

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001996-MR

DAWN SOUTHERN

APPELLANT

V. APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
CIVIL ACTION NO. 02-CI-00042

LIVINGSTON COUNTY ROAD DEPARTMENT;
SAM BOONE; GARY GUILL;
LIVINGSTON COUNTY FISCAL COURT;
JOE WARD; JERRY DEATHERAGE;
ROY RINGSTAFF; JOE O'BRYAN;
AND TERRY STRINGER

APPELLEES

OPINION AND ORDER
REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: Dawn Southern appeals following the entry of summary judgment in favor of the defendants on her claim arising from a motor vehicle accident in which the car she was driving was struck by a dump truck driven by Gary Guill, an employee of the Livingston County Road Department. The circuit court found

that all defendants were shielded from liability by sovereign, governmental, or official immunity. Southern appeals only with respect to Guill, so our opinion necessarily only concerns her claim against him.

The accident occurred in Livingston County on August 16, 2000. Southern alleges that Guill was negligent in his operation of the dump truck, thereby causing the accident. Specifically, she states that Guill's truck crossed the center line of the road and was in her lane of traffic.

On appeal, both sides discuss the relevance of Yanero v. Davis.¹ In Yanero, the Supreme Court explained that public officers and employees enjoy official immunity with respect to actions taken in the exercise of their discretionary functions.² "Qualified official immunity applies to the negligent performance by a public officer or employee of (1) discretionary acts or functions, *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."³ "Conversely, an officer or employee is afforded no immunity from tort liability for the

¹ 65 S.W.3d 510 (2001).

² *Id.* at 521.

³ *Id.* at 522 (citations omitted).

negligent performance of a ministerial act, i.e., one that requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts."⁴

Neither side argues that Guill's actions were taken in bad faith or outside the scope of his authority. The only question is whether his driving a dump truck is to be viewed as a discretionary or ministerial act.

Southern relies on Speck v. Bowling⁵ in support of her position that driving a dump truck should be viewed as ministerial. In that case, we addressed an instance in which a motorist was involved in a collision with a state trooper who was in the process of responding to a burglary call. We held that Speck was performing a ministerial act in driving to the burglary and could, therefore, be liable if he operated his vehicle in a negligent or dangerous manner.⁶

Guill argues that the continued validity of Speck is suspect in light of its having been rendered before Franklin County v. Malone⁷ and Yanero. Furthermore, he argues that since

⁴ *Id.* (citation omitted).

⁵ Ky.App., 892 S.W.2d 309 (1995).

⁶ *Id.* at 311.

⁷ Ky., 957 S.W.2d 195 (1997).

neither the county nor the road department had established policies or explicit directives with respect to driving a dump truck, his actions should be viewed as ministerial.

While Guill is correct that Malone significantly altered the immunity afforded county employees, that section of its holding was expressly overruled by Yanero.⁸ In this respect, Yanero represents a return to the state of the law preceding Malone. We, therefore, see no reason to question the prospective validity of Speck.

Furthermore, Guill's argument regarding the lack of express policies or directives ignores the voluminous traffic and vehicle safety regulations found in the Motor Vehicle Code and administrative regulations promulgated by the Transportation Cabinet. Southern's allegations, if true, are that Guill violated state traffic law by operating his truck on the wrong side of the road. County employees do not have discretion to override state law; therefore, Southern's allegations deal with the exclusively ministerial act of following state law in the operation of a motor vehicle.

Accordingly, the circuit court erred when it concluded that Guill was entitled to official immunity. That part of its

⁸ See Yanero, *supra*, at 523.

judgment is reversed and the case remanded for further proceedings consistent with this opinion.

Before the scheduled oral argument, counsel for both parties tendered an Agreed Order purporting to reverse and remand this case to the circuit court for further proceedings in light of the Kentucky Supreme Court's opinion in Jones v. Lathram.⁹ That decision is not final. But we have treated this tendered order as counsel's motion for summary reversal and remand. By agreement, we cancelled the oral argument. In light of our holding, we deny the motion for summary reversal as moot.

ALL CONCUR.

ENTERED: November 5, 2004

/s/ John D. Minton, Jr.
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

John T. Carneal
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BRIEF FOR APPELLEES:

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⁹ 2002-SC-0590-DG, rendered September 23, 2004, as amended September 27, 2004.