

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1996-CA-001333-MR  
AND  
NO. 1996-CA-003419-MR

JOHN S. JOHNSON

APPELLANT

v. APPEALS FROM PERRY CIRCUIT COURT  
HONORABLE DOUGLAS C. COMBS, JUDGE  
ACTION NO. 96-CI-00016

B. ROBERT STIVERS, II; B. ROBERT  
STIVERS, I; CHARLES E. ALLEN; STEPHEN L.  
TACKETT; BRENT L. CALDWELL; AND  
STIVERS & STIVERS ATTORNEYS AT LAW  
PROFESSIONAL CORPORATION

APPELLEES

### OPINION AND ORDER

#### AFFIRMING

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BEFORE: BUCKINGHAM, KNOX, AND MCANULTY, JUDGES.

KNOX, JUDGE: These are appeals by John S. Johnson (Johnson) from the dismissal of his lawsuit for damages under 42 U.S.C. § 1983 and 42 U.S.C. § 1985. We affirm.

In July 1990, the body of Denver Brock was discovered alongside a roadway in Perry County, Kentucky. The medical examiner concluded that the cause of death was consistent with being struck by a motor vehicle. Johnson was the last person seen with Brock. Johnson was arrested and charged with the

murder of Brock, and, subsequent to a preliminary hearing, the case was bound over to the Perry County Grand Jury. Pursuant to RCr 5.08, Johnson notified then Perry County Commonwealth's Attorney Alva Hollon (Hollon) of his desire to present evidence to the grand jury. However, Hollon failed to so notify the grand jury and, on August 15, 1991, Johnson was indicted for the murder of Denver Brock.

In order to rectify his oversight, Hollon offered to let Johnson testify before the same grand jury. Hollon further agreed that if the grand jury decided that it would not have indicted Johnson had it originally heard Johnson's evidence, then he would dismiss the indictment. Following the presentation of Johnson's evidence, the grand jurors were polled and they indicated that they would not have indicted Johnson if they had originally considered his evidence.

The case languished, and in the meantime Hollon was replaced as Perry County Commonwealth's Attorney by appellee Charles Allen (Allen). On December 7, 1992, Circuit Judge Douglas Combs (who in the meantime had replaced original Judge Calvin Manis) entered an order dismissing Johnson's indictment "with leave for the Commonwealth to resubmit." On July 20, 1993, Allen wrote the Attorney General's Office requesting that a special prosecutor be appointed to prosecute the Johnson case. The request was prompted because a member of Allen's office was the wife of the Public Defender representing Johnson in another county on different charges and because the family of the victim

had made attacks upon the integrity of the Perry County Commonwealth's Attorney's office.

The Attorney General's office appointed appellee B. Robert Stivers, II (Stivers), Assistant Commonwealth's Attorney in the 41<sup>st</sup> Judicial District, as special prosecutor. Stivers thereafter again presented the case to a Perry County Grand Jury and, on July 29, 1993, Johnson was again indicted for the murder of Denver Brock. Meanwhile, Johnson was convicted of an unrelated murder in Leslie County and sentenced to life imprisonment. That murder conviction was upheld on appeal. See Johnson v. Commonwealth, Ky., 892 S.W.2d 558 (1994). Stivers prosecuted the Leslie County murder case.

In December 1993, the tenure of appellee B. Robert Stivers, I, as Commonwealth's Attorney for the 41<sup>st</sup> Judicial District ended. This likewise ended the tenure of his assistant, B. Robert Stivers, II (Stivers). Thereafter, the newly elected Commonwealth's Attorney for Perry County, appellee Stephen Tackett (Tackett), assumed responsibility for the prosecution of Johnson. However, in April 1994, the family of Denver Brock asked Stivers to reenter the case as a privately paid prosecutor, a procedure permitted under Commonwealth v. Hubbard, Ky., 777 S.W.2d 882, 889 (1989). The former Deputy Attorney General, appellee Brent L. Caldwell (Caldwell), signed the appointment letter.

Meanwhile, in December 1993, Johnson moved to dismiss the indictment alleging that there was no competent evidence to show that Johnson's vehicle had hit Brock, whether with criminal

intent or otherwise. On August 12, 1994, Johnson again moved to dismiss the murder indictment arguing that Hollon's original agreement to dismiss amounted to an agreement to dismiss with prejudice. Johnson argued that under Workman v. Commonwealth, Ky., 580 S.W.2d 206 (1979), the Commonwealth was bound by this alleged bargain and, therefore, he could not be legally indicted following the original dismissal.

While the Commonwealth disagreed with Johnson's version of Hollon's offer and the resulting bargain, nevertheless, on December 15, 1994, the trial court dismissed the second murder indictment with prejudice. Appellee Stivers moved to alter, vacate, or amend the order; however, appellee Tackett, though he disagreed with the trial court's ruling, thought the case was "stale" and, during the hearing on Stivers' motion, moved to withdraw the motion and to relieve Stivers from additional responsibility in the case. The court granted both motions.

On January 16, 1996, Johnson filed the instant action asserting civil rights claims pursuant to 42 U.S.C. §§ 1983 and 1985. Named as defendants were B. Robert Stivers, II; B. Robert Stivers, I; Charles E. Allen; Stephen L. Tackett; Brent L. Caldwell; and Stivers & Stivers Attorneys at Law, PSC. None of the parties were named in their individual capacities. The pleading alleges "negligence, malpractice, misrepresentation, fraud, violations of [Johnson's] civil and constitutional rights, [and] violations of [Johnson's] statutory rights and state and federally protected civil liberties."

On February 5, 1996, the defendants filed a motion to dismiss the complaint, arguing that the complaint failed to state a claim upon which relief could be granted; that the defendants were protected by sovereign immunity and prosecutorial immunity; and that service of process was deficient with respect to B. Robert Stivers, I. On February 20, 1996, the trial court granted the defendants' motion, dismissing the case with prejudice. Following various motions, objections, and other litigation in the trial court and this Court, these appeals were perfected.

Johnson raises a variety of contentions on this appeal; however, even were we inclined to agree with the alleged procedural deficiencies raised by Johnson, any error by the trial court was harmless because the appellees are immune from the claims brought by appellant.

A criminal prosecutor enjoys absolute immunity from claims for damages asserted under § 1983 for actions taken in the presentation of the state's case when he acts within the scope of his prosecutorial duties. Imbler v. Patchman, 424 U.S. 409, 420, 96 S. Ct. 984, 990, 47 L. Ed. 2d 128 (1976); Grant v. Hollenbach, 870 F.2d 1135, 1137 (6<sup>th</sup> Cir. 1989); Boyd v. Biggers, 31 F.3d 279, 285 (5<sup>th</sup> Cir. 1994); Joseph v. Patterson, 795 F.2d 549 (6<sup>th</sup> Cir. 1986). "[A]cts undertaken by the prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." Buckly v. Fitzsimmons, 509 U.S. 259, 273, 113 S. Ct. 2606, 2615, 125 L. Ed. 2d 209 (1993). Prosecutorial immunity applies to the

prosecutor's actions in initiating the prosecution and in carrying the case through the judicial process. Graves v. Hampton, 1 F.3d 315, 318 (5<sup>th</sup> Cir. 1991). This absolute prosecutorial immunity extends to § 1983 actions predicated on malicious prosecution. Brummett v. Camble, 946 F.2d 1178, 1181 (5<sup>th</sup> Cir. 1991), cert. denied 504 U.S. 965, 112 S. Ct. 2323, 119 L. Ed. 2d 241 (1992). "Absolute prosecutorial immunity is not defeated by a showing that the prosecutor acts wrongfully or even maliciously, or because the criminal defendant ultimately prevailed on appeal or in a habeas corpus proceeding." Grant at 1138, quoting M. Schwartz & J. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees § 7.8 (1986).

In the case at bar, the wrongful acts and abridgments of constitutional rights alleged against appellees B. Robert Stivers, II; B. Robert Stivers, I; Charles Allen; Stephen Tackett; and Brent Caldwell occurred within the scope of their official duties as officers within the prosecutorial system of the Commonwealth of Kentucky. The appellees were acting in an advocatory role in furtherance of prosecuting the murder of Denver Brock. We conclude that the conduct of the appellees springs directly from the execution of their duties as judicial officers and that they are entitled to absolute immunity from this § 1983 suit.<sup>1</sup> Grant, 870 F.2d at 1140. Accordingly, the trial court did not err in dismissing this action.

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<sup>1</sup>While B. Robert Stivers, I and Brent L. Caldwell were not directly involved as prosecutors in the murder proceedings against Johnson, in the case at bar, in view of their roles as judicial officers ancillary to the proceedings, we conclude they, too, qualify for absolute immunity.

The suit against appellee Stivers & Stivers, PSC, was likewise properly dismissed. The Stiverses were clearly not acting within the scope of employment of their law firm in the matters under litigation - they were acting within the scope of their duties as judicial officers - and hence the firm may not be held liable pursuant to the rules regarding employer liability under the doctrine of respondeat superior. See Horne v Hall, Ky. 246 S.W.2d 241 (1951). Moreover, respondeat superior may not serve as a basis for imposing liability under § 1983. Armaco v. American Honda Motor Co. 917 F. Supp 142 (DC Conn. 1996).

In his civil complaint, Johnson also alleged a 42 U.S.C. § 1985 violation. The absolute immunity discussion, supra, applies whether a § 1983 or § 1985 violation is alleged. Grant 870 F.2d at 1135 n. 1.

Finally, on July 24, 1998, an order was entered by this Court passing to this panel a motion by Johnson for an order instructing the trial court to produce relevant portions of the records or to remand the matter back to the trial court. In view of our discussion herein, and being otherwise sufficiently advised, the appellant's motion is denied.

For the foregoing reasons the order of the trial court dismissing the § 1983 claims of Johnson is affirmed, and it is ORDERED that the motion for an order instructing the trial court to produce portions of the record or to remand is DENIED.

ALL CONCUR.

ENTERED: May 28, 1999

/S/ D. Knox  
JUDGE, COURT OF APPEALS

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