

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000694-MR

BRADLEY SCOTT TACKETT  
AND ROBERTA TACKETT

APPELLANTS

v.

APPEAL FROM SCOTT CIRCUIT COURT  
HONORABLE PAUL F. ISAACS, JUDGE  
ACTION NO. 09-CI-00074

ALLISON TIERNAN, DAVE BUTTON  
AND LINDA TRUE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, LAMBERT, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This is an appeal from the denial of the trial court to strike for cause a specific juror and the granting of a motion for summary judgment in favor of the immunity for one of the defendants. Based upon the following, we affirm the decisions of the trial court.

## BACKGROUND SUMMARY

On August 28, 2008, Appellee Allison Tiernan was driving a school bus for the Scott County Board of Education (“Board”) from Johnson Mill Road in Scott County. When she made the left-hand turn from Johnson Mill Road on to Newtown Pike, she hit Bradley “Scott” Tackett who was riding a motorcycle on Newtown Pike. Tackett was severely injured in the accident.

On January 23, 2009, Tackett and his wife, Roberta Scott Tackett, brought suit in Scott Circuit Court asserting that Tiernan had failed to comply with her driving duties by failing to yield the right of way. During Tiernan’s deposition on August 6, 2009, Tackett learned that Tiernan had complained to the transportation director, Dave Button, and the route supervisor, Linda True, that she believed the left-hand turn required at Johnson Mill Road and Newtown Pike was dangerous due to the blind curve on Newtown Pike. Button denied receiving such a complaint. After the accident, however, Button changed the bus route by eliminating the left-hand turn onto Johnson Mill Road.

On August 26, 2009, the Tacketts filed suit against Button and True and the case was consolidated with the one filed against Tiernan. True was granted summary judgment in her favor without objection from the Tiernans because it was established during discovery that she had no authority to either direct or make changes to bus routes in her position with the School Board.

On August 16, 2010, Button filed a motion for summary judgment with the trial court asserting that he was immune from liability under the doctrine

of sovereign immunity. He contended that his actions in creating bus routes were discretionary duties, rather than ministerial and, thus, he was entitled to immunity. The trial court granted Button's motion on November 15, 2010. It held that Button did not owe a duty to the Tacketts and that his actions were discretionary rather than ministerial and subject to sovereign immunity.

The Tacketts proceeded to trial with their claims against Tiernan. The jury found in favor of Tiernan on the question of whether she breached one or more of her duties to the Tacketts. On March 19, 2012, the trial court entered the Trial Verdict and Judgment finding in favor of Tiernan. The Tacketts then brought 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). We review legal issues such as whether Button's actions in creating bus routes were a ministerial duty *de novo*. *Branham v. Stewart*, 307 S.W.3d 94, 97 (Ky. 2010).

A trial court's denial of a party's motion to strike a juror is reviewed under the abuse of discretion standard. *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007). With these standards in mind, we will review the rulings of the trial court.

## DISCUSSION

The Tacketts first contend that Button's actions in creating bus routes were ministerial and, accordingly, he owed a duty to them to create a safe bus route. Under the Kentucky Department of Education's Pupil Transportation Management Manual ("Manual"), the duties of implementing safe transportation for public school pupils is within the duties of each school district's transportation director. The Manual specifically sets forth the following responsibilities and duties of the transportation director:

1. Work with the driver trainer instructor in developing safe and efficient routing of buses; determine when adjustments are necessary and the best way to make these adjustments.

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Maintain and distribute schedules to drivers and students being transported and identify all hazards on the route such as railroad crossings, narrow bridges, etc.

2. Investigate all requests and complaints concerning pupil transportation.
3. Review routes for possible hazards.
4. Review all requests and complaints concerning pupil transportation.
5. Establish routes so that they will diminish the necessity for school buses to traverse rail grade crossings at unprotected points or where the visibility is obstructed.
6. Once routes are designed, the transportation director/supervisor or designee should conduct a review, so that they may observe any factors which may indicate a route change.

Manual, Appendix 5, pp. 5-19.

The Tacketts argue that the Manual establishes that Button owed a duty to other motorists to determine whether any of the Scott County bus routes posed any hazards and specifically to avoid areas where visibility was obstructed. They assert that he also had a duty to review and act upon any complaints regarding the safety of his bus routes.

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 issued 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*, 521- 522.

Courts have continued to recognize the distinction between discretionary and ministerial acts in sovereign immunity cases and have held that the wrongful performance of ministerial acts can subject the officer or employee to liability for resulting damages. *Yanero*, 65 S.W.3d at 523 (citing *Kea-Ham Contracting, Inc. v. Floyd County Dev. Auth.*, 37 S.W.3d 703 (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*, *supra*, at 201 (quoting *Upchurch v. Clinton County*, 330 S.W.2d 428, 430 (1959)).

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

*Collins v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet*, 10 S.W.3d 122, 125 (Ky. 1999), quoting *Franklin County v. Malone*, 957 S.W.2d 195, 201 (Ky. 1997), *reversed on other grounds by Yanero, supra*. “[I]n 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, 809 (Ky. 2009).

In *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995), the Kentucky Supreme Court held that:

To establish a negligence claim against a public official, the complaint must allege a violation of a special duty owed to a specific identifiable person and not merely a breach of general duty owed to the public at large.

In granting summary judgment to Button, the trial court held:

Although a public official has a general duty to perform their roles in a proper manner, when that general duty requires action on the part of other people, as in this case driving a school bus, there are too many independent actions over which the public official has no control which could lead to a[n] individual being harmed. It would be improper to hold the official responsible

because of the generalized duty for any acts which occurred outside his specific role.

Trial Court Opinion at p. 3.

We agree with the decision of the trial court. Button's acts in creating a bus route were discretionary and he did not owe a specific duty to the Tacketts in his actions creating the bus route. While the Tacketts argue that whether Button breached his duty and caused injury is an issue of material fact, we disagree. The existence of a duty is what is at issue here and that is a legal question. Thus, we affirm the granting of summary judgment to Button.

The Tacketts' final argument is that the trial court erred in denying their motion to strike Juror No. 91 based on her statement that she could not be fair. As a result, they assert that this case should be remanded for a new trial with respect to the claim against Tiernan due to that error.

During voir dire, the trial judge described the case as a motor vehicle collision and questioned the prospective jurors as to whether this fact alone would make them biased against the case. At that time, Juror No. 91 raised her hand and explained to the trial court that she had negative feelings about the trial process due to having been sued in the past. She also stated that it was possible she would have a hard time being impartial.

The trial judge then asked the juror whether she could listen to the evidence in this case and come to a decision based solely on the evidence that was presented. Juror No. 91 then stated that she could try. The trial judge then allowed



Juror No. 91 to remain on the panel. The Tacketts then used one of their strikes to remove Juror No. 91 from the jury. They now argue that the trial court committed reversible error in failing to strike this juror on the basis of her original answer based on the holdings of *Bowman v. Perkins*, 135 S.W.3d 399, 403 (Ky. 2004), and *Fugate v. Commonwealth*, 993 S.W.2d 931, 938 (Ky. 1999).

In *Shane v. Commonwealth*, 243 S.W.3d 336, 341 (Ky. 2007), the Kentucky Supreme Court overruled the long-standing rule that a trial court's failure to strike a juror with bias was not reversible error as long as the juror did not become a member of the jury deciding the case. In *Shane*, the Court held that forcing a party to use a peremptory challenge to remove a juror whom the trial court should have removed for cause is a violation of a substantial right and automatically constitutes reversible error.

In *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009), the Court honed its decision in *Shane* and held that, “[i]n order to complain on appeal that he was denied a peremptory challenge by a trial judge’s erroneous failure to grant a for-cause strike of juror, [a litigant] must identify on his strike sheet any additional jurors he would have struck.” Tiernan argues that the Tacketts have not identified any attempt by them, pursuant to the holding in *Gabbard*, to preserve the argument that they were forced to use a peremptory strike with Juror No. 91. The recent case of *Grubb v. Norton Hospitals, Inc.*, \_\_S.W.3d\_\_, Ky. 2013) 2013 WL 2285066, applied the principles set forth in *Shane* and *Gabbard*. Thus, Tiernan contends that their argument is not preserved for review. We agree.

Pursuant to the holdings in *Gabbard* and *Grubb*, in order to preserve for appeal the denial of a for-cause strike, there must be an identification on the strike sheet which juror(s) should have been struck. In this case, the Tacketts did not so identify Juror No. 91 and, therefore, we may not review the trial court's decision.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Tyler S. Thompson  
Liz J. Shepherd  
Daniel Tysen Smith, II  
Louisville, Kentucky

BRIEF FOR APPELLEES:

John Gary McNeill  
Lexington, Kentucky  
  
John S. Harrison  
Frankfort, Kentucky