

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-002130-MR

MELINDA L. WILSON, EXECUTRIX OF THE  
ESTATE OF DONNA J. JOHNSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE  
ACTION NO. 00-CI-007750

JEFFERSON COUNTY EMERGENCY MEDICAL SERVICE;  
LYLE E. YEAGER; KRISTIAN L. MORRISON; AND  
MARK LITTLE

APPELLEES

### OPINION AND ORDER

1.) OPINION AFFIRMING IN PART,  
REVERSING IN PART, AND REMANDING

2.) ORDER GRANTING IN PART AND  
DENYING IN PART A MOTION TO EXCEED  
PAGE LIMITATION OF REPLY BRIEF

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BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE: Summary judgment was granted to a county  
Emergency Medical Service (EMS) and its employees, and a fireman  
for the alleged negligence of the EMS and fire department  
personnel on the basis of governmental and official immunity. We  
affirm summary judgment as to the EMS but reverse on a matter of

law and remand as to the three employees (in their individual capacities) for a trial.

On December 4, 1999, Donna Johnson, the appellant, was found slumped over in a car in a parking lot in Jefferson County. Someone called 911 and both the Jefferson County EMS and the Highview Fire Department (Fire Department) responded. Appellees, Kristian L. Morrison and Lyle E. Yeager, worked for the EMS. Appellee, Mark Little, worked for the Fire Department. The EMS arrived first, so Morrison and Yeager took charge with Little assisting. The EMS transported the appellant to the hospital with Little assisting. The appellees were sued for negligence in their official capacities and the three personnel were also sued in their individual capacities.

Motions for summary judgment were filed, contending any negligence action would be barred by governmental immunity, official immunity, and by KRS 411.148, the "Good Samaritan Act." The trial court granted summary judgment on the grounds that sovereign immunity and governmental immunity shielded all appellees. The trial court did not address application of the "Good Samaritan Act."

While this appeal was pending, our Supreme Court decided Yanero v. Davis, Ky., 65 S.W.3d 510 (2001) and Commonwealth Board of Claims v. Harris, Ky., 59 S.W.3d 896 (2001), both of which are now final and change some of the rules of law regarding governmental and official immunity.

The appellee, Jefferson County EMS, was found by the trial court to have been created under KRS 108.100, by the

Jefferson County Fiscal Court. As such it is classified as a "local government" per KRS 65.200(3). The Court also found the Highview Fire Department operates under KRS 75.040 (created under KRS 75.010 to KRS 75.031), which allows a fire district to "operate a fire department and emergency ambulance service. . . ." KRS 75.040(1). Again under KRS 65.200(3), the Highview Fire Department would be a "local government."

The trial court also found that the provision of emergency medical services has traditionally been a governmental function, not a proprietary function, and that the three employees that were providing the medical care were performing a ministerial function under Gould v. O'Bannon, Ky., 770 S.W.2d 220, 222 (1989). The court granted summary judgment to the county and the Jefferson County Emergency Medical Service, based on sovereign immunity. The trial court also granted the three employees official immunity based on Franklin County v. Malone, Ky., 957 S.W.2d 195 (1997), which held that as long as the official acts were within the scope of authority of office, the actions are those of the government and the official was entitled to official immunity. On appeal, the appellant did not name the county nor contest the finding that the claim was barred by sovereign immunity. As mentioned earlier, subsequent decisions of our Supreme Court changed some of the holdings in Malone after the trial court's rulings.

In Yanero v. Davis, Ky., 65 S.W.3d 510 (2001), and Commonwealth Board of Claims v. Harris, Ky., 59 S.W.3d 896 (2001), our Supreme Court overruled in part Franklin County v.

Malone, Ky., 957 S.W.2d 195 (1997). Yanero, at 520, 521, applies "governmental immunity" to a governmental corporation performing a public or governmental function, but not when performing a proprietary function. Thus, based on the finding of the trial court in the case sub judice, the trial court was correct in dismissing the claim against the EMS, and we affirm that part of the judgment.

The two EMS employees and the one Fire Department employee were found to have official immunity under Malone. Yanero and Harris overruled that part of Malone and held that when sued in their individual capacities, public officials only enjoy qualified official immunity. "Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions. . . ." Yanero at 522. "Conversely, an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, . . ." Id. Consequently, we affirm that part of the trial court's findings that the three employees were performing ministerial acts, but we must reverse the trial court's holding that would grant official immunity for the performance of "negligent ministerial acts."

Also before this panel is appellant's motion to exceed the page limit of the reply brief. Having reviewed the matter, we note that beginning on page 11 of the reply brief, the appellant begins his discussion of the "Good Samaritan Act." KRS 411.148. In as much as the trial court made no findings on this issue, we grant a one-half page extension and deny the extension

to the extent it includes a discussion of the "Good Samaritan Act." See Commonwealth, Transportation Cabinet Department of Highways v. Taub, Ky., 766 S.W.2d 49, 51 (1988).

Accordingly, we affirm summary judgment in favor of the Jefferson County Emergency Medical Service, and we reverse the summary judgment in favor of the two EMS employees and the one Fire Department employee, and remand for a trial consistent with this opinion.

ALL CONCUR.

ENTERED: December 13, 2002

/s/ Wil Schroder  
JUDGE, COURT OF APPEALS

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