

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-000721-MR

GREG MEREDITH,  
Individually, and in his Official Capacity  
as Chief District Engineer for KYTC D03;  
KEVIN GERALDS, Individually, and in his  
Official Capacity as Engineer Supervisor for  
KYTC D03; ASHLEY GRAVES, Individually,  
and in his Official Capacity as Transportation  
Engineering Supervisor for KYTC D03;  
TOM LAPHAM, Individually, and in his  
Official Capacity as Transportation Engineer for  
KYTC D03; MARK LOVE, Individually, and in his  
Official Capacity as Tech Transportation Engineer for  
KYTC D03; JON LAM, Individually, and in his  
Official Capacity as Staff Engineer for KYTC D03;  
and DARYL PRICE, Individually, and in his Official  
Capacity as Project Engineer for KYTC D03

APPELLANTS

v. APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE JOHN T. ALEXANDER, JUDGE  
ACTION NO. 13-CI-00487

VELMA DECKER,  
Individually and as Executrix of the  
Estate of KENNETH DECKER;  
STEVE NELSON and LINDA NELSON,  
his Wife; JAMIE GROCE; JOHN MCINTOSH;  
KENTUCKY ASSOCIATED GENERAL

CONTRACTORS SELF-INSURANCE FUND;  
SCOTTY'S CONTRACTING AND STONE,  
LLC; and VAN METER CONTRACTING,  
INC.

APPELLEES

AND NO. 2016-CA-000807-MR

VELMA DECKER,  
Individually and as Executrix of the Estate  
of KENNETH DECKER; STEVE NELSON  
and LINDA NELSON, his Wife;  
JAMIE GROCE and JOHN MCINTOSH

CROSS-APPELLANTS

v. CROSS-APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE JOHN T. ALEXANDER, JUDGE  
ACTION NO. 13-CI-00487

VANMETER CONTRACTING, INC.

CROSS-APPELLEE

AND NO. 2016-CA-000858-MR

SCOTTY'S CONTRACTING AND STONE,  
LLC

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE JOHN T. ALEXANDER, JUDGE  
ACTION NO. 13-CI-00487

GREG MEREDITH, Individually, and in his Official Capacity as Chief District Engineer for KYTC D03; KEVIN GERALDS, Individually, and in his Official Capacity as Engineer Supervisor for KYTC D03; ASHLEY GRAVES, Individually, and in his Official Capacity as Transportation Engineering Supervisor for KYTC D03; TOM LAPHAM, Individually, and in his Official Capacity as Transportation Engineer for KYTC D03; MARK LOVE, Individually, and in his Official Capacity as Tech Transportation Engineer for KYTC D03; JON LAM, Individually, and in his Official Capacity as Staff Engineer for KYTC D03; and DARYL PRICE, Individually, and in his Official Capacity as Project Engineer for KYTC D03; VELMA DECKER, Individually and as Executrix of the Estate of KENNETH DECKER; STEVE NELSON and LINDA NELSON, his Wife; JAMIE GROCE; JOHN MCINTOSH; KENTUCKY ASSOCIATED GENERAL CONTRACTORS SELF-INSURANCE FUND; and VAN METER CONTRACTING, INC.

APPELLEES

AND NO. 2016-CA-000884-MR

VELMA DECKER,  
Individually and as Executrix of the Estate of  
KENNETH DECKER; STEVE NELSON  
and LINDA NELSON, his Wife; JAMIE GROCE;  
and JOHN MCINTOSH

CROSS-APPELLANTS

v. CROSS-APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE JOHN T. ALEXANDER, JUDGE  
ACTION NO. 13-CI-00487

SCOTTY'S CONTRACTING AND  
STONE, LLC

CROSS-APPELLEE

AND NO. 2016-CA-000921-MR

GREG MEREDITH, Individually, and in his Official Capacity  
as Chief District Engineer for KYTC D03;  
KEVIN GERALDS, Individually, and in his  
Official Capacity as Engineer Supervisor for  
KYTC D03; ASHLEY GRAVES, Individually,  
and in his Official Capacity as Transportation  
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Official Capacity as Transportation Engineer for  
KYTC D03; MARK LOVE, Individually, and in his  
Official Capacity as Tech Transportation Engineer for  
KYTC D03; JON LAM, Individually, and in his  
Official Capacity as Staff Engineer for KYTC D03;  
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CROSS-APPELLANTS

v. CROSS-APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE JOHN T. ALEXANDER, JUDGE  
ACTION NO. 13-CI-00487

SCOTTY'S CONTRACTING AND  
STONE, LLC

CROSS-APPELLEE

OPINION AND ORDER  
AFFIRMING IN PART AND DISMISSING IN PART AS TO APPEAL NO.  
2016-CA-000721-MR; AND DISMISSING AS TO APPEAL NOS. 2016-CA-  
000807-MR, 2016-CA-000858-MR, 2016-CA-000884-MR, AND 2016-CA-  
000921-MR

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BEFORE: ACREE, KRAMER AND TAYLOR, JUDGES.

KRAMER, JUDGE: The five consolidated appeals before the Court stem from an accident that occurred on October 8, 2012. During a road construction project for the Kentucky Transportation Cabinet (KTC), employees of Vanmeter Contracting, Inc., a subcontractor performing some of the work, were building a portion of a concrete retaining wall using a steel concrete formwork. While the form was being filled with concrete, the form raised up, toppled, and collapsed. Vanmeter employee Kenneth Decker was killed, and three other Vanmeter employees were injured. Subsequently, the affected Vanmeter employees (or their various representatives and successors) filed suit in Barren Circuit Court against several KTC Engineers assigned to the project, asserting negligence actions against them individually.

After a period of discovery, the KTC Engineers moved for summary judgment on grounds of qualified official immunity. In an interlocutory order of April 18, 2016, their motions were denied by the circuit court.

The KTC Engineers also asserted third-party claims against Vanmeter, along with the project's general contractor, Scotty's Contracting and Stone, LLC, alleging in part that if they were ultimately found negligent and liable to the injured Vanmeter employees, then Vanmeter and Scotty's were contractually obligated to indemnify them. This, in turn, prompted a declaratory action between the KTC Engineers, Scotty's, and Vanmeter, which focused upon the language of various contracts, and which culminated in the circuit court's summary determination on May 13, 2016, that Scotty's could be liable for indemnity, but Vanmeter could not. On that same date, the circuit court then entered a separate order purporting to make each of its two prior interlocutory judgments final and appealable, but failed to state that there was no just cause for delay. These five consolidated appeals followed.

That said, we lack jurisdiction to resolve most of the arguments presented in any of these five appeals.

We begin with Appeal No. 2016-CA-000721-MR, which we affirm in part and dismiss in part. The appellants in this matter are the KTC Engineers, and the crux of their appeal, in large part, is that they were entitled to qualified immunity.

To be sure, the KTC Engineers were at all relevant times employees of a governmental agency (the Kentucky Transportation Cabinet), engaged in the

performance of a governmental function (road construction). They have been sued in their individual capacities for negligence. And, when employees of state agencies performing governmental functions are sued for negligence in their individual capacities, they are entitled to qualified official immunity. *Bolin v. Davis*, 283 S.W.3d 752, 757 (Ky. App. 2008). Qualified immunity shields employees of state agencies from negligence suits based upon actions they have taken which are: (1) discretionary, rather than ministerial; (2) made in good faith; and (3) within the scope of the employee's authority. *See Yanero v. Davis*, 65 S.W.3d 510, 522-23 (Ky. 2001).

Below, the circuit court rejected their immunity arguments after concluding the acts that the KTC Engineers allegedly failed to perform were ministerial rather than discretionary, explaining in relevant part:

During the investigation in the aftermath of the accident, citations were issued to KTC for OSHA violations. Plaintiffs have alleged that Defendants were negligent by knowingly allowing safety regulations and specifications to be violated, as evidenced by the citations, even though the parties concur that the cited violations were not directly related to the collapse of the concrete forms.[FN]

[FN] The cited violations related to an inadequate guardrail system (failure to have a toe guard and railing on a particular scaffolding platform) and to inadequate cave-in protection regarding an area of excavation unrelated to the form collapse.

Plaintiffs have further contended that Defendants should have shut the construction project down due to said unsafe work conditions, and that had they done so, the collapse would not have occurred as it did.

....

The language of the [KTC] Construction Guidance Manual is relevant in this analysis. The parties agree that the terms of the Manual are binding. In pertinent part, the Manual states as follows: “Cabinet [meaning KTC] personnel are neither trained nor assigned to inspect, implement, or enforce safety standards. If, however, the section engineer (SE) or a member of the crew observes construction practices with recognized hazards, the practice in question shall be reported immediately to the contractor’s competent person on the project. . . . [I]t is not the intent of the specifications for [KTC] employees to function as OSHA enforcement or OSHA inspectors. However, if a recognized danger is considered to be imminent, the appropriate phase or phases of the work shall be immediately suspended by the SE until the condition is corrected. Imminent danger is any situation or condition . . . that, in the opinion of the SE, may result in serious injury or death to construction personnel or the public.”[FN]

[FN] **Construction Guidance Manual**,  
issued by Commonwealth of Kentucky  
Transportation Cabinet (May 2009), p. 1 of  
2.

In depositions, Defendants have acknowledged that the violations relating to inadequate fall protection and cave-in protection were noted, but no efforts were undertaken to remedy them. The Manual requires that work be “immediately suspended” if a “recognized” danger is “imminent.” Based on the OSHA citations, the dangers represented by the two violations were “imminent” under the definition provided in the Manual. Both were



designated “serious” and “high severity,” with a high likelihood that injury or illness could occur as a result of the violations. The citations indicate that one or more of the Defendants were aware of the violation in each instance, which is supported by the deposition testimony of record in the action. As such, each violation represents a recognized danger which triggered the obligation to shut the project down (in other words, to see that work was “immediately suspended”) until each violation was corrected and the danger abated, regardless of how long such corrective measures might have taken.

Similarly, KTC employees had a duty to inspect the concrete forms prior to the pouring of the concrete. Again, this obligation has been acknowledged in the deposition testimony of record in this action. Further, the Kentucky Standard Specifications for Roads and Bridges, which all parties agree is applicable to construction projects of this ilk, requires inspection of the formworks prior to the pouring of concrete.[FN] There was no such inspection.

**[FN] Kentucky Standard Specifications for Roads and Bridges, § 601.03.12(A);** see also Exhibits A, F, G, and H to Plaintiffs’ Response to Defendants’ Motion for Summary Judgment, electronically filed January 26, 2016.

The KTC Engineers then filed the instant interlocutory appeal, as they were permitted to do. *See Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009); *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010); *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006) (recognizing an immediate right of appeal regarding a claim of immunity). At the outset we note that we agree with the circuit court’s decision that these were ministerial acts. However, the KTC

Engineers do not contest the circuit court's conclusion that the alleged failures, discussed above, qualified as ministerial acts. Instead, and in sum, the KTC Engineers argue: (1) their alleged failures to report known safety violations could not have *proximately caused* the plaintiffs' damages; (2) even if they had fulfilled their duties to inspect the concrete formwork prior to any concrete being poured, it would not have altered the outcome because identifying improper bracing of the concrete formwork was *outside the scope of that duty*;<sup>1</sup> and lastly, (3) any KTC engineer who was not on the worksite or required to be there on the day of the accident should not be held liable.

To be clear, though, whether the KTC Engineers failed to *perform within the scope of their duties*, or *proximately caused* any legally cognizable damages, cannot be addressed at this point because doing so would determine the substantive claims of negligence asserted in this litigation. This case is before us on an interlocutory appeal, and the sole question *properly* raised at this phase-- as the Kentucky Supreme Court recently emphasized-- is whether the *acts* that the KTC Engineers allegedly failed to take were discretionary or ministerial functions. In *Baker v. Fields*, 543 S.W.3d 575, 578 (Ky. 2018) the Kentucky Supreme Court

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<sup>1</sup> In their brief, the appellants argue it was outside the scope of their duties to ensure that the retaining walls were safely anchored or braced. Rather, they describe their duties as limited, primarily, to ensuring that the retaining wall was shaped properly and placed in the correct location.

explained our very limited role in deciding immunity issues on interlocutory appeal.

A court can only address the issues presented in the interlocutory appeal itself, nothing more. Otherwise, interlocutory appeals would be used as vehicles for bypassing the structured appellate process. Specifically, this means, and we hold, that an appellate court reviewing an interlocutory appeal of a trial court's determination of a defendant's immunity from suit is limited to the specific issue of whether immunity was properly denied, nothing more.

*See also Commonwealth v. Samaritan All., LLC*, 439 S.W.3d 757, 760 (Ky. App. 2014) (“Although a party can immediately appeal from the denial of a motion to dismiss based upon absolute immunity, most other substantive defenses must wait for adjudication by a final order.”). Consequently, whether a specific ministerial act is *beyond the scope of a defendant's duties* is an issue that cannot be resolved through an interlocutory appeal of a circuit court's denial of qualified immunity. *Baker*, 543 S.W.3d at 578. Likewise, we are not at liberty to discuss or determine the scope of the KTC Engineers' duties, nor the other substantive issues of proximate cause the KTC Engineers have raised here; those are issues that might warrant summary judgment, but on grounds other than qualified immunity. Accordingly, and to this extent only, we AFFIRM the circuit court's order denying qualified immunity.

That aside, the KTC Engineers raise one other issue in Appeal No. 2016-CA-000721-MR. Like all the issues raised in all the remaining appeals before us in this matter, this remaining issue concerns the circuit court's resolution of the declaratory action relating to their indemnity claims. And, like all the issues raised in all the remaining appeals before us, we cannot address it.

As a general matter, "this court is required to raise a jurisdictional issue on its own motion if the underlying order lacks finality." *Tax Ease Lien Investments I, LLC v. Brown*, 340 S.W.3d 99, 101 (Ky. App. 2011) (citing *Huff v. Wood-Mosaic Corp.*, 454 S.W.2d 705, 706 (Ky. 1970)). The circuit court had the authority to render its decision regarding the parties' declaratory action immediately appealable while reserving the separate issue of the KTC Engineers' underlying liability to the injured Vanmeter employees -- provided it did so by following the requirements of Kentucky Civil Rule (CR) 54.02. *See Preferred Risk Mut. Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co.*, 872 S.W.2d 469, 470 (Ky. 1994).

Civil Rule 54.02 required the circuit court's order to recite not only that it was final, but also that there was "no just reason for delay." *Watson v. Best Fin. Servs., Inc.*, 245 S.W.3d 722, 726 (Ky. 2008). "Absent those certifications, the rule is not invoked." *Spencer v. Estate of Spencer*, 313 S.W.3d 534, 540 (Ky. 2010). Here, the circuit court's order purporting to convert the prior interlocutory

orders of April 18, 2016, and May 13, 2016, into final and appealable orders simply recites that it is “a final and appealable order.” The order omits that there was “no just reason for delay[,]” and this omission was never cured.

Consequently, the circuit court’s resolution of the declaratory action relating to the indemnity claims presented in this matter, which is a subject of Appeal No. 2016-CA-000721-MR, and the *only* subject of every other appeal before us, is merely interlocutory and unripe for review. *Watson*, 245 S.W.3d 722.

In short, the circuit court’s judgment was not in the proper form to invoke CR 54.02. *Spencer*, 313 S.W.3d at 540. And, absent that, we are left with no option other than to DISMISS, in part, the remainder of Appeal No. 2016-CA-000721-MR; and DISMISS, in full, Appeal Nos. 2016-CA-000807-MR; 2016-CA-000858-MR; 2016-CA-000884-MR; and 2016-CA-000921-MR.

ALL CONCUR.



ENTERED: August 24, 2018

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JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANTS/CROSS-  
APPELLEES GREG MEREDITH,  
KEVIN GERALDS, ASHLEY  
GRAVES, TOM LAPHAM, MARK  
LOVE, JON LAM, and DARYL  
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BRIEF FOR APPELLANT/CROSS-  
APPELLEE SCOTTY'S  
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BRIEF FOR CROSS-APPELLEE  
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BRIEF FOR APPELLEES/CROSS-  
APPELLANTS VELMA DECKER,  
INDIVIDUALLY AND AS  
EXECUTRIX OF THE ESTATE OF  
KENNETH DECKER; STEVE  
NELSON, LINDA NELSON, JAMIE  
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