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OPINION OF DECEMBER 21, 2018, WITHDRAWN

# Commonwealth of Kentucky

## Court of Appeals

NO. 2017-CA-000043-MR

THOMAS PUGH, INDIVIDUALLY AND IN  
HIS OFFICIAL CAPACITY AS A LOUISVILLE/JEFFERSON  
COUNTY METRO POLICE OFFICER

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NOS. 08-CI-000204, 08-CI-000251,  
AND 08-CI-000533

CHRIS MEINHART, ADMINISTRATOR OF THE ESTATE OF  
DEMETRA BOYD; JUNENEAN HUSTON,  
AS PARENT, NEXT FRIEND AND ON  
BEHALF OF DEMETRICK BOYD, JR. A MINOR;  
TOSCA BELL, AS PARENT, NEXT FRIEND  
AND ON BEHALF OF LYNN-ASIA BELL,  
A MINOR; TOSCA BELL, AS PARENT,  
NEXT FRIEND AND ON BEHALF OF  
KEI-VONTEZ BELL, A MINOR; TOSCA BELL,  
AS PARENT, NEXT FRIEND AND ON BEHALF  
OF CORTEZ MOORE; LYNN TILLMAN  
AND DARNELL BOYD, AS PARENTS,  
NEXT FRIENDS AND ON BEHALF OF  
DEMETRIUS BOYD, A MINOR; DEMETRICK BOYD;  
AIRECA SMITH, INDIVIDUALLY  
AND AS PARENT AND NEXT FRIEND OF

LOUIS SIMMONS, III, A MINOR;  
EMPIRE FIRE & MARINE INSURANCE COMPANY;  
ENTERPRISE RENT-A-CAR COMPANY  
OF KENTUCKY; AND DEMETRICK BOYD, SR.

APPELLEES

AND

NO. 2017-CA-000594-MR

LOUISVILLE METRO GOVERNMENT

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NOS. 08-CI-000204, 08-CI-000251  
AND 08-CI-000533

CHRIS MEINHART, ADMINISTRATOR OF THE ESTATE OF  
DEMETRA BOYD; LYNN-ASIA BELL;  
TOSCA BELL, AS PARENT, NEXT FRIEND  
AND ON BEHALF OF KEI-VONTEZ BELL, A MINOR;  
TOSCA BELL, AS PARENT, NEXT FRIEND  
AND ON BEHALF OF CORTEZ MOORE;  
LYNN TILLMAN AND DARNELL BOYD,  
AS PARENTS, NEXT FRIENDS AND  
ON BEHALF OF DEMETRIUS BOYD, A MINOR;  
DEMETRICK BOYD; AIRECA SMITH,  
INDIVIDUALLY AND AS PARENT AND  
NEXT FRIEND OF LOUIS SIMMONS, III, A MINOR;  
EMPIRE FIRE & MARINE INSURANCE COMPANY;  
ENTERPRISE RENT-A-CAR COMPANY  
OF KENTUCKY; AND DEMETRICK BOYD, SR.

APPELLEES

OPINION  
REVERSING  
AND REMANDING

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BEFORE: COMBS AND LAMBERT, JUDGES; HENRY, SPECIAL JUDGE.<sup>1</sup>

HENRY, SPECIAL JUDGE: Thomas Pugh (“Pugh”) and Louisville/Jefferson County Metro Government (“Metro”), appeal from the orders of the Jefferson Circuit Court denying their motions for summary judgment based upon their claims of immunity. This matter was brought before us on interlocutory appeals. After reviewing the record in conjunction with the applicable legal authorities we reverse the Jefferson Circuit Court, finding that both parties are entitled to immunity and should be dismissed.

**BACKGROUND**

On January 6, 2007, Pugh, an Officer with the Louisville Metro Police Department (“LMPD”), was dispatched to investigate an assault and purse snatching incident. When Pugh arrived on the scene, the victim complained that she had been assaulted and that her purse had been stolen. She told Pugh that she had just been robbed and that she felt “lucky to be alive.” As the victim was talking to Pugh, she pointed out to Pugh that her assailant was in a red Chevrolet driving past them. Pugh began pursuit of the red Chevrolet. After following the

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<sup>1</sup> Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

vehicle for a while Pugh turned on his emergency lights and signaled for the car to pull over and stop. The vehicle at this point had not been traveling at a high rate of speed. While the car pulled over, as soon as Pugh exited his cruiser and began to approach the vehicle, the assailant started up the car and sped away. Pugh re-entered his vehicle and with emergency equipment activated, began pursuit of the vehicle. In an effort to evade Pugh, the vehicle began accelerating in speed, entered a parking lot, and drove over a sidewalk. Shortly thereafter, the vehicle reached speeds up to 65 miles-per-hour in an attempt to widen the gap between it and the police cruiser. The vehicle continued at a high speed when it approached an intersection where the traffic light was red. In its attempt to run the light at the intersection it collided with a vehicle driven by Demetrick Boyd, Sr. (“Sr.”).

In Sr.’s vehicle were seven passengers, the oldest of which was twelve. Demetra Boyd, a passenger in Sr.’s vehicle was ejected from the car on impact and killed. Demetra Boyd’s estate, the remaining six passengers, and Sr. filed three different lawsuits naming Thomas Pugh; Louisville/Jefferson County Metro Government; Donta Jones (“Jones”);<sup>2</sup> Demetrick Boyd, Sr.; Enterprise Rent-A-Car Company of Kentucky; and Empire Fire and Marine Insurance Company.<sup>3</sup> These cases were consolidated by the trial court on February 19, 2008.

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<sup>2</sup> Jones was determined to be the driver of the vehicle which Pugh pursued.

<sup>3</sup> Each suit contained plaintiffs and defendants which varied. The case numbers are 08-CI-000204, 08-CI-000251, and 08-CI-000533.

On January 14, 2008, Metro filed a motion seeking dismissal based upon its defense of sovereign immunity. On April 2, 2008, Pugh filed a motion to dismiss based upon his defense of qualified official immunity, or in the alternative that his actions were not the proximate cause of the accident. The trial court determined that Pugh was not entitled to qualified official immunity, and Pugh filed an interlocutory appeal to this court.<sup>4</sup> On December 20, 2010, we reversed the trial court ruling, determining that its decision regarding Pugh's immunity claim was prematurely made. We remanded the case back to the trial court with instructions that it take additional discovery concerning whether Pugh adhered to the Standard Operating Procedures ("S.O.P.") of the Metro Police Department. We stated that "The S.O.P. includes procedures for determining when an officer should not pursue a vehicle and when a pursuit should be terminated." We stated that under the S.O.P. of LMPD "Whether a pursuit should be initiated depends, in part, on the seriousness of the perpetrator's offense." Using those guidelines, we remanded the case to the trial court to determine if Pugh's actions were in accordance with the LMPD's S.O.P. and to determine if he was entitled to qualified official immunity.

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<sup>4</sup> *Pugh v. Randolph*, 2009-CA-000755-MR, 2010 WL 5018184 (Ky. App. December 10, 2010).

On March 20, 2014, Enterprise Rent-A-Car filed an appeal with this court, 2014-CA-00428, which was dismissed on May 28, 2015, as being interlocutory, and sent back to the trial court.

On December 5, 2016, the trial court denied the renewed motion for summary judgment filed by Pugh, and he filed a second interlocutory appeal on April 10, 2017. On March 23, 2017, the trial court denied Metro's motion to dismiss second amended complaint with prejudice based upon their claim of sovereign immunity, and they filed an interlocutory appeal on April 10, 2017. On July 14, 2017, we consolidated both appeals by order of the prehearing conference attorney.

This appeal followed.

### **STANDARD OF REVIEW**

This Court has jurisdiction of interlocutory appeals concerning denial of a defense of sovereign immunity. *Louisville/Jefferson County Metro Government v. Cowan*, 508 S.W.3d 107, 109 (Ky. App. 2016) (citing *Breathitt County Board of Education v. Prater*, 292 S.W. 3d 883, 886 (Ky. 2009)). The question of whether a defendant is protected by the doctrine of official qualified immunity is a question of law, which we review *de novo*. *City of Brooksville v. Warner*, 533 S.W.3d 688, 692 (Ky. App. 2017) (quoting *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006)).

## ANALYSIS

We shall deal with Pugh's appeal first. Upon remand from our court in Pugh's first appeal, the trial court took additional discovery. Pugh filed a motion for summary judgment, and in its order of December 5, 2016, the trial court determined that Pugh complied with the LMPD's S.O.P. when he initiated and continued the pursuit of Donta's vehicle. However, the trial court determined that his compliance with the S.O.P. was "ministerial due to their [S.O.P.] dominant nature being the pursuit of a vehicle driven by someone suspected of having committed a felony and then fleeing."

In the context of a claim for qualified official immunity, the denial of a summary judgment denies the defendant immunity from liability as well as the lawsuit. *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010). In Pugh's case, while the trial court determined that Pugh had complied with the S.O.P. of the LMPD, it determined that he was not entitled to qualified official immunity. The trial court based its decision on the repeated use of the term "shall" in the S.O.P., holding that compliance with the provisions in the S.O.P. involved merely the execution of a specific act arising from a fixed and designated set of facts. We disagree.

The S.O.P. of the LMPD states that it is the responsibility of the officer to "weigh the immediate danger or potential danger to the public should the

suspect be allowed to remain at large against the danger or potential danger created by the pursuit itself.” This determination by the officer is based upon his assessment of numerous factors as listed in the S.O.P. (LMPD S.O.P. 12.1.3). While the S.O.P. states that the pursuing officer “shall” consider the factors listed, the decision of how to balance all the issues, the decision of when to begin and when to end the pursuit, are all decisions left to the discretion of the officer on the scene. As we have previously stated “[d]iscretionary acts or functions, [are] those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment . . . .” *City of Brooksville v. Warner*, 533 S.W.3d 688, 692 (Ky. App. 2017). Whereas, a ministerial act is “one that requires 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.* at 692.

The issue of pursuit is one which requires discretion on the part of the officer involved. The guidelines in the S.O.P. are just that, guidelines which Pugh was required to consider before he decided to begin his pursuit. The trial court reasoned that even though Pugh had complied with the requirements of the S.O.P. prior to initiating his pursuit of Donta, his decision was one of mere obedience that the S.O.P. was absolute, certain, and imperative; in essence a checklist, leaving him no discretion in whether to pursue Donta or not. However, the record shows



that while Pugh was required to consider the factors listed in the S.O.P., he had to exercise his own discretion before deciding to begin, continue, or end the pursuit. We have previously stated that “An officer has discretion to decide whether to begin, continue, or end the emergency pursuit[.]” *City of Brooksville* at 694. We believe that Pugh, in reliance on the S.O.P., was required to exercise discretion on whether to pursue Donta, continue the pursuit, or terminate the pursuit.

Under the standard set forth in *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001), for Pugh to qualify for immunity, his actions must be discretionary acts or functions, performed in good faith, and within the scope of his authority. The trial court found that Pugh’s actions were within the scope of his authority and that he acted in good faith and we concur. However, the trial court’s determination that his actions were ministerial in nature was in error. The determination of whether a defendant is protected by immunity is a question of law. *Rowan County*, 201 S.W.3d at 475. Since Pugh has satisfied all of the requirements of *Yanero*, he is entitled to qualified official immunity, and the case against him should be dismissed. Because Pugh was acting in his official capacity, performing a discretionary act, Pugh has no liability in his individual capacity. *Autry v. Western Kentucky University*, 219 S.W.3d 713, 717(Ky. 2007) (citing *Yanero*, 65 S.W.3d 522-23).

The second issue raised on appeal is the trial court's denial of Metro's motion to dismiss based on its claim of sovereign immunity. We find that the trial court's opinion, entered on March 23, 2017, erred when it denied Metro's motion to dismiss them based upon their claim of sovereign immunity. There is no question that Metro is essentially an arm of the Commonwealth, and as such is entitled to absolute immunity and is entitled to be dismissed as a party to the litigation. *Louisville/Jefferson County Metro Government*, 508 S.W.3d at 109.

### **CONCLUSION**

Based upon the foregoing, we reverse the Jefferson Circuit Court's opinion of December 5, 2016, denying Pugh summary judgment based upon his claim of qualified official immunity and we reverse the trial court's opinion of March 23, 2017, denying Metro's motion to dismiss based upon its claim of sovereign immunity and remand this matter back to the trial court to enter orders dismissing both parties.

**ALL CONCUR.**

BRIEFS AND ORAL ARGUMENT  
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ORAL ARGUMENT FOR  
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