

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000745-MR

STEPHEN O'DANIEL

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE PHILLIP J. SHEPHERD, JUDGE  
ACTION NO. 07-CI-00820

MAJOR MIKE SAPP, SERGEANT GARY  
MARTIN, AND SERGEANT BOBBY MOTLEY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, DIXON AND GOODWINE, JUDGES.

DIXON, JUDGE: Stephen O'Daniel appeals the Franklin Circuit Court's trial verdict and judgment entered April 20, 2018. After careful review of the record, briefs, and applicable law, discerning no error, we affirm.

This case has previously been reviewed by the Supreme Court of Kentucky in *Martin v. O'Daniel*, 507 S.W.3d 1 (Ky. 2016). The *Martin* court

discussed the underlying facts and procedural background of this case, which we adopt herein.

Stephen O'Daniel is a retired Kentucky State Police (KSP) officer. He was employed by the Justice and Public Safety Cabinet as Executive Director of the Office of Investigations when he purchased what was purportedly a 1974 Chevrolet Corvette. After discovering that the vehicle was actually a 1975 Corvette, O'Daniel sought the assistance of Detective Riley of KSP's stolen vehicle division.

Riley confirmed for O'Daniel the vehicle had been stolen in 1981 nearly twenty years before O'Daniel acquired it. Riley also informed O'Daniel that after the owner of the stolen Corvette was paid for the loss by State Farm Insurance Company his ownership interest in the car was transferred to State Farm as a result of the settlement. O'Daniel contacted State Farm to ascertain its interest in the car and was initially informed that State Farm claimed no interest in it.

O'Daniel then contacted the Jessamine County Court Clerk and with her assistance, submitted an application for a new title to the car. Upon review of the application, a Kentucky Department of Transportation title branch manager suspected it may be fraudulent and contacted KSP. A criminal investigation into O'Daniel's application ensued, conducted by Appellants Motley and Martin under the supervision of Appellant Sapp. The Justice Cabinet's General Counsel, Secretary, and Assistant Secretary got involved, apparently in an effort to end the investigation or transfer it to local law enforcement officials. Nevertheless, KSP maintained its control over the case and the officers continued their investigation.

The officers presented the results of the investigation to Franklin County Commonwealth's Attorney, Larry

Cleveland. Cleveland expressed doubt about the viability of bringing a criminal charge because proof of criminal intent seemed to be lacking. He declined to prosecute, but citing an unspecified conflict of interest, he asked the Kentucky Attorney General to assign a special prosecutor to review the case. Jefferson County Commonwealth's Attorney, David Stengel, was appointed as special prosecutor. Stengel presented the case, which included Martin's testimony and some of the evidence collected by the officers, to the grand jury. The grand jury indicted O'Daniel for second-degree forgery in connection with his application to secure a new title for the Corvette. O'Daniel pled not guilty, and the case went to trial. The jury acquitted him, and, soon thereafter, he brought a malicious prosecution action against the officers in the Franklin Circuit Court.

The officers moved for summary judgment seeking dismissal of O'Daniel's complaint, arguing that they were immune from civil suit for their actions, and that as mere witnesses in O'Daniel's criminal case, they were not responsible for the "institution or continuation of original judicial proceedings" as required by *Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981). They argued that the criminal prosecution of O'Daniel was not conducted "by, or at the instance of" the officers, as required by *Raine*.

The trial court granted summary judgment, holding that since the officers had neither arrested O'Daniel nor filed a criminal complaint against him, and because the special prosecutor had made the ultimate decision to seek an indictment and to proceed with the prosecution, O'Daniel could not establish that the criminal prosecution was instituted "by or at the instance of" the officers, an essential element of the tort of malicious prosecution. The trial court also concluded that summary judgment was required because the officers were shielded from liability for malicious prosecution by the doctrine of immunity as expressed by the United States Supreme

Court in *Rehberg v. Paulk*, 566 U.S. 356, 132 S.Ct. 1497, 1508, 182 L.Ed.2d 593 (2012).

On appeal, the Court of Appeals reversed the summary judgment and remanded the case to the trial court for further proceedings. We granted discretionary review, and for the reasons set forth herein, we affirm the Court of Appeals.

*Id.*, at 3-4, as corrected (Sept. 22, 2016) (internal footnotes omitted).

On remand and prior to trial, defendants moved the court *in limine* to exclude evidence that the audio recording of Jessamine County Clerk Eva McDaniel’s May 9, 2006, interview with Motley was intentionally withheld. O’Daniel objected, but the court granted the defendants’ motion. The matter was tried by jury April 9-12, 2018, with a trial verdict and judgment in favor of defendants, which was thereafter entered on April 20, 2018. This appeal followed.

As an initial matter, in contravention of CR<sup>1</sup> 76.12(4)(c)(iv), relating to the requirement of a concise statement of the facts and procedural history of an appeal, O’Daniel fails to include “ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings . . . supporting each of the statements narrated in the summary.” Similarly, CR 76.12(4)(c)(v), relating to arguments raised on appeal, requires “ample supportive references to the record and citations of authority

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<sup>1</sup> Kentucky Rules of Civil Procedure.

pertinent to each issue of law[.]” O’Daniel’s brief contains two citations to the record; all other citations are merely to items attached in its appendix. O’Daniel’s brief also only cites one case—aside from his own—in support of his arguments. It is not the job of this or any appellate court to scour a record to determine whether these citations support a party’s assertions. *Walker v. Commonwealth*, 503 S.W.3d 165, 171 (Ky. App. 2016). Appellants must exercise care, diligence, and trustworthiness to ensure the accuracy of pinpoint citations provided to the appellate court in support of any arguments pursuant to CR 76.12, pertaining to both location and substance.

On appeal, O’Daniel argues the trial court erred by granting defendants’ motion *in limine* to exclude evidence that the May 9, 2006, interview of Eva McDaniel was intentionally withheld. The standard of review concerning a trial court’s evidentiary rulings is for abuse of discretion. *Tumey v. Richardson*, 437 S.W.2d 201, 205 (Ky. 1969). “The test for an abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound reasonable principles.” *Penner v. Penner*, 411 S.W.3d 775, 779-80 (Ky. App. 2013) (citation omitted).

We begin our discussion by pointing out that O’Daniel has provided no proof that the recorded interview was ever actually—much less intentionally— withheld. O’Daniel concedes and asserts that the “May 9, 2006, interview was

actually produced in a supplemental discovery response by the Commonwealth on April 27, 2007.” During the bystander’s bill hearing at O’Daniel’s criminal trial, counsel asked if Motley had provided the prosecutor with a recording of McDaniel’s May statement. The prosecutor reviewed his file and found an undated CD labeled “Eva O’Daniel” [*sic*], the prosecutor stated he could not remember whether it was the May recording or not. Motley testified that he delivered a copy of the subject recording to the prosecutor on or about May 10, 2006. The recording was also made available to the special prosecutor who, in turn, provided a copy to O’Daniel. It is undisputed that the recording was available for O’Daniel to present in his defense at his criminal trial on May 17, 2007.

We next observe that even if the recording of Motley’s May 9, 2006, interview with McDaniel was initially “withheld” prior to indictment by the grand jury, it was referenced and discussed in, as well as attached to, his Kentucky State Police Incident Report, which O’Daniel does not contend was withheld. McDaniel was interviewed twice more prior to the grand jury’s being convened on October 18, 2006. The interview conducted on June 6, 2006, by Motley and Martin covered much of the same substance as Motley’s first interview with McDaniel but in greater detail.

O’Daniel asserts “an examination of the transcript of the interview establishes why Defendants/Appellees withheld the tape and why Defendant/Appellee Martin lied about its contents as well when he learned of its existence.” O’Daniel claims the recording was withheld because it contained exculpatory evidence showing that he sought help from the clerk to correct his title and that he relied upon her actions and information. However, as previously noted, O’Daniel fails to establish that the recording was, in fact, withheld. O’Daniel also fails to demonstrate that Martin “lied about [the] contents” of the first interview of which he neither participated in nor reviewed. O’Daniel takes issue with Martin’s testimony during the grand jury proceedings. Ironically, the only case cited by O’Daniel in support of his argument—*King v. Harwood*, 852 F.3d 568, 572 (6th Cir. 2017), cert. denied, 138 S.Ct. 640, 199 L.Ed.2d 527 (2018)—provides that Martin is afforded absolute immunity from suit to the extent that O’Daniel’s claims are based on his grand jury testimony under *Rehberg v. Paulk*, 566 U.S. 356, 132 S.Ct. 1497, 182 L.Ed.2d 593 (2012).

When this case was previously before the Supreme Court of Kentucky, the court held:

We agree that the officers are not immune from O’Daniel’s suit but for slightly different reasons.

**O’Daniel’s claim of malicious prosecution is not predicated simply upon Martin’s grand jury testimony and the testimony of Motley and Sapp in**

O'Daniel's criminal trial. Rather, O'Daniel alleges that the officers engaged in a wide range of activities to encourage and promote the indictment and prosecution of O'Daniel, including the **concealment of exculpatory evidence from the prosecutor. The protection afforded to the officers by the doctrine of immunity based upon their privileged testimony does not extend to the other activities upon which O'Daniel's claim of malicious prosecution is based.** We are aware of no doctrine that extends absolute immunity to such activities, and notably, the parties have cited none.

*Martin*, 507 S.W.3d at 5 (emphasis added). In the instant appeal, O'Daniel now argues that the trial court erred in granting the defendants' motion *in limine* concerning evidence that McDaniel's May 9, 2006, recorded interview was withheld or concealed—a fact not borne out by the record. O'Daniel further argues that this, coupled with Martin's grand jury testimony, are the critical elements of his malicious prosecution claim.<sup>2</sup> Because the subject recording was not concealed, and Martin's grand jury testimony was privileged under *Rehberg*, O'Daniel's arguments fail. Unlike the previous appeal, because there was no evidence of concealment of the subject recording, O'Daniel's claim of malicious prosecution is predicated solely upon privileged grand jury testimony. This is also why our analysis under *Rehberg* and *Martin* now compels a different result:

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<sup>2</sup> O'Daniel also discusses several items from the subject interview which were not specifically discussed in Motley's report. However, O'Daniel fails to explain the relevance or consequence as the recorded interview was attached to the report and supplied to the prosecutor, special prosecutor, and O'Daniel. Therefore, no discussion of these items is warranted.



application of immunity for the testimony. It is also for these reasons that we hold that the trial court did not abuse its discretion in disallowing evidence that the recorded interview of McDaniel was withheld.

In conclusion, for the foregoing reasons, the order of the Franklin Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Thomas E. Clay  
Louisville, Kentucky

BRIEF FOR APPELLEES:

Scott Miller  
Lexington, Kentucky

Charles E. Johnson  
Heidi Engel  
Winchester, Kentucky

William E. Johnson  
Frankfort, Kentucky