

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-001548-MR

BRIAN LUCKETT

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BRIAN C. EDWARDS, JUDGE  
ACTION NO. 11-CI-001829

WILLIAM MURRELL

APPELLEE

OPINION  
REVERSING AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Jefferson Circuit Court denying summary judgment to the Appellant, Brian Lockett, on the issue of sovereign immunity. Based upon the following, we reverse the decision of the trial court and remand the case.

## BACKGROUND SUMMARY

On March 16, 2010, Officer Luckett was in the Sheppard Square housing project in Louisville when he observed Appellee, William Murrell, in the street. Murrell was intoxicated and stated that he was cleaning the streets. When Officer Luckett approached Murrell, he did not believe he was a police officer, but stated that he thought Officer Luckett was trying to buy drugs. Officer Luckett had a canine (Willie) with him which he let out of the cargo area of the Ford Explorer he was driving upon stopping at the scene.

Officer Luckett testified that he believed Murrell could be dangerous and that he had several items with him which could be considered weapons. Specifically, he had a shovel, a pipe, a screwdriver, a broom and a knife. Officer Luckett also stated that he noticed a bulge in Murrell's pocket and was concerned that he had a gun. Officer Luckett approached Murrell who would not cooperate with his search. Officer Luckett and Murrell then engaged in a physical altercation at which time the canine attacked Murrell until Officer Luckett had him subdued. Murrell was subsequently arrested for Assault III, Alcohol Intoxication in a Public Place, Wanton Endangerment I, and Resisting Arrest. Murrell entered into a plea agreement and was referred to the Mental Health Diversion Program where he received treatment through Seven Counties.

Murrell brought this civil action against Louisville Jefferson County Metro Government ("Metro") and Officer Luckett. Both Metro and Officer Luckett filed motions for summary judgment with the trial court, and on August

23, 2103, the trial court granted Metro's motion, but denied Officer Lockett's. The trial court held that Officer Lockett's actions were discretionary, but that he acted in bad faith. Officer Lockett then filed this appeal.

### STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine whether the trial court correctly found "that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03.

"[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists . . . the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court's decision and must review the issue *de novo*. *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the issues before us.

## DISCUSSION

Immunity from suit is not only available to the state, but “also extends to public officials sued in their representative (official) capacities....” *Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2001).

Qualified official immunity is an affirmative defense that must be specifically pled. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). Official immunity can be absolute, as when an officer or employee of the state is sued in his/her representative capacity, in which event his/her actions are included under the umbrella of sovereign immunity... Similarly, when an officer or employee of a governmental agency is sued in his/her representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled... But when sued in their individual capacities, public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment. 63C Am.Jur.2d, Public Officers and Employees, § 309 (1997). Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment, *Id.* § 322; (2) in good faith; and (3) within the scope of the employee's authority. *Id.* § 309; Restatement (Second) Torts, *supra*, § 895D cmt. g.

*Yanero, supra*, at pp 521, 522.

The trial court determined that the deployment of the canine was a discretionary function by Officer Lockett. We have continued to recognize the distinction between discretionary and ministerial acts and have held that the wrongful performance of a ministerial act can subject the officer or employee to

liability for damages. *Kea–Ham Contracting, Inc. v. Floyd County Dev. Auth.*, 37 S.W.3d 703 (Ky. 2000). An act is not necessarily “discretionary” just because the officer performing it has some discretion with respect to the means or method to be employed. *Franklin County v. Malone*, 957 S.W.2d 195, 201 (quoting *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (Ky. 1959)). “In the final analysis, the decision as to whether a public official’s acts are discretionary or ministerial must be determined by the facts of each particular case...” *Caneyville Volunteer Fire Dept. v. Green’s Motorcycle Salvage, Inc.*, 286 S.W.3d 790 (Ky. 2009).

Discretionary or judicial duties are those such as necessarily 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. Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed.

*Collins v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet*, 10 S.W.3d 122, 125 (Ky. 1999) (quoting *Franklin County v. Malone, supra*, at 201 (Ky. 1997), reversed on other grounds by *Yanero, supra*.)

The trial court then went on to determine that “Officer Lockett was not acting in good faith and was not acting within his authority to deploy [the canine] in such a manner as he did. Therefore, Officer Lockett is not eligible for qualified official immunity...” Opinion, 8-23-13 p. 7.

In *Rowan County v. Sloas*, 201 S.W.3d 469, 475-76 (Ky. 2006), the Kentucky Supreme Court cited *Yanero, supra*, that no immunity is afforded for the negligent performance or omissions of a ministerial act, or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive, i.e., again the “bad faith” element. And “[o]nce the officer or employee has shown *prima facie* that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was in [bad] faith.”

The trial court cited to LMPD SOP 12.14.3 as the basis for its determination:

Canine teams will only be deployed to locate and apprehend suspects who have either committed a felony offense or when there is a reasonable suspicion to believe that they have committed a felony offense.

The following is a list of general situations for which the Canine Unit could be utilized:

- \* Building searches to locate and apprehend concealed felony suspects;
- \* Tracking, locating and apprehending felony suspects who have fled the scene of a crime;
- \* Area searches to locate and apprehend felony suspects concealed in large outdoor areas;
- \* Article searches to locate property, drugs, explosive devices or other evidence;
- \* To apprehend a fleeing felon;
- \* To search for suspect(s) by walking along suspected hiding areas with the canine on lead and air scenting for the odor of a person;

\* To respond to an attack on the canine's officer.

The actions by Officer Luckett did not meet the burden of bad faith under *Yanero*. Murrell did not show that Officer Luckett's use of Willie at the scene was "with the malicious intention to cause a deprivation of constitutional rights or other injury...." *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007 ) (quoting *Yanero*, 65 S.W.3d at p. 523). Consequently, it was in error for the trial court to deny Officer Luckett's Motion for Summary Judgment on the issue of qualified immunity. We, therefore, reverse this action and remand to the trial court for entry on an order granting Luckett's motion for summary judgment of qualified immunity.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa A. Schweickart  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Chadwick N. Gardner  
Louisville, Kentucky