KELLER AND THOMPSON, JUDGES.

KELLER, JUDGE: Virginia Gaither (Virginia), Administratrix and Personal Representative of the Estate of LeBron Gaither (LeBron), appeals from the opinion and order of the Franklin Circuit Court dismissing Virginia's claim and reversing the finding by the Board of Claims (the Board) that the actions of state police detectives were ministerial and negligent. On appeal, Virginia argues that the court erroneously found that the actions of state police detectives were discretionary and not subject to Virginia's claims of negligence. The Justice and Public Safety Cabinet and the Department of State Police (collectively the Appellees) argue that their actions were discretionary, thus entitling them to immunity. The Appellees argue on cross-appeal that the Board erred in finding that they had a duty to protect LeBron; that they breached any such duty; that, if they were negligent, superseding/intervening events relieved them of any liability; and, that the amount awarded by the Board was not supported by the evidence and in excess of the appropriate statutory maximum. Having reviewed the record and the arguments of the parties, both orally and in writing, we affirm.

FACTS

The underlying facts are not in dispute; however, as noted by the Board, there is a distinct difference in how the parties characterize those facts. We summarize the salient facts below.

In 1995, LeBron was facing juvenile assault charges related to an incident at his high school. A state police officer, Lt. Sapp, approached LeBron, who was seventeen years of age at the time, about becoming a confidential informant. LeBron agreed, and after he reached eighteen, a state police detective, Danny Burton (Burton), began using LeBron as a confidential informant to make controlled buys of illegal substances from suspected drug traffickers. During the approximately ten months LeBron worked as a confidential informant, he earned in excess of \$3,000.00.

On July 15, 1996, Burton escorted LeBron into the Marion County courthouse, through the public entranceways and hallways, to the grand jury room, where LeBron testified. After LeBron testified, Burton escorted him out of the courthouse, again through public hallways. The following day, July 16, law enforcement officers escorted LeBron into the Taylor County courthouse so that he could testify before that county's grand jury regarding drug charges against Jason Noel (Noel). As a result, the grand jury indicted Noel on those drug charges.

On the evening of July 16, Mary Ann Esarey (Esarey), a member of the Taylor County Grand Jury, contacted Noel and told him of the indictment and identified LeBron as a witness. The next day, July 17, Burton, along with two other detectives, arranged for LeBron to make a controlled purchase of illegal drugs from Noel at a grocery store parking lot in Taylor County. The detectives gave LeBron money with which to purchase the drugs; equipped him with a recorder and transmitter so that they could monitor the transaction; told him to say

"this looks good" if the transaction was going to take place and to say "I wish my brother was here" if something was amiss. The detectives also told LeBron that he should not get in Noel's car with him.

After receiving these instructions, LeBron approached Noel's car and, despite the detectives warning, got in the car. Rather than terminating the transaction at that point, the detectives decided to follow Noel and LeBron. Noel drove to a nearby house, got out of the car, and went into the house, leaving LeBron alone in the car. The detectives drove past the car in which LeBron was sitting but, again, decided not to terminate the transaction. Instead, they drove down the road and stopped so they could continue to monitor the transaction. While doing so, the detectives heard Noel's car start, and they drove toward where the car had been parked. However, they soon realized that they had lost contact with Noel's vehicle and LeBron. The detectives began to search the area, and when that search proved to be unfruitful, the detectives contacted the nearest State Police post and advised officers that they had lost track of Noel and LeBron. Local law enforcement officers stopped Noel later that evening and determined that Noel had, in the interim, driven to Casey County, where he tortured and murdered LeBron. Subsequently, a jury convicted Noel of murder and Esarey of a felony offense for her participation in the events.

Virginia filed a claim in the Board of Claims alleging that the Appellees were negligent and that their negligence led directly to LeBron's death. The Appellees obtained a dismissal of Virginia's claim based on a statute of

limitations defense; however, this Court, sitting *en banc*, reversed and remanded this matter for a hearing. *Gaither v. Commonwealth*, 161 S.W.3d 345 (Ky. App. 2004). The Supreme Court of Kentucky then denied the Appellees' motion for discretionary review.

For reasons that are unclear, this matter was not heard until the late spring/early summer of 2009. Following the hearing, the hearing officer issued a recommended order to the Board finding that the Appellees' actions were discretionary and recommending that Virginia's claim be dismissed. The Board rejected the recommended order, finding that the actions of the Appellees, in their employment of LeBron as a confidential informant, were ministerial rather than discretionary. Further, the Board concluded that the Appellees were negligent in allowing LeBron to testify before the grand juries, and in their use of LeBron in a controlled purchase transaction with Noel, who had been indicted the night before as a result of LeBron's testimony. The Board then determined that the Appellees were 30% liable for LeBron's death and awarded Virginia damages in the amount of \$168,729.90. The Appellees appealed from that order, and Virginia filed a cross-appeal.

On January 5, 2011, the Franklin Circuit Court issued an order reversing the final order of the Board. In its order, the circuit court concluded that the acts of the Appellees were discretionary and not subject to Virginia's claims of negligence. This appeal and cross-appeal followed.

STANDARD OF REVIEW

The question of immunity is a matter of law which both the circuit court and this Court review *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006); *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003).

ANALYSIS

Kentucky Revised Statute (KRS) 44.073(2) provides that the Board has jurisdiction over claims involving "the negligent performance of ministerial acts" by the Commonwealth or its subdivisions. The parties agree that, if the Appellees were performing discretionary acts, they are immune from negligence actions; however, if they were performing ministerial acts, they are not immune.

Determining what is ministerial and what is discretionary and where the line between the two lies is not a straightforward task. Based on our review, it appears that there are three types of cases: those involving purely ministerial actions; those involving purely discretionary actions; and those involving both ministerial and discretionary actions. We set forth examples of each below.

In *Collins v. Commonwealth of Ky. Natural Resources and Environmental Protection Cabinet*, 10 S.W.3d 122 (Ky. 1999), a thirteen-year-old boy drowned in a flooded culvert on a strip mine site. The boy's mother sued the Natural Resources and Environmental Protection Cabinet (the NREPC) alleging that it had failed to inspect the culvert and to insure that it met regulatory specifications. The Court determined that the NREPC had statutory and regulatory duties to do so, which are ministerial acts. In so holding, the Court stated that

[t]o decide whether mine site inspection by [the NREPC's] employees is ministerial or discretionary, it is necessary to determine whether the acts involve policy-making decisions and significant judgment, or are merely routine duties. The statutes governing coal mining in Kentucky are straightforward. KRS 350.020 states that the purpose of KRS Chapter 350 is to regulate and control coal mining operations so as to minimize any injurious effects on the Commonwealth's citizens and resources. To this end, the [NREPC] is directed to enforce the law rigidly and to adopt whatever administrative regulations are necessary to accomplish the chapter's purposes. KRS 350.020. The [NREPC]'s surface coal mining inspectors are required to conduct inspections of coal mining operations and determine the existence of violations. KRS 350.050(5), KRS 350.130(1), KRS 350.465(3)(c). At the time of the accident, the acts required to be performed by the [NREPC] with regard to the drainage culvert were specifically defined by regulation. 405 KAR 1:120, *et seq.* required that all access and haul roads be constructed according to certain requirements. The regulations specifically required that water control structures for the roads be designed with a discharge capacity capable of passing the peak runoff from a 10-year, 24-hour precipitation event. 405 KAR 1:120, Section 3(2). The regulations also required that all culverts and other drainage structures serving haul roads not be restricted or blocked in any manner that impedes drainage. 405 KAR 1:120, Section 4(2).

Inspecting drainage culverts to assure they conform to these regulations does not require any significant judgment, statutory interpretation, or policy-making decisions. Instead, these inspections require attention to specific details, such as whether the culvert is blocked and whether it is large enough to handle a specified amount of water. The regulations can be enforced in a routine, ministerial manner, and thus their negligent performance may be actionable under the Act.

Id. at 126.

Based on the preceding analysis, the Court determined that the NREPC's duties were ministerial and that it could be held liable for negligence.

In *Rowan County v. Sloas*, 201 S.W.3d 469 (Ky. 2006), a prisoner, who was working on a road crew, was injured when struck by a falling tree. He filed a negligence suit in circuit court against, in pertinent part, the deputy jailer who was supervising the crew. With regard to whether the deputy jailer's supervisory duties were discretionary or ministerial, the court quoted *Franklin County, Ky. v. Malone*, 957 S.W.2d 195, 201 (Ky.1997) (*reversed on other grounds by Yanero v. Davis*, 65 S.W.3d 510 (Ky.2001)) for the proposition that a discretionary act is one that

require[s] the exercise of reason in the adaptation of a means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed.

Id. at 477.

The Court then defined ministerial actions as "investigative responsibilities as set out in regulations, which *were particular in their directive.*" *Id.* (*citing Stratton v. Commonwealth*, 182 S.W.3d 516 (Ky. 2006)) (emphasis in original).

Applying these precepts to Sloas's claims, the Court held that the deputy jailer's actions were discretionary noting that he

is in charge of this *crew*. He has to watch them, and try as best he can to anticipate what they might do, correct

them as necessary, determine their capabilities, sometimes by asking them forthright whether they can or can't do the job, assign the duties and see that the work is performed. Work somewhat similar to work one would do around his house or farm, in cleaning brush or trees off a bank or out of a field. Work done this day with chainsaws. Chainsaws that you can buy in any hardware store, which many people operate and many of which have had “kickbacks.” *One would imagine there are many other things you might think about while managing a work crew of six state prisoners*, but what has been set out is enough. It is as discretionary a task as one could envision. No school children, no college professors or academicians, but state prisoners on a highway with one deputy jailer.

Id. at 480 (emphasis in original).

Finally, in *Stratton v. Commonwealth*, 182 S.W.3d 516 (Ky. 2006), a child died as a result of injuries inflicted by her mother's live-in boyfriend. The administrator of the child's estate brought an action in the Board against the Cabinet for Families and Children (CPS). The administrator alleged that CPS case workers were negligent in their investigation and handling of reports of abuse made prior to the child's death. The Court noted that a specific regulation set forth the duties CPS case workers had with regard to investigating reports of abuse. Those regulations set forth which individuals had to be interviewed and whether the interviews had to be in person. However, the regulations did not mandate what actions case workers were required to take after completing an investigation.

In determining that the Cabinet workers' actions in this case were discretionary, the Court found as follows:

[I]n this instance, the CPS case workers are investigating allegations of abuse. Such investigations do have certain mandated statutory requirements as to who shall be interviewed, etc., but they also involve discretionary decisions by the case workers, just as in police investigations. After performing their ministerial duties, the case workers must determine what action, if any, should be taken to resolve each claim - which in this case was to remove the child from a potentially dangerous environment - which they did, even though they could not identify the perpetrator. All such discretionary functions are protected by the doctrine of governmental immunity and do not fall under the waiver outlined by the Board of Claims Act.

Id. at 521.

As previously noted, the preceding are illustrative of the three types of cases: purely ministerial, purely discretionary, and mixed. Based on these illustrative cases, it appears that an act is purely ministerial if statutes and/or regulations impose a clearly defined duty to perform an act, and the performance of the act requires little, if any, judgment, interpretation, or policy-making decisions. Thus, in *Collins*, the Court found that, to meet their statutory and regulatory duties, the NREPC employees were required to inspect culverts and to determine if those culverts met specified criteria. Doing so did not require, or even permit, the exercise of independent judgment. Therefore, their duties were ministerial. 10 S.W.3d at 126.

However, when an actor must choose between or among various courses of action, and that choice involves the exercise of judgment and/or overriding policy

issues, the act is discretionary. Thus, in *Sloas*, the Court held that, how to supervise a prisoner road crew is a discretionary act.

Finally, there are mixed cases, such as *Stratton*, that involve ministerial acts (interviewing specified people following receipt of a report of abuse) and discretionary acts (determining what actions to take after those interviews have been conducted).

In this case, Virginia points to Kentucky State Police, General Order Om-C-3, revised 4-16-90 (General Order Om-C-3), as the source of the Appellees' ministerial duties. According to Virginia, the Appellees violated their duties when they permitted LeBron to testify before the grand jury; when they used LeBron in an undercover operation the day after he testified; and when they failed to terminate that operation before they lost track of Noel and LeBron. While we agree with Virginia and the Appellees' implicit admission during oral arguments that the detectives actions were ill-advised, we disagree that they violated any ministerial duties.

General Order OM-C-3 provides, in pertinent part, that "[a]ny time an informant is being used in an undercover operation, his activities shall be monitored as closely as possible by both the control officer, and a supervisor." It does not make any provision regarding testimony of confidential informants before the grand jury.¹ Furthermore, it does not make any provision for discontinuing use

¹ We note that Burton testified that the Commonwealth's Attorney determines what witnesses to present to the grand jury. Therefore, even if the acts herein were ministerial, the Appellees would not be liable for any damages causally related to LeBron's grand jury testimony.

of a confidential informant after he has testified, nor does it state when an officer must, or even should, stop an undercover operation.

Based on General Order OM-C-3, the law enforcement officers in this case had a duty to monitor as closely as possible LeBron's undercover operation with Noel. However, the execution of the undercover operation was left to the judgment and discretion of the detectives. Specifically, the detectives in this case, like the deputy jailer in *Sloas*, who had to anticipate as best he could the behavior of his prisoners, had to anticipate as best they could the potential dangers that could arise. Although the choices made by the detectives in this case proved to be tragically flawed, the execution of the undercover operation with LeBron was left to the discretion and judgment of the detectives. Therefore, we conclude that the acts of the Appellees were discretionary, and not ministerial. Accordingly, the Appellees are immune from suit under the Board of Claims Act. KRS 44.073.

Based on the preceding, we need not address the issues raised by the Appellees in their cross-appeal.

We acknowledge that the facts in this case are egregious, and note that nothing in this opinion is intended to diminish the tragedy that underlines this case and the empathy we feel for LeBron's family.

CONCLUSION

For the foregoing reasons, we affirm the order of the Franklin Circuit Court.

CAPERSON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent. The Board of Claim's conclusion that the KSP detectives negligently performed a ministerial act and its decision to award damages to this young man's estate should be affirmed.

In a concurring opinion, Chief Justice Minton described the doctrine of sovereign immunity as a "judge made swamp" that should be drained. *Caneyville Volunteer Fire Department v. Green's Motorcycle Salvage, Inc.* 286 S.W. 3d 790, 813 (Ky. 2009) (Chief Justice Minton, concurring opinion). Over a decade after the landmark decision in *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), the immunity swamp has only become murkier.

In *Haney v. Monsky*, 311 S.W.3d 235, 240-241 (Ky. 2010), the Court attempted to bring clarity by explaining the concept of discretionary and ministerial acts:

In spite of these often quoted guidelines, determining the nature of a particular act or function demands a more probing analysis than may be apparent at first glance. In reality, few acts are ever purely discretionary or purely ministerial. Realizing this, our analysis looks for the *dominant* nature of the act. For this reason, this Court has observed that "an act is not necessarily taken out of the class styled 'ministerial' because the officer performing it is vested with *a discretion respecting the means or method to be employed.*" Similarly, "that *a necessity may exist for the ascertainment* of those fixed and designated facts does not operate to convert the ministerial act into one discretionary in its nature. Moreover, a proper analysis must always be carefully discerning, so as to not equate the act at issue with that of a closely related but differing act. The portions of the investigative responsibilities as set out in the regulations

. . . *were particular in their directive*, but we noted that others, which required the exercise of judgment, were not The first part was ministerial, but what followed was held to be discretionary. (internal quotations, internal brackets, and citations omitted).

Despite the Supreme Court's attempt to clarify the distinction between the two types of state action, application of the sovereign immunity doctrine continues to elude even the most learned jurist. However, in this case, the Board of Claims, which confronts this issue on a repetitive basis, found that the KSP detective's actions were ministerial in nature. Under the unique facts of this case, I would defer to the Board of Claims.

The facts in this case are egregious and unprecedented in this Commonwealth. When the detectives recruited Gaither, he was a special education student under the age of eighteen and his guardian was not notified. They offered him absolutely no training and just after his eighteenth birthday, arranged for his participation in a drug buy for financial compensation. Although Gaither was a confidential informant and his testimony unnecessary, KSP narcotics detectives escorted Gaither to the small courthouse and grand jury room to testify demonstrating total ambivalence for his safety.

Realizing the danger in which the KSP placed Gaither, the prosecutor advised Gaither to leave town after testifying. However, the police ignored the known danger to Gaither and again set up a buy between Gaither and Noel, who they did not arrest after his indictment.

After the KSP detectives created the dangerous situation, they failed miserably in providing protection. After losing Noel's vehicle with Gaither inside, the detectives did not report the failed surveillance to the local KSP post or local law enforcement for assistance for three hours after Gaither's disappearance. Tragically, by the time Noel was located, Gaither had been beaten, stabbed, shot, dragged and killed by Noel. The majority holds that despite that the detectives placed Gaither in danger when they paraded him through the courthouse, had him testify to the grand jury, set up a subsequent drug buy with Noel, lost surveillance, and then failed to request assistance, their actions were discretionary. I disagree. Highly reliable and persuasive evidence was presented to the Board that the detectives actions were certain to result in this young man's death. Judge Phillip R. Patton, Circuit Judge for Barren and Metcalf Counties and a former Commonwealth's Attorney with impressive credentials, testified that the identity of a confidential informant is not to be disclosed before a grand jury. If the confidential informant's name becomes public, he has been "burned" and is at risk of being killed. He testified that there was no necessity for Gaither to testify. In addition to Judge Patton's testimony, the Board heard testimony from Barry Bertram, a former Commonwealth's Attorney and current Assistant Commonwealth's Attorney and James L. Arvitt, another Assistant Commonwealth's Attorney. Both agreed with Judge Patton that the detectives placed Gaither in the deplorable situation where he would be killed. In his candid testimony, Mr. Arvitt stated:

In my 19 years as a prosecutor, District Court Judge, and defense attorney, I have never heard of a more reckless, stupid, and idiotic idea than Detective Burton's decision to use LeBron [Gaither] to make yet another drug buy from Jason Noel after his identity was clearly compromised.

He further testified that once Gaither testified before the grand jury his use as confidential informant should have "absolutely" been discontinued unless the detectives wanted to "get him killed."

Although qualified immunity is a question of law, this Court must defer to the Board's findings of fact. The findings of fact by the Board of Claims are conclusive if supported by substantial evidence. *Commonwealth v. Mudd*, 255 S.W.2d 989, 990 (Ky. 1953).

Based on the evidence, the Board made the following findings of fact. It stated: "It is absolute, imperative, and clear to a member of law enforcement, a narcotics detective, or a prosecutor that a confidential informant is not walked through a busy, crowded, rural courthouse, required to testify in person, and then used again by law enforcement after he has been 'burned.'"

Because there was more than substantial evidence to support the Board's findings, this Court must base its review of the immunity question on those facts. Thus, the question before this Court is whether the detectives had a ministerial duty not to create a danger that they knew with reasonable certainty would result in Gaither's death and, after placing him in the path of death, failed to protect him.

Our legislature has recognized the deadly consequences after a confidential informant's identity has been revealed. For instance, KRS 17.150 provides that intelligence and investigative reports maintained by criminal justice agencies are subject to public inspection except those records that would disclose the name or identity of any confidential informant or lead to the identity of any confidential informant. Although the legislature did not provide a civil remedy for its violation, Kentucky has enacted a witness-protection statute. KRS 421.500. Moreover, the KSP's own order requires that the confidential informant's activities "shall be monitored" by the control officer and a supervisor.

I am convinced that under the circumstances, the detectives acts were dominantly ministerial. After the detectives unnecessarily placed Gaither in front of a grand jury and disclosed his identity, the statutes, the KSP's internal order, and common sense dictated that he not be used again as an informant with the same suspect and leave him to be killed. The Board's conclusion was well-reasoned and should be adopted by this Court. I quote:

The term "burned" is a term of art used by the law enforcement community to describe that the confidential informant's anonymity has been compromised or disclosed and the informant should not be used again. You cannot smoke a cigarette twice. Once an informant is known, the drug traffickers are quick to retaliate. Dead men tell no tales. There is no discretion whether to use a burned informant again. It is simply not done, particularly under the set of facts.

I completely agree with the Board. This young man was sentenced to death by the actions of the KSP detectives. Certainly, no state agency has the discretion

to arrange for the death of a citizen. The Board was created to administer the just distribution of state funds for state negligence. In its well-written opinion, the Board detailed the KSP's horrendous actions and its reasons for awarding compensation. I would affirm.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT/
CROSS-APPELLEE:

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BRIEFS AND ORAL ARGUMENT
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