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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001500-MR

TIFFANY WASHINGTON; ROBERT MITCHEM; VAUGHN CARTER; WALTER DUNCAN; JEROME RENDER; GREGORY PEYTON; GEORGE MOZEE; AND NAOMI WEST, AS PARENT AND NEXT FRIEND OF JOSHUA FLOYD — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 10-CI-001183

CRYSTAL MARLOWE, IN HER INDIVIDUAL AND OFFICIAL CAPACITY

APPELLEE

AND

NO. 2013-CA-001617-MR

CRYSTAL MARLOWE — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT

v. HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 10-CI-001183

TIFFANY WASHINGTON;
VAUGHN CARTER; AND
ROBERT MITCHEM APPELLEES

AND

NO. 2013-CA-002013-MR

CRYSTAL MARLOWE APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 10-CI-001183

JOANNE WHITEHEAD AS
PARENT AND NEXT FRIEND
OF ROSHAUD WHITE APPELLEE

AND

NO. 2014-CA-000141-MR

CRYSTAL MARLOWE APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 10-CI-001183

DALE L. TODD APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
APPEAL NO. 2013-CA-001500-MR;
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING APPEAL NO. 2013-CA-001617-MR;
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
APPEAL NO. 2013-CA-002013; AND
REVERSING AND REMANDING APPEAL NO. 2014-CA-000141-MR

** ** ** ** **

BEFORE: MAZE, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Crystal Washington, Robert Mitchem, Vaughn Carter, Walter Duncan, Jerome Render, Gregory Peyton, George Mozee, and Naomi West, as parent and next friend of Joshua Floyd, bring Appeal No. 2013-CA-001500-MR from a July 29, 2013, partial summary judgment of the Jefferson Circuit Court. Crystal Marlow brings Appeal No. 2013-CA-001617-MR from the July 29, 2013, partial summary judgment, and brings Appeal No. 2013-CA-002013-MR from the July 29, 2013, partial summary judgment and an October 31, 2013, order. Marlowe also brings Appeal No. 2014-CA-000141-MR from a January 9, 2014, partial summary judgment of the Jefferson Circuit Court. We affirm in part, reverse in part, and remand Appeal No. 2013-CA-001500-MR. We affirm in part, reverse in part and remand Appeal No. 2013-CA-001617-MR. We affirm in part,

reverse in part, and remand Appeal No. 2013- CA-002013-MR. We reverse and remand Appeal No. 2014-CA-000141-MR.[1]

These appeals center around investigative acts performed by Crystal Marlowe as a detective for the Louisville Metro Police Department (LMPD)[2] during the period of December 2007 through January 2010, which resulted in the alleged wrongful arrest and/or indictment of individuals for various crimes. Upon the filing of a complaint and amended complaints, Tiffany Washington, Robert Mitchem, Vaughn Carter, Walter Duncan, Jerome Render, Gregory Peyton, George Mozee, and Naomi West, as parent and next friend of Joshua Floyd, Roshaud White, and Dale L. Todd (collectively referred to as claimants) alleged, *inter alia*, that Marlowe, in her individual and official capacities, improperly caused various felony and/or misdemeanor criminal charges to be filed against each individual claimant. Claimants maintained that Marlowe breached numerous duties as a detective directly resulting in the improper criminal charges being filed against them. Specifically, claimants raised the following claims: malicious prosecution, abuse of process, assault and battery, intentional and negligent infliction of emotional distress, defamation, false imprisonment, and sundry

[1] By Order entered March 3, 2015, this Court ordered Appeal No. 2013-CA-001500-MR, Appeal No. 2013-CA-001617-MR, Appeal No. 2013-CA-002013-MR and Appeal No. 2014-CA-000141-MR to be heard together for judicial economy.

[2] Louisville Metro Police Department is an agency of the Louisville/Jefferson County Metro Government, and as such is entitled to the protection of sovereign immunity. *Parking Auth. of River City, Inc. v. Bridgefield Cas. Ins. Co.*, 477 S.W.3d 598 (Ky. App. 2015) (citing *Lexington-Fayette Urban County Gov't. v. Smolcic*, 142 S.W.3d 128 (Ky. 2004)).

constitutional violations. Claimants sought both compensatory and punitive damages.

Marlowe filed answers to the complaints. Therein, Marlowe denied breaching any duty owed to claimants and alleged that she properly performed her duties as a police detective. Marlowe also asserted the defense of immunity to all claims raised by claimants.

Subsequently, Marlowe filed motions for summary judgment arguing that she was entitled to the defense of qualified official immunity as to the claims asserted against her in her individual capacity and was entitled to sovereign immunity as to the claims asserted against her in her official capacity. Marlowe also maintained that she breached no duties to claimants and did not act improperly as a police detective as to claimants' various criminal charges.

By partial summary judgment entered July 29, 2013, the circuit court determined that the claims against Marlowe in her official capacity were barred by sovereign immunity and dismissed same. The court also concluded that Marlowe in her individual capacity was entitled to qualified official immunity as to the claims asserted by the individual claimants Duncan, Render, Peyton, Mozee, Floyd, and White, and dismissed all claims asserted by these claimants. However, the circuit court held that Marlowe in her individual capacity was not entitled to qualified official immunity as to the claims asserted by the individual claimants, Washington, Carter, and Mitchem. The circuit court then determined that Washington and Carter failed to set forth a *prima facie* case upon the claim of

defamation and granted summary judgment dismissing that claim against Marlowe. The court also granted summary judgment and dismissed the claims of assault and battery, defamation, and false imprisonment raised by Mitchem, as he also failed to set forth a *prima facie* case thereupon. The court included complete Kentucky Rules of Civil Procedure (CR) 54.02 language in its judgment but limited finality by including the phrase "in part."[3]

Thereafter, on August 7, 2013, White and Peyton filed a CR 59.05 motion to alter, amend, or vacate the July 29, 2013, partial summary judgment. They argued that the circuit court erred by concluding that their claims against Marlowe were barred by qualified official immunity.

Some twenty days later, on August 27, Washington, Mitchem, Carter, Duncan, Render, Peyton, Mozee, Floyd, and White filed a Notice of Appeal (Appeal No. 2013-CA-001500-MR) in the Court of Appeals from the July 29, 2013, partial summary judgment. On the same day, Marlowe also filed a Notice of Appeal (Appeal No. 2013-CA-001617-MR) from the same July 29, 2013, partial summary judgment asserting error in the denial of qualified official immunity as to the claims of Washington, Mitchem, and Carter.[4]

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[3] The July 29, 2013, partial summary judgment read, in relevant part:

> There being no just cause for delay, this is a final and appealable Order, in part.

[4] Curiously, the two appeals (Appeal Nos. 2013-CA-001500-MR and 2013-CA-001617-MR) were filed two minutes apart in the Jefferson Circuit Court Clerk's Office. Crystal Marlowe's appeals (Appeal Nos. 2013-CA-001617-MR, 2013-CA-002013-MR, and 2014-CA-000141-MR) are clearly interlocutory but immediately appealable under *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009).

By Opinion and Order entered October 31, 2013, the circuit court granted in part and denied in part the CR 59.05 motion filed by White and Peyton. The court held that Marlowe was not entitled to qualified official immunity as to the claims raised by White and so amended the July 29, 2013, partial summary judgment. Conversely, the court concluded that Marlowe was entitled to qualified official immunity as to claims asserted by Peyton.

On November 22, 2013, Marlowe filed a Notice of Appeal (Appeal No. 2013-CA-002013-MR) from the October 31, 2013, Opinion and Order denying her qualified official immunity at to White's claims.

Then, by partial summary judgment entered January 9, 2014, the circuit court granted in part and denied in part Marlowe's motion for summary judgment as to claimant Todd. The circuit court determined that Marlowe was not entitled to qualified official immunity upon Todd's claims for malicious prosecution, abuse of process, assault and battery, intentional and negligent infliction of emotional distress, defamation, and false imprisonment.

On January 22, 2014, Marlowe then filed a Notice of Appeal (Appeal No. 2014-CA-000141-MR) from the January 9, 2014, partial summary judgment denying her qualified official immunity as to Todd's claims.

Herein, we are confronted with four appeals. Appeal No. 2013-CA-001500-MR is brought on behalf of five (Duncan, Render, Peyton, Mozee, and Floyd) of the nine claimants challenging the circuit court's summary judgment granting Marlowe qualified official immunity and dismissing their claims. Appeal

No. 2013-CA-001617-MR, Appeal No. 2013-CA-002013-MR, and Appeal No. 2014-CA-000141-MR are interlocutory appeals brought by Marlowe challenging the circuit court's summary judgments denying her qualified official immunity.

By order entered May 14, 2015, the Court of Appeals placed this case in abeyance pending resolution by the Kentucky Supreme Court a trilogy of cases addressing the issue of whether qualified official immunity could bar the intentional tort claim of malicious prosecution. The adjudication of this issue directly affected our review in this appeal. An Opinion was rendered by the Supreme Court in September of 2016 in *Martin v. O'Daniel*, 507 S.W.3d 1 (Ky. 2016), which became final on February 16, 2017. By order entered April 14, 2017, this appeal was returned to this Court's active docket for final resolution.

All four appeals emanate from summary judgments and involve the sole issue of Marlowe's entitlement to qualified official immunity. Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). And, all facts and inferences are to be viewed in a light most favorable to the nonmoving party. *Steelvest, Inc.*, 807 S.W.2d 476.

Qualified official immunity is applicable to a discretionary act negligently performed by a public official when done so in good faith and within the scope of the official's authority. *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). Thus, the public official must be performing a discretionary act as opposed to a

ministerial act. *Id.* A public official has no qualified immunity in relation to the performances of a ministerial act. A ministerial act is generally "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 522. Conversely, a discretionary act is one "involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment . . . ." *Id.* at 522.

In Kentucky, the good faith requirement of qualified official immunity has two components – objective and subjective. *Yanero*, 65 S.W.3d 510. The Kentucky Supreme Court has defined the two components:

> Thus, bad faith [or the lack of good faith] "can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded a person in the plaintiff's position, i.e., objective unreasonableness." Acting in the face of such knowledge makes the action objectively unreasonable. Or, bad faith can be predicated on whether the public employee "willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive," which requires a subjective analysis.

Bryant v. Pulaski Cnty. Det. Ctr., 330 S.W.3d 461, 466 (Ky. 2011) (citations omitted). A lack of good faith may be demonstrated in one of two ways: (1) the public official violated a clearly established constitutional, statutory, or other right of plaintiff, or (2) the public official acted willfully, maliciously, or with a corrupt motive to cause harm to plaintiff. *Yanero*, 65 S.W.3d 510; *Rowan Cnty. v. Sloas*, 201 S.W.3d 469 (Ky. 2006). If the public officer demonstrates *prima facie* that her

act was discretionary and performed within the scope of her duty, the burden then shifts to plaintiff to demonstrate the discretionary act was not performed in good faith. *Sloas*, 201 S.W.3d 469.

Resolution of each appeal (Appeal Nos. 2013-CA-001500-MR, 2013-CA-001617-MR, 2013-CA-002013-MR, 2014-CA-000141-MR) centers upon whether the circuit court properly decided the issue of Marlowe's entitlement to qualified official immunity in its summary judgments. In particular, the circuit court dismissed by summary judgments the malicious prosecution claims asserted by Duncan, Render, Peyton, Mozee, and Floyd based upon Marlowe's entitlement to qualified official immunity. As previously noted, during the pendency of these appeals, the Supreme Court of Kentucky rendered *Martin v. O'Daniel*, 507 S.W.3d 1 (Ky. 2016). In *Martin*, the Supreme Court held that qualified official immunity does not shield a police officer from a malicious prosecution claim. In so holding, the Supreme Court explained:

> Acting with malice and acting in good faith are mutually exclusive. Malice is a material fact that a plaintiff must prove to sustain a malicious prosecution claim. *Raine,* 621 S.W.2d at 899. But, it is also a fact that defeats the defendant's assertion of qualified official immunity. Official immunity is unavailable to public officers who acted "*with the malicious intention* to cause a deprivation of constitutional rights or other injury . . . ." *Yanero,* 65 S.W.3d at 523 (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).
>
> It thus becomes apparent that the very same evidence that establishes the eponymous element of a malicious prosecution action simultaneously negates the defense of official immunity. In simpler terms, if a plaintiff can

> prove that a police officer acted with malice, the officer has no immunity; if the plaintiff cannot prove malice, the officer needs no immunity.

Martin, 507 S.W.3d at 5.

Based upon the holding in *Martin*, we conclude that the circuit court erred by dismissing the malicious prosecution claims of Duncan, Render, Peyton, Mozee, and Floyd upon the basis of Marlowe's entitlement to qualified official immunity. *See Martin*, 507 S.W.3d 1.

As for the remaining claims asserted by Duncan, Render, Peyton, Mozee, and Floyd, the circuit court concluded that Marlowe was entitled to qualified official immunity for her alleged improper acts and rendered summary judgment dismissing said claims. In their appeals, Duncan, Render, Peyton, Mozee, and Floyd allege that Marlowe's improper acts were not discretionary but were ministerial as she violated the LMPD Standard Operating Procedures while investigating their alleged crimes. Alternatively, they argue that even if Marlowe's acts were discretionary she acted in bad faith and, thus, was not entitled to qualified official immunity. As to the claims asserted by Washington, Carter, Mitchem, White, and Todd, the circuit court determined that Marlowe breached ministerial duties by violating certain LMPD Standard Operating Procedures and was not entitled to qualified official immunity as to the claims asserted by these claimants. In her interlocutory appeals, Marlowe alleges that she breached no ministerial duties and was entitled to qualified official immunity.

Marlowe's alleged improper acts as a detective for the LMPD spanned a period between December 2007 through January 2010. Most, if not all, of the alleged improper acts involved Marlowe's investigation of various alleged crimes by claimants, and Marlowe's subsequent pursuit of criminal charges against those claimants. The investigation of crimes by a police detective involves both discretionary and ministerial acts. It is the claimants' position that Marlowe violated various LMPD Standard Operating Procedures and that such operating procedures constituted ministerial directives or if discretionary directives, that Marlow acted in bad faith in the performance of the same. To prevail, each claimant must particularly set forth the specific Standard Operating Procedures that constitutes a ministerial directive or discretionary directive that Marlowe violated.

It is evident that some of LMPD's Standard Operating Procedures were revised during the relevant time periods involved in these appeals which has made our review more difficult. Generally, the Standard Operating Procedures in effect at the time of the alleged improper act will control and will be the proper version applicable to the officer's conduct. *See Allen v. Com.*, 234 Ky. 832, 29 S.W.2d 548 (1930). Under our jurisprudence, the applicability of qualified official immunity is fact-specific; consequently, the facts surrounding each act by Marlowe that allegedly constitute a breach of a ministerial or discretionary act must be examined separately within the corresponding appeal. Our analysis proceeds accordingly.

On April 25, 2008, Margaret Calvery reported to LMPD that she had been accosted by a male suspect, and an LMPD officer responded to the call. Marlowe subsequently investigated the crime and interviewed Calvery. According to the investigative report prepared by Marlowe, Calvery informed the responding officer that she was walking to her car when approached by an African-American male who asked for the time, threw her onto the ground, and demanded money. Marlowe further reported that Calvery stated the suspect fled in a silver or gold SUV. Thereafter, an LMPD officer located a gold SUV in the general vicinity of the crime; the SUV was registered to Walter Duncan.

Marlowe prepared a photo-pack containing Duncan's photograph and presented it to Calvery on May 15, 2008.[5] From the photo-pack, Calvery identified Duncan as the perpetrator of the crime. Consequently, on May 19, 2008, Marlowe filed a criminal complaint against Duncan charging him with second-degree robbery and obtained a warrant for Duncan's arrest. Duncan was arrested on June 24, 2008, and charged with robbery in the second degree. Marlowe did not appear in court when the case was scheduled on July 3, 2008. Then, on July 17, 2008,

[5] A photo-pack identification is defined in Standard Operating Procedures 8.17.1 as:

> Photo-pack identification is the showing of several photographs, including a suspect's, to a witness for the purpose of obtaining an identification. Photo-pack identifications must use multiple photographs shown sequentially or simultaneously to a witness.

Marlowe again failed to attend court resulting in dismissal of the charge of second-degree robbery against Duncan. Thereafter, the matter was subsequently submitted to a grand jury. The grand jury returned an indictment against Duncan upon the charge of second-degree robbery. Upon motion of the Commonwealth, the charge against Duncan was eventually dismissed on January 14, 2009.

Duncan argues that the circuit court erred by holding that Marlowe was entitled to qualified official immunity regarding his claims as Marlowe was performing a discretionary act in good faith. Duncan specifically argues that Marlowe breached Sections 8.17.3 and 5.1.32 of LMPD's Standard Operating Procedures and that by doing so Marlowe breached ministerial duties for which qualified official immunity was not applicable. More particularly, Duncan asserts:

> [I]t is clear that the damages incurred by [Duncan] were inflicted as a direct result of [Marlowe's] negligence when performing a ministerial act. As detailed *supra*, [Marlowe] placed [Duncan] into a photo-pack based simply upon the fact he was found to be driving an automobile of similar color to that described by the victim. It is painfully clear that [Marlowe] conducted virtually no investigation into the guilt or innocence of [Duncan] before charging him and, instead, based solely upon the photo-pack she showed the victim. In fact, [Marlowe] plainly stated "I agree that I did violate the photo-pack identification procedure" when asked about the reasons behind Defendant Chief White's termination of her employment. It was the violation of these procedures that directly lead to the improper charging, arrest, and incarceration of [Duncan] in this matter. The duties outlined in Section 8.17.3 of the SOP are squarely ministerial in nature. Compliance and execution of those duties do not require "the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Yanero*, at 522. An officer does not engage

> in any [sic] "any significant judgment, statutory interpretation, or policy making decisions" when creating a photo-pack pursuant to 8.17.3. *Rowan*[,] at 478. Section 8.17.3 of the SOP "requires only obedience" to its rules and it provides a duty which is [sic] "is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." Finally, the fact that creating a photo-pack pursuant to 8.17.3 is predicated upon necessity to ascertain certain facts "does not operate to convert the act into one discretionary in nature." *Yanero*, at 522.
>
> It is similarly clear that [Marlowe's] lack of investigation in this matter violated her duties under the LMPD's Standard Operating Procedures. Section 5.1.32 (Appropriate Action) of the SOP states that ["]Detectives and Flex members are required to diligently pursue their assigned cases or assignment as directed by a commanding officer." Professional Standards Unit Report at 37 (*quoting* LMPD Standard Operating Procedures Section 5.1.32). While discretion is arguable[ly] inherent in most police investigations, the duty to at least conduct some investigation is certainly not optional. In the instant case, it is clear that [Marlowe] failed to "diligently pursue" her case against [Duncan] and, as a result [Duncan] was improperly arrested and charged. A police officer's [duty] to 'diligently' pursue their case is not discretionary, and therefore, her failure to do so was a breach of her ministerial duty. As a result, [Marlowe] should not enjoy the protections of sovereign immunity for this violation of her ministerial duty.

Appellant's Brief at 17-18 (citations omitted). We will address each alleged violation of Sections 8.17.3 and 5.1.32 of the Standard Operating Procedures *seriatim*.

As to the alleged violation of Section 8.17.3 concerning photo-packs, Marlowe presented a photo-pack to Margaret Calvery on May 15, 2008, at which

time Calvery identified Duncan. Section 8.17.3 is found within the Standard Operating Procedures 8.17. Standard Operating Procedures 8.17 was originally effective July 16, 2004, revised effective August 9, 2004, and again revised effective July 11, 2008. In the appellate record, we are provided with two versions of the Standard Operating Procedures 8.17. One version of the Standard Operating Procedures 8.17 was revised effective August 9, 2004, and the other version was later revised effective July 11, 2008. And, these two versions are substantively different in relation to Section 8.17.3. As we apply the Standard Operating Procedures in effect at the time of Marlowe's alleged improper act, we must apply the version of Section 8.17.3 in effect on May 15, 2008, when Marlowe presented Calvery with the photo-pack. As noted, this version was revised effective August 9, 2004, and reads:

8.17.3 PHOTO-PACK PROCEDURE

When showing a photo-pack to a witness, officers **shall**:

- Show the photo-pack to only one witness at a time.
- Advise them that they will be looking at a set of photographs.
- Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
- Advise the witness that the person who committed the crime may or may not be in the set of photographs being presented.
- Advise the witness that features such as head and facial hair are subject to change.
- Assure the witness that, regardless of whether or not an identification is made, the police will continue to investigate the incident.

- If an identification is made, the officer **may** have the witness sign the back of the photo or on the display by the person he identified. Do not use the signed photo/display again.
- Have the witness complete the Photo-Pack Identification Form (LMPD# 04-08-0819) whether or not an identification is made.

Preserve the photo-pack whether or not an identification is made and place it into the Property Room for future reference (KACP 27.1, CALEA 42.2.3 h).

Persons involved in this procedure are prohibited from making statements or behaving in any manner that may influence the judgment or perception of the witness. (Emphasis added.)

Under Section 8.17.3, an officer is given specific directives as to "showing a photo-pack to a witness." Section 8.17.3 utilizes the word "shall" as to the directives generally. For qualified immunity purposes, we view these directives as mandatory and as only involving mere execution by the police officer. There is generally no discretion in the manner of performing the directives under Section 8.17.3. Thus, we hold that the directives of Section 8.17.3 are ministerial, except as to the directive that the officer "may" have the witness sign the back of the photo or the display. As to this particular directive, Section 8.17.3 specifically utilizes the word "may," and as such, we interpret this directive as being discretionary in nature per Section 8.17.3.

While Duncan argues that Marlowe violated the directives of Section 8.17.3, Duncan has not specifically set forth the particular directive of this Section that was violated or how Marlowe violated said directive. Duncan cites to Marlowe's

depositional testimony where she concedes to violating photo-pack procedures. But, taken in context, Marlowe merely concedes to generally violating the photo-pack procedures as previously found by Chief Robert White in a letter dated January 7, 2011. In this letter, Chief White made no finding of a violation specifically as to Duncan. Thus, we cannot conclude that Marlowe breached a ministerial or discretionary directive of Section 8.17.3. as to Duncan.

Next, we examine Section 5.1.32 of the Standard Operating Procedures that is entitled "Appropriate Action." The undisputed facts illustrate that the crime against Calvery was committed on April 25, 2008. A warrant of arrest for Duncan was issued May 19, 2008, and the grand jury indicted Duncan on October 23, 2008. The charges were finally dismissed against Duncan on January 14, 2009. Thus, Marlowe's alleged improper conduct as to Duncan must have occurred between April 25, 2008, and January 14, 2009.

We have diligently searched the record and have located only one version of Section 5.1.32. This section is contained in the Standard Operating Procedures 5.1. The version of the Standard Operating Procedures 5.1 in the record was revised effective March 10, 2012. Standard Operating Procedures 5.1 indicates that it was previously revised effective December 10, 2011, and the original version of the Standard Operating Procedures 5.1 was effective on August 7, 2003. As Marlowe's alleged improper acts as to Duncan occurred between April 25, 2008, and January 14, 2009, the version of the Standard Operating Procedures 5.1

effective March 10, 2012, is not controlling. Rather, the Standard Operating Procedures 5.1 effective August 7, 2003, is controlling under the facts herein.

As previously pointed out, we were not provided the original version effective August 7, 2003, of the Standard Operating Procedures 5.1. As a consequence, we are unable to discern whether the version of the Standard Operating Procedures 5.1 effective August 7, 2003, and the version effective March 10, 2012, as to Section 5.1.32 are identical. The version of Section 5.1.32 as it existed between April 25, 2008, and January 14, 2009, is the proper and controlling version. As we were not supplied the correct version of Standard Operating Procedures 5.1, we are unable to determine the precise terminology of Section 5.1.32 of the controlling version and if it imposed any ministerial or discretionary duties upon Marlowe.

Thus, we reverse in part the summary judgment as concerns Duncan and remand to the circuit court for it to determine the language of the proper version of Section 5.1.32 (effective August 7, 2003) and then to determine whether it imposes any ministerial or discretionary duties upon Marlowe. We also affirm the circuit court's summary judgment against Duncan as to Marlowe's alleged breach of Section 8.17.3.

JEROME RENDER

On November 20, 2009, two men armed with guns forcefully invaded a home occupied by Michael Brooks and three others. The occupants were able to disarm the perpetrators and hit one of the perpetrators with a pipe causing him to

bleed. Brooks reported that a third man entered the home and assisted the perpetrators. This third man allegedly picked up a gun dropped by one of the perpetrators and fled with the gun.

Marlowe investigated the crime and interviewed Brooks and the three other occupants of the home. Brooks reported that he knew the third man that entered the home to be Render and provided Render's address. Render was interviewed by police, admitted to being at the home, but said that he merely assisted in breaking up the physical altercation at the home. Apparently, Brooks was intoxicated at the time of the crime, and he was the only occupant to report that Render grabbed the gun before fleeing. Marlowe later admitted she knew Brooks was intoxicated at the time of the crime, but did not reveal this information in her investigative report.

Marlowe filed a criminal complaint against Render upon the charges of first-degree robbery and tampering with physical evidence. A warrant of arrest was issued for Render, and on December 17, 2009, Render was arrested. On February 11, 2010, a grand jury found probable cause and indicted Render. Upon motion of the Commonwealth, the circuit court dismissed the charges against Render on February 8, 2011.

Render maintains that the circuit court erred in dismissing his claims by concluding that Marlowe was entitled to qualified official immunity on the premise Marlowe was performing discretionary acts in good faith. Particularly, Render contends that Marlowe breached Section 5.1.32 of the Standard Operating

Procedures and that such breach constituted a breach of a ministerial duty for which qualified official immunity is unavailable. Specifically, Render argues:

> [[Marlowe] decided to charge [Render] based solely upon Michael Brooks theory that [Render] was involved in the robbery. In fact, [Marlowe] herself admitted that Mr. Brooks was intoxicated on the night of the accident, a fact that is found nowhere in her investigative file. Even a cursory review of [Marlowe's] case file fails to yield any evidence (aside from the statement of Mr. Brooks) upon which [Marlowe] based her decision to charge [Duncan] in this case. More specifically, [Marlowe] failed to even attempt to reconcile the discrepancy between Mr. Brooks statement that [Duncan] left the residence with a gun magazine and the other witnesses failure to even remotely mention this allegation. Additionally, as stated *supra*, a blood trail was found leaving the scene, but it does not appear that [Marlowe] attempted to preserve this evidence for the purpose of identifying the unknown individuals who entered the residence on November 20, 2009. Finally, [Marlowe] even failed to correctly outline her own evidence in the warrant she issued for [Duncan's] arrest by incorrectly stating that Mr. Brooks alleged that [Duncan] left his residence with a gun. In short, [Marlowe] based her entire decision to charge and arrest [Duncan] upon the words of a witness who was intoxicated at the time of the incident and who later attempted to make financial gain by extorting [Duncan] for money in exchange for him recanting his statement.
>
> Therefore, it is clear that [Marlowe] violated her duties under the LMPD's Standard Operating Procedures. Section 5.1.32. (Appropriate Action) of the SOP states that 'Detectives and Flex members are required to diligently pursue their assigned cases or assignment as directed by a commanding officer.['] While discretion is arguab[ly] inherent in most police investigations, the duty to at least conduct some investigation is certainly not optional. In the instant case, it is clear that [Marlowe] failed to "diligently pursue" her case against [Duncan] and, as a result, [Duncan] was improperly

> arrested and charged. A police officer's officers [sic] to 'diligently' pursue their case is not discretionary, and therefore, her failure to do so was a breach of her ministerial duty.

Appellant's Brief at 23-24 (citations omitted). Simply stated, Render asserts that Marlowe failed to diligently pursue her investigation thereby breaching the ministerial duty set forth in Section 5.1.32 of the Standard Operating Procedures.

The record indicates that the crime occurred on November 20, 2009. A warrant of arrest was issued, and Render was arrested on December 17, 2009. Render was then indicted by the grand jury on February 11, 2010, and the charges against Render were ultimately dismissed on February 8, 2011. Therefore, Marlowe's alleged improper conduct as to Render must have occurred between November 20, 2009, and February 8, 2011.

As hereinbefore pointed out, Section 5.1.32 is contained within Standard Operating Procedures 5.1. The only version of Standard Operating Procedures 5.1 provided in the record on appeal is the version as it existed on March 10, 2012. As Marlowe's alleged improper conduct as to Render occurred between November 20, 2009, and February 8, 2011, Standard Operating Procedures 5.1 revised effective March 10, 2011, is clearly inapplicable. The Standard Operating Procedures 5.1 as it existed between November 20, 2009, and February 8, 2011, is the proper version. As is apparent upon its face, the Standard Operating Procedures 5.1 was originally enacted on August 7, 2003, and was revised effective December 10, 2011, and then revised again effective March 10, 2012. Thus, both the December

10, 2011, revised version and the August 7, 2003, original version of the Standard Operating Procedures 5.1 are potentially implicated in Render's case. However, we are unsure of the precise terminology of Section 5.1.32 as neither version is in the record on appeal.

We, therefore, reverse the summary judgment as to Render and remand to the circuit court to determine the language of the proper version(s) of Section 5.1.32 and thereafter to conclude whether it imposes any ministerial or discretionary duties upon Marlowe.

GREGORY PEYTON

On November 22, 2009, three men forcibly entered the home of Kristina Perdue. Upon entering the residence, the men assaulted Perdue and demanded drugs. Police were called to the residence, and Marlowe began an investigation into the crime. Marlowe interviewed Perdue and other witnesses. Eventually, Marlowe arrested and charged Alan Foley and Christopher Clayton with the crimes against Perdue. Marlowe failed to determine the identity of the third suspect.

Thereafter, the prosecutor handling Foley and Clayton's case contacted Marlowe and informed her that Clayton identified Peyton as the third perpetrator. Marlowe then prepared a photo-pack containing Peyton's photograph and presented it to Perdue on January 11, 2010. It appears that Perdue failed to initially make a positive identification of Peyton. But, according to Marlowe, Perdue called her ten minutes after viewing the photo-pack and stated that in

retrospect she recognized one of the photographs as being that of the third perpetrator. Marlowe again presented the photo-pack to Perdue. Perdue then positively identified Peyton, and Perdue signed the photo-pack identification form.

By direct submission from the Commonwealth, the grand jury returned an indictment charging Peyton with first-degree robbery and first-degree burglary. Peyton was arrested and incarcerated. Ultimately, Clayton recanted his identification of Peyton as the third perpetrator. As a result, the Commonwealth moved to dismiss the charges against Peyton, and the charges were subsequently dismissed on February 22, 2011.

Peyton contends on appeal that the circuit court erred in dismissing his claims by holding that Marlowe was entitled to qualified official immunity as Marlowe performed discretionary acts in good faith. Particularly, Peyton asserts that Marlowe breached certain ministerial duties regarding the photo-pack presented to Perdue and cites to Section 8.17.3 of the Standard Operating Procedures.

The record reveals that Marlowe created the photo-pack and presented it to Perdue on January 11, 2010. Section 8.17.3 is found within the Standard Operating Procedures 8.17. In the record, we are provided with two versions of Section 8.17. One version was revised effective August 9, 2004, and the other version was revised effective July 11, 2008. And, these two versions are substantively different as to Section 8.17.3. As we apply the Standard Operating Procedures in effect at the time of Marlowe's alleged improper acts, we must apply

the version of Section 8.17.3 in effect on January 11, 2010, which was the version revised effective July 11, 2008. It reads:

8.17.3 OBTAINING PHOTOS FOR A PHOTO-PACK

> Photos used for a photo-pack may be obtained from any source, as long as the non-suspect photos used are similar in size and composition, and do not contain content that would suggest to the victim/witness which photo to choose. The preferred source for photos is the Louisville Metro Department of Corrections (LMDC) MugsPLUS web site, which may be accessed via the LMPD Intranet. If the LMDC does not have an available suspect photo, the Kentucky State Police (KSP) Automated Fingerprint Identification System (AFIS) Branch may be used as a source to obtain a Kentucky driver's license photo <u>for felony or serial misdemeanor cases</u>. To obtain a driver's license photo from KSP, members shall email a request, using the LMPD email system, to livescan@ky.gov. The photo request, at a minimum, shall list the following:
>
> - Investigating officer's last name, first name and middle initial
> - Investigating officer's code number
> - Department name
> - Division/section/unit
> - County
> - Contact phone number
> - Case number(s) (report number)
> - Investigating officer's contact phone number
> - Offense(s) committed
> - Offense date
> - Suspect's/accused's last, first and middle names
> - Suspect's/accused's date of birth
> - Suspect's/accused's Social Security number
> - Suspect's/accused's Kentucky driver's license number

Section 8.17.3 contains specific directives for "obtaining photos for a photo-pack." Some of these directives constitute ministerial duties, and some directives

constitute discretionary duties. The first sentence of Section 8.17.3 begins by granting police officers the discretion to obtain photos from any source, yet it later directs that nonsuspect photos be "similar in size and composition, and do not contain content that would suggest to the victim/witness which photo to choose." The initial directive relating to the source of the photos utilizes the word "may" and is clearly discretionary. And, the directives concerning similar size/composition and of nonsuggestive photos is clearly mandatory and constitute ministerial duties. Indeed, the directives requiring similar photo size/composition and nonsuggestive photos leave the officer no discretion but to comply with said directives. *See Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014). So, we conclude that the directives requiring similar size/composition and nonsuggestive photos are ministerial duties.

The next sentence of Section 8.17.3 merely permits the officer to use her discretion and preferably utilize LMPD's website or if necessary the Kentucky State Police's identification system. If the officer utilizes the Kentucky State Police's identification system, Section 8.17.3 then directs that the officer "shall email a request" and specifically lists fourteen separate items of information to be included in the email request. The inclusion of these items in the email request and the email request itself constitute ministerial duties. There is no discretion left to the officer; rather, the inclusion of the fourteen separate items of information involves "merely execution of a specific act arising from fixed and designated facts." *Id.* at 297 (quoting *Yanero*, 65 S.W.3d at 522).

Citing to Section 8.17.3, Peyton specifically alleges that Marlowe breached ministerial duties thereof by not having "the witness complete the Photo-Pack Identification Form," by failing to have the witness "mark her identification on the photo page itself," by reusing the photo-pack "both times [Marlowe] asked the [witness] to identify" Peyton, and by failing "to list the case/ICN number on the photo-pack." Appellants' Brief at 28-29. A review of the directives set forth in Section 8.17.3 previously discussed clearly shows that none of the duties Peyton alleges Marlowe breached are contained therein.

Consequently, we affirm the circuit court's summary judgment as to Peyton.

GEORGE MOZEE

On January 18, 2010, Officer Joseph Daugherty responded to a call from a liquor store employee. The employee reported that three individuals entered the store, and one individual attempted to cash a check for $355 made payable to Mozee. This individual claimed to be Mozee and presented Mozee's driver's license. The employee copied the driver's license the individual presented. The check for $355 was cashed, and the sum was given to the individual. The employee, thereafter, determined the check was counterfeit and called police. After the incident, Officer Daugherty placed a copy of the check and the drivers' license of Mozee in the LMPD property room. Marlowe subsequently investigated the matter. The liquor store employee identified Mozee as the individual who cashed the check from the driver's license photograph.

Marlowe then filed a criminal complaint against Mozee. Therein, Marlowe alleged that Mozee had cashed the check and that the employee was able to identify Mozee by the driver's license photograph. An arrest warrant was issued charging Mozee with criminal possession of a forged instrument. Mozee was arrested on January 21, 2010, and later released from incarceration on his own recognizance. On March 16, 2010, the charges against Mozee were dismissed after it was determined that Mozee's wallet had been previously stolen and a duplicate driver's license had been issued.

Mozee argues that the circuit court erred in dismissing his claims by concluding that Marlowe was entitled to qualified official immunity as she was performing discretionary acts in good faith. Mozee contends that Marlowe violated ministerial duties set forth in Section 5.1.32 of the LMPD Standard Operating Procedures. Specifically, Mozee alleges that Marlowe's lack of investigation violated the ministerial duties of Section 5.1.32.

As hereinbefore pointed out, Section 5.1.32 is found within the Standard Operating Procedures 5.1. The version of the Standard Operating Procedures 5.1 provided in the record is the version revised effective March 10, 2012. As apparent upon its face, the Standard Operating Procedures 5.1 was originally enacted on August 7, 2003, was revised effective December 10, 2011, and then revised again effective March 10, 2012.

As to Mozee, the undisputed facts reveal that the crime took place on January 18, 2010, and that the criminal charge against Mozee was dismissed on

March 16, 2010. Thus, Marlowe's alleged improper conduct as to Mozee must have occurred between January 18, 2010, and March 16, 2010.

Consequently, the August 7, 2003, version of the Standard Operating Procedures 5.1 is controlling and is not included in the record on appeal. Without such version, we are unable to determine the precise terminology of Section 5.1.32 and if ministerial or discretionary duties were imposed thereunder.

Therefore, we reverse and remand the judgment against Mozee for the circuit court to determine the language of the proper version of Section 5.1.32 in effect at the time of the alleged violation by Marlowe and then determine whether such version imposed any discretionary or ministerial duties upon Marlowe.

JOSHUA FLOYD

On July 17, 2009, Mark Shephard contacted police to report that a group of young men had approached him, whereupon one of the men attempted to take his Bluetooth, and then punched him in the face. Police responded to the call and located a group of young men nearby. Shephard positively identified Floyd, a minor, as the individual who had assaulted him. No arrest was made.

On August 18, 2009, Marlowe interviewed Floyd. During the interview, Floyd implicated Keishawn Hayden as the individual who assaulted and attempted to rob Shephard. Nevertheless, Marlowe arrested Floyd and charged him with first-degree robbery on September 1, 2009. Floyd subsequently informed the district judge that he was the victim of a mistaken identification and that he was actually assisting the Commonwealth in securing the actual perpetrators. Floyd

was placed on home incarceration. On September 11, 2009, Marlowe arrested Hayden and charged him with first-degree robbery. Marlowe did not mention Floyd in Hayden's arrest narrative. Upon motion of the Commonwealth, Floyd was released from custody, and the charge against Floyd was ultimately dismissed on March 9, 2010, due to his cooperation in the investigation.

Floyd maintains that the circuit court erred in dismissing his claims by concluding that Marlowe was entitled to qualified official immunity because Marlowe was performing a discretionary act in good faith. Floyd argues that Marlowe breached Section 5.1.32 of the Standard Operating Procedures and that such breach constituted a breach of a ministerial duty for which qualified official immunity is unavailable. Particularly, Floyd contends:

> [I]t is clear that the damages incurred by [Floyd] were inflicted as a direct result of [Marlowe's] negligence when performing a simply ministerial act. As detailed *supra*, despite clearly exculpatory evidence, [Marlowe] arrested and charged [Floyd] with Robbery in the First Degree. It is painfully clear that [Marlowe] conducted virtually no investigation into the guilt or innocence of [Floyd] before charging him. In fact, despite the fact that the little information she did obtain prior to arresting [Floyd] all pointed to an alternative Defendant, she gradually escalated the potential charges against [Floyd] from Assault in the Fourth Degree to Robbery in the First Degree. . . .
>
> It is similarly clear that [Marlowe's] lack of investigation in this mater violated her duties under the LMPD's Standard Operating Procedures. Section 5.1.32 (Appropriate Action) of the SOP states that 'Detectives and Flex members are required to diligently pursue their assigned cases or assignment as directed by a commanding officer.' While discretion is arguably

> inherent in most police investigations, the duty to at least conduct some investigation is certainly not optional. In the instant case, it is clear that [Marlowe] failed to "diligently pursue" her case against [Floyd] and, as a result, [Floyd] was improperly arrested and charged. A police officer's duty to 'diligently' pursue their case is not discretionary, and therefore, her failure to do so was a breach of her ministerial duty. . . .

Appellants' Brief at 39-40 (citations omitted).

Floyd asserts that Marlow failed to diligently pursue the investigation thereby breaching the ministerial duty set forth in Section 5.1.32 for which no immunity is available. The record indicates that the crime occurred on July 17, 2009, and that Floyd was charged with first-degree robbery on September 11, 2009. The charge against Floyd was dismissed on March 9, 2010. Thus, Marlowe's improper conduct as to Floyd that allegedly violated Section 5.1.32 must have occurred between July 17, 2009, and March 9, 2010.

As previously stated, Section 5.1.32 is found in Standard Operating Procedures 5.1. Standard Operating Procedures 5.1 was originally enacted on August 7, 2003, was revised with an effective date of December 10, 2011, and later revised again with an effective date of March 10, 2012. The last version of the Standard Operating Procedures 5.1 effective March 10, 2012, is the only version present in the record on appeal. As Marlowe's alleged violation of Section 5.1.32 occurred between July 17, 2009, and March 9, 2010, the version of the Standard Operating Procedures 5.1 originally effective on August 7, 2003, is controlling and is not included in the record on appeal. Consequently, we are unable to determine

the precise terminology of Section 5.1.32 and if it imposed any ministerial or discretionary duties upon Marlowe.

We, therefore, reverse and remand the judgment against Floyd to the circuit court to determine the language of the proper version of Section 5.1.32 and thereafter to determine whether it imposes any ministerial or discretionary duties upon Marlowe.

APPEAL NO. 2013-CA-001617-MR

TIFFANY WASHINGTON

On December 22, 2007, three armed suspects (two males and one female) entered the home of Abbey Schmitt. The three suspects demanded money and assaulted Schmitt and her boyfriend, Robert Hayes. Schmitt reported to responding officers that the female suspect was African-American, "20-24 years of age, 5'7", 130 pounds, thin build, and with a short black afro." Marlowe's Brief at 7. Schmitt also reported that one of the male suspects referred to the female suspect as "Nikki." Marlowe was assigned to investigate the robbery.

University of Louisville's campus police investigated a similar robbery near Schmitt's home. Campus police presented a photo-pack to the victim of the similar robbery, and she identified Vaughn Carter as one of the male suspects. Carter was arrested, and Marlowe interviewed Carter. Upon questioning, Carter apparently acknowledged knowing a woman that went by the nickname of "Nikki." According to Marlowe, Carter identified Tiffany Washington

as "Nikki" and reported that she worked at the University of Louisville's campus library.

Marlowe subsequently compiled a photo-pack containing Washington's photo. Marlowe utilized Washington's driver's license photograph and placed it in a photo-pack with five other female mug-shot photographs. The driver's license photograph used in the photo-pack depicted Washington as having straight shoulder-length hair. Also, Washington's driver's license photograph had a light blue background while the other mug shot photographs had a dark colored background.

On March 6, 2008, Marlowe presented the photo-pack containing Washington's photograph to Schmitt. Schmitt identified Washington as the female perpetrator in her robbery. On the next day, Marlowe prepared a criminal complaint charging Washington with first-degree robbery and first-degree burglary. After a determination that probable cause existed, an arrest warrant was issued. Washington was arrested and remained incarcerated for approximately five days until she posted bail. The grand jury declined to indict Washington after hearing alibi evidence that Washington was in Henderson, Kentucky, on the day of the crime.

Marlowe contends that the circuit court erred by concluding that she violated Section 8.17.3 of the Standard Operating Procedures and that such constituted violation of ministerial duties for which official qualified immunity is unavailable. Specifically, Marlowe argues that she did not violate the photo-pack

procedure set forth in Section 8.17.3. Additionally, Marlowe maintains that she possessed probable cause to prepare a criminal complaint and obtain an arrest warrant for Washington, thus entitling her to qualified official immunity.

Section 8.17.3 is contained in the Standard Operating Procedures 8.17. The Standard Operating Procedures 8.17 was originally effective on July 16, 2004, revised effective August 9, 2004, and revised again effective July 11, 2008. The record reveals that Marlowe showed the photo-pack to Schmitt on March 6, 2008, at which time Schmitt identified Washington. As we apply the Standard Operating Procedures in effect at the time of Marlowe's alleged improper act, we must apply the version of Section 8.17.3 as it existed on March 6, 2008; this version was revised on August 9, 2004. It reads:

8.17.3 PHOTO-PACK PROCEDURE

When showing a photo-pack to a witness, officers shall:

- Show the photo-pack to only one witness at a time.
- Advise them that they will be looking at a set of photographs.
- Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
- Advise the witness that the person who committed the crime may or may not be in the set of photographs being presented.
- Advise the witness that features such as head and facial hair are subject to change.
- Assure the witness that, regardless of whether or not an identification is made, the police will continue to investigate the incident.
- If an identification is made, the officer may have the witness sign the back of the photo or on the

display by the person he identified. Do not use the signed photo/display again.

- Have the witness complete the Photo-Pack Identification Form (LMPD# 04-08-0819) whether or not an identification is made.

Preserve the photo-pack whether or not an identification is made and place it into the Property Room for future reference (KACP 27.1, CALEA 42.2.3 h).

Persons involved in this procedure are prohibited from making statements or behaving in any manner that may influence the judgment or perception of the witness.

The circuit court concluded that Marlowe breached the ministerial directives of Section 8.17.3 by utilizing the driver's license photograph with the blue background of Washington, thereby creating a suggestive photo-pack. And, the circuit court also determined that Marlowe violated ministerial directives of Section 8.17.3 by failing to preserve the photo-pack by placing it in the LMPD property room and by failing to have Schmitt sign the photograph of Washington after an identification was made.[6]

In this case, Marlowe did breach the ministerial duty of failing to preserve the photo-pack as mandated by Section 8.17.3.[7] However, as to Marlowe's creation of an unduly suggestive photo-pack, Section 8.17.3, revised effective August 9, 2004, does not set forth any directive as to unduly suggestive photo-

[6] The circuit court also believed that Marlowe violated Section 8.17.3 by having a number two with a circle around it above Tiffany Washington's photo, but Marlowe testified by deposition that the victim, Abbey Schmitt, added the number two with a circle around it after making an identification of Washington.

[7] Our complete analysis and interpretation of Section 8.17.3, revised effective August 9, 2004, is found earlier in this Opinion under the resolution of Walter Duncan's appeal (Appeal No. 2013-CA-001500-MR).

[7]

packs. Hence, we are of the opinion that the circuit court properly concluded that Marlowe violated the ministerial duty of failing to preserve the photo-pack as mandated by Section 8.17.3. But, the circuit court erred by concluding that Marlowe created an unduly suggestive photo-pack in violation of Section 8.17.3.

Section 8.17.3 also states that an officer may require the witness to sign the back of the photograph identified in the photo-pack. By utilizing the word may, we believe that an officer is endowed with discretion as to the performance thereof and thus is a discretionary act. Hence, Marlowe could be entitled to immunity if she were acting in good faith. Considering the facts of this case and the uncertainty regarding the proper versions of the Standard Operating Procedures, we remand to the circuit court for it to determine the issue of whether Marlowe acted in good faith by not having Schmitt sign the photograph of Washington. Marlowe also argues that she possessed probable cause to obtain a warrant for the arrest of Washington, thereby entitling her to qualified official immunity. Marlowe has failed to cite this Court to a published Opinion of the Kentucky Court of Appeals or Kentucky Supreme Court recognizing that qualified official immunity bars tort claims against a police officer who possesses probable cause to obtain an arrest warrant or to effectuate an arrest. There are, however, sundry federal cases establishing this principle of law. *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986); *Howell v. Sanders*, 668 F.3d 344 (6th Cir. 2012); *Ireland v. Tunis*, 113 F.3d 1435 (6th Cir. 1997); *Greene v. Reeves*, 80 F.3d 1101 (6th Cir. 1996). Following well-established federal law, we conclude

that a police officer's decision as to probable cause to obtain an arrest warrant and/or to effectuate an arrest thereafter is generally a discretionary act. *Malley*, 475 U.S. 335; *Howell*, 668 F.3d 344; *Ireland*, 113 F.3d 1435; *Greene*, 80 F.3d 1101. As a discretionary act, Kentucky jurisprudence provides qualified official immunity to the police officer if the arrest warrant is obtained or the arrest made with probable cause at the time, is in the scope of the officer's duties, and is not in bad faith. *See Yanero*, 65 S.W.3d 510; *Sloas*, 201 S.W.3d 469. Probable cause is contingent "upon whether, at the moment the arrest was made, . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] has committed or was committing an offense." *Williams v. Com.*, 147 S.W.3d 1, 12 (Ky. 2004) (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 225, 13 L. Ed. 2d 142, 145 (1964)).

The circuit court did not address whether Marlowe possessed probable cause to obtain an arrest warrant for Washington in its summary judgment. Considering the factual complexity and the current posture of this case, we reverse upon this issue and remand for the circuit court to determine whether Marlowe possessed probable cause to obtain an arrest warrant for Washington and if so, whether Marlowe acted in good faith and was entitled to qualified official immunity.

In sum, as concerns Tiffany Washington, we affirm in part the circuit court's summary judgment that Marlowe violated the ministerial duty of failing to preserve the photo-pack as mandated by Section 8.17.3 but reverse in part the

summary judgment that Marlowe violated a ministerial duty of creating an unduly suggestive photo-pack in violation of Section 8.17.3. We remand for the circuit court to determine whether Marlowe acted in good faith when she failed to have Schmitt sign Washington's photograph. We also reverse and remand for the circuit court to determine whether Marlowe possessed probable cause to obtain an arrest warrant for Washington, acted within the scope of her duties, and acted in good faith for official qualified immunity.

VAUGHN CARTER

As detailed above, on December 22, 2007, two male suspects and one female suspect forcibly entered the home of Abbey Schmitt. Schmitt and her boyfriend, Hayes, were robbed and assaulted. University of Louisville's campus police subsequently investigated a similar crime. Campus police presented a photo-pack to the victim of the similar robbery, and the victim identified Carter as the perpetrator. Thereafter, on February 5, 2008, Marlowe presented the photo-pack utilized by campus police to Schmitt, and Schmitt identified Carter as one of the male perpetrators. Marlowe arrested Carter upon the charges of burglary in the first degree and robbery in the first degree. Carter was incarcerated for approximately three days until he posted bail. The charges against Carter were subsequently dismissed by the district court when Marlowe failed to appear at a preliminary hearing. The charges were ultimately expunged from Carter's record.

Marlowe alleges that the circuit court erred by concluding that she violated Standard Operating Procedures Section 8.17.3 and that such constituted violation of ministerial duties for which qualified official immunity is unavailable. Specifically, Marlowe claims that she did not violate the photo-pack procedures provided in Section 8.17.3.

8.17.3 is found within Standard Operating Procedures 8.17. Standard Operating Procedures 8.17 was originally effective July 16, 2004, was revised August 9, 2004, and was again revised July 11, 2008. The record reveals that Marlowe presented the photo-pack to Schmitt, and Schmitt positively identified Carter on February 5, 2008, as one of the perpetrators of the crime. Thus, we must apply the version of Section 8.17.3 as it existed on February 5, 2008; this version was revised August 9, 2004. It reads:

8.17.3 PHOTO-PACK PROCEDURE

When showing a photo-pack to a witness, officers shall:

- Show the photo-pack to only one witness at a time.
- Advise them that they will be looking at a set of photographs.
- Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
- Advise the witness that the person who committed the crime may or may not be in the set of photographs being presented.
- Advise the witness that features such as head and facial hair are subject to change.
- Assure the witness that, regardless of whether or not an identification is made, the police will continue to investigate the incident.

- If an identification is made, the officer may have the witness sign the back of the photo or on the display by the person he identified. Do not use the signed photo/display again.
- Have the witness complete the Photo-Pack Identification Form (LMPD# 04-08-0819) whether or not an identification is made.

Preserve the photo-pack whether or not an identification is made and place it into the Property Room for future reference (KACP 27.1, CALEA 42.2.3 h).

Persons involved in this procedure are prohibited from making statements or behaving in any manner that may influence the judgment or perception of the witness.

The circuit court concluded that Marlowe breached the ministerial duties of Section 8.17.3 by deficiently filling out the photo-pack identification form and by failing to have Schmitt circle or sign Carter's photograph. The circuit court also believed that Marlowe breached a ministerial duty under Section 8.17.3 by "using the same photo-pack that [University of Louisville] campus police had used in their investigation of another crime" which is "strictly forbidden." July 29, 2013, Partial Summary Judgment at 10.

As to Marlowe's failure to properly complete the photo-pack identification form, the circuit court cited to the fact that the form only listed Carter's name and did not indicate the time it was presented to Schmitt. Section 8.17.3 directs the officer to "[h]ave the witness complete the Photo-Pack Identification Form," and this does constitute a ministerial duty.[8] The photo-pack

[8] Our complete analysis and interpretation of Section 8.17.3, revised August 9, 2004, is found earlier in this Opinion under the resolution of Walter Duncan's appeal (Appeal No. 2013-CA-001500-MR).

identification form does not require an officer to exercise discretion or judgment. Rather, an officer must only require the witness to supply the information from fixed and designated facts to complete the form. Thus, Marlowe's failure to do so constitutes a breach of a ministerial act for which qualified official immunity is unavailable.

Also, as hereinbefore stated, Section 8.17.3 specifically provides that an officer "may have the witness sign the back of a photo-pack on the display by the person he identified." By utilizing the word may, we believe an officer may or may not have the witness sign the photograph once an identification is made; thus, this directive is clearly discretionary in nature. As such, the circuit court erred by concluding the directive was ministerial regarding Carter's identification. Considering the facts of this case and particularly the uncertainly regarding the proper versions of the Standard Operating Procedures, we believe the circuit court should determine upon remand whether Marlowe acted in good faith regarding the identification of Carter.

Further, Marlowe's use of a photo-pack originally created by University of Louisville campus police does not constitute a violation of Section 8.17.3. Section 8.17.3 only prohibits an officer from reusing a "signed photo/display." Consequently, we cannot conclude that Marlowe breached a ministerial duty under the Standard Operating Procedures 8.17.3 by utilizing the photo-pack originally created and utilized by University of Louisville campus police.

In sum, as concerns Carter's claims, we affirm in part the circuit court's summary judgment that Marlowe breached the ministerial duty of completing the photo-pack identification form as required by Section 8.17.3 but reverse in part the circuit court's summary judgment that Marlowe breached a ministerial duty under Section 8.17.3 by failing to require Schmitt to sign the back of the photo. We view this duty as discretionary, and upon remand the circuit court shall determine if Marlowe acted in good faith in conducting this discretionary duty to be afforded qualified official immunity.

ROBERT MITCHEM

On December 5, 2007, an armed man invaded a residence occupied by Mandy Coffee and Michelle Smith. Coffee told police that the suspect forced his way into her residence, held her at gunpoint, and then fled. Robert Hayes was standing outside the residence and witnessed the suspect fleeing from the residence into a vehicle. The suspect then quickly exited the car, robbed Hayes, and fled into a vehicle driven by another suspect. Hayes recognized one of the suspects as being Robert Mitchem. Hayes described the vehicle Mitchem fled in as a champagne-colored Ford Explorer.

Marlowe interviewed Coffee and Hayes on the night of the crime and presented photo-packs to them. Coffee and Hayes both identified Mitchem as one of the suspects from the photo-packs. Hayes provided Marlowe with Mitchem's address. Marlowe filed a criminal complaint against Mitchem to obtain an arrest warrant, and Mitchem was subsequently arrested on June 22, 2008. A grand jury

indicted Mitchem on September 21, 2008. Subsequently, upon motion of the Commonwealth, the charges against Mitchem were dismissed.

Marlowe contends that the circuit court erred by concluding that she breached various ministerial duties under the LMPD Standard Operating Procedures and was not entitled to qualified official immunity in the identification of Mitchem. In the summary judgment, the circuit court determined that Marlowe breached the ministerial duties set forth in Section 8.17.3 as concerns Mitchem by failing to properly complete the photo-pack identification form and by failing to preserve the photo-packs viewed by Smith and Coffee.

8.17.3 is found within Standard Operating Procedures 8.17. Standard Operating Procedures 8.17 was originally effective July 16, 2004, was revised August 9, 2004, and was again revised effective July 11, 2008. Marlowe showed the photo-packs to these witnesses on December 5, 2007. As we apply the Standard Operating Procedures in effect at the time of Marlowe's alleged improper acts, we must apply the version of Section 8.17.3 as it existed on December 5, 2007. This version was revised August 9, 2004, and reads:

8.17.3 PHOTO-PACK PROCEDURE

When showing a photo-pack to a witness, officers shall:

- Show the photo-pack to only one witness at a time.
- Advise them that they will be looking at a set of photographs.
- Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.

- Advise the witness that the person who committed the crime may or may not be in the set of photographs being presented.
- Advise the witness that features such as head and facial hair are subject to change.
- Assure the witness that, regardless of whether or not an identification is made, the police will continue to investigate the incident.
- If an identification is made, the officer may have the witness sign the back of the photo or on the display by the person he identified. Do not use the signed photo/display again.
- Have the witness complete the Photo-Pack Identification Form (LMPD# 04-08-0819) whether or not an identification is made.

Preserve the photo-pack whether or not an identification is made and place it into the Property Room for future reference (KACP 27.1, CALEA 42.2.3 h).

Persons involved in this procedure are prohibited from making statements or behaving in any manner that may influence the judgment or perception of the witness.

As concerns the identification of Mitchem as to Section 8.17.3, Marlowe breached the ministerial duty of failing to preserve the photo-pack in the property room.[9] Marlowe failed to do so, thereby violating the ministerial directive of Section 8.17.3 requiring same.

As to Marlowe's failure to properly complete the photo-pack identification form, Section 8.17.3 mandates an officer to require the witness to complete such form. This duty does not require an officer to exercise discretion or judgment to complete. An officer must only comply therewith and require the

[9] Our complete analysis and interpretation of Section 8.17.3, revised August 9, 2004, is found earlier in this Opinion under the resolution of Walter Duncan's appeal (Appeal No. 2013-CA-001500-MR).

witness to complete the form. This is a ministerial duty that Marlowe failed to perform. Hence, we conclude that the circuit court properly determined that Marlowe breached the ministerial duties of Section 8.17.3 as concerns Mitchem by failing to preserve the photo-pack and by failing to require the witness to complete the photo-pack identification form.

Also, Marlowe asserts that she possessed probable cause to obtain an arrest warrant for Mitchem, thereby entitling her to qualified official immunity. As hereinbefore stated, a police officer's decision to obtain an arrest warrant and/or to effectuate an arrest thereunder is generally a discretionary act. *Malley*, 475 U.S. 335; *Howell*, 668 F.3d 344; *Ireland*, 113 F.3d 1435; *Greene*, 80 F.3d 1101. As a discretionary act, Kentucky jurisprudence provides qualified official immunity to the police officer if the arrest warrant was obtained with probable cause at that time, is in the scope of the officer's duties, and is not in bad faith. *See Yanero*, 65 S.W.3d 510; *Sloas*, 201 S.W.3d 469. Probable cause is contingent "upon whether, at the moment the arrest was made, . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] has committed or was committing an offense." *Williams*, 147 S.W.3d at 12 (quoting *Beck*, 379 U.S. at 91, 85 S. Ct. at 225).

The circuit court made no decision as to probable cause in its summary judgment on this issue. Considering the particular facts and the complexity thereof, we reverse and remand for the circuit court to determine

whether Marlowe possessed probable cause to obtain an arrest warrant for Mitchem and whether Marlowe acted in good faith for qualified official immunity.

In sum, we affirm in part the circuit court's summary judgment that Marlowe breached ministerial duties under Section 8.17.3 by failing to preserve the photo-pack and by failing to complete the photo-pack identification form. We reverse in part and remand for the circuit court to determine whether Marlowe possessed probable cause to obtain an arrest warrant for Mitchem, did so within the scope of her employment, and in good faith in conducting this discretionary duty to be afforded qualified official immunity.

APPEAL NO. 2013-CA-002013-MR

RODSHAUD WHITE

On December 3, 2008, Allie Walker returned home to find a man exiting the rear of her residence. The man was carrying a plastic pail containing Walker's personal property. The perpetrator pointed a gun at Walker, dropped the pail, and then fled. An investigation revealed fingerprints inside Walker's residence that belonged to Bruce Morris. When police presented a photo-pack containing Morris's picture to Walker, Walker did not identify Morris as the perpetrator. And, Morris did not match the description Walker had given to police of the perpetrator.

Several weeks later, Marlowe learned that White had committed burglaries in the area of Walker's residence and also lived on Walker's street.

Marlowe observed that White resembled the description given by Walker of the perpetrator. So, on January 21, 2009, Marlowe presented a photo-pack to Walker that contained White's photograph. Walker identified White as the perpetrator. Thereafter, Marlowe filed a criminal complaint and arrested White upon the charges of first-degree robbery, first-degree burglary, and possession of a handgun by a minor. On July 15, 2009, White was indicted by a grand jury. Upon motion of the Commonwealth, the charges against White were dismissed for lack of probable cause on January 11, 2010.

Marlowe contends that the circuit court erred by concluding that she violated Section 8.17.4 by failing to have Walker sign White's photograph after making an identification and by failing to preserve the photo-pack.

Marlowe presented the photo-pack to Walker on January 21, 2009. As we apply the Standard Operating Procedures in effect at the time of Marlowe's alleged improper acts, we must apply the version of Section 8.17.4 in effect on January 21, 2009. This version was revised on July 11, 2008, and reads:

8.17.4 PHOTO-PACK PROCEDURE

> When showing a photo-pack to a victim/witness, officers shall:
>
> - Show the photo-pack to only one victim/witness at a time.
> - Advise the victim/witness that they will be looking at a set of photographs.
> - Advise the victim/witness it is just as important to clear innocent persons from suspicion as to identify guilty parties.

- Advise the victim/witness the person who committed the crime may or may not be in the set of photographs being presented.
- Advise the victim/witness that features such as head and facial hair are subject to change.
- Advise the victim/witness that, regardless of whether or not an identification is made, the police will continue to investigate the incident.
- Have the victim/witness sign the back of the photo or the display, next to the person he/she identified, if an identification is made. Do not use the signed photo/display again.
- Have the victim/witness complete the Photo-Pack Identification Form (LMPD# 04-08-0819), whether or not an identification is made.
- Preserve the photo-pack for future reference, whether or not an identification is made (KACP 27.1).

Persons involved in this procedure are prohibited from making statements or behaving in any manner that may influence the judgment or perception of the victim/witness.

Under Section 8.17.4, an officer is given specific directions as to "showing a photo-pack to a victim/witness." Section 8.17.4 specifically utilizes the word "shall" as to the directives. The performance of the directives delineated in Section 8.17.4 is mandatory and require mere execution by the officer. The officer is vested with no discretion in the manner of performance, so we hold that the directives set forth in Section 8.17.4 are ministerial for which qualified official immunity is unavailable.

The circuit court concluded that Marlowe failed to have Walker sign White's photograph after identifying him in the photo-pack and failed to preserve

the photo-pack. Section 8.17.4 clearly directs the officer to "have the victim/witness sign the back of the photo/display, next to the person he/she identified." 8.17.4 also plainly directs the officer to "preserve the photo-pack for future reference." Marlowe failed to have Walker sign the back of White's photo and failed to preserve the photo-pack. Consequently, Marlowe breached these ministerial duties set forth in Section 8.17.4 and is not entitled to qualified official immunity as to said ministerial duties.

Additionally, Marlowe asserts that she possessed probable cause to obtain an arrest warrant to arrest White, thereby entitling her to qualified official immunity. A police officer's decision to obtain an arrest warrant and/or to arrest thereunder is generally a discretionary act. *Malley*, 475 U.S. 335; *Howell*, 668 F.3d 344; *Ireland*, 113 F.3d 1435; *Greene*, 80 F.3d 1101. As a discretionary act, Kentucky jurisprudence provides qualified official immunity to the police officer if the warrant for the arrest was obtained or the arrest made with probable cause at that time, is in the scope of the officer's duties, and is not in bad faith. *See Yanero*, 65 S.W.3d 510; *Sloas*, 201 S.W.3d 469. Probable cause is contingent "upon whether, at the moment the arrest was made, . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] has committed or was committing an offense." *Williams*, 147 S.W.3d at 12 (quoting *Beck*, 379 U.S. at 91, 85 S. Ct. at 225).

The circuit court did not reach the issue of probable cause in the summary judgment regarding White's claim on this issue. Considering the complexity of facts herein and the confusion surrounding the proper versions of the Standard Operating Procedures, we reverse and remand for the circuit court to determine whether Marlowe possessed probable cause to arrest White and whether Marlowe acted in good faith.

Therefore, we affirm in part the circuit court's summary judgment that Marlowe breached the ministerial duties of Section 8.17.4 by failing to have Walker sign White's photograph in the photo-pack and to preserve the photo-pack. However, we reverse in part and remand for the circuit court to determine whether Marlowe possessed probable cause to arrest White, acted within the scope of her duties, and acted in good faith in conducting this discretionary duty to be afforded qualified official immunity.

APPEAL NO. 2014-CA-0001410-MR

DALE L. TODD

On October 18, 2009, Robert Kiepke was walking home when he was approached by four male suspects. The suspects repeatedly struck and kicked Kiepke. As a vehicle approached the scene, the perpetrators fled. The approaching motorist stopped to assist Kiepke. Kiepke was taken to the hospital.

Marlowe subsequently assembled several photo-packs of individuals she believed were committing similar crimes in the same area. On October 22, 2009, Marlowe presented the photo-packs to Kiepke. Kiepke positively identified

Todd and the other three suspects from the photo-packs. Based upon Kiepke's identification, Marlowe filed a juvenile petition against Todd charging him with assault in the second degree, and Todd was arrested. Todd entered a plea pursuant to *Alford*[10] and was sentenced to probation. It was subsequently determined that Todd was incarcerated on a separate offense at the time Kiepke was assaulted; thus, Todd could not have been one of the perpetrators. The guilty plea was set aside by agreement with the Commonwealth, and the charge was expunged.

As concerns Todd's claims, Marlowe argues that the circuit court erred by determining that she was not entitled to qualified official immunity. In the summary judgment, the circuit court concluded that Marlowe breached a ministerial duty set forth in Section 8.17.3 by failing to have Kiepke sign the back of Todd's photograph upon making a positive identification. Also, the circuit court determined that Marlowe breached a ministerial duty by "using the same photopack [sic] for Todd and another suspect in the same attack."[11] January 9, 2014, Opinion and Order at 8.

Marlowe presented the photo-pack containing Todd's photograph to Kiepke on October 22, 2009, and Kiepke identified Todd therefrom. As we apply the Standard Operating Procedures in effect at the time of Marlowe's alleged

[10] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[11] In its summary judgment, the circuit court reviewed the Findings of Chief Robert White as to Marlowe's violations of Standard Operating Procedures in relation to Dale Todd. However, the circuit court only relies on two distinct violations of Section 8.17.3 in its summary judgment.

improper acts, we must apply the version of Section 8.17.3 in effect on October 22, 2009.[12] This version was revised July 11, 2008, and reads:

8.17.3 OBTAINING PHOTOS FOR A PHOTO-PACK

> Photos used for a photo-pack may be obtained from any source, as long as the non-suspect photos used are similar in size and composition, and do not contain content that would suggest to the victim/witness which photo to choose. The preferred source for photos is the Louisville Metro Department of corrections (LMDC) MugsPLUS web site, which may be accessed via the LMPD Intranet. If the LMDC does not have an available suspect photo, the Kentucky State Police (KSP) Automated Fingerprint Identification System (AFIS) Branch may be used as a source to obtain a Kentucky driver's license photo <u>for felony or serial misdemeanor cases</u>. To obtain a driver's license photo from KSP, members shall email a request, using the LMPD email system, to livescan@ky.gov. The photo request, at a minimum, shall list the following:
>
> - Investigating officer's last name, first name and middle initial
> - Investigating officer's code number
> - Department name
> - Division/section/unit
> - County
> - Contact phone number
> - Case number(s) (report number)
> - Investigating officer's contact phone number
> - Offense(s) committed
> - Offense date
> - Suspect's/accused's last, first and middle names
> - Suspect's/accused's date of birth
> - Suspect's/accused's Social Security number
> - Suspect's/accused's Kentucky driver's license number

[12] For a more detailed discussion of the different versions of Section 8.17.3, please refer to our analysis of Walter Duncan's claims in Appeal No. 2013-CA-001500-MR earlier in this Opinion.

It appears that the circuit court either relied upon and cited to the incorrect section of the Standard Operating Procedures or to the incorrect version thereof. Section 8.17.3, revised effective July 11, 2008, simply does not contain the directives as set forth by the circuit court. Thus, we reverse and remand the circuit court's summary judgment regarding Todd's claims concluding that Marlowe violated sundry ministerial directives of Section 8.17.3. Upon remand, the circuit court shall determine the proper section and version of the LMPD Standard Operating Procedures applicable to Todd's case.

Marlowe also asserts she possessed probable cause to obtain an arrest warrant for Todd, thereby entitling her to qualified official immunity. A police officer's decision to obtain an arrest warrant and/or to arrest thereunder is generally a discretionary act. *Malley*, 475 U.S. 335; *Howell*, 668 F.3d 344; *Ireland*, 113 F.3d 1435; *Greene*, 80 F.3d 1101. As a discretionary act, a police officer is entitled to qualified official immunity if the warrant was obtained or the arrest was made with probable cause at that time, is within the scope of the officer's duties, and is not in bad faith. *See Yanero*, 65 S.W.3d 510; *Sloas*, 201 S.W.3d 469. Probable cause is contingent "upon whether, at the moment the arrest was made, . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] has committed or was committing an offense." *Williams*, 147 S.W.3d at 12 (quoting *Beck*, 379 U.S. at 91, 85 S. Ct. at 225).

In its decision upon probable cause, the circuit court relied heavily upon Marlowe's violations of ministerial duties set forth in Section 8.17.3. As we have reversed the circuit court's decision that Marlowe violated ministerial duties under Section 8.17.3 and in consideration of the complexity of facts presented herein, we remand for the circuit court to reconsider its decision on whether Marlowe possessed probable cause to obtain an arrest warrant for Todd and whether Marlowe acted in good faith in conducting this discretionary duty to be afforded qualified official immunity.

In sum, we reverse and remand the circuit court's summary judgment that Marlowe violated sundry ministerial duties set forth in Section 8.17.3. We also remand for the circuit court to reconsider its determination of whether Marlowe possessed probable cause to obtain an arrest warrant for Todd, and within the scope of her duties, and acted in good faith in conducting this discretionary duty to be afforded qualified official immunity.

CONCLUSION

The parties should not misconstrue this Opinion as deciding Marlowe's ultimate liability upon the relevant underlying claims. To maintain an actionable negligence claim, the plaintiff must demonstrate duty, breach, causation, and injury. *Wright v. House of Imports, Inc.*, 381 S.W.3d 209 (Ky. 2012). This Opinion only addresses with the elements of duty and breach in connection with qualified official immunity. Upon remand, in order for claimants to prevail upon their claims:

> [T]here must be a causally related "violation of a constitutional, statutory, or other clearly established right" of the complainant. *Id.* It is these causally related violations or acts which are measured against the standards of discretionary or ministerial duties, not the distant myriad acts or omissions that one could logically construct to have preceded them. "[I]f one retreats far enough from a ... violation [, a distant act or omission] can be identified behind almost any such harm inflicted . . . . At the very least there must be an affirmative link between [the act or omission] and the . . . violation alleged." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S. Ct. 2427, 2436, 85 L. Ed. 2d 791 (1985).

Sloas, 201 S.W.3d at 476.

Finally, notwithstanding the discretion of the circuit court, we observe that for no ascertainable reason that we can discern from the record below, these cases have been consolidated below. Each case is complicated and with only two exceptions each case is premised upon different facts, acts, and events forming the basis of the alleged claims. *See* CR 42.01. The claims all involved different witnesses and evidence. This will likely be problematic and prejudicial in granting a fair trial below and could easily be the basis for future appeals. *See* CR 42.02. We strongly suggest that the circuit court revisit this and try each case separately.

For the foregoing reasons, we affirm in part, reverse in part, and remand Appeal Nos. 2013-CA-001500-MR, 2013-CA-001617-MR, and 2013-CA-002013-MR; we reverse and remand Appeal No. 2014-CA-000141-MR.

NICKELL, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS WITH SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: I fully agree with the reasoning and result of the majority's well-written opinion. However, I do not join in the dicta at the conclusion of the opinion concerning the trial court's decision to consolidate these cases. No party has raised this issue, and it is not properly presented to this Court on appeal. Furthermore, a trial court's decision to consolidate under CR 42.01 is discretionary, and we will not disturb the trial court's decision in this regard absent an abuse of that discretion. *Adams Real Estate Corp. v. Ward*, 458 S.W.2d 622, 624 (Ky. 1970). Although these cases involve disparate facts, they clearly share common issues of law. It is likely that the remaining cases may need to be severed for trial. However, I would find no abuse of discretion in consolidating them for discovery and summary-judgment purposes.

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