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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002057-MR

ANGEL RIVERA — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NOS. 09-CI-005832, 09-CI-006320 AND 09-CI-007282

CHRISTOPHER D. LANKFORD; AMANDA B. LANKFORD; CHRISTOPHER D. LANKFORD AND AMANDA B. LANKFORD AS PARENTS AND NEXT FRIEND OF MICHAELA G. LANKFORD; CHRISTOPHER D. LANKFORD AND AMANDA B. LANKFORD AS PARENTS AND NEXT FRIEND OF CORBIN I. LANKFORD; HUMANA HEALTH PLAN, INC., AND ANTHEM HEALTH PLANS OF KENTUCKY; CHANCE RIDES MANUFACTURING, INC.; MARY C. COFFEY; NELSON GILMORE; ESTATE OF CARROLL BARRETT; MARTY PRAY; STEVE GOODWIN; MARK ZOELLER; LOUISVILLE ZOO FOUNDATION; LOUISVILLE JEFFERSON COUNTY METRO GOVERNMENT; JOHN WALCZAK; DAN COLE; ALEX HOBACK AND ARIEL SAYLOR — APPELLEES

AND NO. 2012-CA-002058-MR

NELSON GILMORE APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE FREDERIC COWAN, JUDGE
ACTION NOS. 09-CI-005832, 09-CI-006320 AND 09-CI-007282

CHRISTOPHER D. LANKFORD; AMANDA B. LANKFORD; CHRISTOPHER D. LANKFORD AND AMANDA B. LANKFORD AS PARENTS AND NEXT FRIEND OF MICHAELA G. LANKFORD; CHRISTOPHER D. LANKFORD AND AMANDA B. LANKFORD AS PARENTS AND NEXT FRIEND OF CORBIN I. LANKFORD; HUMANA HEALTH PLAN, INC., AND ANTHEM HEALTH PLANS OF KENTUCKY; CHANCE RIDES MANUFACTURING, INC.; MARY C. COFFEY; ANGEL RIVERA; ESTATE OF CARROLL BARRETT; MARTY PRAY; STEVE GOODWIN; MARK ZOELLER; LOUISVILLE ZOO FOUNDATION; LOUISVILLE JEFFERSON COUNTY METRO GOVERNMENT; JOHN WALCZAK; DAN COLE; ALEX HOBACK AND ARIEL SAYLOR APPELLEES

AND NO. 2012-CA-002059-MR

MARK ZOELLER AND
STEVE GOODWIN APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NOS. 09-CI-005832, 09-CI-006320,
09-CI-007282 AND 09-CI-011860

CHRISTOPHER D. LANKFORD,
INDIVIDUALLY; AMANDA
B. LANKFORD, INDIVIDUALLY;
CHRISTOPHER D. LANKFORD
AND AMANDA B. LANKFORD AS
PARENTS AND NEXT FRIEND OF
MICHAELA GRACE LANKFORD;
CHRISTOPHER D. LANKFORD
AND AMANDA B. LANKFORD AS
PARENTS AND NEXT FRIEND OF
CORBIN ISAIAH LANKFORD;
CHERI MCKENZIE; HUMANA HEALTH
PLAN, INC., AND ANTHEM HEALTH
PLANS OF KENTUCKY; AND CHANCE
RIDES MANUFACTURING, INC. APPELLEES

AND NO. 2012-CA-002097-MR

MARY CLARE COFFEY APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 09-CI-005832

CHRISTOPHER D. LANKFORD; AMANDA B. LANKFORD; CHRISTOPHER D. LANKFORD AND AMANDA B. LANKFORD AS PARENTS AND NEXT FRIEND OF MICHAELA G. LANKFORD; CHRISTOPHER D. LANKFORD AND AMANDA B. LANKFORD AS PARENTS AND NEXT FRIEND OF CORBIN I. LANKFORD; CHERI MCKENZIE; HUMANA HEALTH PLAN, INC., AND ANTHEM HEALTH PLANS OF KENTUCKY; CHANCE RIDES MANUFACTURING, INC.; ANGEL RIVERA; NELSON GILMORE; ESTATE OF CARROLL BARRETT; MARTY PRAY; STEVE GOODWIN; MARK ZOELLER; LOUISVILLE ZOO FOUNDATION; LOUISVILLE JEFFERSON COUNTY METRO GOVERNMENT; JOHN WALCZAK; DAN COLE; ALEX HOBACK AND ARIAL SAYLOR APPELLEES

AND NO. 2012-CA-002123-MR

MARTY PRAY APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT

v. HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 09-CI-005832

CHRISTOPHER D. LANKFORD; AMANDA B. LANKFORD; CHRISTOPHER D. LANKFORD AND AMANDA B. LANKFORD AS PARENTS AND NEXT FRIEND OF MICHAELA G. LANKFORD; CHRISTOPHER D. LANKFORD AND AMANDA B. LANKFORD AS PARENTS AND NEXT FRIEND OF CORBIN I. LANKFORD; HUMANA HEALTH PLAN, INC., AND ANTHEM HEALTH PLANS OF KENTUCKY; CHANCE RIDES MANUFACTURING, INC.; MARY C. COFFEY; ANGEL RIVERA; ESTATE OF CARROLL BARRETT; NELSON GILMORE; STEVE GOODWIN; MARK ZOELLER; LOUISVILLE ZOO FOUNDATION; LOUISVILLE JEFFERSON COUNTY METRO GOVERNMENT; JOHN WALCZAK; DAN COLE; ALEX HOBACK AND ARIEL SAYLOR APPELLEES

AND NO. 2012-CA-002162-MR

ESTATE OF CARROLL BARRETT APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE FREDERIC COWAN, JUDGE
ACTION NOS. 09-CI-005832 AND 09-CI-006320

CHRISTOPHER D. LANKFORD
AND AMANDA B. LANKFORD,
INDIVIDUALLY AND AS PARENTS
AND NEXT FRIENDS OF MICHAELA
G. LANKFORD, A MINOR AND
CORBIN I. LANKFORD, A MINOR;
CHERI MCKENZIE; HUMANA HEALTH
PLAN, INC.; ANTHEM HEALTH
PLANS OF KENTUCKY; CHANCE
RIDES MANUFACTURING, INC.;
ANGEL RIVERA; NELSON GILMORE;
MARTY PRAY; STEVE GOODWIN;
MARK ZOELLER; LOUISVILLE ZOO
FOUNDATION; LOUISVILLE JEFFERSON
COUNTY METRO GOVERNMENT;
JOHN WALCZAK; DAN COLE; ALEX
HOBACK AND ARIEL SAYLOR APPELLEES

AND NO. 2012-CA-002216-MR

CHANCE RIDES MANUFACTURING, INC. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE FREDERIC COWAN, JUDGE
ACTION NOS. 09-CI-005832, 09-CI-006320 AND 09-CI-007282

JOHN WALCZAK; CHRISTOPHER D. LANKFORD, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF MICHAELA G. LANKFORD AND CORBIN I. LANKFORD; AMANDA B. LANKFORD, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF MICHAELA G. LANKFORD AND CORBIN I. LANKFORD; CHERI MCKENZIE; HUMANA HEALTH PLAN, INC., AND ANTHEM HEALTH PLANS OF KENTUCKY; LOUISVILLE ZOO FOUNDATION, INC. D/B/A THE LOUISVILLE ZOO; LOUISVILLE JEFFERSON COUNTY METRO GOVERNMENT; MARTY PRAY; DAN COLE; ALEX HOBACK; ARIEL SAYLOR; STEVE GOODWIN; MARK ZOELLER; MARY C. COFFEY; NELSON GILMORE; ANGEL RIVERA; ESTATE OF CARROLL BARRETT; AND JOHN WALCZAK — APPELLEES

AND — NO. 2012-CA-002217-MR

CHRISTOPHER D. LANKFORD; AMANDA B. LANKFORD; CHRISTOPHER D. LANKFORD AND AMANDA B. LANKFORD AS PARENTS AND NEXT FRIEND OF MICHAELA G. LANKFORD; CHRISTOPHER D. LANKFORD AND AMANDA B. LANKFORD AS PARENTS AND NEXT FRIEND OF CORBIN I. LANKFORD; AND CHERI MCKENZIE — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE FREDERIC COWAN, JUDGE
ACTION NOS. 09-CI-005832 AND 09-CI-006320

LOUISVILLE JEFFERSON COUNTY METRO GOVERNMENT; DAN COLE; ALEX HOBACK; ARIEL SAYLOR; JOHN WALCZAK; THE LOUISVILLE ZOO FOUNDATION, INC.; ANGEL RIVERA; MARY C. COFFEY; NELSON GILMORE; CHRISTOPHER MEINHART, ADMINISTRATOR OF THE ESTATE OF CARROLL BARRETT; MARTY PRAY; STEVE GOODWIN; MARK ZOELLER; HUMANA HEALTH PLAN, INC.; ANTHEM HEALTH PLANS OF KENTUCKY; AND CHANCE RIDES MANUFACTURING APPELLEES

OPINION
AFFIRMING IN PART AND REVERSING IN PART
** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: On June 1, 2009, Train #312 (the "Green Train") at the Louisville Zoo overturned, resulting in varying degrees of injury to its operator and most of the train's twenty-nine passengers. Numerous lawsuits were filed against a host of entities and individuals, including the Louisville Jefferson County Metro Government (Louisville Metro), the Louisville Zoo Foundation, eleven zoo

employees, and Chance Rides Manufacturing, Inc.[1] Most of those cases settled; a few did not.

On November 16, 2012, the Jefferson Circuit Court entered an Opinion and Order that granted summary judgment in favor of some, but not all, of these remaining entities and individuals. Nearly every party was unhappy with some portion of the judgment, and that led to multiple appeals and cross-appeals.[2] We consolidated these appeals for the sake of judicial economy. After a careful review, we conclude that Louisville Zoo Director John Walczak is not entitled to qualified official immunity and reverse the circuit court's Opinion and Order in his favor; we affirm the remainder of the circuit court's order.

I. Factual Background

As with many accidents, this one was the culmination of many things going wrong. That is why we have many parties involved. Therefore, we begin by further identifying the parties.

All who remain of the original plaintiffs in the underlying action are Christopher and Amanda Lankford, individually, and as parents and next friends of Michaela Lankford and Corbin Lankford, minors (collectively, the Lankfords) and Cheri McKenzie. The Lankfords and McKenzie were passengers on the Green

[1] Chance's predecessor manufactured the Green Train.

[2] An order denying a claim of immunity is subject to immediate appeal. *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 886-87 (Ky. 2009). Similarly, an order granting summary judgment that resolves at least one entire claim and that contains Kentucky Rules of Civil Procedure (CR) 54.02 finality language is a final and appealable judgment. *See* CR 54.02(1).

Train on the day of the accident and were injured when the train overturned. They appeal the judgment to the extent it relieves any of the other parties of liability.

At all relevant times, Appellee Louisville Metro owned and operated Louisville Zoological Gardens (the Louisville Zoo). Appellee John Walczak was the director of the Louisville Zoo; Appellant Mark Zoeller was the assistant director; and Appellant Steve Goodwin was the facilities manager. Appellant Angel Rivera was a train mechanic. Other Appellants include guest-services supervisors Nelson Gilmore, Carroll Barrett,[3] and Marty Pray. Appellee Dan Cole was also a guest-services supervisor. Appellees Alex Hoback and Ariel Saylor were certified train operators employed in the guest-services department. Finally, Appellant Mary Coffey was the train operator at the time of the accident.

The Louisville Zoo owns three small-gauge trains, commonly referred to as the Green Train, the Red Train, and the Black Train.[4] Each train consists of a locomotive and two or three passenger coaches.

In the summer of 2009, Coffey was an eighteen-year-old high school graduate. She worked as a seasonal employee in the Louisville Zoo's guest-services department. The zoo trains were operated by guest-services department employees. In mid-May of 2009, guest-services supervisor Gilmore invited Coffey to become a certified train operator. He supplied Coffey with a copy of the

[3] Carroll Barrett passed away on January 1, 2012. The underlying plaintiffs revived their action against Christopher Meinhart, Administrator of the Estate of Carroll C. Barrett. Any reference to Barrett in this opinion refers to Carroll Barrett and/or his Estate.

[4] Some parties refer to the "Black Train" as the "Black and Red Train." To avoid confusion, we have chosen to refer to the "Black and Red Train" as simply the "Black Train."

Louisville Zoo's "Train, Tram, and Carousel Procedures/Scripts" manual. The manual basically described the script or speech[5] that the train operator was required to give during the ride. The manual neither made reference to nor incorporated Chance's Operation Manual. The manual did not contain a description of the train's controls and did not provide emergency-braking/emergency-stopping instructions. Coffey studied the manual at her leisure for about one week.

On May 24, 2009, Coffey began shadowing other certified train operators on the Red Train. She rode with Alex Hoback for eight to ten loops around the track. She also rode with Ariel Saylor for one loop, and with John Ferguson[6] for five or six loops. The operators demonstrated train operation, including operation of the air brakes, and warned Coffey about tricky parts of the track, including a steep hill and tunnel near Gorilla Forest. Neither Hoback nor Saylor instructed Coffey to pump the brakes and neither trained her how to conduct a pre-ride inspection. While shadowing Hoback and Saylor, Coffey did not operate the train personally, except perhaps to apply the parking brake once the train was stopped. However, while shadowing Ferguson, Coffey began operating the train while Ferguson gave her instructions and advice. According to Coffey, Ferguson instructed her to slightly pump the brakes if they "weren't exactly catching" or reacting fast enough to slow the train.

[5] Other than some personal safety precautions for passengers, the speech focused on interesting facts about the zoo and its exhibits and animals visible to passengers during the ride.
[6] Ferguson was not named as a party to this appeal.

A week later, on June 1, 2009, Gilmore instructed Coffey to continue her training with Ferguson. Coffey drove the Black Train without incident and under Ferguson's supervision for approximately two and one-half hours. Later that day, Coffey performed her certification run with Gilmore on the Black Train.[7] During the certification run, Gilmore cautioned Coffey to reduce her speed while going downhill near the Gorilla Forest. Despite not personally training Coffey, not knowing what training she had received, and not knowing if Coffey was familiar with the Green Train's braking system, Gilmore certified Coffey to operate all three zoo trains, not just the Black Train.

At no point in her training or certification had Coffey observed operation of the Green Train or operated that train herself. It is noteworthy that only the Green Train had a separate emergency braking system; the Black Train and the Red Train did not.

After receiving her certification on the Black Train, Coffey independently operated that train for three hours without incident. Later that day, Coffey noticed that the Black Train was struggling to start. Carroll Barrett, another guest-services supervisor, directed Coffey to switch to the Green Train. According to the record, this was Coffey's first time ever to operate this train.

[7] Several appellants indicate in their briefs that Coffey's certification occurred on the Red Train. In her deposition, Coffey distinguished between the Red Train and the Black and Red Train. (Coffey Deposition at 49). She also stated that she was operating the Black and Red Train both during and after her certification run. (Coffey Deposition at 109, 121). As indicated, we have chosen to refer to the Black and Red Train in this opinion as the Black Train. See footnote 4, *supra*.

Barrett, with Coffey in tow, performed a pre-ride inspection of the Green Train by following the zoo's inspection checklist. Barrett testified in deposition that he "primed" the emergency brake by "pushing" a black knob intended for that purpose. Coffey, however, described Barrett pushing the train's clutch, not the black knob. Barrett marked each item on the checklist as working properly, including the brake pads, the control and instrument cluster, and all gauges. Neither Coffey nor Barrett took the Green Train on a full pre-ride test loop. Barrett testified in deposition that a full test loop was unnecessary because mechanic Angel Rivera had previously informed him that the Green Train was operational.

Coffey proceeded to drive the Green Train to the main passenger station. As she pulled into the station, she thought the train's brakes felt sluggish; the train stopped several feet past the designated stopping line. However, because the air brake pressure gauge indicated well within the normal range,[8] Coffey allowed passengers to board and, once they were seated, the Green Train, under Coffey's sole control, departed the station.

After cresting the hill near the giraffe exhibit, Coffey began applying the Green Train's brakes. There was no resistance as there should have been, and the train did not slow. The train continued to gather speed as it approached the tunnel near the base of the hill. Coffey pumped the brakes – as instructed by Ferguson –

[8] Coffey testified in deposition that she was told by Hoback, Saylor, and Ferguson that the brake air pressure was supposed to be within 60 and 90 PSI to safely operator the train. (Coffey Deposition at 76-77).

and engaged the parking brake; neither effort slowed the train. Coffey never attempted to engage the emergency brake, which she had never been trained to operate. Near the Gorilla Forest, the train reached a curve and the Green Train turned over, coming to rest on its left side. The Lankfords and McKenzie sustained severe injuries as a result of the accident.

The Kentucky Department of Agriculture (KDA) investigated the accident. It memorialized its findings in a report dated March 25, 2010 (KDA Report). The KDA concluded that speed, poor maintenance, and inadequate training caused the accident. Relevant to this appeal, the KDA found:

> 1. The train tipped over because it was travelling at an excessive speed.
>
> 2. None of the fifty-eight brake shoes measured on the Green Train was within the manufacturer's specifications and should have been replaced.
>
> 3. Eleven brake shoes were out of adjustment.
>
> 4. The Green Train's brake warning light and buzzer had been disabled.
>
> 5. The knob for the emergency brake was not the proper shape or color.
>
> 6. The train was not operated for a complete test cycle on June 1, 2009 prior to the incident as required by the manufacturer's manual.
>
> 7. The operator [Coffey] failed to follow correct braking or emergency braking procedures. The operator was not familiar with the emergency brake system, was not familiar with the manufacturer's manual, and was not sufficiently

> trained. The action of pumping the brakes made the situation worse.

The KDA Report noted that Chance's Maintenance Manual[9] required regular inspection of the Green Train's brake shoes, and brake shoe replacement when damaged or worn too thin. The Maintenance Manual indicated the replacement thickness threshold to be one and-nine-sixteenths inches in the middle and five-eighths inch or less on the sides. The KDA investigators measured fifty-eight of the Green Train's sixty-four brake shoes and discovered that all fell outside the manufacturer's specifications for operation and should have been replaced.

Following the KDA Report, the Louisville Zoo hired MAH Consulting, an expert amusement-rides firm, to review its operations and the KDA Report. With respect to the Green Train's brake shoes, MAH agreed with the KDA Report, stating: "A review of the measurements provided, clearly show that the brake shoes were worn beyond the manufacturers maximum wear threshold for replacement. . . . The failure to replace the worn brake shoes is a total lapse in the manufacturers prescribed maintenance requirements for the safe operation of the [train]." (R. at 2986). It was also apparent to MAH that "a lack of proper and quality operator training contributed significantly to the train accident." (R. at 2987).

Coffey, and perhaps others, appear to have misunderstood the Green Train's braking systems. The record shows that Chance designed the Green Train with

[9] Chance's "specifications and recommendations" for operating the trains are contained in the Chance Manual (R. at 2478 – 2940). The Chance Manual is divided into multiple sections, three of which are relevant to this appeal: the Operation Manual, the Maintenance Manual, and the Field and Inspection Manual. Where the context requires, we shall differentiate between the various parts of the Chance Manual.

three braking controls: a brake lever to operate the air-brake system, a parking brake, and an emergency brake. The air-brake lever, located in front of the dash panel, activates air brakes on each wheel of the locomotive and on the passenger coaches only when the system is fully charged and pressurized; it is used for the normal stopping of the train. When manufactured, the Green Train had a warning system consisting of a buzzer that would sound and a light that would illuminate whenever the pressure needed to operate the air brakes was insufficient.

Chance representative Terry Giddeon described the emergency brake valve's dual function and its relation to the low-air buzzer and low-air warning light. According to Giddeon, when the train is started the buzzer and light will be activated and the engine drive compressor begins charging the locomotive's air-supply tank. Once the locomotive's supply tank reaches ninety pounds per square inch, the operator must pull the emergency brake valve to charge the coaches' brakes, *i.e.*, to allow the air tanks on the passenger coaches to be charged with air. Once the passenger coaches' tanks are charged, the buzzer will stop sounding and the light will go out. The Chance Operation Manual confirms this. (Chance Operation Manual at 7, 12). The coach brakes only function effectively if charged with air. This is where the emergency brake and the air-brake system interrelate; the emergency brake is the control that charges the air-brake system.

The Green Train was designed and manufactured with an emergency brake control shaped like a red stop sign and located on the dash panel. When pushed, every brake shoe on every wheel on every passenger coach fully engages.

According to the Chance Operation Manual, to function effectively, the emergency valve must be "primed," *i.e.*, pulled or charged, when the train is started. (Chance Operation Manual at 7, 12). According to Chance, ensuring the emergency brakes were primed was critical to the safe operation of the Green Train.

Chance originally manufactured the Green Train with a red dashboard label around the emergency stop button that advised the operator, "pull to fill trailer – PUSH for EMERGENCY." At some point, Louisville Zoo employees replaced the red, octagon-shaped emergency control with a plain, round black button that was not labeled and did not operate as designed.

Notwithstanding the design or design changes, once the coach brakes are charged by the proper manipulation of the emergency brake control, the air gauge located on the train's dash panel indicates the pressure throughout the entire system, not just the tank located on the locomotive; then, the locomotive's brakes and coaches' brakes will work together to stop the train.

However, if the coach brakes are not charged, the air gauge measures only the pressure in the locomotive air-supply tank, potentially giving the operator a false sense of security. Giddeon explained that the buzzer and light warning system was designed to avoid that possibility. (Chance Operation Manual at 11-12). Giddeon also said the low-air buzzer will sound and the low-air light will illuminate if the coach brake tanks drop below a certain pressure while the Green Train is in operation. (Chance Operation Manual at 6). However, if the buzzer and

light are inoperable, there is no way for the train's operator to know if the coach air-supply tanks are charged with air.

During their investigation, KDA examiners observed that the Green Train's red brake warning light had been removed, and the low-air buzzer disconnected; the buzzer's ground wire was affixed with electrical tape to other wires away from the buzzer. Danielle O'Mary, a former zoo employee, testified in deposition that mechanic Angel Rivera had disconnected the buzzer and light about a year before the accident. Rivera denied doing so.

The foregoing describes the operation of the Green Train. However, the Red Train and the Black Train – on which Coffey trained and was certified – are not equipped with an emergency brake system like that contained on the Green Train. Because Coffey had not trained on the Green Train, there was an issue regarding whether Coffey was aware of the difference in the braking systems. Barrett testified in deposition that he told Coffey of the emergency brake and how to use it during their pre-ride inspection of the Green Train. Coffey claims she had no knowledge of the Green Train's emergency brake prior to the accident.

On the day of the accident, when the Green Train's brakes failed to catch as the train entered the tunnel, Coffey pumped the brakes. Barrett testified, "it was almost S.O.P. to do that." However, the KDA found that Chance's Operation Manual advises *not* to pump the brakes because every pump releases more air pressure and causes a series of brake disengagements. Thus, the KDA concluded

that each time Coffey pumped the brakes she released and reapplied the brakes, rendering the brakes less effective.

As additional facts are necessary, we will provide them within the context of our analysis.

II. Procedure

The Lankfords and McKenzie filed suit against the various defendants in 2010. Lengthy discovery ensued. The defendants then filed independent motions for summary judgment primarily claiming immunity from liability on the basis of sovereign immunity and qualified official immunity.

The trial court granted summary judgment in favor of Louisville Metro on the basis of sovereign immunity. The Zoo Foundation was determined to have owed no duty to the Lankfords or McKenzie and the claim against the Zoo Foundation was dismissed.

Louisville Zoo Director, John Walczak, was deemed entitled to qualified official immunity and dismissed as a defendant. However, the circuit court determined that Assistant Director Mark Zoeller did not enjoy immunity, nor did the zoo's facilities manager, Steve Goodwin

Of the four guest-services supervisors, only Dan Cole was dismissed from the suit; the circuit court determined he owed no duty to the Lankfords or McKenzie. The circuit court determined the three remaining guest-services supervisors – Nelson Gilmore, Carroll Barrett, and Marty Pray – were not entitled to qualified official immunity and remain as defendants in the lawsuit.

Guest-services employees and certified train operators Alex Hoback and Ariel Saylor were found to have owed no duty to the Lankfords or McKenzie and were dismissed from the lawsuit.

Train mechanic, Angel Rivera, remains in the suit as he was deemed not entitled to qualified official immunity.

Finally, Mary Coffey, the operator of the train at the time of the accident, was determined not to be entitled to qualified official immunity.

The Lankfords, McKenzie, and Chance Rides appeal the circuit court judgment in favor of Louisville Metro, the Zoo Foundation, Walczak, Cole, Hoback, and Saylor.

Zoeller, Goodwin, Gilmore, Pray, Barrett, Rivera, and Coffey appealed to this Court, arguing the trial court erred when it found they were not entitled to qualified official immunity. As noted, we consolidated these appeals for the sake of judicial economy.

III. Standard of Review

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Our review is *de novo*. *Mitchell v. University of Kentucky*, 366 S.W.3d 895, 898 (Ky. 2012).

Similarly, whether a defendant is entitled to immunity is a question of law subject to *de novo* review. *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).

IV. Analysis

Each of these appeals and cross-appeals falls into one of three categories of analysis: (1) sovereign immunity, as it relates to Louisville Metro; (2) qualified official immunity, as it relates to Walczak, Zoeller, Goodwin, Gilmore, Barrett, Pray, Rivera, and Coffey; and (3) duty as that concept relates to the Zoo Foundation, Cole, Hoback, and Saylor. We will examine each appeal by category.

A. Sovereign Immunity

The Lankfords and McKenzie argue that Louisville Metro is not entitled to sovereign immunity. They assert that operating a zoo is a proprietary function, not a governmental one and, therefore, Louisville Metro should not be afforded immunity status. To rule in the Lankfords and McKenzie's favor would require us to ignore decades of immunity law that clearly states that "Kentucky counties are cloaked with sovereign immunity." *Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004) (citing *Monroe County v. Rouse*, Ky., 274 S.W.2d 477, 478 (1955)); *Schwindel v. Meade County*, 113 S.W.3d 159, 163 (Ky. 2003) ("A county government is cloaked with sovereign immunity."); *Kenton County Public Parks Corp. v. Modlin*, 901 S.W.2d 876, 879 (Ky. App. 1995) ("Since 1792, nothing could be clearer in Kentucky law than the principle that counties enjoy sovereign immunity from ordinary tort liability, the same immunity as the Commonwealth.") We decline to do so.

Sovereign immunity derives "from the common law of England and was embraced by our courts at an early stage in our nation's history. It is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity." *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001) (citation omitted). "Counties, which predate the existence of the state and are considered direct political subdivisions of it, enjoy the same immunity as the state itself." *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009). While a merged urban-county government, such as Louisville Metro, is a new classification of county government, it is no less a county government entitled to the protections of sovereign immunity. *Smolcic*, 142 S.W.3d at 132; *St. Matthews Fire Prot. Dist. v. Aubrey*, 304 S.W.3d 56, 60 (Ky. App. 2009) ("Although Jefferson County and the City of Louisville have merged to form the Louisville Metro Government, Jefferson County has not been abolished, nor has sovereign immunity been affected as to the county or county officials."); *Jewish Hosp. Healthcare Services, Inc. v. Louisville/Jefferson County Metro Gov't*, 270 S.W.3d 904, 907 (Ky. App. 2008) (finding that, absent an explicit statutory waiver, Louisville Metro was entitled to sovereign immunity).

Undaunted by this jurisprudence, the Lankfords and McKenzie argue Louisville Metro's operation of a zoo is not an integral function of government and, therefore, sovereign immunity protections are unavailable. In essence, the Lankfords and McKenzie urge this Court to apply the "governmental function" test

to ascertain Louisville Metro's immunity status. This argument fails to recognize the distinction between sovereign immunity and governmental immunity and, in turn, the difference between the protections afforded a county government as opposed to those afforded a government agency or entity.

As previously noted, Kentucky counties are irrefutably cloaked with sovereign immunity. *Louisville Arena Auth., Inc. v. RAM Engineering & Const., Inc.*, 415 S.W.3d 671, 680 (Ky. App. 2013)("[O]nly the Commonwealth and counties enjoy sovereign immunity.") Governmental immunity, on the other hand, is "a policy-derived offshoot of sovereign immunity," *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 801 (Ky. 2009), that seeks to protect government agencies and entities from liability. *Yanero*, 65 S.W.3d at 519. Under the doctrine of governmental immunity, "a state agency [or entity] is entitled to immunity from tort liability to the extent that it is performing a governmental, as opposed to a proprietary, function." *Id.* Simply put, while a county government is wholly immune from suit, immunity is a conditional status for a government agency or entity that turns on whether the agency or entity is performing an essential government function. *Caneyville Volunteer Fire Dep't*, 286 S.W.3d at 804. As applied to this case, we need only point out that Louisville Metro is a county government, not a government agency or entity. Therefore, there is no need to apply the essential-government-function test. *See Yanero*, 65 S.W.3d at 526 (reiterating there is "no need to engage in a governmental/proprietary analysis" when the party is "entitled to absolute

sovereign immunity"). Governmental immunity concepts are irrelevant; sovereign immunity concepts apply and control. Louisville Metro is immune and we affirm the circuit court's ruling in this regard.

Having so ruled, we agree with and repeat the circuit court's well-reasoned and thoughtful expression of concern regarding this ruling. The circuit court questioned why entities, such as Louisville Metro in this case, that choose to take direct control of proprietary activities should enjoy the protection of sovereign immunity. The court stated:

> While compelled to make this finding, the Court finds little sense in a rule that allows the state or county to avoid tort liability for its negligent operation of a proprietary business while its agencies and corporations are held accountable for identical conduct. This rule is certainly one subject to abuse, allowing the state or county to shield itself from liability by simply hiring employees to run a proprietary business without creating a separate entity or assigning an agency to direct and oversee their activities. As discussed infra, to a certain extent the public is protected from this abuse by the doctrine of qualified official immunity. The Court can envision, however, various scenarios where discovering the identity of a negligent employee to sue would be difficult, if not impossible, leaving an injured citizen without just compensation.
>
> The Court, therefore, if left to its own devices, would apply a rule that employs the governmental function test without regard to the entity performing the function. In this case, this Court would find that Louisville Metro's operation of Louisville Zoological Gardens is not an integral function of government, a proposition that John Walczak, the Director of the Zoo, and Mark Zoeller, the Assistant Director, expressly admitted in deposition. Louisville Metro's argument that, by statute, Louisville Zoological Gardens is the state zoo and exists to create "a

> unique education experience," does little to change the fact that the operation of a zoo is not such an "integral part of [county] government as to come within regular patterns of administrative organization and structure," and is not a function that "only an arm of the [county] can exercise." As the Zoo constitutes a proprietary function, this Court, if given a choice, would find that Louisville Metro is not entitled to immunity.

(R. at 4636-37)(internal citations omitted).

Like the circuit court, this Court is powerless to rule inconsistently with clear Kentucky Supreme Court precedent. *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986). However, the Supreme Court has invited "constructive criticism[,]" where appropriate, noting that the Court of Appeals "can set forth the reasons why, in its judgment, the established precedent should be overruled[.]" *Id.* Constructive criticism is appropriate in this case. We share the circuit court's concern and adopt its statement as our own for the Supreme Court to consider.

B. Qualified Official Immunity

The arguments presented by Appellants Zoeller, Goodwin, Coffey, Gilmore, Pray, Barrett, and Rivera are virtually identical – they claim they are entitled to qualified official immunity. Additionally, the Lankfords, McKenzie, and Chance Rides argue that Walczak is *not* entitled to qualified official immunity. We shall separately address the immunity status of each defendant. Before doing so, we find it helpful to reiterate some guiding legal principles.

1. Qualified Official Immunity Generally

The doctrine of qualified official immunity shields public officers and employees from liability for the negligent performance of discretionary acts if done in good faith and within the scope of their authority. *Nelson Co. Bd. of Educ. v. Forte*, 337 S.W.3d 617, 621 (Ky. 2011); *Yanero*, 65 S.W.3d at 521. The doctrine is designed to protect officials for their "good faith judgment calls made in a legally uncertain environment." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010). On the other hand, no immunity is afforded for the negligent performance or omissions of a ministerial act. *Yanero*, 65 S.W.3d at 521; *Forte*, 337 S.W.3d at 621 ("[I]t has always been the case that the negligent performance of a *ministerial* act by an official or employee enjoys *no* immunity[.]" (first emphasis added; second emphasis in original)).

The distinction between a discretionary act and a ministerial act is critical to the immunity determination. *Yanero*, 65 S.W.3d at 521. Our threshold task in any qualified official immunity case, then, is to label the "the particular acts or functions in question" as either discretionary or ministerial. *Haney,* 315 W.3D at 240.

Discretionary acts involve "the exercise of discretion and judgment, or personal deliberation, decision, and judgment[.]" *Yanero*, 65 S.W.3d at 522. Such acts "require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." *Haney*, 311 S.W.3d at 240.

Conversely, "ministerial acts or functions – for which there are no immunity – are those that require 'only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.'" *Id.* (citing *Yanero*, 65 S.W.3d at 522). The need to ascertain the "fixed and designated" facts does not necessarily convert a ministerial act into a discretionary act. *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959). Likewise, "[a]n act is not necessarily 'discretionary' just because the officer performing it has some discretion with respect to the means or method to be employed." *Yanero*, 65 S.W.3d at 522.

Because "few acts are ever purely discretionary or purely ministerial" we must employ "a more probing analysis" focusing on "the *dominant* nature of the act" or function at issue. *Haney*, 311 S.W.3d at 240. Of course, while recitation of these rules requires little effort on our part, application often proves problematic. Ultimately, "the decision as to whether a public official's acts are discretionary or ministerial must be determined by the facts of each particular case[.]" *Jerauld ex rel. Robinson v. Kroger*, 353 S.W.3d 636, 640-41 (Ky. App. 2011) (quoting *Caneyville Volunteer Fire Dep't*, 286 S.W.3d at 809 n.9).

2. Relevant Statutes and Regulations

The Kentucky Legislature and the KDA have enacted numerous statutes and regulations, respectively, that govern the operation and maintenance of

amusements rides.[10] *See* KRS[11] 247.232 – KRS 247.236; 302 KAR[12] 16:010 – 302 KAR 16:140. These laws positively charge certain persons with carrying out specific acts. The trial court relied upon these statutes and regulations in the course of its qualified-official-immunity analysis.

KRS 247.234 and 302 KAR 16:020 identify certain pre-ride obligations that must be undertaken by the ride's owner and/or operator. KRS 247.234 provides, in part:

> (5)(a) An owner of an amusement ride or attraction shall:
>
> > 1. Conduct a pre-opening inspection and test of the ride or attraction prior to admitting the public each day the ride or attraction is intended to be used[.]

KRS 247.234(5)(a)(1). Similarly, 302 KAR 16:020 Section 10 states that:

> (2) The owner of the ride or attraction shall develop a daily pre-opening checklist which shall contain, at a minimum, all requirements listed in the operator manual, the date and time of the pre-operation inspection, printed name of the person completing the pre-operation inspection, and signature of the person completing the pre-operation inspection.
>
> (3) The owner or operator of an amusement ride or attraction shall perform a pre-opening daily pre-operation inspection prior to public use of the ride or attraction, using the checklist provided by the owner, in accordance with subsection (2) of this section. This pre-opening

[10] An "amusement ride" is defined as "[a]ny mechanized device or combination of devices which carry passengers along, around, or over a fixed or restricted course for the purpose of giving its passengers amusement, pleasure, thrills, or excitement[.]" KRS 247.232(1)(a). No one disputes that the Green Train falls within the definition of an amusement ride as set forth in this statute.

[11] Kentucky Revised Statutes

[12] Kentucky Administrative Regulations

> inspection shall include rides or attractions that do not require an operator.

302 KAR 16:020 Section 10(2), (3).

Other statutes and regulations relate to the operation and maintenance of amusement rides. KRS 247.236 provides, in part:

> (1) Amusement rides and attractions shall not be operated at unsafe speeds[; and]
>
> . . . .
>
> (4) Amusement rides and attractions shall not be operated if the owner or operator knows or should know that the operation will expose the public to an unsafe condition which is likely to result in personal injury or property damage.

KRS 247.2351(1) provides, in part:

> All amusement rides and attractions shall be operated and maintained according to the most stringent specifications and recommendations of:
>
> > (a) The manufacturer's specifications and recommendations;
> >
> > . . . .
> >
> > (c) Any other applicable state or federal laws.

And, 302 KAR 16:020 Section 11 reiterates that "[a]musement rides and attractions shall be operated according to manufacturer's guidelines."

It is readily apparent that some of these acts apply only to the ride's "owner," some apply to the ride's "owner or operator," and some broadly apply to any person with authority or control over the amusement ride. *Compare* KRS

247.234 *and* 302 KAR 16:020 Section 10(2) *with* 302 KAR 16:020 Section 10(3), KRS 247.236, *and* 302 KAR 16:020 Section 11. Significantly, an owner "means any person *or authorized agent* of the person who owns an amusement ride or attraction[.]" KRS 247.232(2) (emphasis added).

3. John Walczak – Director of the Louisville Zoo

The trial court found Walczak entitled to qualified official immunity. We do not agree.

Walczak testified in deposition, without contradiction, that he delegated responsibility for the operation and maintenance of the Louisville Zoo's trains to Zoeller. Relying on *Autry v. Western Kentucky University*, 219 S.W.3d 713 (Ky. 2007), the trial court found the delegation of this managerial function to be a discretionary act, thus entitling Walczak to qualified official immunity. We cannot agree with the circuit court's interpretation of *Autry*.

In *Autry*, a student died following an assault in her dorm room. Western Kentucky University (WKU) managed the university's dormitories, but created WKU Student Life Foundation, Inc., (SLF) a non-profit corporation, to hold title to certain university facilities, including the dorm where the student died. The Kentucky Supreme Court declared both WKU and SLF immune from suit. The Court explained that SLF acted as WKU's alter ego "for purposes of holding title to the dormitory properties and obtaining funding to refurbish them." *Autry*, 219 S.W.3d at 719. The slain student's estate argued that the terms of SLF's articles of incorporation placed upon SLF the authority and duty to manage its dormitory

properties; technically, this was true. *Id.* However, SLF's Management Agreement with WKU placed the responsibility squarely with WKU, not SLF. *Id.*

The Supreme Court might have decided the case in SLF's favor by determining that SLF was "a non-operative, non-negligent entity who was a landlord out of possession." *Kenton County Parks Corporation v. Modlin*, 901 S.W.2d 876, 880 (Ky. App. 1995) (citing *Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979)). Instead, the Court turned to immunity law, calling the Management Agreement a "delegation" of the duty to manage the dorm. *Autry*, 219 S.W.3d at 719. According to the opinion, the act of delegation was "the product of a good faith judgment call that the action would best serve the general functions for which SLF was formed, and was therefore discretionary in nature [so that] SLF was entitled to qualified official immunity." *Id.*

That analysis clearly led the circuit court to conclude that *Autry* stands for the principle that a government employee can insulate himself from liability if it is within his discretion to delegate his duty to a subordinate, just as Walczak claims he did in this case. It is unfortunate that *Autry* employs the concept of delegation to resolve the case; because it does, we believe the case should be limited to the facts of that case and to other cases in which the facts are substantively indistinguishable. The case before us is clearly distinguishable.

In *Autry*, no duties were statutory in nature, but were established by agreement when WKU created SLF. It was WKU's plan, from the beginning, that the ultimate duty of dormitory management be borne by WKU while dormitory

ownership, for reasons apparently related to taxes and the deductibility of contributions by WKU friends and alumni, be vested in SLF. In the case now before us, Walczak's duty *was* statutory. It was a duty created by the legislature, and it was a duty to be discharged by the train's owner, the owner's agents, and the train's operators.

We believe the circuit court, influenced by *Autry*, conflated two distinct concepts – authority and responsibility. On the one hand, a government supervisor often and typically has discretion to delegate to a subordinate the *supervisor's* *authority* to carry out a statutory duty. On the other hand, the supervisor cannot abdicate a duty imposed directly upon him by statute; discharging the duty itself, or seeing that such duty is discharged by a subordinate, must remain the *supervisor's* *responsibility*.

The fallacy of the circuit court's analysis is revealed when we consider that if the law allowed Walczak to delegate both authority *and* duty to Assistant Zoo Director Zoeller, then Zoeller could delegate authority and duty to his own subordinate, facilities manager, Steve Goodwin. At what point would we require such buck-passing to cease – when no one is left but the lowest ranking government employee? Our jurisprudence cannot condone such irresponsible governance.

Our conclusion that senior supervisors cannot abdicate their statutorily imposed duties does not obligate them to micromanage the details of the work. The degree to which a senior supervisor must manage his subordinates will depend

on many factors, but that determination will only affect the duty calculus; it does not impact the determination whether he is entitled to qualified official immunity. That determination remains whether the duty is discretionary or ministerial.

We reverse the circuit court's determination that Walczak is entitled to qualified official immunity based on *Autry*. Whether he is entitled to claim immunity will depend upon whether his duties were discretionary or ministerial. However, we need not remand the case for the circuit court to make this determination. It has already undertaken that analysis as it relates to Walczak's subordinates, Zoeller and Goodwin. That same analysis applies to Walczak, especially considering that the amended complaint presents the same allegations against all three.

As we discuss *infra*, Zoeller and Goodwin admitted their duties generally, including their supervisory duties. Walczak admitted in deposition that he is responsible for all aspects of the zoo's operation, including the operations department and guest services. (Walczak Deposition at 6-7). As such, Walczak's duties included ensuring compliance with the identified statutes and regulations, despite delegating authority over the zoo trains to Zoeller. As director of the Louisville Zoo, Walczak was, and remains, the senior ranking "authorized agent" of Louisville Metro. By holding that *Autry* does not apply, we did nothing more than eliminate the distinction between Walczak and his two subordinates, Zoeller and Goodwin, when it comes to the qualified immunity analysis.

The circuit court found Zoeller's and Goodwin's duties under the applicable statutes to be ministerial and denied their assertion of qualified official immunity. As set forth below, we affirm the circuit court's ruling as to Zoeller and Goodwin. Therefore, applying the reasoning we articulate in the next section, we also conclude that Walczak is not entitled to qualified official immunity.

4. Mark Zoeller, Assistant Director, and Steve Goodwin, Facilities Manager

We read the amended complaint against Zoeller and Goodwin as did the circuit court, *i.e.*, as including both a claim for negligent supervision, and a claim for breaching a statutory duty under KRS 247.232 to properly maintain, repair, and operate the Green Train. We address each separately.

(a) Negligent-supervision claims

The trial court found that while the supervisory duties of Zoeller and Goodwin were largely discretionary in nature, these supervisors lacked any discretion to supervise the employees under their control "in any way other than to assure compliance the law." (R. at 4642-43). We agree and, like the circuit court, find the duty of a supervisor to supervise to be ministerial.

Zoeller admits his responsibilities included supervising Gilmore, Pray, and Goodwin. Likewise, Goodwin admits he was responsible for supervising Rivera. Nevertheless, Zoeller and Goodwin both argue that their actions in supervising others were discretionary. We disagree. An employer (or the employer's manager) has no discretion to utterly refrain from supervising employees.

We are aware that the Kentucky Supreme Court has "found that supervising the conduct of others is a duty often left to a large degree – and necessarily so – to the independent discretion and judgment of the individual supervisor." *Haney*, 311 S.W.3d at 244. However, we draw a distinction between the ministerial duty to supervise and the discretionary manner in which supervision is conducted. A government official charged with the duty to supervise must do so. To find otherwise would encourage those anointed with supervisory power not to supervise at all.

As applied to this case, Zoeller and Goodwin had the ministerial duty to supervise their respective employees in such a way as to ensure compliance with Kentucky law. The manner in which they went about carrying out this duty was discretionary. However, the record in this case suggests Zoeller and Goodwin wholly failed to take any action to determine, much less assure, that their subordinates were complying with Kentucky law. A complete failure to supervise, if proven, would constitute the breach of a ministerial duty.

If the third-amended complaint only asserted a negligent-supervision claim against Zoeller and Goodwin, our analysis would be complete. But the plaintiffs' complaint contains more. As referenced, it also charged Zoeller and Goodwin with the failure to ensure the train was properly maintained, repaired, and operated – a requirement imposed upon them by KRS 247.232. This is an independent claim separate and apart from a claim of negligent supervision and to which different duties apply.

(b) Failure to maintain, repair, and operate the Green Train

Zoeller was the Louisville Zoo's second in command. Zoeller testified in deposition that he was responsible for managing all zoo operations "inside the fence," which included the guest-services department and the maintenance department. Walczak indisputably delegated authority over the zoo trains to Zoeller. There is no viable argument that Zoeller was not an authorized agent of the Louisville Zoo with respect to the zoo trains. KRS 247.232(2).

It was Zoeller's responsibility to ensure that the trains were being maintained and operated in accordance with specifications and recommendations set out in the Chance Manual. KRS 247.2351(1); 302 KAR 16:020 Section 11. It was also Zoeller's responsibility to develop a daily pre-opening checklist that contained all of the components specified in 302 KAR 16:020 Section 10(2), and to conduct a daily pre-opening inspection and test of the trains. KRS 247.234(5)(a)(1). These duties do not require the exercise of discretion nor do they involve policy-based decisions. They are "absolute, certain, and imperative" tasks. Zoeller was without discretion regarding compliance with these statutes and regulations. *See Upchurch*, 330 S.W.2d at 430 (finding the duty required to be performed pursuant to a statute to be ministerial in character, noting "the word 'shall' [as used in the statute] imports the absolute necessity of carrying out these legal conditions according to their tenor"). Zoeller is not entitled to qualified official immunity regarding this claim.

Goodwin is the Louisville Zoo's facilities manager. He is in charge of the facilities department and is responsible for maintenance of the zoo's trains. In that capacity, he was required under Kentucky statutes and regulations to maintain the zoo trains, including the Green Train, "according to the most stringent specifications and recommendations" issued by Chance. KRS 247.2351(1)(a). Goodwin had no discretion in this regard. The Chance Manual sets forth specific maintenance schedules and instructions, including when to change the train's brake shoes. Compliance with KRS 247.2351 was ministerial. There is evidence in the record suggesting the Green Train was not maintained in the manner prescribed by the Chance Manual, particularly as such maintenance relates to the train's brake shoes, low-air warning light, low-air warning buzzer, and emergency brake knob. Goodwin is not entitled to qualified official immunity.

5. Mary Coffey, Operator of the Green Train

The trial court ruled that Coffey was not entitled to qualified official immunity because she had a statutory, ministerial duty to operate the train in accordance with the procedures contained in the Chance Operation Manual, which required her to employ the emergency brake when the regular brakes failed. Coffey contends the manual provided no specific rules or regulations for her to follow regarding the duties at issue in this case.[13] We empathize with Coffey's

[13] Mary Coffey also stated she was never given a copy of the Chance Manual and should not be charged with knowledge of its contents. She was not the only defendant to assert lack of knowledge as a defense to a claim, nor was she the only one who asserts that such lack of knowledge support a claim of qualified official immunity. Because so many of the defendants reassert this position on appeal, we address it separately, *infra*, as applicable universally to these parties.

plight for, in more ways than one, and to the extent duties were breached, she, too, is a victim. However, we are unpersuaded by her legal argument here.

KRS 247.2351(1) and 302 KAR 16:020 Section 11 require that the zoo trains be operated in accordance with the Chance Manual. The Operation Manual includes specific pre-ride instructions. Relevant to Coffey, the Operation Manual states that, during the start-up process, the operator should: (i) pull out the emergency coach brake valve, observe that the low-air warning light is not on and the air pressure gauge shows at least ninety pounds per square inch; (ii) listen to verify the low-air warning buzzer is silent; and (iii) test brake operation. (Chance Operation Manual at 12). The Operation Manual specifies that, to apply the air brakes, the operator must gradually move the brake lever to the left. Moving the brake lever to the right releases the brakes. (Chance Operation Manual at 6, 15, 26). The Operation Manual also includes emergency-stopping procedures. In the case of an emergency, the manual directs the operator to "[p]ress in on the emergency brake valve to apply the brakes on all coaches." (*Id.* at 26). Because Coffey's duty was statutorily prescribed and defined, it was absolute, certain, and imperative; that is, it was a ministerial duty to comply with procedures identified in the Chance Manual while starting and operating the Green Train. KRS 247.2351(1) and 302 KAR 16:020 Section 11. She either followed the procedures or she did not, and the answer to that question will inform the circuit court whether she breached this ministerial duty.

As the Green Train's operator on June 1, 2009, Coffey was also required, in conjunction with Gilmore, to accurately complete the pre-operation inspection of the Green Train using the Louisville Zoo's checklist. 302 KAR 16:020 Section 10. Satisfying this duty did not involve any measure of discretion. Again, either Coffey properly completed the pre-operation inspection or she did not.

In light of these ministerial duties, the trial court properly concluded that Coffey is not entitled to qualified official immunity.

The Lankfords, McKenzie, and Chance Rides also assert that Coffey had a ministerial duty not to operate the Green Train at an unsafe speed. Although KRS 247.236(1) prohibits operation of amusement rides "at unsafe speeds . . . in accordance with the factory specifications[,]" the statute does not further define an unsafe speed. Nor does the Chance Manual define unsafe speed. Indeed, the manual states:

> The maximum safe operating speed for the train will vary according to track conditions and the number of coaches being pulled. . . . The correct speed at which curves are negotiated depends on several factors, including the radius of the curve, the degree of bank on the curve, and the visibility around the curve.

(Chance Operation Manual at 14). The Train, Tram, and Carousel Procedures/Scripts manual merely warns an operator to "watch your speed." None of the zoo trains are equipped with a speedometer or other instrument to measure the train's speed. Coffey testified that she was instructed during her training that her speed should not be too fast, but not be too slow either, and to "use her

judgment as to what is slow and what is fast." (Coffey Deposition at 88). Coffey was required to exercise personal judgment in determining the speed at which to operate the train. This duty was discretionary in nature.

In any event, there is no evidence in this case that Coffey purposely operated the train at an unsafe speed. Her unrefuted testimony was that she was operating the train at a comfortable pace and that as she approached the top of the hill near the giraffes, she began applying the brakes by holding the brake lever to the left. This was consistent with her training. When the brakes failed, gravity acted upon the train, causing it to reach a speed Coffey could not reduce and at which the curve could not be negotiated. While Coffey's failure to comply with the Chance Manual may have contributed to the Green Train's ultimate derailment, the record does not support the assertion that Coffey intentionally operated the train at an unsafe speed.

6. Nelson Gilmore, Guest-Services Supervisor

The trial court found guest-services supervisors Nelson Gilmore and Marty Pray equally responsible for developing a training program for train operators. The trial court reasoned that the law imposed upon Gilmore the ministerial duty to include in this training Chance's recommendations contained in the Chance Manual, which would have added assurance that Coffey knew how to operate the Green Train's air brakes and emergency brake.

We find nothing in the relevant statutory or regulatory sections requiring the Louisville Zoo, or its authorized agents, to develop a training "program" *per se* for

the zoo's train operators. However, it is clear to us that the Louisville Zoo, as the owner of the train ride, or its authorized agent, had a ministerial duty to develop a daily pre-opening checklist which contained, "at a minimum, all requirements listed in" the Chance Operation Manual. 302 KAR 16:020 Section 10(2); KRS 247.234(5)(a)(1). While the zoo did have a pre-ride checklist that it provided to zoo employees, the record indicates that the checklist incorporated very little of Chance's operation requirements.

Gilmore argues he is not subject to the requirements of 302 KAR 16:020 Section 10(2) and KRS 247.234(5)(a)(1) because he does not qualify as an authorized agent of the Louisville Zoo. *See* KRS 247.232(2). We disagree. Gilmore – and Pray – were "the" guest-services supervisors. Together they were directly in charge of all aspects of the guest-services department, including the zoo trains, and they were equally responsible for training, certifying, and managing the zoo train operators. As one of the supervisory authorities in the guest-services department, Gilmore was certainly an "authorized agent" of the Louisville Zoo with respect to the operation of the zoo trains. Therefore, he was responsible for complying with the ministerial duties identified in KRS 247.234(5)(a)(1) and 302 KAR 16:020 Section 10(2).

The Lankfords, McKenzie, and Chance Rides also assert that Gilmore was tasked with – and subsequently violated – other ministerial duties with respect to Coffey's certification as a train operator. It is undisputed that Gilmore certified Coffey. Except for the Train, Tram, and Carousel Procedures/Scripts manual,

there is nothing in the record suggesting that the Louisville Zoo issued guidelines directing how or by what measure to certify zoo train operators. Gilmore was not given any certification criteria and none seem to exist. In fact, Gilmore and Pray both testified that certification was left to their individual discretion, and each employed certification methods and procedures different from the other. Because he was not told *how* to certify train operators, Gilmore argues that operator certification was a discretionary function.

We acknowledge Gilmore's statement that train-operator certification was, in large part, left to his discretion. However, there are certain minimum statutory expectations Gilmore was required to satisfy. First, an amusement-ride "operator" is "a person eighteen (18) years of age or older who has been properly trained to operate amusement rides and attractions, has knowledge of the manufacturer's recommendations for the operation of the rides and attractions, and knows the safety-based limitations of the rides and attractions." KRS 247.232(4). Thus, Gilmore had a legal, ministerial duty to see that Coffey qualified as an operator, as defined by KRS 247.232(4), before placing her at the train's controls. This included ensuring Coffey had knowledge of the Chance Operation Manual and that she knew the safety-based limitations of each train, including how to operate the brakes. Either Gilmore complied with these requirements or he did not.

Second, KRS 247.2351(1) requires that the trains be operated according to Chance's specifications and recommendations. The Chance Operation Manual includes a section dedicated to operator selection and instruction. (Chance

Operation Manual at 2-3). This section presents in a rudimentary way the basics of what an operator needs to know before he or she assumes control of a zoo train. Specifically, the manual directs those selecting, training, and certifying operators to instruct operators: (i) fully in the proper use and function of the ride he or she is to operate, including controls and procedures for normal and emergency operation; (ii) to inspect the train before each day of operation; (iii) to always test run the train before each day of operation; and (iv) in emergency procedures related to the operation of the train. (Chance Operation Manual at 2-3). These requirements from the manual were incorporated into the statutes setting forth Gilmore's duties and he had no discretion to disregard these requirements.

Gilmore argues he never instructed or otherwise trained Coffey prior to or after certification, and he was not legally required to do so. The underlying purpose of the statutory and regulatory provisions related to amusement rides is to promote public safety. Implicit in all the various statutes and regulations – and specifically stated in the definition of an operator, KRS 247.232(4) – is the requirement that operators be properly, adequately, and fully trained. Gilmore attempts to shift this duty to Zoeller, claiming Zoeller was ultimately in charge of the zoo trains. However, Gilmore and Pray were tasked with handling the day-to-day operations of the zoo trains. This necessarily includes operator training.

Gilmore maintains that even if he had a duty to train operators that duty was discretionary in nature because neither the Louisville Zoo nor the relevant laws offer guidance as to what constitutes proper training. At the very least, it is clear

that, to be properly trained, an operator must be familiar with the manufacturer's operation instructions. *See* KRS 247.232(4); KRS 247.2351(1); 302 KAR 16:020 Section 11. When Gilmore chose Coffey to become a train operator, he had a ministerial duty to see that she was properly trained prior to certifying her as an operator and that meant no less than the minimum required by the statutes and regulations, incorporating the manufacturer's manual. Based on the record, Gilmore did not accomplish this.

Finally, the Lankfords, McKenzie, and Chance maintain that Gilmore had a ministerial duty to report train maintenance issues, such as the inoperable low-air warning buzzer and low-air warning light, to the facilities department. They argue that this duty derives from the language of KRS 247.236(4) that prohibits the operation of the train if the owner or operator "knows or should know that the operation will expose the public to an unsafe condition which is likely to result in personal injury or property damage." Gilmore admitted in deposition that he was obligated to report train mechanical issues to the facilities department. This duty was ministerial in nature. Gilmore (in conjunction with Pray) was in charge of the guest-services department, which included the zoo trains. If Gilmore knew or should have known of the Green Train's inoperable buzzer and light, he had a ministerial duty to report that to the facilities department.

In sum, we agree with the trial court that Kentucky statutes and regulations imposed ministerial duties upon Gilmore related to Coffey's training and

certification and the maintenance of the Green Train. Accordingly, Gilmore was not entitled to qualified official immunity.

7. Marty Pray, Guest-Services Supervisor

Pray's arguments on appeal mirror those of Gilmore. Like Gilmore, and for the same reasons, we find Pray to be an authorized agent of the Louisville Zoo with respect to the operations of the zoo trains and for purposes of the applicable statues cited above. Accordingly, Pray was equally responsible for developing a daily pre-opening checklist which included the Chance Operation Manual. This was a ministerial duty.

Similarly, Pray, like Gilmore, had a ministerial duty to report train-maintenance issues to the facilities department. Pray testified in deposition he was familiar with the Green Train's light and buzzer system and that system's purpose. The record also suggests that Pray rode each of the trains on a regular basis. Still, a genuine issue of material fact exists as to whether Pray knew or should have known about the inoperable buzzer and light, thereby triggering his ministerial duty to report such to the facilities department. Until that issue of fact is resolved in favor of Pray, his failure to satisfy this ministerial duty remains an issue. Therefore, the trial court did not err when it denied Pray the protections of qualified official immunity on this issue.

Notably, the trial court's order makes no mention of any other ministerial duties owed by Pray. Before this Court, the Lankfords, McKenzie, and Chance Rides argue that Pray, like Gilmore, was also in charge of training, certifying, and

managing zoo-train operators and therefore was required by Kentucky law to provide proper training and a copy of Chance's Operation Manual to each train operator. KRS 247.232(4). We agree generally with this premise. However, we disagree with the ultimate conclusion that Pray failed to properly train Coffey before she drove the Green Train. If Pray had actually trained or seen to the training or certification of Coffey, or both, he would be subject to the same ministerial duties as Gilmore – compliance with the statutes and regulations that effectively incorporate the Chance Operation Manual. But Pray did not train or certify Coffey. Gilmore, not Pray, selected Coffey to become a train operator. Gilmore, not Pray, certified Coffey. This fact is not in dispute. Nothing in the record indicates that Pray had any authority over Coffey or the methods by which she or other train operators were certified. We therefore conclude that Pray had no ministerial duty to comply with the statutory requirements for training or certifying this particular operator, Mary Coffey.

8. Carroll Barrett, Guest-Services Supervisor

Barrett, another guest-services supervisor, was also unsuccessful in urging the trial court to recognize his right to claim qualified official immunity. The trial court reasoned:

> Barrett performed a pre-operating inspection in accordance with the Zoo's checklist and plaintiffs complain that he did so negligently by failing to note that the warning light and buzzer had been disconnected. This failure, plaintiffs argue, constitutes the negligent performance of a ministerial duty since Barrett had no discretion in deciding (1) whether to report the warning mechanisms were inoperable or (2) whether to take the train out of service until the safety features were repaired. Plaintiffs also point out that KRS 247.234(5)(a)(1) and 302 KAR 16:020 §10(2) required Barrett to take the Zoo train on a test loop prior to allowing customers to ride it and he failed to do so, missing an opportunity to detect and correct any brake problems prior to the accident. . . .
>
> The Court agrees with the plaintiffs that the duties they claim Barrett violated are ministerial in nature in that he had no discretion to fail to take the train on a test loop prior to its operation or to fail to report the inoperable emergency warning light and buzzer. Contrary to Barrett's arguments, the inoperable warning light and buzzer might well have been a factor in causing the accident. The air brake warning system was an important safety feature, one that was indispensible in determining whether the coach brakes on the train were fully operational. Coffey's testimony establishes that she had brake problems of some sort that began as she started the descent near the giraffe exhibit and plaintiffs' theory that the brakes were inadequately charged is a viable one. That the KDA Report did not adopt this theory is, in the Court's mind, legally irrelevant since no one has argued that the report is binding on the parties under the doctrines of *res judicata* or collateral estoppel.

(R. at 4644-45).

Barrett was required to accurately perform the daily pre-operation inspection of the Green Train prior to public use of the ride, utilizing the checklist provided by the Louisville Zoo. 302 KAR 16:020 Section 10(3). Barrett also, as an authorized agent of the Louisville Zoo, was required to take the train on a pre-

operation test ride. KRS 247.234(5)(a)(1). These duties are ministerial in nature. Compliance is not discretionary and does not involve the exercise of discretion or judgment.

Barrett also had a ministerial duty not to operate the train if he knew or should have known that the operation would expose the public to an unsafe condition likely to result in injury. KRS 247.236(4). Barrett admitted in deposition that he was familiar with the low-air warning buzzer and light. (Barrett Deposition at 10). When Barrett started the Green Train on June 1, 2009, he knew the warning system was supposed to activate until the passenger coach air tanks were charged, but he heard no buzzer and saw no light that should have preceded a proper charging of those tanks. Nevertheless, Barrett chose to operate the train and to allow Coffey to do so. Barrett knew or should have known that operating the Green Train without properly functioning safety devices risked harm to the train's passengers. Upon ascertainment of these "fixed and designated facts" Barrett's duty not to operate the Green Train was "absolute, certain, and imperative[.]" *See Haney*, 311 S.W.3d at 240.

Finally, Barrett had a ministerial duty to operate the train in accordance with the manufacturer's guidelines. 302 KAR 16:020 Section 11. The Chance Operation Manual states without qualification that, if the train is so equipped, prior to operating the train, the emergency brake valve must be pulled out (primed) to allow the coach brake system to be charged with air and that the train's brakes must be tested. (Operation Manual at 7, 12).

Barrett contends he complied with some, if not all, of these ministerial duties. The record is certainly conflicting. Resolving these factual disputes is not within the scope of our review. Instead, the only issue before us is whether Barrett's duties were ministerial or discretionary in nature; we find the duties to be ministerial in nature. Barrett is not protected by qualified official immunity.

9. Angel Rivera, Train Mechanic

The Louisville Zoo employed Rivera as a mechanic. He was in charge of maintaining the zoo trains. Like Goodwin, Rivera had a ministerial duty to operate and maintain the Green Train in accordance with Chance's most stringent specifications. KRS 247.2351(1)(a); 302 KAR 16:020 Section 11. Rivera was also required by Kentucky statute not to "expose the public to an unsafe condition which is likely to result in personal injury[.]" KRS 247.236(4).

The Chance Operation Manual prohibits the removal of or tampering with factory-installed safety devices. (Chance Operation Manual at 3). The manual directs that all such devices must be operating properly before the train is utilized. (*Id.*). The manual describes how the low-air warning buzzer and low-air warning light work in conjunction to alert the train operator that the train's air brakes are not sufficiently charged with air to function effectively. Rivera knew that train operators should hear the warning buzzer and see the light when starting the Green Train. Likewise, if a loss of coach air pressure occurs while the train is running, the buzzer and light would activate, alerting the operator. The buzzer and light constitute a significant safety feature. Rivera had a statutory, ministerial duty not

to tamper with or disable the low-air warning buzzer and low-air warning light. *See* KRS 247.2351(1)(a); 302 KAR 16:020 Section 11. His decision to do so, if proven at trial,[14] constitutes an "identifiable deviation from an absolute, certain, and imperative" order. *Haney*, 311 S.W.3d at 245.

The Chance Manual recommends the train's brake shoes be inspected daily and required replacement when the brake shoes were worn or damaged past certain specified dimensions. The manual includes a diagram of the brake shoe showing exactly when it was worn past the point that it needed to be replaced. Once the Green Train's brake shoes wore past the dimensions specified in the Chance Manual, Rivera was required to replace them or not allow the train to operate with defective brakes. He lacked the discretion to do otherwise. The KDA investigation revealed that fifty-eight of the Green Train's sixty-four brake shoes were not within specifications at the time of the accident.

The specifications identified in the Chance Manual are quite clear. Rivera's obligation to comply with the Chance Manual is a ministerial duty because he was directed by statute to do so. KRS 247.2351(1)(a). Such compliance does not involve the exercise of discretion, but instead requires "'only obedience' or 'merely execution of a specific act from fixed and designated facts.'" *Haney*, 311 S.W.3d at 245 (quoting *Yanero*, 65 S.W.3d at 522).

Rivera argues that KRS Chapter 247 and 302 KAR 16:020 did not impose any ministerial duty upon him because those pieces of legislation address only

[14] Rivera denies tampering with the low-air buzzer and low-air light. O'Mary offered opposing testimony. There is certainly a genuine issue regarding this material fact.

"owners" of amusement rides, and does not create separate liabilities or duties for employees of the owners. We disagree. Undoubtedly, some of the above-referenced laws impose specific duties upon an amusement ride's owner (or the owner's authorized agent). *See, e.g.,* KRS 247.234. Others apply to the owner or operator of the ride. *See, e.g.,* 302 KAR 16:020 Section 10. The remaining apply broadly to any employee involved in the amusement ride's maintenance or operation. *See, e.g.,* KRS 247.2351(1)(a); 302 KAR 16:020 Section 11. Rivera was not simply an employee within the Louisville Zoo's facilities department. He was specifically charged with maintaining the zoo trains. (Rivera Deposition I at 22). Rivera clearly falls within these statutory and regulatory definitions.

Rivera claims that he was unaware of the Chance Manual and that Chance never provided any instruction to him as to how to maintain the train; this claim also rings hollow.[15] Goodwin testified in deposition that Rivera was not given a blank slate upon hire. Instead, Rivera was given instructions, a maintenance check list, and the Chance Manual, which was located in the mechanic's shop. (Goodwin Deposition at 35, 100-01). Dan Cole testified that the Chance Manual was available for reference at Rivera's convenience. In fact, Rivera testified in deposition that he knew the Chance Manual existed and where to find it. (Rivera Deposition II at 158). He cannot claim his duties were discretionary by asserting he had free rein to maintain the equipment in a manner other than that prescribed by the Chance Manual.

[15] Chance's counsel noted at oral argument that Rivera ordered parts from the parts list contained in the manual.

10. Residual Arguments Related to Qualified Official Immunity

Before leaving qualified official immunity to discuss the duty element of negligence, we must address two arguments raised by several of the zoo employees. They relate to knowledge of ministerial duties and causation.

(a) Knowledge

Nearly every zoo employee claims ignorance of their ministerial duties. They assert they had no knowledge of their statutory and regulatory obligations. They also assert ignorance of the Chance Manual. In *Wales v. Pullen,* this Court concluded that ignorance of the law is no excuse.

> This Court does not believe [that ignorance of a statutory duty] is an adequate defense for a public official or employee seeking the protection of [qualified official] immunity. There is no notice requirement in [qualified official] law or any safe harbor for a government employee who does not know the duties of his or her job.
>
> > [W]here the law imposes upon a public officer the performance of ministerial duties in which a private individual has a special and direct interest, the officer will be liable to such individual for any injury which he may proximately sustain in consequence of the failure or neglect of the officer either to perform the duty at all, or to perform it properly. In such a case the officer is liable as well for nonfeasance as for misfeasance or malfeasance.

390 S.W.3d 160, 166-67 (Ky. App. 2012) (quoting *Cottongim v. Stewart*, 283 Ky. 615, 142 S.W.2d 171, 177 (1940)). The reasoning of *Wales* is sound. Government officials must comply with their statutory and regulatory duties. The citizens of this Commonwealth expect no less.

(b) Causation

Another popular argument, one raised directly by two appellants (Rivera and Barrett) and hinted by others, is that they could not be held negligent because their particular conduct did not cause the train crash or the plaintiffs' injuries. Causation relates to a party's negligence, not his entitlement to immunity. With respect to Rivera and Barrett, the trial court only adjudicated the issue of immunity. Whether their conduct played a causative role in the accident goes beyond the immunity query. Our determination with respect to Rivera and Barrett in this interlocutory appeal is limited to the qualified-immunity issue. The trial court's decision, if at all, to deny their respective summary-judgment motions on grounds other than immunity is not reviewable at this stage. *See Abbott v. Chesley*, 413 S.W.3d 589, 602 (Ky. 2013) (denial of summary judgment is interlocutory and generally not appealable).

C. <u>Duty as an Element of Negligence</u>

The Zoo Foundation, Dan Cole, Alex Hoback, and Ariel Saylor were found by the circuit court to owe no duty to the plaintiffs below. Each of the summary

judgments as to these claims was an interlocutory judgment made final and appealable by operation of CR 54.02 and, therefore, is properly before us. We examine the ruling as to each of these parties in that order.

1. Louisville Zoo Foundation

Citing *Kenton County Parks Corporation v. Modlin*, 901 S.W.2d 876 (Ky. App. 1995), the trial court concluded that the Zoo Foundation could not be liable for negligence in this case "because the undisputed facts indicate it never had anything to do with the Zoo's operation." (R. at 4638-39). The trial court's analysis did not turn on immunity, but on general negligence principles.

The traditional elements of a standard negligence action are duty, breach, causation, and injury. *Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 213 (Ky. 2012). Whether a defendant owes the plaintiff a duty of care is a question of law. *Jenkins v. Best*, 250 S.W.3d 680, 688 (Ky. App. 2007). "There can be no negligence where there is no duty imposed." *Warren v. Winkle*, 400 S.W.3d 755, 758 (Ky. App. 2013) (citation omitted).

Kentucky courts have been loath to impose tort liability "unless we have first found circumstances giving rise to a relationship of some kind in which one particular party owed a duty to another particular party." *Best*, 250 S.W.3d at 691. Foreseeability remains the most important factor in determining whether a duty exists. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003).

The Zoo Foundation is a non-profit organization that acts, in large part, as the fundraising arm for the Louisville Zoo. According to its bylaws, the Zoo Foundation's purpose is:

> 1) To foster a partnership between Louisville Metro, the private sector and state and federal Governments through strategic initiatives focused upon the Zoo's commitment "To Better the Bond Between People and the Planet."
>
> 2) To solicit and receive contributions and grants of money and property from individuals, private organizations, public organizations, Louisville Metro, the Commonwealth of Kentucky and the federal Government to support programs and activities with the Mission set forth above in sub-paragraph (1).
>
> 3) To assist and advise the Zoo staff with the development and implementation of a strategic plan to meet the goals set forth herein.

(R. at 4084).

In their third-amended complaint, the Lankfords and McKenzie asserted that the Zoo Foundation "owned and operated" the Green Train and that the "Foundation has and exercises a right to direct and control operations and employees of the Zoo[.]" (R. at 1961, 1966). They grounded their claims in the language of the bylaws. Because of the Zoo Foundation's alleged involvement with the Green Train's operation, the Lankfords and McKenzie assert the Zoo Foundation owes a duty of care to the injured train patrons and the circuit court erred in finding otherwise.[16]

[16] Only the Lankfords and McKenzie take issue with the circuit court's decision to dismiss the Zoo Foundation. Chance did not oppose the Zoo Foundation's dismissal at the trial level, and does not challenge that ruling on appeal. (Chance Brief at 12).

The trial court rejected the Lankfords and McKenzie's argument, noting that "[w]hile the Zoo Foundation's bylaws, if construed very generously in plaintiffs' favor, may give it the power to direct the Zoo's employees and upper management at the operational level, there is simply no evidence in the record that it ever exercised the power." (R. at 4639). The trial court deemed the Zoo Foundation a "non-operative entity" that owed no duty to the injured train patrons with regard to the operation or maintenance of the Green Train.

We agree with the trial court's analysis. The Lankfords and McKenzie do not direct us to anything in the record indicating the Zoo Foundation was actually involved with the operation of the zoo or the zoo trains. Merely pointing to the bylaws is not enough. Instead, the record reveals the Zoo Foundation acted as an advisory and fundraising committee designed to develop and direct the zoo's broader mission and strategic goals and objectives. It has no hand in the actual day-to-day operations of the zoo or the trains. Walczak's deposition testimony confirms this, as he plainly stated that the Zoo Foundation has "not been involved with the operation [of the train]. [It] has been involved with acquiring funds for the benefit of the train, but not the operation [of the train]." (Walczak's Deposition at 55).

Accordingly, we find the Zoo Foundation owed no duty to the plaintiffs with respect to the operation and/or maintenance of the Green Train. *See generally Modlin*, 901 S.W.2d at 879-80 (finding that Kenton County Public Parks

Corporation – which was empowered by its Articles of Incorporation to operate a golf course, but did not – was a "non-operative, non-negligent entity").

2. Dan Cole, Guest-Services Supervisor

Cole was another guest-services supervisor subordinate to Gilmore and Pray. Cole's duties included, at least in part, training and certifying train operators. The Plaintiffs' claims against Cole can be divided into two parts: negligent operator training and negligent maintenance of the Green Train. With respect to the former, the trial court concluded that Cole was entitled to qualified official immunity because, unlike Gilmore and Pray, he "had no responsibility for developing the training program for train drivers." (R. at 4642). We agree. As explained, the relevant statutory and regulatory schemes impose no duty upon Louisville Metro or its authorized agents to develop a training program. Thus, to the extent certain Louisville Zoo employees chose to do so anyway, this would be a discretionary act.

The Lankfords, McKenzie, and Chance argue that Cole admitted responsibility for training zoo train operators, and thus was subject to the same ministerial statutory duties as the other guest services. However, we find Cole fares no differently than Pray in this regard. Like Pray, had Cole chosen to certify an employee as a train operator, *then*, vis-à-vis that employee, he would have been bound by the ministerial duties imposed by the pertinent statutes and regulations. But Cole played no role in Coffey's training or certification. Accordingly, he did

not have a ministerial duty to ensure Coffey was properly trained and able to safely operate the Green Train.

This leaves the plaintiffs' negligent-maintenance claim. The Lankfords, McKenzie, and Chance maintain that Cole had a ministerial duty to report maintenance issues to the facilities department and not to allow the Green Train to be operated if he knew or should know that its operation would expose the public to an unsafe condition likely to result in harm. KRS 247.236(4). The trial court resolved this argument with the following rationale:

> The only claim of negligence the plaintiffs make against Cole is that he failed to report that the low air buzzer and warning light on the train had been disconnected one year prior to the accident. However, there is no evidence in the record that Cole rode or inspected the train during this year.

(R. at 4642). In essence, the trial court concluded Cole was entitled to judgment as a matter of law because there was no evidence sufficient to create a genuine issue of material fact that Cole violated his ministerial duty to report maintenance issues to the facilities department. The Lankfords, McKenzie, and Chance argue that Cole regularly rode the trains, which gives rise to the inference that he knew or should have known about the inoperable buzzer and light. We have carefully reviewed Cole's deposition and are unable to locate any testimony indicating Cole regularly rode the trains between June 2008 and June 2009 (the period in which the buzzer and light were allegedly disconnected) or that Cole specifically rode or operated the Green Train during this time period. The Lankfords, McKenzie, and

Chance cannot defeat Cole's properly presented summary-judgment motion "without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). We affirm the trial court's decision as to Cole.

3. Alex Hoback and Ariel Saylor, Guest-Services Employees

The trial court dismissed the claims against Hoback and Saylor, finding they "violated no ministerial duty." (R. at 4645). The trial court explained that, while Hoback and Saylor trained Coffey on the Red and Black trains, "they were never given the responsibility to train Coffey on the Green Train" and "it is undisputed that the training they provided Coffey was not negligent in any way." (*Id.* at 4646).

The Lankfords, McKenzie, and Chance assert it was improper for the trial court to address run-of-the-mill negligence issues at this stage of the case. They claim only immunity – not liability – was before the trial court. A review of Hoback and Saylor's summary-judgment motion reveals they asserted alternative grounds for summary judgment, the first centered on general negligence principles and the second on immunity. The trial court granted their summary-judgment motion based on the former. We see nothing wrong with the trial court's decision.

Turning to the substance of the trial court's ruling, the Lankfords, McKenzie, and Chance argue that KRS 247.232(4) imposed ministerial duties upon Hoback and Saylor. They argue that, under that statute, Hoback and Saylor

had the ministerial duty to properly train Coffey, and to provide her with a copy of the Chance Manual. We are not persuaded.

Though quoted and referenced numerous times throughout this Opinion, it is important to emphasize that KRS 247.232(4) simply defines the term "operator." A zoo employee is only deemed an operator if certified. And, only certain persons, *i.e.,* Gilmore, Pray, Cole and possibly Barrett, were authorized to certify train operators. Certification is the credential that permits an employee to take control of a zoo train. Accordingly, we find the duty rested upon the guest-services supervisor certifying a zoo employee to ensure the employee was properly trained, was familiar with all of the Chance Manual, and knew the safety-based limitations of each train. KRS 247.232(4) imposed no duty upon Hoback and Saylor. We affirm the grant of summary judgment in their favor.

V. Apportionment

Finally, Chance argues that the jury should be permitted to apportion fault among all the defendants who caused the plaintiffs' injuries, even if some of those defendants are entitled to immunity. Chance seeks to include immune defendants – despite their insulation from liability – in the apportionment instruction to prevent non-immune parties, such as Chance, from bearing more than its own relative percentage of fault. Chance maintains that granting immunity to a zoo employee and then omitting him from the apportionment instruction will perpetuate a fraud upon the jury. Chance strongly disagrees with the Kentucky Supreme Court's holding in *Lexington–Fayette Urban County Government v.*

Smolcic, 142 S.W.3d 128 (Ky. 2004), and *Jefferson County Commonwealth Attorney's Office v. Kaplan*, 65 S.W.3d 916 (Ky. 2001), that fault cannot be apportioned to persons or entities that enjoy absolute or sovereign immunity because they fail to qualify as substantive "parties to the action" and therefore do not fall within the scope of KRS 411.182, Kentucky's apportionment statute.

While tantalizing, this argument is not ripe for adjudication before this Court. Though raised by Chance, the trial court has not yet ruled on the availability of apportionment. "[I]t is the accepted rule that a question of law which is not . . . passed upon by the trial court cannot be raised here for the first time." *Fischer v. Fischer*, 348 S.W.3d 582, 589 (Ky. 2011) (quoting *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 461, 466 (Ky. 1955)). We decline to address Chance's apportionment argument.

VI. Conclusion

For the foregoing reasons, we reverse that part of the Jefferson Circuit Court's November 16, 2012 Opinion and Order that held John Walczak was entitled to qualified official immunity. The remaining holdings of that order regarding liability and immunity of the various defendants are affirmed.

ALL CONCUR.

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