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**COMMONWEALTH OF KENTUCKY
SUPREME COURT
APPEAL NOS. 2012-SC-00024-D AND 2012-000835-D
324**

VIRGINIA GAITHER, ADMINISTRATRIX APPELLANT/CROSS-APPELLEE
AND THE PERSONAL REPRESENTATIVE
OF THE ESTATE OF LEBRON GAITHER,
DECEASED, and

COMMONWEALTH OF KENTUCKY,
APPELLEE/CROSS-APPELLEE KENTUCKY BOARD OF CLAIMS

V.

COMMONWEALTH OF KENTUCKY,
JUSTICE AND PUBLIC SAFETY CABINET, APPELLEES/CROSS APPELLANTS
DEPARTMENT OF KENTUCKY STATE
POLICE

** ** *

**APPEAL AND CROSS-APPEAL FROM COURT OF APPEALS
NOS. 2011-CA-00185 AND 2011-CA-000199, and FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 10-CI-00023, HONORABLE THOMAS D. WINGATE**

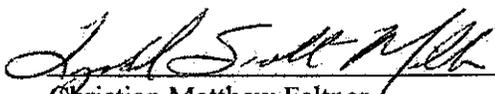
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**COMBINED RESPONSE AND OPENING
BRIEF OF APPELLEES/CROSS-APPELLANTS**

** ** *

CERTIFICATE OF SERVICE

I certify that I have filed 10 copies of this Brief with the Clerk, Supreme Court of Kentucky, 209 Capitol Bldg., 700 Capital Ave., Frankfort, KY 40601, and that I have mailed a true copy of this Brief by U.S. mail, postage pre-paid to Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, Ky 40601; the Hon. Daniel T. Taylor III, 10701 Sleepy Hollow Road, Prospect, KY 40059-9504; Hon. G. Mitch Mattingly, Kentucky Board of Claims, 130 Brighton Park Blvd., Frankfort, KY 40601; and Hon. Thomas D. Wingate, Judge, Franklin Circuit Court, Judicial Bldg., 669 Chamberlin Ave., Frankfort, KY 40601 all done this 11th day of June, 2013. I hereby certify that the record on appeal was not withdrawn from the Office of the Franklin Circuit Clerk.


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INTRODUCTION

This matter is before this Court on discretionary review from the Court of Appeals, which affirmed the Franklin Circuit's decision reversing a final order of the Kentucky Board of Claims. This matter is further before this Court on cross-discretionary review from the Court of Appeals. The purpose of the cross-appeal is to preserve for appellate review alternate grounds argued before the Court of Appeals for reversal of the final order of the Board of Claims, which were not resolved by the Court of Appeals.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees/Cross-Appellants (collectively referred to hereinafter as "KSP") respectfully request argument. This matter raises important issues concerning whether certain aspects of covert law enforcement investigations should be deemed ministerial or discretionary for purposes of Kentucky law, and further concerns the scope of legal duty, if any, owed by law enforcement officers to confidential informants and cooperating witnesses.

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COUNTER-STATEMENT OF CASE

A. Statement Of Facts

Appellant Virginia Gaither is the Administratrix of the Estate of Decedent Lebron Gaither (Gaither). Gaither was murdered on July 17, 1996, in Casey County, Kentucky. At the time of his death, Gaither was assisting KSP as a paid confidential informant. The following factual history surrounding Gaither's murder are not in dispute, and were fully developed in a two-day evidentiary hearing held before the Kentucky Board of Claims.

Gaither first began serving as a paid confidential informant for KSP in September 1995. In exchange for compensation, Gaither would make covert controlled substance purchases from suspected drug traffickers. Normally, Gaither would wear a covert recording device concealed on his person to capture, for evidentiary purposes, conversations related to his purchase of controlled substances.

Between September 1995 and June 1996, Gaither made numerous controlled substance purchases on behalf of KSP in Taylor and Marion Counties. Gaither was paid approximately \$3,150 over the course of time that he assisted KSP. The majority of illicit controlled substance transactions completed by Gaither involved investigations assigned to KSP Detective Danny Burton (Detective Burton).

On July 15, 1996, Detective Burton presented several drug trafficking investigations to the Marion County Grand Jury for indictment that involved Gaither as the confidential informant who had made the illicit controlled substance purchase. On the following day (July 16, 1996), Detective Burton presented additional drug trafficking investigations for indictment before the Taylor County Grand Jury that also involved Gaither as a confidential informant.

It is undisputed that in addition to Detective Burton, Gaither himself testified in person before both the Marion County and the Taylor County Grand Juries. It is further undisputed that Detective Burton was aware that Gaither had appeared before both the Marion County and Taylor County Grand Juries. Detective Burton, however, believed that any indictments handed down were going to be sealed.

One of the cases presented for indictment before the Taylor County Grand Jury involved a suspect named Jason Noel (Noel). One of the jurors seated on the Taylor County Grand Jury was a female named Mary Ann Esarey (Esarey). Esarey was an acquaintance of Noel. On the evening of July 16, 1996, Esarey informed Noel that Gaither had testified before the Grand Jury.¹

On July 17, 1996, Gaither met with Detective Burton and two other KSP Detectives -- Tim Simpson (Detective Simpson) and James Antle (Detective Antle). The purpose of the meeting was to attempt to make an additional controlled substance purchase utilizing Gaither as a confidential informant.

Following unsuccessful efforts to affect a controlled substance purchase from other persons, the decision was made to affect a "buy/bust"² on Noel. At the time this decision was made, Detective Burton was unaware that Esarey had publicly leaked

¹Esarey was convicted of a felony offense for her role in Gaither's death. The facts surrounding her conviction are set forth in an unpublished opinion. See Esarey v. Commonwealth, No. 2001-CA-001153-MR. (Index(1)).

² A buy/bust describes a circumstance where a drug trafficking suspect is arrested immediately (without a warrant) after having sold an illicit controlled substance to a confidential informant, as opposed to a scenario where the suspect is permitted to sell the substance without being arrested on the spot -- with the case later being presented for prosecution directly to a grand jury and the suspect being subsequently arrested pursuant to an indictment warrant.

information concerning Gaither's identity from the Grand Jury proceedings that were supposed to involve sealed indictments.

The buy/bust operation involving Noel was planned to occur at Nolley's Grocery in Campbellsville, Kentucky. Noel was to meet Gaither in the parking lot of the grocery and Gaither was to exchange marked "buy money" with Noel for a quantity of cocaine. Gaither was equipped with a micro-cassette recorder concealed in a cigarette package as well as a radio transmitting device concealed within the case of a pager. The radio transmitter was to allow for the KSP Detectives to be able to listen to Gaither's conversations with Noel.

The KSP Detectives involved in the buy/bust situated themselves in two separate motor vehicles in positions on opposite sides of the parking lot where the transaction was to take place. Detective Burton and Detective Antle were in one vehicle and Detective Simpson was in the other vehicle. The officers instructed Gaither not to get into Noel's vehicle during the drug transaction.

Gaither was further instructed that the code words to signal that the transaction had been completed was "this looks good," which would result in the officers moving in and effecting Noel's arrest. Gaither was further instructed that if anything went wrong he was to state the code words "I wish my brother was here" and the officers would move in and terminate the operation.

Noel arrived at Nolley's Grocery as anticipated. However, upon arrival, Gaither almost immediately got in the front passenger seat of Noel's vehicle, which was not in accordance with the planned operation. Noel began to pull out of the parking lot. None

of the officers involved heard Gaither utter any of the code words that had been discussed, nor observed any activity that led them to believe Gaither was in danger.

Rather than affecting a vehicle stop, the officers elected to follow Noel and Gaither. Noel's vehicle was followed to a residence in Campbellsville where Detective Burton observed Noel exit the vehicle while Gaither remained inside. Detective Burton drove past the residence but still did not observe any conduct or activity that led him to believe Gaither was in danger. Detective Burton then parked his vehicle a short distance away from the residence and continued to monitor the radio transmitter.

Shortly thereafter, Detective Burton heard via his radio transmitter Noel's car start. Detective Burton pulled out onto the street and could not see Noel's vehicle. Detective Burton drove back to Nolley's Grocery and did not find Noel's vehicle or Gaither. After further searching the Campbellsville area for Noel and Gaither, KSP Post 15 (Columbia) was advised that Gaither was missing.

Later that evening, Noel was located. Upon investigation and questioning of Noel's associates, it was learned that Gaither had been transported to a rural area of Casey County and murdered. Noel was tried and convicted for Gaither's murder, and his conviction was affirmed on direct appeal by the Kentucky Supreme Court in an unpublished opinion. See Noel v. Commonwealth, No. 1999-SC-000379-MR (Index(2)).

B. Procedural History

Gaither's Estate initiated a wrongful death administrative action before the Kentucky Board of Claims (the "Board") against KSP on February 12, 1998. The Board subsequently dismissed the Estate's claim as untimely, in that it was not asserted within one year of Gaither's death. The Franklin Circuit Court affirmed dismissal. The Court of

Appeals reversed, and reinstated the claim. (Gaither v. Commonwealth, 161 S.W.3d 345 (Ky. App. 2004)).

Following remand, the matter was set for evidentiary hearing on May 14-15, and June 10, 2009. By agreement, the hearing was held at KSP Headquarters in Frankfort, Kentucky. Following the hearing, KSP filed its proposed findings of fact and conclusions of law. (ROA, Administrative Record). The Hearing Officer issued his report on September 28, 2009, with a recommended order that the Estate's claim be dismissed. (ROA, Administrative Record)

On or about December 8, 2009, the Board served on the parties its final order rejecting the Hearing Officer's recommendation on the parties. (ROA, Administrative Record) The final order found KSP liable for ministerial negligence and apportioned 30% fault for Gaither's death to KSP -- with 50% fault being attributed to Noel, 15% to Esarey, and 5% to Gaither himself. The total amount of damages awarded against KSP was \$168,729.90.

On January 6, 2010, after receiving the statutory required consent of the Attorney General to appeal, KSP filed a petition for judicial review in the Franklin Circuit Court pursuant to KRS 44.140. The petition was filed in Franklin County in accordance with KRS 44.140(1) due to the fact that the hearing was conducted by agreement of the parties in Franklin County.

In support of its petition, KSP filed its brief on the merits on February 23, 2010. KSP's brief set forth several challenges to the Board's final order. Specifically, KSP asserted that the Board erred as a matter of law: (1) in finding KSP negligently performed a ministerial duty; (2) in finding KSP had a duty to protect Gaither; (3) in

finding KSP was negligent; (4) in apportioning fault to KSP; and (5) in finding the statutory maximum recovery applicable in this case was \$200,000. All of these bases for denial of the Estate's claim had been argued and preserved to the Board in KSP's post-hearing brief presented to the Hearing Officer.

The Franklin Circuit Court issued its opinion and order on January 5, 2011. The Court reversed the final order of the Board of Claims, finding that the Board's award of damages was premised upon the performance of discretionary acts. The Court's order did not address the additional asserted grounds for relief argued by KSP.

Appellant Virginia Gaither filed a notice of appeal on January 26, 2011. KSP filed its notice of cross-appeal on January 27, 2011. By way of its cross-appeal, KSP sought to preserve for appellate review the alternate grounds asserted before the Franklin Circuit Court in support of reversal of the Board of Claims' final order that the Circuit Court did not address. The Court of Appeals affirmed the Franklin Circuit Court on the issue that Board of Claims erred in finding KSP liable for the negligent performance of a ministerial act under the facts of this case. The Court of Appeals did not rule on the merits of KSP's alternate grounds for relief from the final order of the Board of Claims.

ARGUMENT

I. ARGUMENT IN RESPONSE TO APPEAL

A. Standard Of Review

The standard of review of the final order of an administrative agency is limited to a determination of "whether the agency's decision is supported by substantial evidence." McManus v. Kentucky Retirement Systems, 124 S.W.3d 454, 458 (Ky. App. 2003). Substantial evidence is whether there is evidence of a sufficient probative value to induce

a conviction in the minds of reasonable people. Owens-Corning Fiberglass v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998). See also Kentucky Unemployment Insurance Co. v. Landmark Community Newspapers of Kentucky, Inc., Ky., 91 S.W.3d 575, 579 (Ky. 2002) ("Substantial evidence is defined as evidence of substance and relative consequence having the fitness to induce conviction in the minds of reasonable persons.").

Under the substantial evidence standard: "If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained." Landmark at 579. Likewise, a reviewing court must give due deference to the agency's rationale and must refrain from substituting its judgment for that of the agency's. See Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 355 (Ky. App. 1997) ("The court seeks not to form its own judgment, but, with due deference, to ensure that the agency's judgment comports with the legal restrictions applicable to it."). See also Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406, 409-10 (Ky. App. 1995) ("In weighing the substantiality of the evidence supporting an agency's decision, a reviewing court must hold fast to the guiding principle that the Trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it. . . . [al]though a reviewing court may arrive at a different conclusion than the trier of fact in its consideration of the evidence in the record, this does not necessarily deprive the agency's decision of support by substantial evidence."). A reviewing court, however, determines questions of law decided by the Board on a *de novo* standard of review. Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky Transportation Cabinet, 983 S.W.2d 488, 490 (Ky. 1988).

B. The Court of Appeals Correctly Found That KSP's Conduct With Respect To The Facts Underlying The Gaither Estate's Claim Was Discretionary In Nature

Review of the Board's Final Order reflects that it appears to have found KSP negligent in several respects. First, the Board was critical of the fact that KSP utilized Gaither as confidential informant again after he had testified before two grand juries.³ The Board further found that KSP was negligent in the way the buy/bust was handled, and likewise found that the detectives involved should have called for assistance sooner after visual surveillance on Noel's vehicle was lost.

The Board of Claims Act explicitly preserves the sovereign immunity of the Commonwealth for the performance of discretionary acts. See KRS 44.073(13)(a). "In determining whether acts are ministerial or discretionary for purposes of determining whether the Commonwealth or one of its agencies may be held liable for negligent performance of that act, it is necessary to determine whether the acts involve policy-making decisions and significant judgment, or are merely routine duties." Commonwealth of Kentucky Transportation Cabinet, Department of Highways v. Sexton, 256 S.W.3d 29, 32 (Ky. 2008). "[T]he fact that an agency occasionally or even regularly engages in a particular act does not necessarily mean that the act is a 'routine duty' not involving 'significant judgment, statutory interpretation, or policy-making decisions.'" Id. at 32-3.

In Sexton, the Kentucky Supreme Court reversed an award of damages entered against the Highway Department premised upon a finding that the Department had a

³ The Board criticized KSP based upon its determination that Gaither was taken through busy courthouses to testify before the Marion and Taylor County grand juries. (See Final Order, pp. 2-3). However, there is no evidence in the record to support a finding that Noel learned of Gaither's cooperation with KSP other than through Esarey.

ministerial duty to remove dead trees from state-owned property. In so holding, the Court noted that there was no specific statute or decisional authority imposing a duty on the Highway Department to inspect for dead or decaying trees and remove such trees that pose a danger of falling on an adjoining landowner's property. *Id.* at 33.

In this case, the Board of Claims failed to identify any controlling statute or decisional authority which supports its conclusion that KSP had a ministerial duty not to use confidential informants in additional covert investigations after the informant has testified before a grand jury. The Board likewise failed to identify such authority which limits the discretion of law enforcement officers in the manner in which they initiate and execute drug investigation buy/busts.

In Stratton v. Commonwealth, 182 S.W.3d 516 (Ky. 2006), the Court held in a Board of Claims action that the Cabinet for Families and Children could not be subject to an action concerning a claim alleging negligence in a child abuse investigation. The Court stated: "[S]uch investigations do have certain mandated statutory requirements as to who shall be interviewed, etc., but they also involve discretionary decisions by the case workers, just as in police investigations." *Id.* at 521.

As suggested in Stratton, the discretion granted officers within the law enforcement context has been recognized several times in decisions extending qualified immunity to law enforcement officers accused of making negligent tactical decisions. See Burnette v. Gee, 137 Fed.Appx. 806 (6th Cir. 2005), *cert. denied* 546 U.S. 1032 (2005) (unpublished opinion) (Index(3)) (granting qualified immunity under Kentucky law on a claim involving an officer who elected to rush an armed suicidal suspect, and then used deadly force against the suspect when he could not get control of the weapon);

Crawford v. Allen, 2004 WL 539239 (Ky. App. 2004)(unpublished opinion) (Index(4)) (granting qualified immunity under Yanero to law enforcement officer who killed suspect who drove car in reverse towards officer); Haugh v. City of Louisville, 242 S.W.3d 683 (Ky. App. 2007) (granting immunity to officers who made decision to storm residence and utilize non-lethal force in an attempt to effect an arrest).

The Board of Claims disregarded the above-cited qualified immunity decisions due to the fact that they involved use of force claims. The Board instead relied on Franklin County v. Malone, 957 S.W.2d 195 (Ky. 1997), *overruled on other grounds by Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), which held that the searching of an arrested person by a law enforcement officer is a ministerial function. The Board, however, failed to cite any like authority for support for its finding that law enforcement activities with respect to the use of a confidential informant are ministerial in nature.⁴ In addition, the Board ignored recent appellate decisions that have construed discretionary act immunity broadly.

For example, in Caneyville Volunteer Fire Department v. Green's Motorcycle Salvage, Inc., 286 S.W.3d 790 (Ky. 2009), the Court held that the manner in which a fire chief elected to respond to a structure fire was a discretionary act. In so holding, the Court stated that public officials cannot be held liable for "bad guesses" in "gray areas."

⁴ Aside from Malone, recent appellate decisions that have found ministerial duties on the part of law enforcement officers involve emergency response driving, and leaving the keys in an unattended police vehicle. See Jones v. Lathram, 150 S.W.3d 50 (Ky. 2005); Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky. 2006). But See Walker v. Davis, 643 F.Supp.2d 921 (W.D.Ky. 2009) (granting qualified official immunity under Kentucky law for claim premised upon decision to initiate or continue motor vehicle pursuit by law enforcement officer). See also Ashby v. City of Louisville, 841 S.W.2d 184, 189 (Ky. App. 1992) (holding statutorily-mandated record keeping and arrest requirements indomestic violence context are ministerial duties).

Id. at 810. As another example, the Kentucky Supreme Court has held that supervision of a prisoner work crew assigned to tree trimming details is a discretionary function. See Rowan County v. Sloas, 201 S.W.3d 469 (Ky. 2006).

More recently, in Haney v. Monsky, 311 S.W.3d 235 (Ky. 2010), the Court granted qualified official immunity with respect to a claim of negligent supervision leveled against a Louisville Zoo camp counselor who conducted a youth event which resulted in injury to a minor child. The Court granted immunity in spite of the fact that the counselor had received specific training from her employer as to how to generally conduct the activity in question. In so holding the Court stated:

As should now be clear, the question of whether a particular act or function is discretionary or ministerial in nature is and, indeed, should be, inherently fact-sensitive. Both the trial court and the Court of Appeals simply concluded that Haney's supervisory duties in conducting the Night Hike activity were made ministerial by virtue of her being trained. Yet, without more, this should not halt further analysis and, to be sure, if it did, potentially all public employees and officials could be subject to suit. Rather, a court must continue on and examine the training imparted as it related to the acts or functions alleged as tortious or directly causing the event, all in an effort toward determining whether the training actually left the employee or official with significant discretion regarding the act or function at issue. Id. at 246.

Even more recently, in 2011 this Court recognized that the supervision of students by teachers is discretionary to the extent such supervision is not governed by a specific rule or policy. See Turner v. Nelson, 342 S.W.3d 866, 876 (Ky. 2011) ("It is imperative that teachers maintain the discretion to teach, supervise, and appropriately discipline children in the classroom. To do this, they must have appropriate leeway to do so, to investigate complaints by parents, or others, as to the conduct of their students, to form conclusions (based on facts not always known) as to what actually happened, and ultimately to determine an appropriate course of action, which may, at times, involve

reporting the conduct of a child to the appropriate authorities. In fact, protection of the discretionary powers of our public officials and employees, exercised in good faith, is the very foundation of our doctrine of "qualified official immunity."). Simply put, if teachers maintain discretion to supervise, investigate and discipline students in spite of the myriad and diverse policies that govern nearly aspect of public education, it cannot be gainsaid that law enforcement officers should likewise be recognized to have significant and abundant discretion in the conduct of covert drug investigations involving cooperating witnesses.

In this case, the Estate argues that KSP was engaged in ministerial acts because it maintained an internal policy that applied to confidential informants. However, nothing in the policy prohibited the KSP from utilizing informants that had previously testified in judicial proceedings. Likewise, the policy does not mandate any particular course of action when an investigation proceeds in a manner contrary to the initial plan such as occurred in this case.

In this respect the holding of Haney, supports KSP's position that simply because an internal policy governed certain aspects of the use of cooperating witnesses does not mean that all aspects of KSP's utilization of cooperating witnesses is ministerial in nature. Rather, as recognized in Stratton, police officers must be given broad discretion in the performance of their duties. See also Phillips v. Commonwealth, 473 S.W.2d 135, 137 (Ky. 1971) ("Police officers must be given reasonable discretion and a wide latitude of action in investigation of crime. Courts are in no position to say as a matter of law that an officer must break off an investigation at any particular point in time or that he must move in and effect an arrest at any particular time. These are matters that do and must

remain in the reasonable discretion of the officer in the field conducting the investigation.").

Likewise, there is no showing in this case that the existence of KSP's cooperating witness policy or the application of the policy to the facts of this case in any way increased a risk of harm to Gaither. See Morgan v. Scott, 291 S.W.3d 622 (Ky. 2009) (rejecting liability argument premised upon alleged violation of internal policy as there was no showing of increased risk of harm to plaintiff flowing from alleged policy violation). To hold otherwise would inevitably send a message to governmental agencies that the adoption of internal policies increases liability risks and removes all discretion from public officials who must make difficult decisions in a legally uncertain environment. See Flehsig v. United States, 991 F.2d 300, 304 (6th Cir. 1993) (applying Kentucky law in a Federal Torts Claim action, Court holds that violation on internal policy by Bureau of Prisons does not constitute negligence per se: "To hold otherwise would be to create a disincentive for the Bureau to have written procedures. An organization creates documents such as the Program Statement here as operational guidelines. To hold that failure to follow such guidelines creates potential Bureau liability would be to cause the Bureau to adopt as procedures only what is legally required. The Bureau should not be discouraged, due to fears of increased liability, from promulgating guidelines which improve performance.").

Next, the Estate's reliance on prior appellate decisions that have held that operation of motor vehicles by law enforcement officers is a ministerial function is not persuasive in this case. As noted in Haney, supra. "[D]riving a motor vehicle is clearly one of the most intensely regulated, trained, tested, and supervised activities that an

individual may perform." Id., 311 S.W.3d at 246. KSP respectfully submits that -- just as with the activity at issue in Haney, the fact that certain aspects of use of cooperating witnesses is addressed in policy does not render all aspects ministerial for purposes of imposition of liability under the limited waiver of sovereign immunity extended by the Board of Claims Act.

Finally, the Board of Claims clearly erred in evaluating KSP's actions with the 20/20 vision of hindsight. Law enforcement officers often have to adapt to fluid investigative situations, and they must use their personal discretion, judgment and experience as to how to respond when events do not go precisely to script. "[W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. . .") Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992). See also Graham v. Connor, 490 U.S. 386, 396-7 (1989) ("'[r]easonableness'. . . must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving. . .").

In this case, the Board engaged in hindsight speculation to the effect that Gaither's death could have been avoided if the detectives terminated the buy/bust immediately when Gaither got into Noel's car. Likewise, the Board's conclusion that the detectives were trying to "hide their mistakes" (See Final Order, p. 10) by attempting to locate

Gaither for a period of time before notifying Post 15 of the situation is wholly unsupported by the record.

The evidence presented at the hearing by the Taylor County Commonwealth Attorney at the time of Gaither's death, was that an informant had never been murdered in that area before, nor was he aware of grand jury leaking information on a sealed indictment. (Transcript of Evidence, Day 3 (6/10/09), pp. 106; 130; 132). The detectives made an on-scene discretionary decision to allow the investigation to proceed because there was no evidence from the radio transmissions that Gaither was in distress. The officers likewise had no information to suggest that Noel was aware that Gaither was a confidential informant. Finally, terminating the operation through active police intervention could just have easily put Gaither as well as other members of the public in danger, thus supporting the detectives' discretionary election to instead engage in covert mobile surveillance.

Simply put, the Board completely failed to identify any remote decisional authority that supports its declaration of several ministerial duties going forward on KSP with respect to the utilization of confidential informants and the methods and procedures officers must utilize in responding to fluid covert drug trafficking investigations. In the absence of any clear statutory or decisional support for its broad-brushed declaration of ministerial law enforcement obligations, the Board's Final Order was properly reversed by the Franklin Circuit Court.

II. ARGUMENT IN SUPPORT OF CROSS-APPEAL

A. The Board Of Claims Erred As A Matter Of Law In Finding A Duty To Protect Under The Facts Of This Case

The Board of Claims erroneously held that KSP had a duty to protect Gaither from harm. The issue of when law enforcement officers have a duty to protect members of the public from harm was addressed in Ashby v. City of Louisville, 814 S.W.2d 184 (Ky. App. 1992). Ashby involved a claim that officers failed to protect a domestic violence victim from harm.

Ashby establishes that there is no affirmative duty on law enforcement to protect a person from a criminal act in the absence of a special relationship. Id. A special relationship does not exist unless it is shown, in a given situation, that the victim was in state custody or was otherwise restrained by the state at the time in question, and that the violence or other offensive conduct was perpetrated by a state actor. Id. at 190. See also Fryman v. Harrison, 896 S.W.2d 908, 910 (Ky. 1995) (holding that to establish an affirmative legal duty on the part of a public official to protect a person from harm: "[I]t must be demonstrated that 'the victim was in state custody or was otherwise restrained by the state at the time in question, and that the violence or other offensive conduct was perpetrated by a state actor.'").

The Ashby court likewise cited to Santy v. Bresee, 473 N.W.2d 69 (Ill. App. 4 Dist. 1984) for the proposition that law enforcement does not assume any affirmative duty to protect by mere knowledge of the threat to the safety of a citizen. See Id. at 190 ("[n]o special relationship was created between murder victims and the defendant law enforcement agency or officers where the victims had requested protection, the defendants were aware of the murderer's threats against the victims, and the defendants had promised to warn the victims of the murderer's release from custody. These

circumstances “do not take the case out of the general rule that law enforcement agencies and officers do not owe individual citizens a duty to protect them from crime.”).

Under Ashby to establish that KSP had a legal duty to protect Gaither from harm, the Board had to find substantial evidence in the record that KSP coerced Gaither or that Gaither was under state control. The facts of record establish that Gaither was voluntarily assisting KSP in the capacity of a paid confidential informant at the time of his death. Gaither was under no obligation to assist KSP, and Gaither was never in state custody at any time he was performing as a confidential informant for KSP. While the Board made much of the fact that Gaither was used as an informant after he testified in front of two grand juries, there is no support in the record to suggest his continuing cooperation with KSP was in any way coerced. In this respect, Gaither elected to continue to assist KSP for compensation with full knowledge of the potential self-risk involved when he engaged in conversations with the prosecutors and testifying in court as to his activities.

Further, the harm suffered by Gaither was not inflicted by a state actor. Rather, Gaither was murdered by the target of a drug investigation. For all of these reasons, the facts do not support a holding that KSP violated a duty of care to Claimant. See Commonwealth of Kentucky Corrections Cabinet v. Vester, 956 S.W.2d 204, 206 (Ky. 1997) (applying holding of Fryman as to limitation on duty of public officials to prevent harm to third persons to Corrections Cabinet in Board of Claims action). See also Summar On Behalf Of Summar v. Bennett, 157 F.3d 1054, 1059 (6th Cir. 1998) (rejecting substantive due process state created danger claim against police for alleged harm suffered by informant who was deemed a volunteer who assumed risk of harm in

assisting police); Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 80 (1st Cir. 2005) (accord -- noting informant was free to discontinue acting in such capacity at any time); Gatlin v. Green, 227 F.Supp.2d 1064, 1076 (D.Minn. 2002) (rejecting federal due process claim where murdered informant voluntarily agreed to assist police, and was not in their custody); Vaughn v. City of Athens, 176 Fed.Appx. 974 (11th Cir. 2006) (unpublished opinion) (Index(5)) (rejecting due process claim of estate of murdered informant where informant was not forced to act as an informant and was aware of the risks involved).

It is also worthy of note that this Court has specifically rejected a claim asserted in a case involving the alleged negligence of police with respect to the murder of an informant. In Collins v. Hudson, 48 S.W.3d 1 (Ky. 2001), the allegations against the officers involved a claim that they failed to warn the juvenile informant victim that his identity had been turned over in criminal discovery documents to the person he had informed upon, and further that the police failed to advise the informant that a relative of the person responsible for the murder had called the police and warned them of danger to the informant. In analyzing this claim, the Court stated:

The Court of Appeals determined that Sheriff Collins, the Sheriff's Department, and the City of Frankfort could not bear liability based on common law principles. It recognized that this Court and the Court of Appeals have spoken to the issue on several recent occasions and concluded that settled law precludes imposition of common law liability under the facts presented here. Appellee Hudson virtually concedes that existing law does not favor her position. Rather, she urges limitation of [Fryman v. Harrison] and [Ashby v. City of Louisville] to cases brought under 42 U.S.C 1983, and she urges an exception to the prevailing rule by virtue of the fact that her decedent was a juvenile during the time he acted as a police informant.

It is unnecessary to extensively review our decisions to resolve this issue. In Fryman v. Harrison, we held that there must be a special duty owed by the public official to a specific, identifiable person and not merely a breach of a general duty owed to the public at large. In Commonwealth

Corrections Cabinet v. Vester we followed Fryman expressing the view that without a special relationship, there was no liability, and both followed the view expressed in Ashby v. City of Louisville that "a 'special relationship' exists only when the victim is in state custody or is otherwise restrained by the state at the time in question. From these authorities, Fryman developed a two-prong test that required proof that the victim was in state custody or was otherwise restrained by the state and that the violence or other offensive conduct was perpetrated by a state actor. While such a result is harsh, it is not without a basis in logic and public policy, and inasmuch as Appellee Hudson has shown no compelling reason to depart from the authorities relied upon, we decline to reconsider these prior decisions. The fact that Appellee's decedent was a juvenile at the time of his co-operation with the authorities does not require a different result. Whether a common law duty exists or not appears to be unrelated to the age of the victim. Likewise, we see no reason to modify the holding in Fryman to limit it to cases brought under 42 U.S.C. 1983. Id. at 5-6.

In spite of established law that law enforcement does not have a duty to protect absent a special relationship, and that confidential informants voluntarily undertake performance of a potentially hazardous activity, the Board nonetheless imposed a duty on KSP. Specifically, the Board opined that because Gaither was eighteen years old at the time of death – and in the Board's view immature -- KSP had undertaken a duty to protect him.

The problem with the Board's conclusion is that it is wholly unsupported by any controlling decisional authority. Rather, "[P]ersons of the age of eighteen (18) years are of the age of majority for all purposes in this Commonwealth except for the purchase of alcoholic beverages and for purposes of care and treatment of children with disabilities, for which twenty-one (21) years is the age of majority, all other statutes to the contrary notwithstanding." KRS 2.015. The Board's viewpoint aside, persons over the age of 18 are clearly of the age of majority, and the Board thus erred as a matter of law in imposing a duty on KSP based upon Gaither's youth or asserted immaturity. Likewise, Collins

specifically rejected an argument that a special duty to protect should be imposed on law enforcement to protect juvenile confidential informants, and Gaither was not a juvenile in the first instance.

In sum, Gaither was not in state custody at the time of his death. Gaither's death was not inflicted by a state actor. Gaither voluntarily undertook to continue assisting, for compensation, KSP as a confidential informant, in spite of any conversations he engaged in with prosecutorial authorities regarding the risks of testifying before a grand jury. These facts do not support the finding of a duty to protect.

Finally, the Board's finding of a duty to confidential informants has no potential end. The existence of a duty is an issue of law, and a court, when making the determination of such existence, engages in what is essentially a policy determination. Sheehan v. United Services Auto Association, 913 S.W.2d 4, 6 (Ky. App. 1996).

Informants undertake their assistance with the understanding that they may have to eventually testify in Court. The Board's ruling raised the question of just how far does this newly-found duty of KSP to protect confidential informants extend? Does KSP owe a life-long duty of protection to all such persons? Is KSP obligated to create, manage and fund a witness protection program similar to that maintained by the federal government? Such public policy issues are not appropriate for the Board to adjudicate on an *ad hoc* basis.

The use of informants is an essential tool of law enforcement, not only in drug investigations but in other areas as well. See Hunt v. Commonwealth, 408 S.W.2d 182, 184 (Ky. 1966) ("Confidential informants play an important role in law enforcement."). The legal obligations of law enforcement agencies to informants, if any, are best-suited

for definition, limitation in scope to the legislative process. The Board, thus clearly erred in imposing a duty of care on KSP under the facts of this case.

B. The Board Erred As A Matter Of Law In Finding KSP Negligent

The Board found KSP negligent in continuing to utilize Gaither as a confidential informant. The Board further found that KSP executed the buy/bust operation in a negligent manner. These legal conclusions are not supported by substantial evidence. The Estate failed to offer any competent evidence on the standard of care required of law enforcement officers with respect to these issues. Instead, the Estate proffered the testimony of two former and one current Commonwealth Attorney to the effect that informants should not be utilized further after his or her identity becomes known. Likewise, the basis of such opinion is not grounded in any identifiable statute, binding legal authority, or accepted law enforcement practices at the time of the incident.

The KSP detectives involved in this case, furthermore are not prosecutors. KSP offered the opinion testimony of a law enforcement expert witness who testified that the detectives involved acted in accordance with generally accepted law enforcement practices at the time of Gaither's death. (See Transcript of Hearing, day 2, testimony of James Tipton, pp. 358-366). The Estate failed to effectively rebut this testimony. Accordingly, the Board's finding of negligence was not supported by substantial evidence.

C. The Board Erred As A Matter Of Law In Apportioning Fault To KSP

The administrative record establishes, and it is otherwise undisputed, that Gaither was murdered by Noel. It is further undisputed that Esarey was convicted of a felony offense for leaking confidential grand jury information to Noel that Gaither was a

confidential informant. In spite of the undisputed criminal responsibility of Noel and Esarey for Gaither's death, the Board nonetheless apportioned 30% responsibility for the same to KSP.

It is well-established that a superseding cause relieves the original negligent actor from liability irrespective of whether the antecedent negligence was or was not a substantial factor in bringing about an injury. Commonwealth Department of Highways v. Graham, 410 S.W.2d 619, 620 (Ky. 1967). Likewise, the legal doctrines of superseding cause and comparative fault are applicable to Board of Claims Actions. See Transportation Cabinet v. Babbitt, 172 S.W.3d 786, 792-3 (Ky. 2005).

The courts of the Commonwealth have determined in several instances that criminal conduct can constitute a superseding cause in negligence actions. See, e.g., Fryman v. Harrison, 896 S.W.2d 908 (Ky. 1995) (finding superseding cause in claim against public officials who released inmate that assaulted plaintiff); Bruck v. Thompson, 131 S.W.3d 764 (Ky. App. 2004) (holding thief who stole car and hit pedestrian a superseding cause of any negligence of vehicle's owner in leaving key in the ignition of an unattended vehicle); Briscoe v. Amazing Products, Inc., 23 S.W.3d 228 (Ky. App. 2000) (finding criminal act of person who used defendant's drain cleaner product as a weapon was superseding cause in products liability action). Contra, Pile v. City of Brandenburg, 215 S.W.3d 36, 41-42 (Ky. 2006) (rejecting superseding cause where officer violated statutory prohibition against leaving keys in ignition of an unattended vehicle that was stolen and wrecked by DUI suspect).

Except under extraordinary circumstances, individuals are generally entitled to assume that third parties will not commit intentional criminal acts. Norris v. Corrections

Corporation Of America, 521 F.Supp.2d 586, 589, fn. 2 (W.D.Ky. 2007). Likewise, the foreseeability as to the occurrence of such intentional criminal acts is not determined in hindsight. Norris, at 591. See also Sergent v. City of Charleston, 549 S.E.2d 311 (W.Va. 2001) (in action alleging negligence on part of law enforcement officers Court holds that suspect who fled from police was intervening cause of cyclist's death when fleeing suspect struck and killed cyclist).

In this case, KSP suspected that Noel was a drug trafficker -- not a murderer. Likewise, contrary to the Board's speculative belief that KSP should have foreshadowed the possibility that a grand juror might violate the secrecy mandate of RCr 5.24 (See Final Order, pp. 3-4), the record fails to establish any evidence that KSP knew or should have known that a grand juror would leak Gaither's identity to Noel. Finally, the mere fact that Gaither appeared in courthouses on a grand jury day is irrelevant. If Esarey had not leaked Gaither's identity to Noel -- there is no substantial evidence that Noel would have otherwise known Gaither's business at the courthouse regardless of whether he was seen therein or not.

For all of these reasons, the Board erred as a matter of law in apportioning any fault to KSP because the combined felonious conduct of Esarey and Gaither were a joint intervening/superseding cause of any fault on the part of KSP. In the alternative, the Board's apportionment of 30% fault to KSP was not supported by substantial evidence. It defies logic to suggest that KSP bears greater responsibility for Gaither's death than the grand juror who was convicted of a felony for her actions -- and is only slightly less responsible for his death than the individual criminally convicted of Gaither's murder.

D. The Amount Of The Board's Award Of Damages Is Not Supported By Substantial Evidence

During the administrative hearing, the parties' stipulated that the total amount of Gaither's destruction of earning capacity damages was \$490,024. (Transcript of Evidence, day 2 (5/15/09), pp. 196-7). In spite of this stipulation, the Board determined that Gaither's destruction of earning capacity damages was \$562,433.00. The discrepancy between the amount stipulated and amount awarded appears to be based upon the Board's inclusion of "foregone social security retirement contributions and annual fringe benefits." (See Final Order, p. 12).

With all due respect to the Board, no evidence was presented at the hearing as to the amount of foregone social security contributions and annual fringe benefits. It appears the Board has taken quasi-judicial notice of some calculation method to determine this amount that is not even cited or referenced in the Final Order. As such, KSP has no means to either agree with or contest the Board's method of calculation of an award of additional lost earning capacity damages beyond that stipulated by the parties.

If the Board intends to engage in damage fact-finding calculations not supported by the record, then it should announce its asserted ability to do so either by statute or regulation. As the matter stands, KSP is merely left to guess as to the manner of calculation utilized by the Board.

Further, KSP states that even if the calculation could be supported by a recognized authoritative source, the Estate waived such an additional award by stipulation to the amount of lost earning capacity damages. For all of these reasons, the award, if otherwise affirmed, must be reduced to \$148,787.24. ($\$562,433.00 - \$490,024.00 = \$72,409.00$. Total damages awarded were \$568,006.08. Deduction of \$72,409.00 from total awarded = $\$495,957.08 \div 30\%$ adjudged liability = \$148,787.24).

E. The Board Erred In Determining That The Estate's Damages Were Not Subject To The \$100,000 Recovery Limit In Effect At The Time The Claim Was Filed

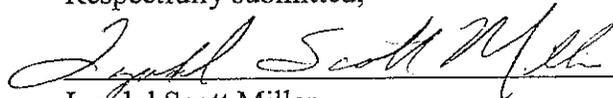
At the time the Estate initiated this action in 1998, the jurisdictional damage limit for claims before the Board was \$100,000. This limit was raised to \$200,000 subsequent to the filing of the claim. University of Kentucky v. Guyn, 372 S.W.2d 414 (Ky. 1963), holds that the statutory maximum limit in effect at the time the time an action was commenced before the Board determined the amount recoverable. Likewise, the general rule of statutory construction is that statutes are not to be applied retroactively unless expressly so declared. KRS 446.080(3).

The Board addressed this issue and determined that because the increase in the amount of damages was remedial in nature that the increased recovery amount applies. (See Final Order, pp. 13-7). KSP submits that the amount of recovery should be determined by the damage limit in effect at the time of filing of a claim as opposed to the time of adjudication, with the maximum amount recoverable capped at \$100,000.00.

CONCLUSION

For all of the above-cited reasons, it is respectfully requested that the Opinion and Order of the Franklin Circuit Court and Kentucky Court of Appeals be affirmed in all respects.

Respectfully submitted,



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