

**FILED**  
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SUPREME COURT

COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
NO. 2014-SC-000425-D

MATT JONES, ET AL.,

MOVANTS

VS. . . . **BRIEF ON BEHALF OF THE MOVANTS, MATT JONES & LORIE JONES**

LARRY BENNETT, RUSSELL COUNTY  
SHERIFF, ET AL.,

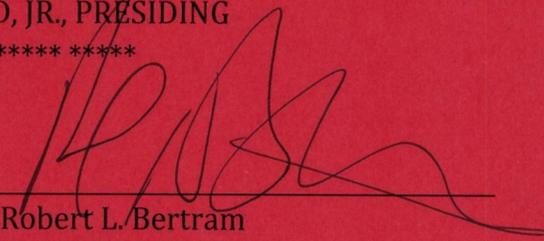
RESPONDENTS

\*\*\*\*\*

ON APPEAL FROM THE RUSSELL CIRCUIT COURT  
CIVIL ACTION NO. 10-CI-00267  
HON. VERNON MINIARD, JR., PRESIDING

\*\*\*\*\*

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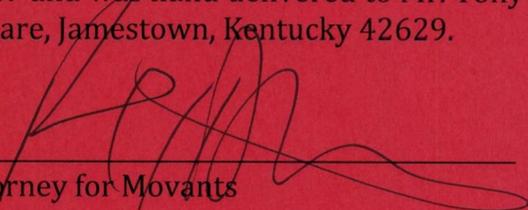
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CERTIFICATE OF SERVICE

I hereby certify that a copy of Brief on Behalf of the Movants was this the 6th day of July, 2015 served upon the following by placing same in the U.S. Mail, postage prepaid to Hon. David A. Nunery, Hon. Steven C. Call,, Nunery & Bennett, PLLC, 105 East Main Street, Campbellsville, Kentucky 42718; Hon. Todd Page, Stoll, Keenon & Ogden, 2000 PNC Plaza, 500 West Jefferson, Louisville, Kentucky 40202; Hon. Winter Huff, Attorney Services of Kentucky, PLLC, PO Box 627, Monticello, Kentucky 42633 and Hon. Vernon Miniard, Jr, Judge, Russell Circuit Court, PO Box 10, Jamestown, Kentucky 42629 and was hand delivered to Mr. Tony Kerr, Clerk, Russell Circuit Court, 202 Monument Square, Jamestown, Kentucky 42629.

  
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## I. INTRODUCTION

Appellant Matt Jones was injured in an automobile crash that resulted from Russell County Deputy Bertram's pursuit of a drunk driver. The Russell Circuit Court granted summary judgment against Matt Jones and his wife, Lorie Jones, finding that the defendant-appellees' actions were not the proximate cause of the wreck and that the defendant appellees were entitled to sovereign immunity and qualified official immunity.

## II. STATEMENT CONCERNING ORAL ARGUMENT

Given the Court's prior ruling concerning oral arguments, Movants do not request an oral argument in this matter.

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#### IV STATEMENT OF THE CASE

While most of the facts in this case are in dispute, it is beyond dispute that a drunk driver (Lawless), while being pursued by Russell County Sheriff Deputy Bertram, crashed into appellant Jones' vehicle. The crash happened on a major highway, U.S. 127. Movants contend that Deputy Bertram's actions caused their injuries. Before the crash, Deputy Bertram observed the drunk driver leave a residence and enter his vehicle and then pursued drunk driver Lawless. Deputy Bertram chased Lawless on US 127 until Lawless turned down a dead-end road. Then rather than block the roadway, Deputy Bertram waited for Lawless to come out of the dead-end road and began the chase again when Lawless came back onto US 127. Movants contend that Deputy Bertram could have easily blocked the dead-end road and arrested Lawless at that point. Instead, Deputy Bertram played a game of cat-and-mouse. Deputy Bertram hid, waited and then allowed Lawless to drive back onto Highway 127. Deputy Bertram then chased. Before Deputy Bertram could catch Lawless, Lawless crashed into the Jones' vehicle. (Complaint, Rec. at p. 1). The Sheriff and Deputy Bertram: disputed the facts regarding Deputy Bertram's pursuit; argued that Lawless's negligence was the proximate cause of the injuries; and argued that they were entitled to immunity. While discovery was ongoing, the Russell Circuit Court granted summary judgment against Matt and Lorie Jones. (Rec. p. 422)

In granting summary judgment, the Russell Circuit Court ruled that the Sheriff and Deputy Bertram's actions were not the proximate cause of the crash, and ruled that the claims against the Sheriff and Deputy Bertram were barred by

immunity. (Rec. 422). Matt and Lorie Jones appealed. The Court of Appeals affirmed the Russell Circuit Court's summary judgment. In affirming the grant of summary judgment, the Court of Appeals ruled that the Sheriff and Deputy Bertram were immune. According to the Court of Appeals:

In the present case, the trial court is correct that the actions of Deputy Bennett (sic) were within the course and scope of his employment. Bennett (sic) was actively within his law enforcement duties in pursuing an individual whom he suspected of driving under the influence. Thus his actions were discretionary acts and he is, therefore, subject to qualified immunity. It also follows that the Russell County Sheriff's Office is also shielded under the doctrine.

The Court of Appeals did not reach the proximate-cause question, stating that that argument was mooted by its qualified-immunity holding.

#### V. ARGUMENT

Pursuant to Civil Rule 76.12(4)(v)m the following issues were preserved at all stages during briefing before the Circuit Court and the Court of Appeals. The trial court's ruling is located in its Order Granting Summary Judgment entered November 8, 2011, and entered (and made final) on October 5, 2012.

#### **1. SUMMARY JUDGMENT IN FAVOR OF APPELLEES WAS IMPROPER BECAUSE DEPUTY BERTRAM'S ACTS WERE MINISTERIAL, NOT DISCRETIONARY**

The Appellees were not entitled to qualified immunity, because Deputy Bertram's alleged negligent actions were ministerial, not discretionary. In Kentucky, the controlling case on qualified immunity is *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). *Yanero* set forth the test for analyzing whether a public actor's actions are discretionary or ministerial, and therefore whether qualified immunity applies. Although determining whether negligent actions were discretionary or

ministerial may be perplexing, Yanero clearly shows that the determination is not based on the public actor's title or position. Instead, the focus must be on the nature of the public actor's allegedly negligent actions. Yanero involved a teenager who was injured during baseball practice, and dealt with the question whether the coaches, an athletic director and a school board were entitled to immunity. Yanero held that public officers and employees, when sued in their individual capacities, enjoy only qualified official immunity for good faith judgment calls. According to Yanero:

Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or function, i.e. those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee's authority. An act is not necessarily "discretionary" just because the officer performing it has some discretion with respect to the means or method to be employed.

*Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001).

This Court reaffirmed the holding of *Yanero*, in *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014), and emphasized that whether an actor is entitled to qualified immunity depends upon a factual analysis of the actor's actions. "The decision rests not on the status or title of the officer or employee, but on the function performed." *Marson v. Thomason*, 438 S.W.3d 292 (Ky. 2014)

In *Jones v. Lathram*, 150 S.W.3d 50 (Ky. 2004), this Court applied the Yanero standard to facts very similar to the case at hand. *Jones v. Lathram* involved an automobile accident that occurred while a Kentucky State Trooper, Lathram, was responding to an emergency situation. Trooper Lathram was proceeding to the scene of the emergency, with his blue lights

illuminated and siren sounding, when he collided with a truck. The truck driver was killed. A wrongful death action was filed against Trooper Lathram. Both the trial court and the Court of Appeals granted summary judgment in favor of Trooper Lathram, finding that he was entitled to qualified immunity because his decision to proceed to the scene of the emergency involved discretion. This Court summarized Trooper Lathram's position:

Trooper Lathram argues that ministerial acts are those that are precisely prescribed leaving nothing to the discretion of the actor. He further contends that he had to make a subjective decision based on the radio exchange, and then had to make another determination regarding how he would respond to the call without additional information and without guidance from a superior...He argues that emergency driving is a discretionary act that authorizes personal judgment by a trained police officer.

*Jones v. Lathram*, 150 S.W.3d 50, 52.

This Court held that although Trooper Lathram made a decision to respond to the emergency call for assistance, and thereafter made decisions "based on his assessment of roadway danger," Trooper Lathram's decision was not the type of decision making that would afford him qualified immunity:

While decisions were required in the course of driving, there were no decisions that would appear to be truly discretionary acts. We recognize that Lathram independently assessed the situation and responded in a manner that he determined to be appropriate. However, the act of safely driving a police cruiser, even in an emergency, is not an act that typically requires any deliberation or the exercise of judgment. Rather, driving a police cruiser requires reactive decisions based on duty, training, and overall consideration of public safety. In our view, Lathram's duty is comparable to the duty of the coaches in Yanero where we held that the duty to enforce the rule requiring batting helmets was ministerial. Upon the foregoing analysis, we conclude that whether Trooper Lathram was negligent in operating his police cruiser, with due regard being given to all the

facts and circumstances, is a question for resolution by the trier of fact. As such, summary judgment was inappropriate and this cause is remanded to the trial court for further consistent proceedings.

*Jones v. Lathram*, 150 S.W.3d 50, 53-54.

Unfortunately, neither the trial court nor the Court of Appeals properly applied the *Yanero* standard to the case at hand. Instead, the trial court apparently made its determination based on the generality that whether and how to arrest is a discretionary act. According to the trial court's order: "As noted by these Defendants, a law enforcement officer's determination whether to arrest, and thus how to arrest, is a discretionary act. *Jeffers v. Havrin*, 10 F.3d 380 (6<sup>th</sup> Cir. 1993). (Order Granting Summary Judgment, Rec. p. 422). The trial court failed to follow *Yanero* and *Jones v. Lathram*, and by granting summary judgment cut off any analysis of whether Deputy Bertram's "decision" to pursue was discretionary or ministerial. More importantly, there was no analysis as to whether Deputy Bertram's acts, *after* he made the decision to pursue, were discretionary or ministerial. Deputy Bertram's acts, while pursuing drunk driver Lawless, were ministerial; in the same way that Trooper Lathram's acts, in responding to an emergency call, were ministerial.

Because Deputy Bertram's acts were ministerial, the Appellees are not entitled to immunity, and the grant of summary judgment was improper. Thus, the grant of summary judgment should be reversed, and this action should be remanded to the Russell Circuit Court for further proceeding to determine the Movants' claims of negligence.

**2. SUMMARY JUDGMENT WAS IMPROPER BECAUSE CAUSATION WAS A FACTUAL QUESTION FOR THE JURY AND MATERIAL ISSUES OF FACT EXISTED.**

The Court of Appeals did not reach the question whether the trial court erred in granting summary judgment based on the trial court's improper conclusion that the appellees' actions were "not the proximate cause of that motor vehicle accident." Movants contend the trial court erred. It is axiomatic that summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Civil Rule 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 809 S.W.2d 476, 480 (Ky. 1991). In the case at hand, genuine issue of material fact existed as to the appellees' negligence, and as to whether the appellees' negligence was a contributing factor in causing the crash. The question of proximate cause, like the question of negligence, is a question of fact for the jury. *Ohio Casualty Ins. Co. v. Commonwealth, Dept. of Highways*, 479 S.W.2d 603 (Ky. App. 1972); *State Contracting & Stone Co. v. Fulkerson*, 288 S.W.2d 43 (Ky. App. 1956). The grant of summary judgment was improper.

**VI. CONCLUSION**

WHEREFORE, Movants Matt Jones and Lorie Jones respectfully request the Kentucky Supreme Court to reverse the Court of Appeals Opinion and to remand this cause to the Russell Circuit Court.

Respectfully submitted,

BY: \_\_\_\_\_



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