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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000778-MR

PERRY MASON — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 14-CI-00355

JOHN C. BARNETT AND
VANESSA V. BARNETT — APPELLEES

OPINION
AFFIRMING, IN PART, REVERSING, IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, DIXON AND JONES, JUDGES.

ACREE, JUDGE: The McCracken County Road Supervisor, Perry Mason, brings this interlocutory appeal to challenge the McCracken Circuit Court's denial of his claim of qualified official immunity. We conclude the circuit court correctly held Mason's duty to replace a stop sign is ministerial and, as to that duty, Mason is not entitled to immunity. However, we find a road supervisor's duty to clear foliage

involves discretion and, therefore, the circuit court erred when it found this duty to be ministerial. Mason is entitled to qualified official immunity against claims he breached his duty to clear foliage. We affirm, in part, reverse, in part, and remand.

I. Factual and Procedural Background

On June 25, 2013, John Barnett was injured in an automobile accident at the intersection of Ashland Avenue and Old Highway 60 in Paducah, Kentucky. He alleges Mason's failures to replace a missing stop sign and to clear overgrown foliage at the intersection were substantial factors in causing the accident.

Law enforcement officers who responded to the accident observed the "STOP AHEAD" sign just before the intersection and the white stop bar on Old Highway 60, but saw the stop sign itself was missing. Presuming the old state highway was the Commonwealth's responsibility, the officers contacted the State Highway Department, which replaced the sign that very evening.

The Barnetts later learned that maintenance of Old Highway 60 was the responsibility of the McCracken County Road Department. They sued the Road Department, County Road Supervisor Mason, and two other department employees, in their official and individual capacities, for negligent failure to replace the missing stop sign and negligent failure to remove foliage at the intersection of Ashland Avenue and Old Highway 60.

The area in question had been mowed in accordance with the Road Department's cyclical mowing operations on February 5, 2013, May 7, 2013, and July 11, 2013. The accident in this case occurred on June 25, 2013. Mason asserts there was no indication that the mowing plan was inadequate, and there were no complaints made by the public about the foliage at the intersection. Additionally, Mason points out that there was heavy rainfall and flooding in June 2013 requiring the road department's full attention elsewhere in the county.

Summary judgment was granted on immunity grounds to all defendants in their official capacities and, except for Mason, to all defendants in their individual capacities.

The circuit court denied Mason's claim to qualified official immunity. After discussing the public duty doctrine and concluding Mason's statutory duties were owed to Barnett, the circuit court stated the law of this case as follows:

> Pursuant to KRS[1] 179.070(1), the duty to maintain county roads in a safe condition and remove trees or other obstacles is imposed upon . . . the county road supervisor . . . . [and] that removing downed trees was a ministerial act for which the county [supervisor] was not entitled to qualified immunity. . . . [Further,] the failure to replace a missing sign was a ministerial act for which [county supervisors] were not entitled to qualified immunity.

(Summary Judgment, R. 806). "Applying these rules," the circuit court said:

[1] Kentucky Revised Statutes.

> Mason, as county road supervisor, owed a special duty to [Barnett] pursuant to KRS 179.070(1). Being aware of his responsibility for maintaining the section of Old Highway 60 where the accident occurred, detecting and replacing the missing stop sign at the intersection, and removing any obstructions to view of the county roads adjoining the intersection were ministerial acts for which he is not entitled to official immunity. . . . As to Mason acting [in his] individual[capacity], summary judgment will be denied.

(*Id.*, R. 806-07). Additional facts will be discussed as necessary.

II. Standard of Review

We review summary judgments to determine "whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). Entitlement to immunity is a question of law subject to *de novo* review. *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006); *Estate of Clark ex rel. Mitchell v. Daviess Cty.*, 105 S.W.3d 841, 844 (Ky. App. 2003).

Summary judgments are especially important in the context of qualified official immunity because the defense "renders one immune not just from liability, but also from suit itself." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010); *Sloas*, 201 S.W.3d at 474.

III. Analysis

Public officials and employees may be shielded from tort liability by qualified immunity when sued in their individual capacities. *Yanero v. Davis*, 65

S.W.3d 510, 522 (Ky. 2001). Whether qualified immunity extends to the public employee turns on whether the acts in question were discretionary or ministerial. *Marson v. Thomason*, 438 S.W.3d 292, 296 (Ky. 2014) (citing *Yanero*, 65 S.W.3d at 522). The doctrine applies only to discretionary acts negligently performed by a public official when performed in good faith and within the scope of the official's authority or employment. *Yanero*, 65 S.W.3d at 522.

Discretionary acts involve "the exercise of discretion and judgment, or personal deliberation, decision, and judgment[.]" *Id.* They "require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued." *Haney*, 311 S.W.3d at 240.

Conversely, "ministerial acts or functions—for which there are [sic] no immunity—are those that require '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.* (quoting *Yanero*, 65 S.W.3d at 522).

Ultimately, "the decision as to whether a public official's acts are discretionary or ministerial must be determined by the facts of each particular case[.]" *Jerauld ex rel. Robinson v. Kroger*, 353 S.W.3d 636, 640-41 (Ky. App. 2011) (quoting *Caneyville Vol. Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 809 n.9 (Ky. 2009)).

1. Knowing which roads are in road supervisor's care is a ministerial duty.

The Barnetts argued and the circuit court concluded, in effect, that KRS 179.070 imposed upon a county road supervisor the duty of knowing the scope of his duties. We will not bicker about the source of this duty; it is not explicitly stated in statute or regulation. However, it can hardly be denied that an official has a duty to know his duty. And it is illogical to conclude that an official can somehow exercise discretion regarding what part of his duties to know, and what part he need not know. We cannot hold otherwise than that an official's duty to know the scope of his duties is ministerial. But we are not finished analyzing this duty – a duty we have already implicitly acknowledged exists.

We said in *Wales v. Pullen* that "[t]here is no . . . safe harbor for a government employee who does not know the duties of his or her job." 390 S.W.3d 160, 166 (Ky. App. 2012). But the duty to know one's duty is coterminous with other duties that *are* expressed in statute or regulation. Breach of this overarching duty to know one's duty means nothing in the absence of the breach of a specific ministerial duty, or the bad faith performance (or non-performance) of a discretionary one. An official's lack of awareness of his specific duty merely explains how or why he breached it.

A government official's failure to perform a ministerial duty of which he is unaware constitutes nonfeasance and the official "is liable as well for nonfeasance as for misfeasance or malfeasance." *Id.* at 167 (citation and internal quotation marks omitted). Immunity will not be available for the non-performance of a ministerial duty no matter the reason, including ignorance.[2] But breach of this duty to know one's duty does not constitute a separate, independent cause of action, nor will it enhance compensatory damages a plaintiff is entitled to recover for breach of the underlying, specific duty.

When the unknown duty is discretionary, the analysis is slightly more complicated. The question becomes whether the lack of knowledge of one's own duties constitutes bad faith. If not, the official is immune.

Although we are tempted to discuss the impact of an official's ignorance of his duty on the bad-faith analysis, we would be expressing *dicta*. The Barnetts do not claim Mason performed a discretionary duty in bad faith. We will be satisfied here to note only that "[b]ad faith is . . . *not prompted by an honest mistake* as to one's rights or duties, but by some interested or sinister motive." *Sloas*, 201 S.W.3d at 483 (quoting *Bad faith*, BLACK'S LAW DICTIONARY (rev. 4th

[2] However, resolution of the *liability* question based on the ignorance of a ministerial duty is not as manifest as resolution of the immunity question. An official's admission that he failed to perform a ministerial duty because he was unaware it was his duty will not, in and of itself, support a directed verdict. That a "duty is ministerial . . . does not dictate the duty is absolute." *Storm v. Martin*, 540 S.W.3d 795, 801 (Ky. 2017), *reh'g denied* (Mar. 22, 2018). A jury may be persuaded to excuse the breach of a duty when the official has a genuine belief the duty is owed by someone else. *Id.*

ed. 1968); emphasis added by Supreme Court). The Barnetts do not assert a bad faith claim, perhaps because the evidence in this record fails to demonstrate it.

In summary, the breach of the non-explicit yet undeniable duty to know one's duties does not impact the balance of our immunity analysis.

2. Sign replacement is a ministerial duty.

"[M]aintenance of traffic-control devices is a ministerial function." *Lexington-Fayette Urban Cty. Gov't v. Smolcic*, 142 S.W.3d 128, 136 (Ky. 2004) (citing *Estate of Clark*, 105 S.W.3d at 846 (replacing warning sign is ministerial duty)). The circuit court, citing *Estate of Clark*, concluded Mason was not immune.

Mason argues that even if he had known the road was his responsibility, the fact he had no notice the sign was missing distinguishes his case from *Estate of Clark* in which the responsible official did have notice. *Estate of Clark*, 105 S.W.3d at 846. This is a defense to liability, but in the context of the immunity analysis it does not distinguish Mason's case; it is, in fact, irrelevant.

Similarly, his explanation of the four methods he employs to monitor the need for replacing signage and other problems along more than 800 roads in McCracken County does not impact our review.[3] Mason explains that none of

[3] Mason's monitoring methods are: (1) citizens' calls; (2) notice from department employees on duty; (3) quarterly road inspections by a designated employee to whom the responsibility for replacing missing signs was delegated; and (4) Mason's semi-annual inspection of county roads.

these methods alerted him. If they had, the County Road Department policy required that the downed or missing road sign be replaced within one (1) hour during business hours, and within two (2) hours at all other times.

These protocols are not relevant to our analysis. Again, lack of notice, like lack of knowledge of responsibility, may be a defense to the claim that Mason is liable. *See Freeport Transport, Inc. v. Commonwealth, Dep't of Highways*, 408 S.W.2d 193, 194-95 (Ky. 1966) (no liability because no actual notice to Department or road hazard, reversed on finding constructive notice as a matter of law); *City of Dayton v. Thompson*, 372 S.W.2d 407, 408 (Ky. 1963) (To hold someone "liable for dangerous conditions for travel . . . , some officer or agency . . . having in charge their maintenance must have knowledge of the unsafe condition, or it must have existed for such a length of time . . . that knowledge of it could have been obtained by the exercise of ordinary care." (citation and internal quotation marks omitted)).[4] We say again, lack of notice has no impact on the question whether Mason is immune from suit.

[4] Additionally, we reject as irrelevant Mason's argument that initial placement of a stop sign was inappropriate at this location; that decision had long ago been made. Citing the Manual on Uniform Traffic Control Devices (MUTCD), Mason testified that a stop sign was not necessary at the intersection because Old Highway 60 was a dead-end. Mason testified that, according to the MUTCD, stop signs are not necessary in such an area. However, the initial determination to place or not place a sign on a county road where it is not required by MUTCD is a discretionary function undertaken by the fiscal court. *Madison Fiscal Court v. Edester*, 301 Ky. 1, 190 S.W.2d 695, 696 (1945); *see* KRS 67.080(2)(b). The record is devoid of any evidence that the McCracken County Fiscal Court took any recent action regarding this disputed area of roadway.

We simply repeat the Supreme Court's holding in *Smolcic* that "maintenance of traffic-control devices is a ministerial function." 142 S.W.3d at 136.

3. Clearing foliage from along county roads is a discretionary duty.

Our Supreme Court said, "the nature of a particular act or function demands a more probing analysis than may be apparent at first glance." *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010). The questions raised here demand nothing less than that kind of analysis.

The circuit court ruled that performing the duties of "removing any obstructions to view of the county roads adjoining the intersection were ministerial acts for which [Mason] is not entitled to official immunity . . . ." (Summary Judgment, R. 806-07). What is that duty's source? The circuit court found it to be KRS 179.070(1), and cited *Wales* and *Ezell v. Christian County*, 245 F.3d 853 (6th Cir. 2001) as support. The circuit court's legal conclusion is erroneous because it interprets the statute too broadly and inconsistently with *Wales*. And to the extent the Sixth Circuit case of *Ezell v. Christian County* appears to support the circuit court's ruling, it also misinterprets Kentucky law.

This case involves only the *replacement*, not the initial placement, of a sign missing but previously determined to be appropriate at the relevant location.

a. *Duty to cut foliage along county roads is not found in KRS 179.070(1)(j)*

The subsection the circuit court believes is applicable here says, "The county engineer shall . . . [r]emove trees or other obstacles from the right-of-way of any publicly dedicated road when the tree or other obstacles become a hazard to traffic . . . ." KRS 179.070(1)(j). Because neither the term "obstacle" nor the term "right-of-way" is defined in this chapter, we must discern what the Legislature meant by "obstacles from the right-of-way."

We do not know why the Legislature used the word "obstacles" rather than "obstructions" – a term it defined for this chapter more than a hundred years ago. 1914 Ky. Acts ch. 80 (codified as KS[5] 4338; re-codified as KRS 179.010(3) (as revised) ("'Obstructions' includes any object which prevents the easy, safe and convenient use of a county road for public travel.")). We consider the words synonymous, as the Legislature apparently did.

The term "right-of-way" has many definitions.[6] But when this legislation was enacted a hundred years ago, the traveled portion of the road and

[5] Kentucky Statutes.

[6] "'Right-of-way' means the right of one (1) vehicle or pedestrian to proceed in a lawful manner in preference to another[.]" KRS 189.010(9). In a different context, "'right-of-way of a public highway' means the entire width between and immediately adjacent to the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." KRS 189.530(6). Absent recordation of a right-of-way, the legislature says, "the width of a public road right-of-way shall be presumed to extend to and

the right-of-way were understood as being co-extensive. "[P]ersons driving in vehicles or riding on horseback are not required to confine themselves to that part of the road that is most traveled . . . [recognizing] the right of the traveling public to the use of the entire right of way of the road[.]" *Harvey v. Illinois Cent. R. Co.*, 159 Ky. 492, 167 S.W. 875, 877 (1914). When or if that understanding changed we do not and need not know because the Supreme Court recently articulated the meaning of subsection (1)(j) in this context, and consistently with *Harvey*.

In *Storm v. Martin*, the Supreme Court addressed the duties of a county road engineer when "a significant windstorm resulted in downed power lines and trees across the Louisville area." 540 S.W.3d 795, 797 (Ky. 2017), *reh'g denied* (Mar. 22, 2018). "Three days [after the windstorm], Martin was driving his motorcycle on Phillips Lane in Louisville when he collided with a downed tree in the roadway." *Id.* As here, the focus in *Storm* was the road engineer's duty under of KRS 179.070(1)(j). "Clearly[,]" said the Supreme Court, "the intent behind KRS 179.070(1)(j) is to ensure that trees or other obstacles do not block a public roadway." *Id.* at 801.

The Supreme Court thus interpreted the statutory phrase "obstacles from the right-of-way" as the equivalent of "obstructions from the roadway." As

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include that area lying outside the shoulders and ditch lines and within any landmarks such as fences, fence posts, cornerstones, or other similar monuments indicating the boundary lines." KRS 178.025(2). Understanding context is the key.

noted, the definition for this chapter of "Obstructions" has not changed in a century. KRS 179.010(3). "Roadway" is not defined in chapter 179, but because it has not taken on any special or technical meaning, *see* KRS 446.080(4),[7] there is no reason to interpret the word other than as commonly used, or as used in *Storm*, or as defined in other laws. *See* KRS 189.010(10) ("'Roadway' means that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder."); *see also* KRS 304.39-020(9) ("'Public roadway' means a way open to the use of the public for purposes of motor vehicle travel.").

In sum, *Storm* tells us the ministerial duty expressed in the statute is to keep a roadway clear of obstacles that suddenly impede traffic. *Storm*, 540 S.W.3d at 797 ("downed tree in the roadway"); *Wales*, 390 S.W.3d at 163 ("branches of a tree . . . in the middle of the roadway"). *Storm* does not recognize in KRS 179.070(1)(j) a ministerial duty to periodically clear foliage along a roadway.

The circuit court also relied on this Court's decision in *Wales*. However, *Wales* is indistinguishable from *Storm*. In *Wales*, we said, "Kentucky statutory law placed a duty upon the County Engineer to remove trees *in the roadway* that cause a public safety hazard." *Wales*, 390 S.W.3d at 164 (emphasis

[7] "All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning." KRS 446.080(4).

added). The circuit court's broader interpretation of KRS 179.070(1)(j) is just as inconsistent with *Wales* as it is with *Storm*.

We acknowledge that *Storm* and *Wales* do not explicitly eliminate the possibility of a broader interpretation.[8] To support a broader interpretation, the circuit court cited the Sixth Circuit case of *Ezell v. Christian County*, 245 F.3d 853 (6th Cir. 2001). But that case is about liability, not immunity. In fact, the Sixth Circuit "certified two questions to the Kentucky Supreme Court concerning *liability* of the county engineer . . . [but t]he Kentucky Supreme Court denied the request." *Ezell*, 245 F.3d at 855 (emphasis added). The court lamented that it was left to "answer the questions raised in this appeal as best we can, given the lack of guidance from the Kentucky courts." *Id.*

Second, the plaintiff in *Ezell* did not claim roadside foliage impeded his view of traffic. He claimed the road supervisor was "negligent . . . because *the stop sign* was blocked from view by bushes." *Id.* (emphasis added). The court found in 603 KAR[9] 5:050 a duty that the road supervisor must comply with the

[8] The Supreme Court does not say in *Storm* whether the duty created by KRS 179.070(1)(j) is exclusive of all other duties, although we believe it is implied. Later in this opinion we consider and eliminate the possibility that subsection (1)(j) can be the source of a duty to clear roadside foliage and remain true to *Storm* and *Wales*. As explained in that discussion in Part 3.f., *infra*, the duty in KRS 179.070(1)(j) is to remove suddenly appearing obstructions in the "county through road system" created by the Legislature in 1964, and not obstructions on county roads generally – that duty was created in 1914 and, as explained below, exists today as KRS 179.210.

[9] Kentucky Administrative Regulations.

Manual on Uniform Traffic Control Devices (MUTCD). *Id.* at 857 n.2. That Manual instructs that "[s]igns should be properly maintained for cleanliness, *visibility*, and correct positioning." MUTCD, Section 6F.04 Sign Maintenance (2009 ed.) (emphasis added). Based on this analysis, the Sixth Circuit reversed a summary judgment that held a road supervisor owed no duty and was not liable to cut foliage that blocked the view of a traffic control device. *Ezell*, 245 F.3d at 857.

Thirdly, *Ezell* can easily be misinterpreted as finding a ministerial duty to clear foliage simply because, in its discussion of at least three statutory duties, the court said, "The statute specifically states that the county engineer *shall* . . . '[r]emove trees or other obstacles . . . when [they] become a hazard to traffic.'" *Id.* (emphasis in original). True, *Ezell* does involve foliage allegedly obstructing a driver's view. However, as previously discussed, that holding would not be supported by *Storm* or *Wales* or any other Kentucky jurisprudence that touched upon the subject. *See Bolin v. Davis*, 283 S.W.3d 752, 759-60 (Ky. App. 2008), *as modified*, (Jan. 23, 2009), *disc. rev. denied* (Ky. June 17, 2009).[10] *Ezell* offers little or no help to a court undertaking an immunity analysis when the duty claimed to

[10] In *Bolin*, this Court was:

> unswayed by the [appellant's] reliance upon *Ezell v. Christian County, Ky.*, 245 F.3d 853 (6th Cir. 2001) . . . . *Ezell* predated rendition of *Yanero, supra*, by several months and *Clark* by two years and makes no mention of qualified official immunity or the distinction in discretionary functions and ministerial acts. Furthermore, in *Ezell*, the Sixth Circuit acknowledged it was resolving the appeal without guidance from the Kentucky courts.

Bolin, 283 S.W.3d at 759-60.

have been breached is cutting grass or clearing foliage that obstructs observation of oncoming traffic. As established by *Storm* and *Wales*, KRS 179.070(1)(j) creates a different duty.

b. *Resolving a dilemma of interlocutory review of immunity*

Sometimes interlocutory review of a claim of immunity can be stifled by a sort of chicken-or-egg dilemma. This is such a case. Before a circuit court can determine whether the duty allegedly breached is ministerial, it must determine a duty exists in the first place. Here, the circuit court found that duty solely in KRS 179.070(1)(j). But *Storm* says otherwise. The logically inescapable conclusion from our analysis is that the circuit court failed thus far to identify the source of Mason's duty to cut roadside foliage. Because duty is an element of negligence, this would seem to be fatal to the Barnetts' claims against Mason. But not so; not at this stage of the case at least.

"[D]etermining the claim of negligence . . . [i]s outside the scope of interlocutory appellate review." *Baker v. Fields*, 543 S.W.3d 575, 578 (Ky. 2018). Does that mean our work here is finished? Hardly, but it does mean before we can proceed to the issue whether immunity was properly denied, we must solve a conundrum which is this: we cannot say no duty has been identified because *Baker* prohibits it, *id.*; and, we cannot say the duty expressed in KRS 179.070(1)(j) is not ministerial because *Storm* says it is (although descriptive of a different duty).

Storm, 540 S.W.3d at 801 ("This duty [under KRS 179.070(1)(j)] is ministerial[.]"). So, how should we solve the conundrum?

Presuming a duty exists and then deciding whether that presumed duty is ministerial or discretionary is not the solution. That would be like tailoring a suit of clothes for a ghost. We conclude, at this stage of the interlocutory appeal, and under such circumstances, that it is this Court's role to find that duty in our jurisprudence if it can be found. As noted earlier, there are no material facts in dispute. It is thus our responsibility to determine the law and the duty applicable to those facts, *de novo*, as a necessary predicate to resolving "the specific issue of whether immunity was properly denied[.]" *Baker*, 543 S.W.3d at 578.

c. *Legislatively intended duties of a county road engineer/supervisor*

We share with the circuit court and the parties a sense that the county road supervisor has some responsibility to tend the land abutting the traveled portion of a county road. But no one suggests a source for that responsibility other than the circuit court's discredited finding that it is KRS 179.070(1)(j). To find the correct source of that duty, we look first to the statutes and to the "words actually employed by the Legislature[11] . . . viewed in the light of the general purpose or

[11] We acknowledge that "an act may be ministerial even if that act is not specifically covered by applicable statutes, or administrative regulations." *Gaither v. Justice & Public Safety Cabinet*, 447 S.W.3d 628, 635 (Ky. 2014) (quoting *Commonwealth, Transp. Cabinet, Dep't of Highways v. Sexton*, 256 S.W.3d 29, 33 (Ky. 2008)). Still, "ministerial duties will frequently be established by guidelines in statutes and regulations[.]" *Greene v. Commonwealth*, 349 S.W.3d 892, 907 (Ky. 2011) (citing *Sexton*, 256 S.W.3d at 33). We must always look there first.

scheme which the Legislature had in mind *when it passed the statute*."[12] *Lewis v. Creasey Corp.*, 198 Ky. 409, 248 S.W. 1046, 1048 (1923) (emphasis added).

However, "given language's inherent slipperiness, the legislative intent is not [always] perfectly apparent from the statute alone . . . ." *Ballinger v. Commonwealth*, 459 S.W.3d 349, 355 (Ky. 2015). That is the case here. In such circumstances, we must resort "to the statutory context; to the legislative history . . . . ; to the *'historical settings and conditions out of which the legislation was enacted,'* . . . ; to the canons of statutory construction; and to such other interpretive aids as may be appropriate in the given case." *Id.* (emphasis added; citation omitted). We start with the origin of the laws establishing the duties of the county road engineer or supervisor.

The laws stated in KRS Chapter 179 addressing the county road engineer and maintenance of county roads rarely have been amended. Excluding the unitary 1982 subchapter addressing Subdivision Road Districts (KRS 179.700

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[12] We are dealing with a chapter of our laws in which most of the statutes have gone untouched and unamended by the Legislature for over a hundred years. Still, a statute "must be construed in the light of conditions *at the time of its enactment*. It would have harmonized with the prevailing conditions." *Sanitation Dist. No. 1 of Jefferson Cty. v. Louisville & Jefferson Cty. Metropolitan Sewer Dist.*, 307 Ky. 422, 426, 208 S.W.2d 751, 754 (1948) (emphasis added). We cannot impute an evolving intent to statutes enacted so long ago simply to suit changing times or technology. *See Alva West & Co. v. Corwin*, 273 Ky. 557, 117 S.W.2d 192, 195 (1937) ("While it may be true that, at the time the statute was enacted, practically all the roads in the state of Ohio were one-lane roads, we must interpret the statute as written and not give it a different meaning because the number of lanes has been increased." (interpreting Ohio statute requiring that "Vehicles shall keep to the right side of the road or highway . . . .")).

to .735), nearly two thirds of the statutes (23 of 37) read exactly as they did more than a hundred years ago.[13] Not surprisingly, nearly all the duties previously mentioned regarding county road engineers or supervisors, and more, are found in 1912 Ky. Acts ch. 110, titled "An Act defining Public Roads—providing for their establishment, regulation and construction and use and maintenance—creating the office of Road Engineer, and prescribing the duties thereof."

This 1912 legislation "was designed to inaugurate a new system of maintaining the public roads." *Rawlings v. Lyttle*, 157 Ky. 517, 163 S.W. 476, 477 (1914). Our highest court called it "comprehensive" and "revolutionizing[.]" *Fiscal Court of Fayette Cty. v. Nichols*, 287 Ky. 478, 153 S.W.2d 986, 987 (1941).

Perhaps owing to its "revolutionizing" nature, there were some falters right out of the gate. The 1912 Act survived only until the next legislative session. "In 1914 the Legislature expressly repealed the 1912 Act and enacted another elaborate law dealing with the subject . . . [that] omitted some but re-enacted most of the provisions relating to the duties and authority of the Road Engineer that appeared in the 1912 Act." *Id.* at 987-88. Aside from some interesting provisions

[13] The 23 static statutes are: KRS 179.040 to .060, 179.150, 179.180, 179.210 to 179.260, 179.270 to 179.320, 179.350 to 179.370, 179.380, 179.440, and 179.460. We include KRS 179.230 because the change was so minimal, merely eliminating a secondary means of public notice – "by handbills posted in at least ten conspicuous places in each voting precinct of their counties outside of the incorporated towns[.]" 1970 Ky. Acts ch. 92 § 57.

peripherally relevant here,[14] the 1914 Act was nearly identical to its predecessor.

Some relevant parts read as follows:

> § 39. There is hereby created in the several counties of the State of Kentucky the office of County Road Engineer. . . .
>
> § 42. The County Road Engineer . . . shall have general charge of all public roads . . . [and] shall see that same are improved, repaired and maintained as provided by law . . . .

[14] According to contemporary newspaper accounts, the amendatory Act passed by the 1914 General Assembly "cured up many of the defects of the present road law, included in which was the provision that the fiscal court of a county must employ a County Road Engineer. Under the provisions of [1914 Ky. Acts ch. 80] the fiscal court may or may not employ a road engineer. . . . This bill also provides distinctly for a return to the overseer and *warning out of hands system* of cintrolling [sic] the country roads, if the fiscal court so decides. . . . It passed by a good majority." *Change in Road Bill Thru Both Houses,* THE INTERIOR JOURNAL (STANFORD, KY.) March 17, 1914, at 1, 2 (emphasis added). The "warning out of hands system" is a form of conscription. *See* Melvin Gutterman, "*Failure to Communicate" the Reel Prison Experience*, 55 *SMU L. Rev.* 1515, 1541 n.188 (2002). Sections of the 1914 Act, not included in its predecessor Act, "provided that the fiscal court may have its public roads maintained by *requiring* the citizens of the county to work upon the roads, and . . . the alotting [sic] of able-bodied male citizens between the ages of 18 and 50 years to work on the roads in the respective precincts . . . . Where the roads are maintained by *requiring* the citizens to work upon them, the fiscal court is given authority to pay the hands for the work . . . ." *Russell Cty. v. Hill*, 164 Ky. 360, 175 S.W. 988, 991 (1915) (emphasis added). The system was re-codified in 1942 as KRS 179.120 to 179.130 and authorized the warning out of hands system until the statutes were repealed in 1960. 1960 Ky. Acts ch. 60 § 1. Little opposition to this system came from farmers because it allowed them to "'work off' road taxes during the nonharvest season by spending a given number of days repairing roads and digging runoff trenches." Gregory C. Lisa, *Bicyclists and Bureaucrats: The League of American Wheelmen and Public Choice Theory Applied*, 84 GEO. L.J. 373, 384 (1995). At least once however, when some "duly warned" hands "refused to respond" and the county judge "issued, or was about to issue, warrants to try the disobedient hands," the men sought to enjoin the criminal prosecutions by claiming the warning out of hands system was violative of "constitutional provisions against 'involuntary servitude,' and was in effect a taking of their property without due process of law." *Johnson v. Tartar*, 199 Ky. 45, 250 S.W. 498, 498 (1923). The case was determined on "the settled doctrine . . . that criminal cases cannot be enjoined[.]" *Id*. at 499 (citation omitted). However, on the constitutional question the court said, in *dicta*, that "we would have no trouble in concluding that the contentions concerning the unconstitutionality and invalidity of the statute were each and all without merit." *Id.* at 498.

> § 48. It shall be the duty of the County Road Engineer to inspect, or cause to be inspected, every six months, . . . the public roads . . . . *He shall cause noxious weeds growing by the bounds of public roads to be cut down in the month of August.* . . . *When a public road is suddenly obstructed* by the falling of rock or timber, landslides, or other cause, or a public bridge is from any cause rendered unsafe, if the same is under contract [to a third party] for continuous maintenance . . . *he* [*the county road engineer*] *shall immediately give notice thereof to the contractor . . . whose duty it shall be* within twenty-four hours or *as soon as practicable thereafter, to remove such obstruction*, and in case no effort has been made by the contractor . . . within twenty-four hours . . . he shall immediately employ such person, machinery and teams as may be necessary, and *without avoidable delay, cause the obstruction to be removed from the public road, or the bridge to be made safe* . . . . But if the said section of obstructed road be not under his contract, the said County *Road Engineer shall immediately remove the obstructions* . . . .
>
> § 52. Obstructions within the meaning of this chapter shall include trees . . . or any other thing which will prevent the easy, safe and convenient use of such public road for public travel.

1914 Ky. Acts ch. 80 §§ 39, 42, 48, and 52 (emphasis added).

The 1914 Act was codified in numerous sections of the Kentucky Statutes and, as noted above and discussed below, most provisions survive to this day, unchanged, as Kentucky Revised Statutes. Reading the 1914 Act as a whole gives a better understanding of its purposes and reveals a bit of the nature of the era's roads and mode of traveling them.

Naturally, the road engineer's duties included recommending dedication by the fiscal court of existing roads as county roads and building entirely new ones and the bridges along the way. 1914 Act at §§ 14-20. Maintaining the county roads meant the road engineer had to "cause loose stones lying in the beaten track along the public roads to be removed [and] ke[ep] in repair slucies and *converts*[.]"[15] 1912 Act at § 61 (emphasis in original). Horse racing on county roads would result in the horse's owner and rider being "fined not less than ten dollars nor more than fifty dollars."[16] 1914 Act at § 62. Apparently, there was not a corresponding concern for automobile racing because there was no fine for that.

Concern for the welfare of horses, raced or not, was evinced in a section authorizing the road engineer to pay $2.00 annually to persons who "construct and maintain a watering trough beside the public road, to be supplied with fresh water[.]" *Id.* at § 70. Pedestrian travel was also in the road engineer's bailiwick; "[a]cross every stream[,]" where necessary, he had to "place[] and ke[ep] a sufficient bridge, bench, or log for accommodation of foot passengers."

[15] Indicative of the previously mentioned "inherent slipperiness" of language, we assume sluices was intended rather than "slucies" because the correct spelling is found in the 1914 Act. But we are at a loss regarding the meaning of the word "*converts*" or why it was italicized.

[16] According to the United States Bureau of Labor Statistics' CPI calculator, the fine range in today's dollars would be $252.01 to $1,260.03. Bureau of Labor Statistics, CPI Calculator, *available at* https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=50.00&year1=191407&year2=201807 (last visited on August 28, 2018).

1912 Act at § 61; 1914 Act at § 48. Removing or damaging that bench or log was a misdemeanor. 1914 Act at § 57. At "forks and crossing[s]" of county roads, the engineer had to make "a guide board on which shall be stated in plain letters the most noted places to which each road leads and the number of miles thereto." *Id.* at § 48. (currently codified as KRS 179.320). It was a different era, but one in transition.

d. *Conditions in Kentucky when the applicable law was enacted*

So, what were the "historical settings and conditions out of which the legislation was enacted"? *Ballinger*, 459 S.W.3d at 355 (quoting *Commonwealth v. Howard*, 969 S.W.2d 700, 705 (Ky. 1998)). What compelled legislators, in two successive sessions, to devote such effort to, and to "pass by a good majority,"[17] such a "comprehensive . . . revolutionizing . . . [and] elaborate" law? *Nichols*, 153 S.W.2d at 987. The answer can be found in the advances of three interrelated fields of human endeavor that undoubtedly helped drive the effort, nationally and in Kentucky, for road improvement – agriculture, commerce, and transportation.

(1) *The roads problem*

A 1912 Berea newspaper article described this interrelationship well. Writing during the Kentucky legislative session, and citing as sources "the Interstate Commerce [C]ommission" and "the government office for public

[17] *See* footnote 14, quoting *Change in Road Bill Thru Both Houses*, THE INTERIOR JOURNAL (STANFORD, KY.) March 17, 1914, at 1, 2.

roads[,]" the unnamed author made the argument for improved roads from the farmer's perspective. *Farm and Road Improvement: Improved Roads in America*, THE CITIZEN (BEREA, KY.) Jan. 4, 1912, at 8. "There are in the United States[,]" he began, "a little more than two million one hundred fifty thousand miles of road" but "only one hundred seventy-six thousand, four hundred and twenty-nine miles are improved[,]" or about 8.2%, and "improved" in those days meant nothing more than a road was "surfaced with gravel, stone or some special material." *Id.* Road improvement was driven by the "modern conditions and the relations now existing between producer and consumer" as well as the "increased cost of hauling [agricultural goods] over unimproved roads" which imposes "an immense tax [in the broader sense] upon the farmer and those who purchase his products[.]" *Id.*

The "modern conditions" of which the author wrote no longer included the government's involvement in internal improvements that highlighted the first years of the Republic.[18] "[A]fter the middle of the nineteenth century, direct governmental participation in road building virtually ceased altogether."

[18] For a discussion of "Internal improvements – as the building of infrastructure, such as roads and canals, was called in early America[,]" see Paul Chen *The Constitutional Politics of Roads and Canals: Inter-Branch Dialogue over Internal Improvements, 1800-1828*, 28 Whittier L. Rev. 625, 625-27 (2006) ("Clearly, the new nation desperately needed better infrastructure to integrate the economies of the several states, promote commerce and communication across its vast territory, and facilitate the commercial and agricultural development of millions of acres of unused land in the west."). In this article, Professor Chen examines why the federal government failed to implement a national plan for an integrated system of roads despite popular support as well as support from Congress and four consecutive presidents.

Gregory C. Lisa, *Bicyclists and Bureaucrats: The League of American Wheelmen and Public Choice Theory Applied*, 84 Geo. L.J. 373, 377 (1995) (footnote omitted). Farmers, not government, maintained the roads fronting their property. The combined effort of our farmers was necessary to make roads passable at all.

The United States Department of Agriculture supported the farmers' self-help effort with pamphlets on road maintenance.[19] Viewing road maintenance as just another aspect of farming, the USDA saw the self-help effort continuing indefinitely because "the majority of our public highways will of necessity be composed of earth for many years to come." MAURICE O. ELDRIDGE, EARTH ROADS, U.S. DEP'T OF AGRICULTURE, FARMERS' BULLETIN NO. 136, at 3-4 (1902). That prediction would prove to be wrong. The automobile was coming of age for one thing. So was the Good Roads Movement "to push the government back into an area that it had abandoned" – road improvement and maintenance. Lisa, *supra*, at 373.

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[19] The Department of Agriculture regularly issued pamphlets to help the farmer solve the road problem. *See* MAURICE O. ELDRIDGE, GOOD ROADS FOR FARMERS, U.S. DEP'T OF AGRICULTURE, FARMERS' BULLETIN NO. 95 (1899); MAURICE O. ELDRIDGE, EARTH ROADS, U.S. DEP'T OF AGRICULTURE, FARMERS' BULLETIN NO. 136 (1902); WILLIAM L. SPOON, SAND-CLAY AND BURNT-CLAY ROADS, U.S. DEP'T OF AGRICULTURE, OFFICE OF PUBLIC ROADS (NO. 27), FARMERS' BULLETIN NO. 311 (1906); D. WARD KING, USE OF THE SPLIT-LOG DRAG ON EARTH ROADS, U.S. DEP'T OF AGRICULTURE, FARMERS' BULLETIN NO. 321 (1908); AUSTIN B. FLETCHER, CONSTRUCTION OF MACADAM ROADS, U.S. DEP'T OF AGRICULTURE, OFFICE OF PUBLIC ROADS (NO. 29), FARMERS' BULLETIN NO. 338 (1909) ; L. W. PAGE, THE ROAD DRAG AND HOW IT IS USED, U.S. DEP'T OF AGRICULTURE, FARMERS' BULLETIN NO. 597 (1914); OFFICE OF PUBLIC ROADS, THE BENEFITS OF IMPROVED ROADS, U.S. DEP'T OF AGRICULTURE, FARMERS' BULLETIN NO. 505 (1917).

At first, farmers resisted the Movement because they "resented the idea of paying additional taxes for better roads . . . . In the farmer's eyes, the idea of paying taxes out of his own pocket for 'experts' to construct roads was both unwarranted and unwise." *Id.* at 383-84. Eventually "[f]orced to realize the hidden losses incurred with their present [self-help] system, many farmers decided that a modest tax investment would work to their benefit" and they rallied behind the Good Roads Movement. *Id.* at 383-86.

In 1899, with fewer than 40 automobiles in Kentucky,[20] both of our major political parties were urged to make passing good roads legislation a plank in their platforms. *Id.* at 398 n.54.[21] The historical and legislative records clearly show Kentucky legislators were prompted to act by the farmers' embrace of the Good Roads Movement.[22] In the grand scheme, Kentucky legislators were not

[20] Statistics compiled by the U.S. Department of Transportation show the number of automobiles in Kentucky was 40 in 1900, 2,680 in 1910, and 11,766 when the 1914 Act was made law. In 1995, there were 2,631,396 cars and trucks and 32,996 motorcycles. Federal Highway Administration, Highway Statistics Summary To 1995, Table MV-201, Sheet 5, *available at* https://www.fhwa.dot.gov/ohim/summary95/mv201.pdf (last visited August 28, 2018).

[21] In a footnote, the article's author cites "Letter from Owen Lawson, Secretary-Treasurer of Kentucky Division, League of American Wheelmen, to Maurice O. Eldridge, U.S. Dept. of Agriculture, Office of Road Inquiry (Apr. 3, 1899) (describing Kentucky campaign for state aid, detailing attempts to get both parties to insert good roads provisions into convention platforms) (on file with *The Georgetown Law Journal*).

[22] Just a few years later, on what one reporter called "[t]he most eventful opening day in the history of Kentucky legislative bodies[,]" Governor Edwin P. Morrow addressed both chambers of the legislature with an ambitious agenda. Maurice Burnaugh, *Legislature Has Eventful Opening*, LEXINGTON (KY.) LEADER, January 7, 1920, at 1. That agenda placed improving Kentucky's roads on an equal footing with other bold initiatives like woman's suffrage,

slow to act. Despite the challenges of funding the law, our legislators were still several years ahead of their federal counterparts. But Kentuckians were no doubt grateful when federal funding came their way after the national good roads "campaign . . . led to . . . the Federal-Aid Road Act of 1916 [39 Stat. 335 (1917) (codified as amended at 23 U.S.C. §§ 101-58 (1994))]." *Id.* at 373.

(2) *The weed problem*

But bad roads were not the farmers' only problem. Noxious weeds were strangling Kentucky crops. Kentucky newspaper articles addressing the infestation included those by "Professor Ransom Asa Moore [1861-1941], internationally famous agronomist and agriculturalist[.]"[23] In one article published in the Barbourville Mountain Advocate, he said:

> Farmers on the virgin soils of the United States where weeds were not numerous were inclined to ridicule the idea that they could ever become seriously troublesome. The fears of the scientists have been realized, however, and there are now . . . [n]oxious weeds spreading at a rate which has alarmed those who are acquainted with the seriousness of the situation. . . . There is a great necessity of some concerted action for weed control . . . .

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reorganizing state government, anti-lynching and equal rights legislation, and "the removal of the judiciary from the slough of politics" by electing judges on a non-partisan basis. H.R. JOURNAL, REG. SESS., VOL. 1, at 20-31, 26 (Ky. 1920). As to roads, the governor said, "[I]n every way *the good roads movement* should be stimulated and placed upon the most modern and successful basis." *Id.* at 29 (emphasis added).

[23] Biographical information from "A Joint Resolution Relating to the life and public service of Professor Ransom Asa Moore." J. Res. 64, A, 1941 Leg., Reg. Sess. (Wis. 1941).

R. A. Moore, *Weed Eradication*, MOUNTAIN ADVOCATE (BARBOURVILLE, KY.) February 17, 1911, at 5.

This weed problem was not news to the Kentucky Legislature. Two decades earlier it enacted a law "to prevent the growth and ripening of Canada thistles." 1892 Ky. Acts ch. 111 (codified as KS 200). The law required all landowners "to cut and destroy" Canada thistles "so as to prevent such weeds or thistles from going to seed and the seed of the same from ripening[.]" *Id.* at § 1. Violation was both a fineable offense and grounds for a private right of action for "any person or persons, who may consider themselves aggrieved or about to be injured by such neglect or refusal" to cut and destroy the weeds. *Id.* at §§ 2, 3. That law, with the fine and private right of action provision repealed, survives today, unchanged since 1942, as KRS 249.180.[24]

The 1914 Act itself addressed weed eradication, divvying up the responsibility between the road engineer and the owners of land adjoining the county roads. As quoted above, the county road engineer was required to "cause noxious weeds growing by the bounds of public roads to be cut down in the month

[24] Other contemporaneous laws required the same of land owners along state roads. "On the neglect or refusal of the person who holds the land to cut and destroy [Canada thistles] . . . , the Commissioner of Agriculture may enter upon or hire other persons to enter upon the land and cut down and destroy the Canada or nodding thistles [and] recover . . . the reasonable costs of the eradication." KRS 249.190 (formerly KS 201 from the same 1892 Ky. Acts ch. 111); *see also* KRS 176.051 (entitled, "Department to eradicate noxious weeds and invasive plants on rights-of-way; advertisement of program; administrative regulations").

of August." 1914 Act § 48 (most recent codification, unchanged from the Act, at KRS 179.200 (repealed 1978 Ky. Acts ch. 118 § 19)). The duty the road engineer owed was to *cause* the weeds to be cut down, but not necessarily to do the job himself. Unquestionably, he could have delegated the work to his overseers and conscripted county residents to perform the actual clearing by using the "warning out of hands system."[25] 1914 Act § 85 (most recent codification at KRS 179.100 to .130 (repealed by 1960 Ky. Acts ch. 60)). In 1978, the Legislature repealed KRS 179.200 and cutting noxious weeds is no longer, *per se*, a county engineer's duty. 1978 Ky. Acts ch. 118 § 19.

Another section of the 1914 Act imposed a direct and separate duty upon the citizenry. It was "the duty of the owner or occupant of land situated along the public road, to remove all obstructions . . . *within the bounds* of the right of way . . . ."[26] 1914 Act § 53 (emphasis added; currently codified at KRS 179.240(1)). "[O]bstructions" was defined as "includ[ing] trees . . .or any other thing which shall prevent the easy, safe and convenient use of such public road for public travel." *Id.* at § 52 (currently codified at KRS 179.010(3)).

If there was any confusion about the responsibility of county road-front property owners, the 1918 General Assembly cleared that up. Senate Bill 18

[25] *See* footnote 14, *supra*, discussing "warning out of hands system."

[26] As noted earlier, traffic was not confined to the improved portion of the right-of-way. *Harvey*, 167 S.W. at 877.

of that session "provide[d] that abutting property owners must clean the public highways of brush, bushes, weeds and all other obstructions . . . [and further required that a]ll hedge fences must be trimmed back to five feet." Mildred McCann Moss, *Bill to Force Improvement of Public Highways Passes Senate*, LEXINGTON (Ky.) HERALD, February 9, 1918, at 3 (describing 1918 Ky. Acts ch. 169 § 1). Landowners would have to perform this work "between the 1st day of June and the 20th day of August of every year . . . ." 1918 Ky. Acts ch. 169 § 2. The bill passed the Senate by a vote of 25 to 8. Moss, *supra*, at 3. The Senators who opposed the bill saw "no reason why landowners should beautify their property for the benefit of the city automobiles" and tried to limit the bill to "inter-county seat roads" that carried the most automobile traffic.[27] *Id.*

The opposing Senators missed the point. Landowners were not only required to "beautify *their* property," but to clear bushes and brush from the right-of-way on government owned or controlled land. Notwithstanding the opposition, and after amendments, House passage (49-13),[28] and reconciliation,[29] the bill was

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[27] In 1918, there were 65,884 automobiles and 1,479 motorcycles in Kentucky. *See* note 21, *supra* (U.S. Department of Transportation, Federal Highway Administration, Highway Statistics Summary To 1995, Table MV-201, Sheet 5).

[28] Of 100 elected representatives, only 62 took part in the vote which occurred immediately before recess for the noon meal. When the House reconvened, and the roll was called, 86 members were present. H.R. JOURNAL, REG. SESS., VOL. 1, at 951-52 (Ky. 1918).

[29] "Senate Bill No. 18 . . . [wa]s similar to House Bill No. 73[.]" H.R. JOURNAL, REG. SESS., VOL. 1, at 809 (Ky. 1918). The notable amendment which found concurrence in both chambers

enacted as 1918 Ky. Acts ch. 169, and codified as KS 4342a-1, *et seq.* H.R. JOURNAL, REG. SESS., VOL. 1, at 951, 1521 (Ky. 1918); S. JOURNAL, REG. SESS, VOL. 1, at 1405-06 (Ky. 1918). The law is currently found, with language virtually identical to the original, at KRS 179.220 to .230.

To be sure, both the problem and the solution were controversial, and front-page news. The Lexington press reported that "[t]he Fayette county grand jury is going to indict the Fayette fiscal court. . . . The cause of the grand jury's ire is the abundant growth of weeds along the country roads." *May Indict Fiscal Court Because of Weeds on Roads*, LEXINGTON (Ky.) LEADER, July 13, 1919, at 1. The newspaper's editor weighed in and correctly predicted "[i]t is not likely . . . that the grand jury will indict the fiscal court . . . ." *As To The Cutting of Weeds Along the Turnpikes*, LEXINGTON (Ky.) LEADER, July 15, 1919, at 4.

The same editor also opined that, because "[l]abor was never so scarce[,] . . . the fiscal court will not deal harshly with the farmers . . . for permitting the weeds to grow luxuriantly along the right-of-way." *Id.* This second prediction proved wrong. Within a month, warrants were to be issued against "[a] number of prominent Fayette county property owners [who] have neglected the warning that the state law would be enforced . . . ." *Trouble Promised Owners*

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made the law applicable only upon order of the county fiscal court. *Id.* at 948-50; S. JOURNAL, REG. SESS, VOL. 1, at 1044-45, 1405-06 (Ky. 1918).

Who Failed to Cut Weeds, LEXINGTON (Ky.) HERALD, August 17, 1919, at 4. In September came the report that "[t]wenty-eight summonses will go out today from the office of [the] County Attorney . . . to farmers who are said to have failed to comply with the law by not cutting weeds and shrubbery along the public highways abutting their land . . . ." *Pesky Weeds*, LEXINGTON (Ky.) LEADER, September 29, 1919, at 4. Clearly, the pressure, and the duty, was on the farmers.

At least one representative wanted to remove that duty. At the 1920 legislative session, a newly-elected House member from rural Clinton County[30] introduced H.B. 343, "An act to repeal an act entitled, 'An act for the improvement of the public highways of this Commonwealth,' being chapter 169 of the Acts of 1918, relating to the removal of weeds, shrubs, etc., by the owners and controllers of lands abutting on the public highways." H.R. JOURNAL, REG. SESS., VOL. 1, at 377 (Ky. 1920). The Committee on Public Roads and Highways recommended passage, but the bill to repeal never received a third reading and the 1918 law stayed on the books. *Id.* at 589, 592-93, 606, 611-12.

When a Webster County landowner was indicted for violating the 1918 law, he challenged its constitutionality. *Commonwealth v. Watson*, 223 Ky. 427, 3 S.W.2d 1077, 1078 (1928). He said the law "is discriminatory, and takes

[30] Simon G. Smith of Albany, Kentucky, (b. 1866) had just been elected state representative in November 1919 after serving Clinton County as circuit clerk, county attorney, and county judge. FRANK K. KAVANAUGH, KENTUCKY DIRECTORY FOR THE USE OF COURTS, STATE AND COUNTY OFFICIALS AND GENERAL ASSEMBLY OF THE STATE OF KENTUCKY 213 (1920).

private property for public use without due compensation." *Id.* Our highest court rejected his argument and compared the law to analogous legislation for snow removal. "[T]he weight of authority, and the better reasoning, is to the effect that the Legislature of a state may authorize a municipal corporation by ordinance to require property owners to remove snow and ice from sidewalks in front of their property." *Id.* Calling the constitutional challenge "radically unsound [and] a theory of selfish immunity from all duties inherent in citizenship[,]" the Court said:

> The purpose of the statute was to make the highway free of all obstructions and to provide a clear view along the highway, to the end that accidents may be avoided[,] and the lives and property of the citizens be properly protected. In other words[,] the statute was enacted for the public safety, which has always been regarded as a proper subject of the police power. It deals with *a situation that cannot be met effectually by the fiscal court*, and it operates alike upon all persons similarly situated.

Id. at 1079 (emphasis added). The Court later noted that the statutory "obligation was imposed on those best able to perform it and upon those who would realize a distinct benefit." *Second St. Properties, Inc. v. Fiscal Court of Jefferson Cty.*, 445 S.W.2d 709, 714 (Ky. 1969).

The law survives today, unchanged in wording for exactly 100 years. KRS 179.220. However, to impose the duty on the owners of land abutting the county roads, the fiscal court must order it. *Id.* ("When ordered by the fiscal court

. . . .”). Absent the order, it is logical that the duty would fall first to the fiscal court, as suggested by the previous highlighted quote from *Watson*.

Presuming a fiscal court delegates the duty to its road engineer, it remains a duty that “cannot be met effectually” without the equivalent resource of a large portion of the county’s total agricultural labor force. *Watson*, 3 S.W.2d at 1079. Surely technology lessened the need for manual labor to achieve the task. Reliance on technology, or at least reliance on government, would be consistent with the repeal of the warning out of hands laws in 1960. 1960 Ky. Acts ch. 60. But even with modern, more efficient means of clearing bushes and brush, it is not a duty that can be satisfied simultaneously at every county roadside. Discretion must be exercised regarding where to start, where to clear next, and where to finish before the process starts all over again. Applying reason to these circumstances points us in the direction of concluding the act of clearing foliage is discretionary. That conclusion is further bolstered by another legislative provision, KRS 179.230.

When the Legislature enacted the law creating the duty to clear roadside foliage (currently codified at KRS 179.220), it built in discretion by providing a window within which the duty is to be accomplished, no matter who must bear it. Substantively unchanged from the 1914 Act, the current statute reads, in part: “The brush, bushes, weeds, overhanging limbs of trees and all other

obstructions along the roads *shall be removed between July 1 and August 20* of each year . . . ." KRS 179.230 (emphasis added).

e. *Absence of an implicit foliage clearing duty in KRS 179.070(1)(j)*

A casual student of KRS Chapter 179 will notice its two separate provisions that, at first blush, appear to establish the same duty to clear obstacles constituting hazards to traffic. They are KRS 179.070(1)(j) and KRS 179.210. The former provision says: "The county engineer shall . . . [r]emove trees or other obstacles from the right-of-way of any publicly dedicated road when the tree or other obstacles become a hazard to traffic . . . ." KRS 179.070(1)(j). The latter, much older law says: "When a county road is suddenly obstructed . . . the county road engineer shall immediately remove the obstructions . . . ." KRS 179.210.[31]

As it turns out, a "first blush" conclusion that these provisions identify the same duty is repugnant to our rules of statutory construction which prohibit a finding of legislative redundancy. "We endeavor to read statutes so as to avoid redundancy [because accepting it] violates the universal rule . . . that in construing statutes it must be presumed that the Legislature intended *something* by what it attempted to do." *White v. Commonwealth*, 178 S.W.3d 470, 482 (Ky. 2005), *as modified* (Jan. 6, 2006) (citation and internal quotation marks omitted; emphasis in original).

[31] A slightly different duty, also contained in KRS 179.210, applies when the road is under contract for continuous maintenance by a third party pursuant to KRS 178.140. KRS 179.210.

It seems some litigants, like the Barnetts, conclude the phrase "right-of-way" in KRS 179.070(1)(j) is the distinguishing factor. On its face, and not taking the analysis beyond the language of the statutes themselves, the distinction would seem valid. It would require interpreting the phrase "right-of-way" from KRS 179.070(1)(j) to mean all the land controlled by the county and the phrase "county road" from KRS 179.210 to mean only the traveled portion of that right-of-way. Such an interpretation might give strength to the argument that KRS 179.070(1)(j) addressed obstructions off the roadway but in the right-of-way while KRS 179.210 does not. However, there are three reasons to reject that argument.

We already addressed the first. As noted earlier, the origin of the language of KRS 179.210 can be traced to 1914 Ky. Acts ch. 80 § 48, codified as KS 4334 and re-codified later as KRS 179.210. Therefore, the legislative intent remains as it was in 1914. And, in 1914, the traveled portion of the roadway and the right-of-way were understood as being co-extensive. *Harvey*, 167 S.W. at 877.

The second reason, also previously addressed in this opinion, is that our Supreme Court said "right-of-way" means "roadway" in the context of KRS 179.070(1)(j). *Storm*, 540 S.W.3d at 801.

The third reason is that the county road engineer's duty to clear foliage from alongside the traveled portion of the county roads is found in KRS

179.220 to .230. To find the same duty again in KRS 179.070(1)(j) would violate the rule against legislative redundancy.

This leaves unanswered why, fifty years after creating the duty now found in KRS 179.210 to remove obstacles from the roadway, the Legislature enacted KRS 179.070(1)(j). Again, the answer is in the legislative history.

f. *Creation of the County Through Road System in 1964*

Even before the 1914 Act addressed county roads and road engineers, the Legislature put control of roads in cities of the first class (Louisville) in the hands of the city's three-member board of public works. KS 2824, 2825 (1903).[32] The legislative scheme encompassing these statutes was re-codified as KRS Chapter 93, and the chapter survived until its wholesale repeal principally by 1980 Ky. Acts ch. 239. After enactment of the 1914 Act, general differences "between city streets and county roads" were revealed. *Department of Highways v. Jackson*, 302 S.W.2d 373, 375 (Ky. 1957). By the 1950s, our courts were addressing "the confusion that has arisen out of the distinction between city streets and county roads[.]" *Id.* Soon, the Kentucky Legislature addressed the confusion, too.

[32] KS 2824 (1903): "**Board to consist of three members – salary.** The board of public works shall consist of three members. Each member of said board shall receive a salary of not less than twenty-five hundred dollars." KS 2825 (1903): "**Control of public ways and property – lighting streets and public places.** The board of public works shall have exclusive control over the construction, reconstruction, cleaning, repairing, platting, grading, improving, sprinkling, lighting and using of all streets, alleys, avenues, lanes, market-houses, bridges, sewers, drains, wells, cisterns, ditches, culverts, canals, streams and water courses, sidewalks, curbing and the lighting of public places."

In 1964, the Legislature passed Senate Bill (S.B.) 214 "Permitting fiscal court of county with a city of the first class to establish a 'county through road system'."[33] H.R. JOURNAL, REG. SESS., at lxviii (Ky. 1964). The bill, enacted as 1964 Ky. Acts ch. 80, declared that "county through roads" could include publicly dedicated roads of any kind[34] except "roads on the state highway system." KRS 178.330(2). That eliminated confusion over whether certain categories of roads were under county control or city control because all non-state roads in a county of the first class would fall under the purview of the county road engineer.

To carry out the purpose of the "county through road system," the Legislature deemed it appropriate to amend KRS 179.070. The first amendment eliminated "the requirement that the county road engineer hold a meeting in each magisterial district" for public feedback. S. LEGIS. REC. ENTRY, S.B. 214 (Ky. 1964). Three new sections were added to KRS 179.070 to give a voice to the county road engineer with governing bodies of cities of the first class. *See, e.g.,*

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[33] For a brief explanation of the "county through road system" see 3 Robert W. Keats, KY. PRAC. REAL ESTATE TRANSACTIONS § 12.17 *County roads* (Sept. 2017 update).

[34] "County through roads may include:

> (a) Main traveled roads;
> (b) Roads in unincorporated areas necessary for the circulation of traffic within the county;
> (c) Streets and roads through, within, or adjacent to cities of any class necessary for the circulation of traffic within the county; or
> (d) Major roads connecting two (2) primary roads maintained by the state.
>
> County through roads shall not include roads on the state highway system."

KRS 178.330(2).

1964 Ky. Acts ch. 80 § 8, codified as KRS 179.070(1)(k) ("county engineer shall . . . [m]ake recommendations to municipal authorities").

One of the three new sections added to KRS 179.070 is of most interest here – section (1)(j). The intended purpose of section (1)(j) was "*empowering* the county engineer to remove hazardous trees or obstacles, in counties containing cities of the first class[.]" S. LEGIS. REC. ENTRY, S.B. 214 (Ky. 1964) (emphasis added). Obviously, the Legislature deemed that power then lacking, but necessary in the "county through road system." Section (1)(j), however, is not merely an empowerment provision; it also puts upon the county engineer in counties containing cities of the first class the duty to remove obstacles from the county through road system.[35]

In *Storm* and *Wales* our respective courts analyzed KRS 179.070(1)(j) and not KRS 179.210 because the obstructed roads in those cases were in a county (Jefferson County) containing a city of the first class or a consolidated local government (Louisville/Jefferson County Metro Government) with a county through road system. *Storm*, 540 S.W.3d at 797; *Wales*, 390 S.W.3d at 162.

[35] The Legislature later amended the statute to include "counties containing . . . a consolidated local government . . . ." 2002 Ky. Acts ch. 346 § 191.

g. *Summary of Mason's duty to clear foliage from alongside a county road*

Having exhaustively analyzed the duty of a county road engineer or supervisor to clear foliage from alongside county roads, we conclude as follows.

First, KRS 179.070(1)(j) was enacted as part of the "county through road system" in 1964 and the duty contained therein, in accordance with KRS 178.330(1), is owed by the county engineer "in counties containing a city of the first class or a consolidated local government . . . ." KRS 178.330(1). Mason's duty to clear foliage from alongside McCracken County roads is not created by KRS 179.070(1)(j).

Second, when the Kentucky Legislature enacted 1914 Ky. Acts ch. 80 § 48, now codified, in part, as KRS 179.220 to .230, it created a duty "to make the highway free of all obstructions and to provide a clear view along the highway, to the end that accidents may be avoided and the lives and property of the citizens be properly protected." *Watson*, 3 S.W.2d at 1079. Because the Legislature empowered the fiscal court to impose that duty upon owners of land abutting the county roads by issuing an order, logic dictates that the duty resides first in the fiscal court. Logic further dictates that, because the same legislation imposed upon the county road engineer a responsibility for supervising and enforcing the duty,

and even prosecuting violators of the duty,[36] the fiscal court's responsibility for satisfying the duty imposed by KRS 179.220 is delegated to the county road engineer when there is no fiscal court order putting the duty upon "every owner and manager of lands bordering on the public roads . . . ." KRS 179.220.

Third, we conclude, as our highest court indicated, that the duty just described "cannot be met effectually by the fiscal court[,]" *Watson*, 3 S.W.2d at 1079, and therefore must at least create a challenge for a county road engineer and his crew. After all, for a period of our history, he conscripted a community of laborers to satisfy the duty. Furthermore, the Legislature recognized that even this workforce needed a window of time, greater than seven weeks, within which to perform that duty. Found now in KRS 179.230, the duty is clarified as follows: "The brush, bushes, weeds, overhanging limbs of trees and all other obstructions along the roads shall be removed between July 1 and August 20 of each year . . . ." KRS 179.230(1).

"In reality, few acts are ever purely discretionary or purely ministerial. Realizing this, our analysis looks for the *dominant* nature of the act." *Haney*, 311 S.W.3d at 240. The act that must be performed pursuant to KRS 179.220 and .230 is, by its creation and nature, predominantly discretionary. Much of that discretion was built in by the Legislature. In 2013, as in every year, Mason was required to

[36] 1914 Act § 74: "The County Road Engineer shall bring an action . . . against any person . . . to enforce the performance of any duty . . . in relation to such public roads."

remove "[t]he brush, bushes, weeds, overhanging limbs of trees and all other obstructions along" Old Highway 60 and Ashland Avenue, and he had to accomplish that act between July 1, 2013, and August 20, 2013.

The question we must answer is whether Mason owed a duty to clear foliage between August 20, 2012, and the date of Mr. Barnett's accident, June 25, 2013. The Legislature has not created such a duty. Furthermore, "[i]t is a primary rule of statutory construction that the enumeration of particular things excludes ideas of something else not mentioned." *Bratton v. CitiFinancial, Inc.*, 415 S.W.3d 625, 630 (Ky. 2013) (citation and internal quotation marks omitted). That principle applies here. Identifying a duty to be performed within a particular time period excludes the idea that the same duty must be performed outside that time period.

We conclude that the duty Barnett claims Mason owed him to clear foliage before he had his accident on June 25, 2013, to the extent such a duty existed at all between August 20, 2012, and July 1, 2013, is a discretionary one. "[T]here being no evidence offered from which reasonable jurors could conclude [Mason's duties] were performed in "bad faith," [Mason is] entitled to the protection of qualified official immunity." *Sloas*, 201 S.W.3d at 491.

IV. Conclusion

In sum, Mason is not protected by qualified official immunity because the duty of replacing a missing stop sign is a ministerial duty. However, to the extent a duty was owed by Mason to clear foliage along Old Highway 60 or Ashland Avenue prior to Barnett's accident, such duty was discretionary. Therefore, we affirm, in part, reverse, in part, and remand for further proceedings.

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