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**COMMONWEALTH OF KENTUCKY**
**SUPREME COURT OF KENTUCKY**
**APPEAL NO. 2012-SC-000324-D**
**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 — MOVANT/APPELLANT/ CROSS RESPONDENT

and

COMMONWEALTH OF KENTUCKY,
KENTUCKY BOARD OF CLAIMS — APPELLANT/ CROSS RESPONDENT

v.

# BRIEF FOR APPELLANT

COMMONWEALTH OF KENTUCKY
JUSTICE AND PUBLIC SAFETY CABINET,
DEPARTMENT OF KENTUCKY STATE POLICE — APPELLEES/CROSS MOVANTS/ CROSS PETITIONERS

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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 4060; 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 12th day of April, 2013. Also I certify that I have returned the record in this case to the Clerk of the Franklin Circuit Court.

Daniel T. Taylor III

## INTRODUCTION

This is a case to determine whether the acts and omissions of the Kentucky State Police were negligent and ministerial, and if so, the Appellant is entitled to the damages awarded her by the Kentucky Board of Claims.

## STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests that Oral Argument be scheduled in this case due to its tremendous importance in clarifying the relationship and duties of the Kentucky State Police in regard to their use of Confidential Informants in preparation for intended drug prosecutions.

## STATEMENT OF POINTS AND AUTHORITIES


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## STATEMENT OF THE CASE

The beginning of this case was in 1996 when the Appellant, Gaither, was murdered as a direct consequence of the negligent ministerial acts of the Appellees, Kentucky State Police (hereinafter KSP). Thereafter, in 1998 Gaither's Administratrix filed suit in the Board of Claims, thus to the present date the actual litigation in this case now comprises a total of 15 years.

Relevant to the above:

July 17, 1996 - Gaither was murdered (Tr.I, p.12)

February 12, 1998 - Gaither filed claim with Board of Claims

Thereafter, Board of Claims Dismisses Gaither's claim on Statute of Limitations grounds

February 5, 2003 - Franklin Circuit Court Dismisses Gaither's claim, upon Gaither having appealed to it for review

October 1, 2004 - Gaither having appealed to the Court of Appeals, the Court of Appeals reverses Gray v. Commonwealth of Kentucky, Transportation Cabinet, Dept. of Highways, 973 S.W.2d 61 (Ky. App. 1997) in Gaither v. Commonwealth, 161 S.W. 3d 345 (Ky. App. 2004) and returns the case for Hearing in the Board of Claims

May 11, 2005 - KSP attempts but fails to get Discretionary Review in the Supreme Court of Kentucky

May 14, May 15, July 10, 2009 - 3 days of Hearings before the Hearing Officer of the Board of Claims

September 28, 2009 - Hearing Officer of Board of Claims Recommends Dismissal of Gaither's claim

November 19, 2009 - Board of Claims Rejects Recommendations of Hearing

Officer and awards in favor of Gaither (Apx. II)

January 5, 2011 - KSP having appealed to Franklin circuit Court for Judicial Review, Franklin Circuit Court issues Opinion and Order Dismissing Gaither's claim (Apx. III)

June 21, 2011 - Gaither appeals the Franklin Circuit Court Opinion to the Kentucky Court of Appeals

May 4, 2012 - Court of Appeals, in a divided Opinion with an extremely strong Dissent by Judge Thompson, Dismisses Gaither's claim (Apx. I)

December 12, 2012 - Discretionary Review of the case is granted by the Supreme Court of Kentucky, thus the case is now before the Court

Relative to the above 15 years, Gaither's Estate has gone without payment of any kind; lacking funds for even a headstone (Tr.I, p. 17), his grandmother yielding her own pre-paid burial plot for his interment (TR.I, p. 17) and an unpaid funeral bill as of May 2009 of $5573.09 (Tr.I, p. 19), increasing daily.

In this case there is absolutely no disagreement between Gaither and KSP as to the facts. This is notated in the Final Order of the Board of Claims (Apx. II).

These facts were clearly revealed in the three days of Hearings before the Hearing Officer of the Board of Claims in 2009.

The May 14 and May 15 transcript references appear as Tr.I, p. ___). Those from June 10 appear as Tr.II, p. __).

Full transcripts of these Hearings were provided to the Board and are presently forwarded in the Record of this case to this Court.

In arriving at its Final Order the Board had been provided with and had

access to over 300 pages of transcript of the three days of Hearings before the Hearing Officer, along with full page references to all testimony, and thus was able to fully establish the facts in this case, upon which its Final Order was grounded, after equally applying the law to same.

In furtherance of the above, Gaither would point out that the following facts in this case were clearly determined by the Board of Claims on the basis of the Hearings' transcripts before it:

1. In 1995, just shortly after the decedent LeBron Gaither had become 18 years of age, KSP employed Gaither as a Confidential Informant (hereinafter CI), putting him to work in that capacity without any training whatsoever.

2. Prior thereto, KSP had failed to obtain the requisite waiver, under their own rules, From Gaither's guardian, Virginia Gaither, while he was still an infant at law.

3. At the time of KSP's enlistment of Gaither he was a high school dropout of limited intelligence with serious criminal charges pending against him in Marion County - here the classic trade-off frequently and generally employed by KSP to begin with a Confidential Informant, thus then and there creating the special relationship and in custody provision that an occasional case references as being required for the contested act to be held as ministerial.

4. Thereafter a continuum of events and failure of ministerial duty to

Gaither by the KSP occurred which ultimately led to Gaither's murder by one Jason Noel, who has been convicted of same and is presently in the penitentiary.

5. On July 15, 1996, Kentucky State Police Detective Danny Burton visibly paraded Gaither into the Grand Jury room in Marion County. Gaither was an extremely large black man and absolutely would stand out in any setting. And to get to this Grand Jury room it was necessary to walk through or past the crowded courtroom, among which were many defendants in the drug culture in that area.

6. At that time and place the Kentucky State Police, acting through Detective Burton and without authorization from the Commonwealth's Attorney or any Order of Court, then had Gaither testify before the Grand Jury, in order to obtain Indictments for intended drug prosecutions. Under Rcr 6.08 Gaither's name then became endorsed on these Indictments, and a matter of public record.

7. The very next day - July 16, 1996 - Detective Burton repeated the above before the Grand Jury in Taylor County, again parading Gaither in full view of a courtroom among which sat defendants already charged with drug offenses, or otherwise in the local drug culture. In Taylor County Detective Burton caused Gaither to testify before the Grand Jury to obtain an Indictment against Jason Noel, who then murdered Gaither the next day after the KSP had deliberately sent Gaither to make a drug buy from him.

8. One of the members of the Taylor Grand Jury was a woman named

Easery, who was a confidante of Noel, and that night revealed to Noel that Gaither had testified before this Grand Jury with a resultant Indictment then being found against Noel. Easery was subsequently tried and convicted in Pulaski County, on change of venue, for her actions in this regard and sent to the penitentiary.

9. Though Gaither at this point was totally "burned," as the word is employed when the identity of a Confidential Informant has been publicly revealed, and under which absolutely no further use of him as a Confidential Informant should be done, Kentucky State Police Detectives Burton, Antle and Simpson nonetheless continued in their use of Gaither as a Confidential Informant.

10. Thus on July 17, 1996, these three Detectives employed and sent Gaither to effect a "buy-bust" against Jason Noel, even with the knowledge that they already had an Indictment against him, and in clear violation of their basic ministerial duty, both by General Order of the Kentucky State Police (Apx.III) and their own testimony, that their highest duty was to protect the life of their Confidential Informant. (A buy-bust is a term used when narcotics detectives employ a supposed Confidential Informant to purchase drugs from an individual and immediately signal the detectives so that the seller can be arrested (busted) there on the spot).

11. However, in spite of three State Police Detectives in two separate automobiles staked out for both arrest and surveillance purposes at Nolly's

Grocery in Campbellsville (Taylor County), the Detectives failed to arrest Noel on the spot; Noel managed to capture Gaither in his automobile and quickly left the area; the back-up transmitter device on Gaither's person had a mere half-mile range; the surveillance of Gaither was quickly lost; but not before Burton had actually passed a residence where Noel had stopped and gone in, leaving Gaither sitting visibly in the Noel car. Thereafter instead of calling for help in locating the Noel vehicle from local law enforcement, the three Detectives muddled around trying to locate the Noel car by themselves.

12. Next the inevitability in this situation occurred. Noel, having enlisted others in his drug activities to help, drove Gaither into Casey County where he then murdered Gaither by the most burtal of means, first by beating him with a baseball bat, followed by several pistol shots to Gaither, some in his head, then with a shotgun blast to Gaither's body. In fact, upon Gaither's funeral, only his face could be seen as his entire form was so macerated it had to be encased in a plastic wrapper.

After the above Noel than ran his automobile twice over the dying Gaither.

Noel and his confederates then attached a log chain to Gaither's body and drug it for concealment into the woods of Casey County.

13. Before turning to testimony at the Hearings before the Board of Claims, it is pointed out:

A. The KSP had opportunity to arrest Noel (clearly a ministerial duty) and protect Gaither at the intended buy/bust at Nolly's Grocery, but they failed to do so.

B. The KSP had opportunity to arrest Noel and protect Gaither in that part of their pursuit of the Noel car when it was parked before a building before they lost surveillance, but they failed to do so.

The above sets out facts in this case - from beginning to end, a period of 15 years.

Throughout 3 long Hearings and several hundred pages of transcript a quick outline is set out as the most salient of the testimony[1]. It is noted that all of this was testified to on oath before the Hearing Officer, and was available to the full Board of Claims in determining its Final Order; and was available to the Court of Appeals, which nevertheless rejected the Board's Final Order and dismissed Gaither's claim.

Beginning, Philip R. Patton, Circuit Judge of Barren and Metcalfe Counties, being under subpoena in adherence to the Canons of Judicial Conduct, testified in behalf of Gaither in this case. Judge Patton, himself a former Commonwealth's Attorney, including several terms as President of the State's Commonwealth's Attorneys Association, and with an otherwise formidable and impressive list of

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[1]This Reviewing Court is advised that when page numbers are noted in transcript references in this Brief, they are the numbers centered at the bottom of the Court Reporter's pages, not those appearing in a column on the right side ot the page.

credentials, was qualified and accepted as an expert witness (TR.I, p.80). He testified that the identity of a Confidential Informant (hereafter CI) is not to be disclosed before a Grand Jury (TR.I, p. 76); that if the CI's name is publicly known he has been "burned," i.e., of no further use (Tr.I, p.88).

Next the Hon. Barry Bertram, a former Commonwealth's Attorney and presently an Assistant Commonwealth's Attorney, testified that a CI should not be used for testimony before a Grand Jury for the reasons already enumerated in this Brief.

Finally, the Hon. James L. Avritt, a former Assistant Commonwealth's Attorney, testified with outstanding vehemence as follows, and this is taken directly from the Hearing before the Hearing Officer:

> "In my 19 years as a prosecutor, District Court Judge, and defense attorney, I have never heard of a more reckless, stupid, and idiotic idea than Detective Burton's decision to use LeBron (Gaither) to make yet another drug buy from Jason Noel after his identity was clearly compromised." (Tr.II, p. 45).

Avritt went on to say:

> "And certainly after he'd testified in front of the Grand Jury, anybody with an ounce of common sense would know his identity was exposed." (Tr.II, p. 52).

When asked whether use of a CI who has testified before a Grand Jury should then be discontinued, Avritt answered:

> "Absolutely, unless you want to get him killed." (Tr.II, p.68).

Avritt further testified that once paraded in and out of the Grand Jury room a Confidential Informant's identity is exposed and his usefulness is exhausted. (Tr.II, p.78).

Relative to these three experienced witnesses for Gaither, they all pointed out the small sizes of the two courtrooms here involved (Marion and Taylor Counties) and the total visibility by persons in the courtrooms as to who went into the Grand Jury room, and escorted by whom, which here, of course, were LeBron Gaither and Detective Danny Burton.

In an attempt to rebut this testimony of three former prosecutors, one a former Judge, another the present Circuit Judge of Barren and Metcalfe Counties, KSP attempted to vouch an expert of its own, a gentleman named Tipton, who spent a page or two extolling his credentials.

Q: A lot of commendations. Were you here when Judge Patton testified?

A: Yes, sir I was.

Q: Do you have any substantial differences with what he said?

A: No, not really.

Mr. Taylor: Pass the witness (Tr.I, p. 329)

Further testimony favorable to Gaither was elicited, although grudgingly, from the State Police themselves on cross-examination.

Detective Simpson admitted that testifying a CI before the Grand Jury risks

exposure of his identity. (Tr.II, p.152), Tr.II, p.30). He admitted the KSP lost surveillance of the Noel car carrying Gaither to his death. (Tr.II, p.38).

From Detective Antle the testimony was that CI s receive no training (Tr.I, p.257) and that surveillance and protection of a CI is to be performed to the highest degree. (Tr.I, p.258).

To conclude with the three State Police Detectives responsible for Gaither's death, the lead officer, Danny Burton, testified as follows:

> A CI is to be monitored as closely as possible. (Tr.I, p.109).
>
> Surveillance of Noel and Gaither was lost. (Tr.I, p.115).
>
> A CI receives no training from the KSP.. (Tr.I, p.126).
>
> The CI's safety is the highest responsibility of the KSP. (Tr.I,p.214).

At this point in the Hearing a stipulation of Gaither's lifetime earnings was entered into the Record of the case, as became relevant in the Final Order of the Board of Claims. (Tr.I, p.184).

The last day of the Hearings Burton was re-called on the stand as if on cross-examination and further testified:

> Gaither had been put at risk by the KSP. (Tr.II, p.8).
>
> Confidential Informants receive no training by the KSP. (Tr.II, p.14).
>
> As previously testified, KSP lost surveillance of their CI, LeBron Gaither. (Tr.II, p.15).

To conclude with the testimony of the most prominent witnesses before the

Hearing Officer, mention is here made of KSP Lt. Col. Sapp, the person under KSP organization who was in command and at the top of all directions to the narcotics detectives in this case. It is hard to find a more callous, minimalist and indifference to the responsibility of KSP to its CI s than his testimony that it is a "concern" to keep the identity of a CI confidential. (Tr.II, p.156). To the intelligent and reasoning mind a mere "concern" does not rise to the level of absolute, certain and imperative duty that should, indeed must, be followed by the KSP to protect the identities and confidentiality of its Confidential Informants.

Before closing on this portion of Gaither's Brief, it is pointed out:

A. All of the actions of these Kentucky State Police Detectives were within the course and scope of their employment. (Apx.III).

B. At the Hearings the KSP stipulated the lifetime earnings of LeBron Gaither at minimum wage, which figure the Board employed in its computation of the damages to be awarded in this case. (Apx.II)

C. The Board, in plain language in its Final Order, concluded as follows:

1). The State Police Detectives clearly compromised Gaither's identity as an Informant (p. 3).

2). The State Police Detectives should have known this (p. 4).

3). The State Police Detectives failed in surveillance and thereafter failed to enlist the help of other law enforcement (p. 5).

4). The State Police Detectives failed to use any significant judgment; their conduct constituted the negligent performance of a series of ministerial duties (p. 8).

5). Once an Informant is known, the drug traffickers are quick to retaliate (p. 9).

6). State Police Detectives should have known that walking a Confidential Informant through a crowded rural courthouse risks disclosing his identity to the very people to whom they don't want it disclosed (pp. 9-10)

7). State Police Detectives should have known that Grand Jury members often talk about proceedings before the Grand Jury (p. 10).

8). The conduct of the Grand Jury member and Noel was foreseeable (p. 11).

9). Again the Board concluded that the Kentucky State Police acted negligently (p. 11).

As clearly demonstrated above, the facts in this case are undisputed.

But in this connection I here clarify two fallacious contentions which KSP has attempted to urge in this case:

1. KSP may claim that its Detective Burton was merely following orders, having been directed by the Commonwealth's Attorney to place Gaither before these two Grand Juries. However on cross-examination, Burton admitted that was

not the case, but was his doing entirely:

The questioner here is Gaither's attorney, Daniel T. Taylor III. The respondent is Danny Burton of the Kentucky State Police:

> Q: Would you take a look at that? There is nothing special about it. My question is a simple one, trooper.
>
> What I wanted to ask you is, certainly neither in your deposition nor in your case report did you mention or state or refer that you were told to get any subpoenas. Isn't that correct?
>
> A. For me to obtain subpoenas?
>
> Q: Yeah?
>
> A. I am not understanding.
>
> Q. All right.
>
> A. For me to get a subpoena for LeBron to appear before the grand jury?
>
> Q. Yeah?
>
> A. I didn't get no subpoena. I wasn't told to get a subpoena for him to appear before the grand jury. (Tr.II, p.9, l. 8-24).

2. Earlier in this case KSP has attempted to avoid blame in this case by alleging Gaither did not follow orders when he met Noel at Nolly's Grocery.

In the first place, having been burned, he shouldn't have been sent there under any circumstances.

Secondly, at trial it was both developed that the Noel automobile had tinted windows, with the strong possibility that Noel was accompanied by another

individual with a shotgun directing Gaither to get in the Noel automobile. In this connection as so pointedly stated in Rovario v. United States, 353 U.S. 53 (1957), "Dead men tell no tales" so in this wise KSP attempts to posit an element in the Nolly Grocery meeting, knowing that Gaither nor his Counsel could not refute it, with Gaither being dead and buried in the ground.

## ARGUMENT

### THE ACTIONS OF THE KENTUCKY STATE POLICE IN SUCCESSIVE INSTANCES WERE NEGLIGENT AND MINISTERIAL AND THEY ARE LIABLE FOR THEM

This action was brought under KRS 44.073(2) in the Board of Claims for the negligent performance of ministerial acts against the Commonwealth or its officers, agents or employees while acting within the scope of their employment.

Thus two issues must be resolved, the one depending on the other, and they are whether the KSP were negligent in their performance of ministerial acts regarding Gaither.

Due to their absolute and necessary relationship, both of these issues are best dealt with in a single argument in this Brief.

The Standard of Review for this Court is well-understood by both parties. This Court reviews this case de novo both as to the facts and the law as contained in the Final Order of The board Of Claims (Apx. II), as that is at the bottom of the dispute in this case.

Well-settled authority regarding this Court's Standard of Review is found in Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky Transportation Cabinet, 983 S.W.2d 488 (Ky. 1988); McManus v. Kentucky Retirement Stystems, 124 S.W.3d 454 (Ky. App. 2003); Transportation Cabinet v. Thurman, 897 S.W.2d 597 (Ky. App. 1995). This Court proceeds de novo as to the facts and the law of the case before it

To begin, the recent case of Haney v. Monsky, 311 S.W.3d 235 (Ky. 2010), provides great direction on the issue in this case. This was a case involving a helper at the Louisville Zoo and an injured child.

Haney recognizes and cites many of Gaither's cases as set out infra, but its importance is its clear statement that the determination between discretionary and ministerial acts is fact-sensitive, or stated another way, is to be determined from the facts in the case. This determination depends on the acts or functions performed by KSP regarding Gaither.

The Court has already been advised in the foregoing Statement of the Case in this Brief of the avalanche of undisputed facts in this case which were both negligent and ministerial by the Kentucky State Police.

Haney sets out the well-recognized requirements for a ministerial act, beginning with obedience to the orders of others, or where the duty is absolute, certain and imperative. It also recognizes that an act is not necessarily taken out of

ministerial merely because an officer is vested with discretion.

Another important part of Gaither's case before the Court is whether or not there exists a specific Statute or regulation, the violation of which is a ministerial act. Haney recognizes that this is not a necessity - that the determination depends on the nature of the duty. Again Gaither points out that, specific regulation or not, the duty on KSP was to preserve the confidentiality as a Confidential Informant of LeBron Gaither, as well as his life, both of which they failed to do. The Kentucky State Police had a General Order in effect at this time regarding the use of Confidential Informants (Apx. III).

Further in Haney the Kentucky Supreme Court held that a common law duty can render an act or a function ministerial in the absence of any Statute or regulation on the point. Obviously this further binds KSP into their liability to Gaither.

Finally, in Haney the Court attempted to explain the concept of discretionary and ministerial acts as follows:

> In spite of these often quoted guidelines, determining the nature of a particular act or function demands a more probing analysis than may be apparent at first glance. In reality, few acts are ever purely discretionary or purely ministerial. Realizing this, our analysis looks for the *dominant* nature of the act. for this reason, this Court has observed that "an act is not necessarily taken out of the class styled 'ministerial' because the officer performing it is vested with *a discretion respecting the means or method to be employed."* Similarly, "that a

> *necessity may exist for the ascertainment* of those fixed and designated facts does not operate to convert the ministerial act into one discretionary in its nature. Moreover, a proper analysis must always be carefully discerning, so as to not equate the act at issue with that of a closely related but differing act. The portions of the investigative responsibilities as set out in the regulations . . . *were particular in their directive,* but we noted that others, which required the exercise of judgment, were not. . . . The first part was ministerial, but what followed was held to be discretionary. (internal quotations, internal brackets, and citations omitted.)

Therefore from Haney this test is set out: Is the action or inaction (as here sued upon against the KSP) an identifiable deviation from absolute, certain and imperative obligation? It cannot be sensibly argued that the actions of KSP in this case were anything less than absolute, certain and imperative.

The case of Yanero v. Davis, 65 S.W.3d 510 (Ky., 2001) involved a child not wearing a protective helmet who was hit in the head by a baseball.

For purposes of this Brief, it attempts to set out the difference between discretionary and ministerial acts. It deals with what a reasonable officer knew or should have known when his action results in injury to another. We derive the rule from this case that if the questioned act is absolute, certain and imperative it is a ministerial act.

In a case where a trooper crossed the center line and injured a person, it was held that it is ministerial to avoid creating foreseeable harm to another; Speck v. Bowling, 892 S.W.2d 309 (Ky. App. 1995).

Similarly in a case where the trooper left the ignition keys in his cruiser and a prisoner secured them and drove away and killed a woman, the duty breached there was absolute, certain and imperative and ministerial; Jones V. Lathrom, 150 S.W.3d f0 (Ky. 2004)

Another case with near parallel facts to Jones resulted in a woman being killed, and the Court held that a trooper driving is a ministerial act at all times, including attention to the ignition keys in his cruiser; Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky. 2006).

The cases continue in the attempt to clarify the difference between discretionary and ministerial acts. In a case from Clinton County where roving dogs killed the Claimant's sheep, Upchurch v. Clinton County, 330 S.W.2d 428 (Ky. 1959), Kentucky's highest Court held:

> "Discretionary or judicial duties are such as necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued. Discretion in the manner of the performance of an act arises when the act may be performed in one of two or more ways, either of which would be lawful and where it is left to the will or judgment of the performer to determine in which way it shall be performed. *However, an act is not necessarily taken out of the class styled "ministerial" because the officer performing it is vested with a discretion respecting the means or method to be employed."* (Emphasis added).

Particularly as seen from this case, any claim by KSP that its blunders in this case were discretionary is quickly faulted and their actions were actually

ministerial.

Another case which involved urban land owners and unsound trees, while it did not hold the acts as ministerial, it does set out the difference between discretionary and ministerial acts; Commonwealth of Kentucky Transportation Cabinet, et al. v. Sexton, 256 S.W.3d 29, 33 (Ky. 2008).

For a case that directly states that causing injury to another is a violation of a ministerial act and duty, and no immunity from liability is had when a Constitutional or clearly-established right is violated (Gaither's right to stay alive), see Autry v. Western Kentucky University, 210 S.W.3d 713, 717 (2007).

In a case where a child's feet were severed by the explosion of the contents in a metal drum, once again it is held that a duty to exercise ordinary care to prevent injury to another is a ministerial duty; M&T Chemicals, Inc. v. Westrick. Ky., 525 S.W.2d 740.

To summarize, these cardinal principles clarify the law in Kentucky regarding discretionary and ministerial duties:

1. Depending on the facts in the case, a normally discretionary duty can become ministerial;

2. There is no requirement for a Statutory or Agency regulation to render an act ministerial if it injures or kills another person and foreseeability existed in the situation;

3. Any act causing injury or death to another is ministerial, particularly and indisputably if its outcome is foreseeable.

THE OPINION OF THE COURT OF APPEALS

Before analyzing this Opinion, Counsel for Gaither would recall a perplexing statement from one of the Judges on the panel at Oral Argument in Warsaw. He apparently was abraded at the temerity of Gaither's expert witnesses during Hearings in the Board of Claims when a Judge and two Prosecutors offered their Opinions as to whether the acts of KSP were discretionary or ministerial. At Oral Argument this Judge asserted somewhat huffily that it was for his Court to make this distinction. Gaither's Counsel fully agreed with that, as that was the very reason this case was before the Court of Appeals at that point.

However this interesting directive from the Bench at that time neglects to consider that a presenting lawyer likewise should and must have some opinion as to the issue in the case, and in his/her Brief and Oral Argument identify what it is. In this case it was whether the acts of the KSP were discretionary or ministerial.

Turning to this Opinion itself, the majority of it failed to give weight to the basic legal rule that findings of an administrative agency (here the Board of Claims) are to be given great deference; 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).

Nor did this Court consider the many provisions of law for the protection of individuals used in confidential capacities by the Commonwealth; KRS 421.500 - witness protection act; KRS 44.160(2) - findings of Board of Claims are res judicata; KRS 17.150 - records of criminal justice proceedings to be kept confidential; GOP of KSP (Apx. III).

This Opinion of the Court of Appeals is annexed to this Brief as Appendix I.

In summarizing the facts (p.3) this Court failed to recognize that no waiver was obtained from Gaither's guardian before he became 18; that he was immediately placed out in the drug world without training whatsoever; that he was never monitored as required; that Gaither's confidentiality was immediately breached and the public was informed that he was a Confidential Informant for KSP when Burton first took him before the Marion County Grand Jury, and successively thereafter in Taylor County without any direction from any Commonwealth's Attorney or Order of Court.

In connection with the last point above, any experienced and knowledgeable Commonwealth's Attorney conducting Grand Jury proceedings knows absolutely that hearsay is permitted for the arresting officer to state that he has information from a CI to obtain the Indictment, at the same time absolutely not revealing the

name of such person.

This Opinion (p.3) mentions that a woman (Esarey), having been a member of the Taylor County Grand Jury, quickly informed Noel that Gaither was a Confidential Informant, after which Noel murdered Gaither. Puzzlingly the foreseeability as to this was totally lost on the two Judges in the majority when this case was before the Court of Appeals.

Continuing, this Court simply paid no attention to the absolute stupidity of KSP sending Gaither to make a drug buy/ bust from Noel, after Gaither had been repeatedly "burned" (Marion County, Taylor County, Easery), and they already had their Indictment of Noel from the day before, at which time absolutely KSP could have secured a warrant against Noel and arrested him on the spot, a totally ministerial duty.

Further this Court incorrectly (at p.4) gave full credit to KSP's claim as to instructions to Gaither at Nolly's Grocery, which actually were contrived by KSP to avoid liability in this case. and of course Gaither himself lacked opportunity to rebut these because he was dead.

Additionally, (p.4) this Court failed to recognize the absolute duty of KSP to protect Gaither's life, starting at the grocery, continuing thereafter, and then culminating in their total loss of surveillance of Gaither, all ministerial acts, and these failures by KSP absolutely resulting in Gaither's death.

Further error by the majority of this Court was its unfamiliarity with the record in this case. In its Opinion (p.5) it states: "For reasons that are unclear, this matter was not heard until the late spring/early summer of 2009." Had this Court's majority taken the trouble to examine the record in this case, it would have seen that before the case ever got back to Hearings in the Board of Claims there was tremendous and lengthy activity in the appellate Courts, first the dismissal of Gaither's claim; this then reversed by the Court of Appeals, KSP then attempting to get Discretionary Review in the Supreme Court of Kentucky which was not granted.

It is evident (p.5) that the majority of this Court had the Final Order of the Board of Claims before it, but simply didn't understand it, and mis-applied the law as is set out in it.

Next (beginning at p.6) this majority attempts, without success, and with ponderous block quotes from cases (p..8) to define the difference between discretionary and ministerial acts.

Its mention of Yanero (p.8) totally leaves out the implications of that case favorable to Gaither, as pointed out in the Argument section of Gaither's Brief before this Supreme Court of Kentucky.

One of the first mistakes in this majority Opinion was its reliance on the Stratton v. Commonwealth, 182 S.W.3d 516 (Ky. 2006) case (p.10), a case which

is simply wrong.

Continuing (p.11), apparently this majority had never heard of Haney, thinking that the law requires an adjective Statute or regulation as to any ministerial duty - this simply is not the law. We have a dead man here - if it is not ministerial for KSP to protect the life of a Confidential Informant, which they flouted in six successive instances, then there is no such thing as a ministerial duty.

It is hard to choke down the self- justification that the majority on this panel used who simply threw away Gaither's claim and his life itself, with the elision they then wrote: "While we agree with Virginia and the Appellees' implicit admission during Oral Arguments that the Detectives' actions were ill-advised, we disagree that they violated any ministerial duties."

This majority Opinion concludes in total confusion by first setting out (p. 12) that KSP General Order OM-C-3 (Apx.III) requires monitoring of a Confidential Informant, then swerving to the admission (pp.12-13) that this simply did not occur - an oxymoron if there ever was one. Finally and predictably the majority concludes with the fig-leaf of great sympathy for Gaither and his Estate, while nonetheless it has failed to follow the law in his case - an over-used and transparent example of damning with faint praise.

Refreshingly Judge Kelly Thompson, a third Judge on this panel, entirely understood this case and law that must be applied to it.

Beginning at p.14 he filed a six-page Dissent, concluding at p.19.

At the start of this Dissent, both the Caneyville and Yanero cases are recognized, after which this Judge writes that "the immunity swamp has only become murkier;" Caneyville v. Green's Motorcycle, 286 S.W.3d 790 (2009).

But next he correctly moves into Haney which clarifies so many problems connected with this issue. Further he demonstrated a total knowledge of the record in this case, including the Final Order of the Board of Claims, and states that he agrees with it (p.15).

This Dissent continues by pointing out the egregious and unprecedented facts in this case. No training of Gaither, immediate use as a Confidential Informant, presentation of Gaither at two Grand Juries, failure of KSP to provide protection to Gaither (p.16).

Next in this Dissent, the importance of Gaither's Expert Witnesses at the Hearings in the Board of Claims is recognized, and agreed with by this Dissenting Judge.

He totally agreed with the Board's findings of fact.

He cited KRS 17.150 which requires protection of the identity of one used in criminal proceedings, which was continuously violated in this case by the KSP.

He cited KRS 421.500, our witness protection Statute. He cited KSP's own Order requiring monitoring by a control officer and a supervisor, none of which

was followed in Gaither's case.

Concluding, (at p. 19) he set out a direct paragraph from this Final Order of the Board of Claims to the effect that once a Confidential Informant has been burned, he must never again be used on a drug purchase.

Here is this thundering paragraph:

> The term "burned" is a term of art used by the law enforcement community to describe that the confidential informant's anonymity has been compromised or disclosed and the informant should not be used again. You cannot smoke a cigarette twice. Once an informant is known, the drug traffickers are quick to retaliate. Dead men tell no tales. There is no discretion whether to use a burned informant again. It is simply not done, particularly under the set of facts.

In closing his Dissent, this Judge correctly stated that Gaither was sentenced to death by the actions of the KSP Detectives. That no state agency has the discretion to arrange for the death of a citizen. That the Board of Claims detailed the horrendous actions of KSP in this case and he affirms its reasons for awarding compensation.

## CONCLUSION

This Court pronounces the law on the most important issues in the Commonwealth involving State government. After years of diverse rulings on the prime issue in this case, Judicial clarification is absolutely called for regarding negligent acts by State employees as to whether they be discretionary or ministerial.

KRS 44 creates an exception to sovereign immunity, and is a remedial Statute and its proper application must be to the high and the low, and this includes the Kentucky State Police. As was well said by the Dissenting Judge in the Court of Appeals, "The Board was created to administer the just distribution of State funds for State negligence."

Under the facts in this case and the controlling case law in Kentucky, it is indisputable that the actions of the Kentucky State Police in a number of regards were absolutely negligent ministerial acts, as the Brief has set out.

The Court may perceive further need to award costs to Gaither for the funeral bill as yet unpaid and other expense.

But mainly Gaither's request is simple and straightforward. As Movant/Appellant he asks that after 15 years of prior proceedings in this case this Court affirm the Final Order of the Board of Claims, as all subsequent litigation stemmed from that. He does not seek to open a floodgate of future litigation, but

merely requests a ruling on his case.

The maxim No one can take advantage of his own wrong applies to the Kentucky State Police in this case.

As does the maxim He who takes the benefit must bear the burden.

A third maxim Law respects form less than substance applies to the many prior cases which evaded responsibility or excused actions as being discretionary when they were in fact negligent and ministerial.

To conclude, the decisions of this Court set public policy. Therefore there is an element of moral responsibility in the decisions it makes.

Respectfully filed this 12th day of April, 2013.

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