

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-001738-MR  
&  
NO. 2009-CA-001739-MR  
&  
NO. 2009-CA-001795-MR

GARY MARTIN; MIKE SAPP; AND  
BOBBY MOTLEY

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE SHEILA R. ISAAC, SPECIAL JUDGE  
ACTION NO. 07-CI-00820

STEPHEN O'DANIEL

APPELLEE

### OPINION AND ORDER AFFIRMING

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BEFORE: KELLER AND LAMBERT, JUDGES; SHAKE,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: Three Kentucky State Police Officers, Det. Gary Martin (Det.

Martin), Lt. Colonel Mike Sapp (Lt. Col. Sapp), and Sgt. Bobby Motley (Sgt.

Motley) appeal from the circuit court's denial of their motion for summary

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<sup>1</sup> Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

judgment on the issue of qualified immunity. Having reviewed the record and the arguments of counsel, we affirm.

## FACTS

The underlying facts, generally, are not in dispute. However, because this is before us on a summary judgment issue, we construe disputed facts in a light most favorable to the appellee, Stephen O'Daniel (O'Daniel). *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Sometime in early March 2006, O'Daniel, a retired Kentucky State Police (KSP) Officer, purchased what he thought was a 1974 Corvette from David Godsey (Godsey). At the time, O'Daniel worked as Executive Director of the Office of Investigations for the Justice & Public Safety Cabinet (the Cabinet). Shortly after purchasing the Corvette, O'Daniel took it to a Wal-Mart for an oil change where he discovered that the engine was not a 1974 Corvette engine. Because he suspected the Corvette might not be what he thought he had purchased, O'Daniel undertook an investigation and eventually came into contact with Detective Bill Riley (Det. Riley), who worked in the stolen vehicle division of the KSP. With O'Daniel's agreement and assistance, Det. Riley inspected the Corvette and determined that it was a 1975, not a 1974 model. Det. Riley also discovered that the original 1975 vehicle identification number (VIN) plate had been replaced with a different VIN plate. Det. Riley then prepared a "confidential report,"<sup>2</sup> told O'Daniel that the Corvette appeared to have been stolen, and impounded the car.

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<sup>2</sup> The report is called a "confidential report" because it reflects information obtained from a review of the "confidential" or hidden VIN. It is not meant to be kept confidential.

With further investigation, Det. Riley determined that the 1975 Corvette had been stolen in 1981; that State Farm had paid the original owner for the loss; and that the VIN plate belonged to a 1974 Corvette that had also been reported as stolen. Based on that information, Det. Riley believed that State Farm was the titular owner of the 1975 Corvette.

After discovering that the 1975 Corvette was a stolen car, O'Daniel told Luke Morgan (Morgan), general counsel for the Cabinet. Morgan told O'Daniel that the matter was personal and that he should not let it interfere with his duties as Executive Director of the Office of Investigations.

O'Daniel, who was insured by State Farm at the time, contacted his insurance agent. The agent referred O'Daniel to Rod Marshall in State Farm's Illinois office. Rod Marshall stated that State Farm could not find any documentation regarding the Corvette, was not interested in the Corvette, and that O'Daniel could have the car. At some point during this time period, O'Daniel also spoke with a State Farm representative in Kentucky, Kevin Root (Root). Contrary to what Rod Marshall said, Root advised O'Daniel that State Farm was interested in and would pursue a claim for the Corvette.

Based on these conversations, O'Daniel began to explore how he could get a "clear" title containing the correct VIN and model year, and he contacted an attorney, David Marshall (Attorney Marshall). Attorney Marshall spoke with Rod Marshall and Root and confirmed what they had told O'Daniel. Additionally, Attorney Marshall contacted Det. Riley, who stated that he would

crush the Corvette before he would return it to O'Daniel.<sup>3</sup> At some point after that conversation, O'Daniel took three steps that ultimately led to this litigation.

One, O'Daniel contacted personnel at the Department of Transportation (DOT) to find out how he could get a clear title to the Corvette. He was advised that he could not because the Corvette had been stolen.

Two, after speaking with DOT personnel, O'Daniel contacted the Jessamine County Clerk and asked her how he could obtain a "corrected" title and replacement VIN plate. The Clerk told O'Daniel that he needed a confidential report from the KSP indicating what the correct VIN and model year were for the Corvette. Several days later, O'Daniel returned to the Clerk's office with the confidential report that had been prepared by Det. Riley, and the Clerk completed an application for a title with the Corvette's correct VIN and model year and an application for a replacement VIN plate. When personnel at the DOT received O'Daniel's applications, they contacted the KSP and reported that they had received applications for title and replacement VIN plates from State Farm and O'Daniel. The KSP then began a criminal investigation regarding O'Daniel's applications. Sgt. Motley and Det. Martin were assigned to conduct that investigation under the supervision of Lt. Col. Sapp.

Three, O'Daniel told Morgan about Det. Riley's comment that he would rather crush the car than give it to O'Daniel. Morgan believed at that point

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<sup>3</sup> We note that Det. Riley stated that he could not remember making this statement. Furthermore, there is some evidence that the statement, if made, was made in jest. However, O'Daniel and Attorney Marshall took the statement seriously and, because this matter is before us on a summary judgment, we construe the statement as they did.

the matter was purely a civil dispute between O'Daniel and State Farm regarding ownership of the Corvette. Because he wanted to avoid any appearance of impropriety, Morgan took steps to get the investigation regarding the Corvette out of the hands of the KSP and the Cabinet. These steps included calling a meeting with O'Daniel, Lt. Col. Sapp., Sgt. Motley, and Det. Martin; consulting with the Deputy Secretary of the Cabinet, the Secretary of the Cabinet, the Commissioner of the KSP, and the Governor's Chief of Staff; and asking the KSP to transfer the investigation and the Corvette to another police department. The preceding Cabinet members became involved in this matter to various degrees and the KSP interpreted their involvement as interference with a criminal investigation and/or obstruction of justice. When the KSP did not abandon the investigation and only very reluctantly transferred the Corvette to the Jessamine County Sheriff, the Cabinet members interpreted behavior by the KSP officers as insubordination. We note that the record is replete with accusations of obstruction of justice and insubordination; however, the details of those accusations are largely irrelevant to the issue on appeal. Therefore, we do not recite them further herein.

Once Det. Motley and Sgt. Martin had completed their investigation into O'Daniel's alleged fraud, they presented their evidence to the Franklin Commonwealth Attorney, Larry Cleveland (Cleveland). According to O'Daniel, Cleveland indicated that he did not believe the evidence was sufficient to establish the intent necessary to successfully prosecute O'Daniel, and he refused to do so. O'Daniel further asserts that, because Cleveland refused to prosecute, the

appellants then "shopped" for a prosecutor who would put the evidence against O'Daniel before a grand jury.

The appellants assert that Cleveland chose not to prosecute because he had a conflict and that he recommended bringing in a special prosecutor. Regardless, a special prosecutor reviewed the evidence presented by Det. Martin and Sgt. Motley and presented that evidence to a grand jury. The grand jury then indicted O'Daniel. The case went to trial and the jury acquitted O'Daniel. O'Daniel then brought a malicious prosecution action against Lt. Col. Sapp, Sgt. Motley, Det. Riley, and Det. Martin. The trial court dismissed O'Daniel's claims against Det. Riley; therefore, we address only those issues related to Lt. Col. Sapp., Sgt. Motley, and Det. Martin.

As to Lt. Col. Sapp, O'Daniel alleges that he: refused to comply with orders from Cabinet personnel to transfer the investigation of O'Daniel to another police agency; and orchestrated removing Cleveland and replacing him with another prosecutor. Furthermore, O'Daniel alleges that Lt. Col. Sapp failed to timely produce for O'Daniel's criminal defense attorney written evidence of his involvement in Cleveland's removal. As to Det. Martin, O'Daniel alleged that he: lied to the grand jury about how many times the Jessamine County Clerk had been interviewed; lied to the grand jury about the status of O'Daniel's civil case; and withheld the Clerk's first statement from O'Daniel's criminal defense attorney until the week before trial. As to Sgt. Motley, O'Daniel alleged that he withheld the

statement he took from the Jessamine County Clerk. Finally, O'Daniel alleged that all three appellants conspired to wrongfully prosecute him.

The appellants filed motions to dismiss on the pleadings and/or motions for summary judgment. In their motions, the appellants argued that O'Daniel had failed to set forth sufficient evidence to meet his burden of establishing the elements of malicious prosecution. They also argued that they are entitled to qualified immunity. The trial court, in summary fashion, denied the appellants' motions. It is from the trial court's denial of their motions for dismissal/summary judgment on the issue of qualified immunity that the appellants appeal.

#### STANDARD OF REVIEW

Because the appellants offered, and the trial court considered, evidence outside the pleadings, we treat the matter before us as an appeal from a denial of summary judgment. *Cabinet for Human Resources v. Women's Health Services, Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994). Summary judgment is only proper when "it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest*, 807 S.W.2d at 480. In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* Whether the appellants are entitled to qualified immunity is a question of law, which we review *de novo*. *Haney v. Monsky*, 311 S.W.3d 235, 240 (Ky. 2010).

## ANALYSIS

At the outset, we note O'Daniel's argument that the trial court's denial of the appellants' motions for summary judgment is not appealable. The appellants made motions for summary judgment based on two arguments: that they are entitled to qualified immunity; and that O'Daniel had not presented sufficient evidence to meet his burden of proving malicious prosecution. Following the hearing on the appellants' motions, the trial court summarily denied them. The court did not specifically address whether that denial was based on a finding that the appellants are not entitled to qualified immunity or on a finding that O'Daniel had raised sufficient issues of material fact regarding malicious prosecution. Because granting either motion would have put an end to this matter, we presume the court denied the appellants' motions on both grounds.

"The general rule under CR 56.03 is that a denial of a motion for summary judgment is . . . not appealable because of its interlocutory nature . . . ." *Transportation Cabinet, Bureau of Highways, Com. of Ky. v. Leneave*, 751 S.W.2d 36, 37 (Ky. App. 1988). However, the denial of a motion for summary judgment based on a claim of qualified immunity is properly appealable. *See Haney v. Monsky*, 311 S.W.3d 235 (Ky. 2010). Therefore, the court's denial of the appellants' motions for summary judgment on the issue of malicious prosecution is not properly before us. However, the court's denial of the appellants' motions for summary judgment on the issue of qualified immunity is.



Before we undertake our analysis of the appellants' entitlement to qualified immunity, we note that the appellants argue extensively in their briefs that the trial court erred when it denied their motions based on the issue of malicious prosecution. Although we might agree with the appellants and might have held differently than the trial court on that issue, we cannot address it herein. Thus, we only address the trial court's denial of summary judgment on the issue of qualified immunity.

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, *id.* § 322; (2) in good faith; and (3) within the scope of the employee's authority. *Id.* § 309; Restatement (Second) Torts, *supra*, § 895D cmt. g. An act is not necessarily “discretionary” just because the officer performing it has some discretion with respect to the means or method to be employed.

*Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001).

As noted by O'Daniel, the Supreme Court of Kentucky in *Yanero* limited the application of qualified immunity to claims of negligence. Therefore, to determine if the trial court erred in denying the appellants' motions for summary judgment on the issue of qualified immunity, we must determine if O'Daniel's claim sounds in negligence. We hold that it does not.

Generally speaking, there are six basic elements necessary to the maintenance of an action for malicious prosecution, in response to both criminal prosecutions and civil action. They are: (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary

proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

*Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981).

As noted by the Supreme Court in *Yanero*, a public official is not entitled to qualified immunity if "the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive." *Yanero*, 65 S.W.3d at 524. One of the key elements of malicious prosecution is malice, which, if proven, negates a public employee's claim to qualified immunity. Because the trial court determined that O'Daniel had produced sufficient evidence to go forward with his malicious prosecution claim, a claim involving the malicious intent to cause harm, the appellants are not entitled to qualified immunity. Therefore, we affirm the trial court's denial of the appellants' motion for summary judgment on the issue of qualified immunity.

We note that the appellants cited to *Smith v. Nesbitt*, 2003-CA-000331, 2003 WL 22462413 (Ky. App. Oct. 31, 2003), *Howell v. Sanders*, 2010 WL 2490343 (E.D. Ky. June 17, 2010), and *Caudill v. Felder*, 2010 WL 411474 (E.D. Ky. Jan. 29, 2010), in support of their position that they are exempt from liability based on qualified immunity. In *Smith*, Boyle County officials filed flagrant non-support charges against Smith. Those charges were ultimately dismissed and Smith filed a malicious prosecution claim against the officials

because of the flagrant non-support charges. The circuit court found that the officials were entitled to qualified immunity and dismissed Smith's claim.

In affirming the circuit court, this Court agreed that the officials were entitled to qualified immunity because there was sufficient evidence to bring the charges against Smith and the defendants had acted in good faith. In fact, this Court specifically noted that there was no "evidence that [the officials] acted with a corrupt motive." *Id.* at \*4. *Smith* is easily distinguished from the matter before us. Unlike in *Smith*, the trial court herein found that there was sufficient evidence of malicious intent to permit the matter to proceed. Therefore, *Smith* is not persuasive.

*Howell* involved entitlement to immunity by a prosecutor, not police officers; and therefore is distinguishable. Furthermore, the federal district courts in *Howell* and *Caudill* found that the plaintiff had not established the elements necessary to make a claim for malicious prosecution. The circuit court herein, when it denied the appellants' motions for summary judgment on O'Daniel's malicious prosecution claims, came to the opposite conclusion. Therefore, *Howell* and *Caudill* are also not persuasive.

Finally, O'Daniel filed a motion to dismiss this appeal approximately one month before oral arguments. In support of his motion, O'Daniel cited to a recent opinion by another panel of this Court, wherein this Court remanded an appeal to the circuit court for additional findings on the issue of qualified immunity. In that case, there were a number of issues in addition to qualified

immunity and it was not clear if the circuit court had considered the issue of qualified immunity in denying summary judgment. We do not believe that such a remand is necessary in this case because it is clear to us that the circuit court denied the appellants' qualified immunity motion for summary judgment.

Furthermore, we note that O'Daniel, while not formally withdrawing his motion during oral arguments, indicated that the only "benefit" he believed he would receive by a remand would be the passage of time prior to a final resolution.

Therefore, he indicated that he was not going to argue his position. For these reasons, O'Daniel's motion to dismiss this appeal is denied.

#### CONCLUSION

Qualified immunity is available in claims sounding in negligence; however, O'Daniel's claim of malicious prosecution does not sound in negligence. To the contrary, it is an intentional tort, requiring proof of malice; and the trial court believed there were genuine issues of material fact regarding malice on the part of the appellants. To reiterate what we said earlier, we might have found differently regarding the aforementioned; however, that issue is unfortunately not before us. Therefore, although we would like to see this matter come to an end, we hold that the appellants are not entitled to qualified immunity and we affirm.

Finally, for the reasons set forth above, we deny O'Daniel's motion to dismiss this appeal.

ALL CONCUR.

ENTERED: May 20, 2011

/s/ Michelle M. Keller  
JUDGE, COURT OF APPEALS

BRIEFS AND ORAL  
ARGUMENT FOR APPELLANT  
GARY MARTIN:

William E. Johnson  
Frankfort, Kentucky

BRIEF FOR APPELLANT  
BOBBY MOTLEY:

Heidi Engel  
Charles E. Johnson  
Winchester, Kentucky

ORAL ARGUMENT FOR  
APPELLANT BOBBY MOTLEY:

Charles E. Johnson  
Winchester, Kentucky

BRIEF FOR APPELLANT  
MIKE SAPP:

Morgain M. Sprague  
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ORAL ARGUMENT FOR  
APPELLANT MIKE SAPP:

Scott Miller  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Daniel J. Canon  
Thomas E. Clay  
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ORAL ARGUMENT FOR  
APPELLEE:

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