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**COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
APPEAL NO. 2012-SC-000324-DG; 2012-SC-000835DG  
ON REVIEW FROM COURT OF APPEALS  
NOS. 2011-CA-00185 AND 2011-CA-000199  
FRANKLIN CIRCUIT COURT NO. 10-CI-00023**

VIRGINIA GAITHER, ADMINISTRATRIX  
AND PERSONAL REPRESENTATIVE OF  
THE ESTATE OF LEBRON GAITHER, DECEASED  
and  
COMMONWEALTH OF KENTUCKY,  
KENTUCKY BOARD OF CLAIMS

APPELLANT  
CROSS-APPELLEE  
  
APPELLANT  
CROSS-APPELLEE

**v. APPELLANT'S REPLY BRIEF/APPELLEE CROSS- APPEAL BRIEF**

COMMONWEALTH OF KENTUCKY  
JUSTICE AND PUBLIC SAFETY CABINET,  
DEPARTMENT OF KENTUCKY STATE POLICE

APPELLEES  
CROSS-APPELLANTS

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CERTIFICATE OF SERVICE

I certify that I have filed 11 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. Christian M. Feltner, Justice & Public Safety Cabinet, Dept. of Kentucky State Police, 919 Versailles Rd., Frankfort, KY 40601; 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 7th day of August, 2013. Also I certify that I have returned the record in this case to the Clerk of the Franklin Circuit Court.

*Daniel T. Taylor*

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Daniel T. Taylor III

## INTRODUCTION

Pursuant to CR 76.12(2) this Brief is a combined Brief containing Appellant's Reply Brief at pp. 1 - 11, followed by the Cross-Appellee's Brief at pp. 12 - 23.

For the convenience of the Court the words Kentucky State Police are often shortened to K.S.P.; the words Confidential Informant are often shortened to C.I.

## STATEMENT CONCERNING ORAL ARGUMENT

Appellant and Cross-Appellee again request that Oral Argument be scheduled in this case due to the importance of clarifying the relationship, responsibilities and duties of the Kentucky State Police in regard to their use of Confidential Informants in prosecutions for drug offenses.

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## APPELLANT'S REPLY BRIEF

While they are more fully set out in the Appellant's beginning Brief, Appellant believes it would be helpful to this Court to have a more thorough understanding of the facts in this case than was afforded by the Appellees' Brief.

These follow hereunder, but first this Court is advised that Detective Burton of the K.S.P. was the lead officer in this whole operation and that Appellee simply does not comprehend that Gaither's identity as a C.I. was more than compromised - it was revealed, putting him at risk for his life, which was then terminated by Jason Noel. Gaither was pressed into this service without any training or monitoring whatsoever as the record reveals.

In this case Appellees admit their performance of a sequential series of acts which must be held to have been ministerial.

1. Detective Burton produced Gaither as a witness before the Marion County Grand Jury, after having walked him through a Courtroom crowded with people charged with crime, many of which were drug offenses. This immediately destroyed Gaither's confidentiality (C.I.) as an informant in drug prosecutions as did the fact that RCr. 6.08 requires that his name appear on any Indictment gotten as a witness for such purpose.

2. The next day Burton repeated the identical mistake, again using Gaither as a witness before the contiguous Taylor County Grand Jury. This Grand Jury indicted one Jason Noel, who by that time, due to Burton's use of Gaither the day

before, already knew that Gaither was a C.I.

Appellee's mention of a woman named Esarey<sup>1</sup> as having been a member of the Taylor County Grand Jury who was also a confidante of Jason Noel, and reported Gaither's testimony to Noel is irrelevant. By then, as already pointed out, Noel was fully aware that Gaither was a C.I., or in his parlance an "undercover narc."

3. The following day Burton had Gaither arrange to meet Noel at a grocery in Campbellsville, indeed he drove Gaither there for such purpose and dropped him off. It was Burton's intention to procure a "buy-bust" of drugs between Noel and Gaither, although at this point he already had sufficient legal cause to arrest Noel on the spot.

Burton, along with two other K.S.P. Detectives, were nearby the grocery for surveillance and appropriate action, all of which failed.

Appellees would have this Court believe that Gaither failed to employ agreed code words on his transmitter to them, and in violation of instructions, got into the Noel car. Noel's car had tinted windows and there is some suggestion in the proof that an individual in Noel's car with a shotgun caused Gaither's entry into the Noel car. However the point in this discussion, which of course Gaither could not rebut as he is dead, is that there was absolutely no sensible or legal

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<sup>1</sup>Esarey was tried, convicted and imprisoned for violation of Grand Jury secrecy.

reason or requirement for this fatal tryst at the grocery, as Burton already had his charge against Noel; further the other two detectives who were there failed entirely to do what glaringly was their duty.

Appellant is not impressed by Appellees' pallid claim that their arrest of Noel on the spot at Nolly's Grocery "might have put the public at large in danger." Consider - any, almost all, arrests are made without such a horrendous scenario being present.

Next, Noel sped away with the imprisoned (and doomed) Gaither in his car after which three supposedly able K.S.P. Detectives had failed to make a simple arrest at the grocery.

4. Thereafter Noel, with the detectives pursuing him, though they could have, and should have, effected his arrest at the grocery, stopped at a house in Campbellsville, got out of his car with Gaither left in it.

Another opportunity to save Gaither's life, but these three detectives in two separate cars, in full sight of everything, drove serenely and cavalierly right on by.

5. Noel returned to his car and drove away and in short order these three detectives in two separate cars were unable to maintain surveillance of the Noel vehicle. This is hard to understand or justify.

6. Finally, in their last failure of their duty to protect a C.I., and as clearly reflected in the Record of this case, the detectives wandered around for approximately three hours before enlisting Post 15 and local authorities to help in

finding Noel who had Gaither in his control with the full intention to kill him as any reasonable person would conclude.

Which is exactly what Noel did before the Appellees could prevent it, as they had also failed to do on five successive occasions.

It is unclear to Appellant why Appellees, at pages 5 and 6 of their Brief, set out points in this case more properly dealt with in their Cross-Appeal. These issues are the negligence of K.S.P. in performing a ministerial duty; K.S.P.'s duty to protect Gaither; whether K.S.P. was negligent; apportioning of fault to K.S.P.; and the Statutory maximum recovery applicable to this case.

In the pursuit of orderliness, and as mentioned above, Appellant will deal with these issues in a following portion of this Brief styled Cross-Appellee's Brief which begins at page 12 of this combined Brief.

Continuing, Appellant is in agreement with Appellee's Brief in two regards about which the law is well-settled:

A. Regarding the facts in a case on review, great deference is to be given to the findings of an administrative agency, and such is not to be disturbed if substantial evidence exists for it. Here we have the Final Order of the Board of Claims which was meticulously done and strongly supported by the evidence in the case; Kentucky Unemployment Insurance Co. v. Landmark Community Newspapers of Kentucky, Inc., Ky. 91 S.W.3d 575, 579 (Ky. 2001); Transportation Cabinet v. Babbit, 172 S.W.3d 786, 792-3 (Ky. 2005); Commonwealth v. Mudd,

255 S.W.2d 989, 990 (Ky. 1953).

B. However, as to questions of law in a case on review, this Court proceeds de novo ; Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky Transportation Cabinet, 983 S.W.2d 488 (Ky. 1998).

Thus let us now turn to those authorities set out in Appellee's Brief as claimed to be supportive of their position.

Commonwealth of Kentucky Transportation Cabinet, et. al. v. Sexton, 256 S.W.3d 29, 33 (Ky. 2008), a case involving urban land owners and unsound trees, attempts to set out the difference between discretionary and ministerial acts. The question being did the act or acts involve policy-making decisions and significant judgment or were they merely routine duties?

While this case held the acts to be discretionary, its helpfulness is that it contains language setting out the difference between discretionary and ministerial acts, of which Appellant has presented those of Burton, Antle and Simpson to be absolutely ministerial.

Indeed in this case it is stated in some situations an act may be ministerial even if it is not specifically covered by Statute or an Administrative regulation.

Appellant would urge this Court that the panoply of bizarre actions by Burton, Antle and Simpson went far beyond "routine duties." Their Grand Jury uses of Gaither were condemned by Gaither's three Expert Witnesses at the Hearings in the Board of Claims, and even the Appellee's own Expert Witness

agreed with Gaither's witnesses on this point; (Tr. 1, p. 329).

Next the Appellees claim that no Decisional or Statutory authority exists placing responsibility for a C.I. on them.

This is simply incorrect.

First, the General Order of K.S.P. (ApX. I) at page 1 requires strict security regarding a C.I. At page 2 a consent form is required, which is absent from this case. As is monitoring here absent.

Further on page 2, a monthly meeting is required, which did not occur.

Completely inexplicable at page 2 of this General Order is the paragraph:

“At no time will a criminal informant be employed as an agent provocateur or to commit any illegal acts under the guise of the Kentucky State Police.”

Which is just exactly what the K.S.P. were doing with Gaither.

Admittedly this General Order could have been much better done, but for actual Statutory obligation and responsibility see K.R.S. 17.150 denying public inspection of records disclosing the identity of a C.I. See K.R.S. 421.500, our Kentucky witness protection Statute.

The Appellees contend that the acts of K.S.P. in this case were “tactical decisions,” thus not rising to the ministerial. When the K.S.P. deliberately puts a person in a situation where the inevitability is that he will be killed, this goes miles beyond a tactical decision.

At page 8 of Appellee's Brief it is appalling how they try to slip around and

out of their failures in this case.

Indeed on this page in a footnote, Appellees complain that the Board of Claims criticized Burton conducting the two Grand Jury appearances. Further, Appellees contend that there was no evidence that Noel knew Gaither was a C.I. The facts are otherwise, of course he did, by all that had gone on before.

At page 9 of their Brief Appellees cite Stratton v. Commonwealth, 182 S.W.3d 516 (Ky. 2006). However a reading of this case reveals its fault in that while by Administrative Regulation it imposes a duty on the social worker involved, nonetheless that regulation does not provide what further action is to be taken if a violation of such ministerial duty is determined.

Citing Caneyville v. Green's Motorcycle, 286 S.W.3d 790 (2009) Appellees contend that K.S.P. cannot be held liable for "bad guesses" in "gray areas." Burton's conduct went well beyond guesses, and the areas he violated were not merely gray - they were pitch- black.

At their page 10 Appellees cite Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky. 2006) and Jones v. Lathram, 150 S.W.3d 50 (Ky. 2005) as cases in which ministerial acts were found. Jones particularly states that if the act or duty is absolute, certain and imperative, then it is a ministerial act. Following, they cite Haney v. Monsky, 311 S.W.3d 235 (Ky. 2010).

Of the myriad cases confronting the issue in this case, it is submitted that Haney is the one most determinative of the outcome of this appeal.

A reading of it establishes these prime principles regarding the issue in Gaither's case:

1. In determining whether the act sued upon is discretionary or ministerial, such analysis is fact-sensitive. What was it that happened in the case, as we have in Gaither's case?

2. Our Kentucky jurisprudence on the issue in this case has advanced beyond an absolute necessity for an Administrative or Statutory mandate to exist in the determination of whether the act or acts before the Court are discretionary or ministerial. In the above regard this language is taken directly from Haney:

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..

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.

Appellees next offer Turner v. Nelson, 342 S.W.3d 866, 876 (Ky. 2011) which is irrelevant to this case. Of course teachers must control their classrooms but they are not empowered to send students to their death, as occurred here.

Appellees cite Phillips v. Commonwealth, 473 S.W.2d 135, 137 (Ky. 1971) as not allowing Courts to limit or hamper on-going investigations by police officers. However in this case on review Burton's "investigation" was way over.

Any such function residing in him was well past that.

Incontestably Burton and the other two detectives should have arrested Noel at the grocery in Campbellsville.

Next, Appellees conjure up a proposition that is inimical to common sense and sensible jurisprudence.

A careful reading of their page 13 offers the proposition that policies must not be had which impose liability.

This is totally inane and incorrect. When the rules for an act are imposed it is inescapable that liability must be attached to its violation.

Again appellees return to Haney and concede that operation of their motor vehicles by the K.S.P. is ministerial.

Do note Burton's motor vehicle usage in the six several glaring instances in this case involving Gaither, starting when he picked Gaither up to take him to Nolly's Grocery.

Following, Appellees trot out a threadbare "hindsight" argument. They incorrectly assert that the Final Order of the Board of Claims was faulty in finding that Gaither's death would have been avoided had K.S.P. terminated the "buy-bust" at the grocery. Actually there was no legitimate need or purpose to match Gaither and Noel up at the grocery at all.

Simply stated, the Final Order is entirely correct in this regard.

Appellees fail in their hope that this Court will find Burton's actions in this

case to be excusable instantaneous reactions in emergency situations by police which are tolerated. All three of these detectives had plenty of time to think through what they were doing.

Any argument by Appelles that we are talking about excusable “split-second judgments” in this case is totally incorrect.

There is absolutely no merit in their claim that K.S.P. was forced into “split-second judgments.” Graham v. Conner, 490 U.S. 386, 396 -7 (1989) informs that the “reasonableness of an officer’s conduct must be judged from the perspective of a reasonable officer on the scene” - all definitely lacking in this sequence of actions by the K.S.P.

At one point in its Brief the Appellees take great credit and smugly assert that K.S.P. warned Gaither of the risks he had taken in testifying before the two Grand Juries, but only after he had been dragooned into doing so. When one is to be informed of a risk, it is greatly preferable that this be done before the intended act, than after. Otherwise you are simply locking the barn after the horse has run away.

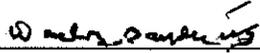
Appellees go on to criticize the Board’s Final Order which notes that K.S.P. attempted to “hide their mistakes” after repeatedly failing to correctly resolve the problem they had.

Appellee’s closing descends into the unfathomable when they try to justify these failures by K.S.P. on the basis that they had never encountered a murder in

that area before. Then, further, Appellees offer the sanctimonious premise that if they had moved in at the grocery it would have put Gaither and the general public in danger - the alternative to that being that Noel drove away with Gaither to kill him.

The Appellant, Virginia Gaither, moves this Court to overrule the Court of Appeals in this case and to affirm the Final Order of the Board of Claims in its entirety, and for all further and proper relief to which she may be entitled.

Respectfully submitted this 7<sup>th</sup> day of August, 2013.

  
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## APPELLEE CROSS-APPEAL BRIEF

The Appellee K.S.P. has filed a Cross-Appeal in this case which Appellant Gaither here responds to.

In their Cross-Appeal K.S.P. maintains:

1. The Board of Claims erred as a matter of law in finding a duty to protect Gaither in this case;
2. The Board erred in finding K.S.P. negligent;
3. The Board erred in apportioning fault to K.S.P.;
4. The Board's award of damages is not supported by substantial evidence;
5. The Board erred in determining the recovery limit in this case.

Taking the above in sequence, Gaither (now Appellee) would begin with K.S.P.'s claim that there existed no duty to protect Gaither in this case.

This is entirely rebutted by the provisions of K.R.S. 44.160 (2) and further by the General Order of the K.S.P. (Apx.I) as well as K.R.S. 17.150 mandating secrecy of records in criminal prosecutions, which is exactly what was going on in this Gaither case.

K.S.P. offers Ashby v. City of Louisville, 814 S.W.2d 184 (Ky.App. 1992) as requiring a special relationship for any duty to protect to exist. And they cite Fryman v. Harrison, 896 S.W.2d 908, 910 (Ky. 1995) for the proposition that the violence complained of be effected by a state actor.

However both of these positions quickly crumble when, as the record will reflect, it is recognized that state custody or not, the nubile Gaither was entirely under the control of Detective Burton, and indeed coerced to act exactly as Burton directed, with the quid pro quo, which was a trade, was contemplated that the criminal charges against Gaither in Marion County would be altered favorably for him.

Also this first claim by K.S.P. is totally destroyed, and about which there is much later, as in Gaither's case there absolutely existed an independent intervening superseding cause, coupled with foreseeability, which removes it as a defense for K.S.P. and places the liability right back on them, which totally removes any requirement that Gaither had to be in state custody at the time of the violence against him, and that same had to be done by a state actor.

Regarding the Ashby case, it did not even arise from the Board of Claims thus lacks application to Gaither's case on review which takes its meaning from K.R.S. 44, constituting a waiver of immunity upon the violation of a negligent ministerial act.

As for this Appellant's Fryman case, it too suffers the same defect, i.e. was not a review of a case begun in the Board of Claims. Further as pointed out in the Board's Final Order, it was too remote to have application to the issue here.

Apparently oblivious to the above, this Appellant next cites Commonwealth of Kentucky Corrections Cabinet v. Vester, 956 S.W.2d 204, 206 (Ky. 1997)

similarly appraised by the Board of Claims as too remote for application here.

Next Appellant cites Collins v. Hudson, 48 S.W.3d 1 (Ky. 2001), which is quickly distinguished from Gaither's case inasmuch as the K.S.P. greatly exceeded mere "police mistakes." In this case on review the multiple actions of K.S.P. literally constructed the situation which resulted in Gaither's death.

Appellee is in agreement with Sheehan v. United Services Auto Association, 913 S.W.2d 4, 6 (Ky. App. 1996) that the existence of a duty is an issue of law to be made by the Court, but does urge that in doing so the Court engages in what is essentially a policy decision.

It is somewhat sardonic that this Appellant next, citing Hunt v. Commonwealth, 408 S.W.2d 182, 184 (Ky. 1966) bombastically avers that the use of informants is an essential tool of law enforcement, while totally ignoring the collateral aspect of this which is accord must be made to the confidentiality and safety of persons so used by the State.

As stated above, Appellant contends that K.S.P. had no duty to protect Gaither, yet totally disregarding their own actions which caused Gaither's death.

Over and over in the decided cases the brightline depends on whether the disputed act, and the protection against it, involved a duty that was absolute, certain and imperative; Jones v. Lathram, 150 S.W.3d 50 (Ky. 2004); Yanero v. Davis, 65 S.W.3d 510, 522 (Ky. 2001); Upchurch v. Clinton County, 330 S.W.2d 428 (Ky. 1959)

Applying this well-settled law to Gaither's case before this Court, it simply cannot be disputed that the Appellant's duty to protect Gaither under the facts of this case was absolute, certain and imperative.

Indeed, as the facts further show, not only did Appellants fail in these three cardinal duties, by their own actions they further moved Gaither into situations which directly caused his murder.

Continuing, K.S.P. seeks to avoid liability in this case under the doctrine of independent intervening superseding cause.

In this regard, attention is called to the controlling element in this case which was the denial of liability to K.S.P. under a claim of independent intervening superseding cause. This defense fails, as it must here, if foreseeability of the injury is present.

Regarding foreseeability many cases have ranged through the Courts. To understand the applicability of this it must be understood that:

A. The intervening act, which was Noel's murder of Gaither, must be a separate thing from the original act, those various acts of the three detectives in this case.

B. The intervening act must not have been foreseeable. However if it is foreseeable then that defense excluding liability fails.

Regarding the margins set out above, Noel's murder of Gaither was an entirely different act from the prior acts of Appellants. However this totally fails

as a defense for K.S.P. due to its absolute foreseeability.

Such foreseeability in this case is glaringly obvious. Here the Appellants had already repeatedly revealed that Gaither was a C.I., then they sent him to meet with the very person they had indicted with Gaither's help; absolutely Noel knew by then that Gaither was a C.I.; then the Appellants allowed Noel to spirit Gaither away, beyond their protection.

Thus begging the question - what would any rational person expect to happen next?

The only answer to this is that Noel intended to take Gaither to his death.

Which is exactly what happened.

To reiterate, and as the cases inform, this claimed defense by K.S.P. fails due to the foreseeability by the original act (Noel) of an adverse effect on the victim (Gaither). Clearly such adverse effect was near-inevitable, beginning with the attempted buy/bust at Nolly's Grocery.

In Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky., 2006) the element of foreseeability of adverse effects was present, both as a matter of law and common sense.

See also NKC Hospitals, Inc. v. Anthony, Ky. App. 849 S.W.2d 564 (1993), a patient-hospital case in which any superseding cause was entirely negated due to the foreseeability of injury.

In Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980), the Court applied the

substantial factor test to the event which caused the injury, not the injury itself, stating that the injury need only flow from the event.

We are further informed by Miller v. Mills, 257 S.W.2d 520 (Ky. 1953), quite a colorful case involving a fist-fight between a bus driver and two drunks, with a 16 year old getting hit in the head with a whiskey bottle. The Court said:

“We think it is clear that so far as foreseeability enters into the question of liability for negligence, it is not required that the particular precise form of injury be foreseeable - it is sufficient if the probability of injury of some kind to persons within the natural range of effect of the alleged negligent act could be foreseen.”

For other cases holding a failure of intervening cause, see Ambrosius Industries v. Adams, Ky. 293 S.W.2d 230 (1956); Mackey v. Spradlin, Ky., 397 S.W.2d 33 (1965).

The next case is one of the two most determinative of this issue. In Glasgow Realty Company v. Metcalfe, 482 S.W.2d 750 (1972), the Court held once again that the action of a busy-body child in pushing a glass windowpane out, which fell below resulting in a bad injury to a fifty-six year old woman, did not constitute intervening cause as the negligence of the building owner in maintaining the window constituted foreseeability of harm to others. The Court of Appeals held that, while the child's action was a contributing cause to the woman's injury, it was not substantial, and with its Opinion quoted from the Restatement of Torts as follows:

If the effects of the actor's negligent conduct actively and

continuously operate to bring harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act is also a substantial factor in bringing the harm about, does not protect the actor from liability.”

The clear holding of this case was that the original actor (here State Police Detective Burton) is not relieved of liability of the subsequent intervening cause. (Noel's murder of Gaither) if it could have been reasonably foreseen.

Referring back to Miller, infra, this Court further said:

“We think it is clear that so far as foreseeability enters into the question of liability for negligence, it is not required that the particular precise form of injury be foreseeable - it is sufficient if the probability of injury of some kind to persons within the natural range of effect of the alleged negligent act could be foreseen.”

The question of duty to protect a Confidential Informant looms large in this case, and deserves determination by this Court.

The decided cases, the academic legal literatures, the Harvard pundits, and the Restatements vary widely and contradictorily on this issue.

Yet a normal human being, when asked what police are for would respond “to protect and serve,” as is emblazoned on the sides of countless police cars and embroidered as a motto on the patches they wear.

Your writer would submit that society employs qualified individuals to do exactly that - protect and serve.

Therefore Appellant must take issue that duty was absent in this case for K.S.P. to protect Gaither, who they were using for their own purposes.

And particularly when by their own actions they escalated the risk he was already under with the result that he was murdered by Jason Noel.

In this case the Appellee recognizes that Appellants in effect attempt, at least partially, to raise the defense of good faith. the relevant cases in this regard are Rowan County v. Sloas, 201 S.W.3d 469, 475 (Ky. 2006); Yanero v. Davis, 65 S.W.3d 510, 523 (Ky.2001); Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). However a reading of these cases informs that such defense both fails and is inapplicable to this case on review because:

1. Gaither's case is brought under the Board of Claims Statute, which expressly waives and denies immunity for negligent ministerial acts;
2. These cases do not allow immunity for incompetent or criminal acts. Here this Court is asked were the K.S.P. acts in this case acts of competent police officers? Painful though it may be to so ascribe, they were not.

Appellant's next argument, that the Board erred in finding K.S.P. negligent, is baldly incorrect on its face, indeed borders on the preposterous, considering the evidence and record in this case.

One sensibly cannot say that the Board lacked evidence of K.S.P's negligence - it was all over the place, from start to finish.

Regarding this portion of Appellant's Brief, they attempt to gloss over the testimony of Gaither's three Expert Witnesses regarding the mistaken and incorrectness of testifying a C.I. before a Grand Jury to get an Indictment, by their smug assertion that they had witnesses saying that routine police practices were

followed.

In the first place if what occurred in this case is applauded as routine police practices, then certainly some correction must be made as to same.

Secondly, Appellant's own Expert Witness, Tipton (Tr. 1, p.329) totally agreed with the testimony of an Expert Witness offered by Gaither - Judge Philip Rogers Patton testifying under subpoena - that testifying a C.I. before a Grand Jury was never to be done.

The third issue raised by K.S.P. in its Cross-Appeal is that the Board of Claims erred in apportioning fault to it.

Clearly under K.R.S. 44 the Board is certainly so empowered to act.

Absolutely there cannot be any question that this Appellant, K.S.P. was at fault under the facts of this case. Certainly it could be, and was under the aegis of the Board to make a fractional evaluation of fault among all the parties involved in this case.

The authority for this exists in the doctrine of comparative negligence.

The case of Commonwealth of Kentucky, Transportation Cabinet, Department of Highways v. Babbit, (Ky., 172 S.W.3d 786 (2005) is directly on point. It provides that comparative negligence is proper and available in a Board of Claims case as part of its Final Order.

Before turning to Appellant's fourth contention in its Brief, this sentence is taken from their page 23: "Finally the mere fact that Gaither appeared in

courthouses on a grand jury day is irrelevant.”

This statement by Appellants is either disingenuous, unaware of the facts in this case, or willfully made to escape liability in view of the facts in this case on review.

This of course falls far short of the occurrences in Marion and Taylor Counties, inasmuch as a truth is not a truth unless fully told. As the record reflects and about which there is no disagreement, Gaither was taken far beyond what this sentence faultily conveys.

He was presented to two Grand Juries as a witness, which was seen by the general public in both Courthouses, and which totally destroyed his confidentiality as a spy and intended informant for the K.S.P.

Next and fourth, this Appellant claims that the Board’s award of damages is not supported by substantial evidence. One would have to turn a blind eye to the record in this case, all the testimony from the Hearings, including that of K.S.P. itself, to make such a statement.

Over and over the Final Order of the Board of Claims recognizes and points out what evidence exists in this case upon which its award was grounded; additionally the correctly-reasoned Dissent by Judge Thompson when this case was before the Court of Appeals performs the same task.

Finally, and again without any merit, this Appellant makes claim that the

limit on the amount of recovery in this case was incorrect.

Appellants are totally wrong in this regard; under K.R.S. 44.070(5) the ruling Statute as to this expanded this dollar amount to \$200,000.00 if, as occurred in Gaither, the claim with the Board was filed before, as in Gaither, the Final Order of the Board of Claims.

For a case directly on point and entirely dispositive of this question in this case, see University of Kentucky v. Guynn, 372 S.W.2d 414 (Ky. App., 1963).

#### CONCLUSION

Appellee would urge that there is no merit in any of the five complaints contained in this Cross-Appeal by K.S.P.

Rather they are a continuance of grasping at straws in an attempt to tip this case in favor of K.S.P.

However, the straws aren't even there.

Certainly the Board of Claims correctly found K.S.P. negligent, and of ministerial duty, and correctly apportioned fault; it had mounds of evidence for its Final Order; it correctly followed the law as to the recovery limit in this case.

This Cross-Appeal must be recognized for what it is, an attempt to somehow justify the faulty and egregious actions by K.S.P. under the facts of this case. It should not be allowed to obfuscate and over-ride the primary, indeed sole actual issue in this case, which by this Court's Opinion will be a clear deliniation

between discretionary and negligent ministerial acts.

The Appellee moves the Court to Dismiss the Cross-Appeal of the Appellants K.S.P.

Respectfully submitted this 17<sup>th</sup> day of August, 2013.

*Daniel T. Taylor III*

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**APPENDIX**

General Order, Kentucky State Police; effective date 4/16/90

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