COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO: 2014-SC-000389-DG

MIKE SAPP — APPELLANT

vs.

STEPHEN O'DANIEL — APPELLEE

** ** ** ** **

APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NUMBER 2012-CA-001961-MR
HONORABLE JUDGES CAPERTON, COMBS AND THOMPSON

** ** ** ** **

REPLY BRIEF OF APPELLANT MAJOR MIKE SAPP

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2015, a true and correct copy of the Reply Brief of Appellant Mike Sapp was served via first-class mail, postage prepaid, on the following persons: Hon. Thomas E. Clay, Meidinger Tower, Suite 1730, 462 South 4th Street, Louisville, KY 40202; Hon. William E. Johnson, 326 West Main Street, Frankfort, KY 40601; Hon. Charles Johnson and Hon. Heidi Engle, 43 S. Main St., Winchester, KY 40391; Hon. Senior Judge Sheila Isaac, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601; Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. I hereby further certify that the record on appeal was not withdrawn by undersigned counsel.

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STATEMENT OF POINTS AND AUTHORITIES:

1. **APPELLEE CITES TO NO PART OF THE OFFICIAL RECORD ON APPEAL AND ATTEMPTS TO USE AS AUTHORITY MATTERS THAT ARE NOT IN THE RECORD**

2. **ABSOLUTE IMMUNITY**

3. **INITIATION OF MALICIOUS PROSECUTION ACTION**

ARGUMENT:

1. Appellee, through Counsel, cites to no part of the official record on appeal and attempts to use as authority matters that are not in the record.

In his brief, the Appellee makes no reference to any part of the record on appeal to which the Court may make reference and as such it is almost impossible to attack the completely baseless accusations made in the Appellee's brief. For instance, on Page 2 of the Appellee's Brief, in a footnote that is not referenced in any other way, counsel for the Appellee gives a recitation of a telephone call allegedly made by the foreman of the trial jury in the Appellee's criminal trial. The supposed source of this information is the deposition of the Appellant, Major Mike Sapp. What Appellee's counsel does not tell the Court is that that entire statement is self-contained within a question asked by Appellee's counsel to Major Sapp. There was no affirmation by any witness in this case that the alleged facts contained within counsel's question were true. It is not evidence in this case and was never verified in any way by any part of the record in this case.

Another example of this very loose and cavalier attitude toward the facts of this case taken by counsel for the Appellee appears on Page 22, within the "Argument" portion of the Appellee's Brief. Counsel for the Appellee offers up a completely self-serving and unproven statement that is not a part of the record in this case when he writes:

> **"Additionally, counsel for the Appellee, the undersigned, had a discussion with Mr. Cleveland in which Mr. Cleveland discussed his recollection of the conversation he had had with the Appellants. Counsel for the Appellee saw a sticky note in Mr. Cleveland's file, which had the question 'where is the intent' (Mr. Cleveland stated that he had seen the interview of Eva McDaniel conducted by the Defendant Motley on May 9, 2006). The May 9, 2006, interview was a pivotal piece of evidence in Mr. Cleveland's decision to decline prosecution."**

The Court must understand that this is not evidence, that it is not a part of the record and was never introduced into evidence in this matter. Nowhere does counsel for the Appellee cite where in the record this information is contained. He cannot do so because it is not contained in the record and was never stated by Mr. Larry Cleveland, Commonwealth's Attorney for Franklin County. Instead, Mr. Cleveland recused himself from prosecuting this action and asked the Attorney General's office to appoint a Special Prosecutor which was done.

These are just two examples of the myriad of ways in which the brief for the Appellee is replete with information that is not cited to the record because it is not a part of the record in this case. The Court should recognize that counsel for the Appellee has failed to cite to the record in any portion of his brief.

2. The Court of Appeals was in error in failing to recognize that the trial court correctly applied total immunity under *Rehberg v Paulk, 132 S. Ct. 1497, 182 L. Ed. 2d 593 (2012).*

Appellee argues in his brief that the Kentucky Court of Appeals thoroughly discussed and analyzed the doctrine of *Rehberg, supra.* Nothing could be further from the truth. What the Court of Appeals said about the *Rehberg* decision as applied by the trial court was that the finding that the officers were entitled to ***absolute immunity*** (emphasis added here) did not affect the Court of Appeals previous finding in their first opinion that the officers were not entitled to qualified immunity. As Appellant, Mike Sapp, pointed out in his initial brief, there is simply no means to make sense of this opinion. If one has absolute immunity, the discussion ends there. But for the Court of Appeals it did not end there, when that Court simply ignored *Rehberg, supra*, in order to find as they chose to find in their first opinion before *Rehberg.*

The discussion of *Rehberg, supra*, in the Court of Appeals opinion begins on Page 7 where nothing is said other than that the trial court had concluded that the officers were entitled to immunity under *Rehberg v Paulk.* Beginning on Page 8, in footnote 2, the Court begins to discuss that Sapp argues that he is entitled to **"qualified official immunity."** (emphasis added here) For the next three and a half pages, the Court of Appeals opinion rehashes the reasons that it found in its first opinion that the officers were not entitled to qualified immunity. Finally, in the middle of Page 12 the Court comes back to the trial court's reliance on *Rehberg v Paulk.* Here the Court of Appeals says: "We believe our prior holding that the officers were not entitled to qualified immunity is not impacted by the recent decision in *Rehberg v Paulk*... and it was error for the trial court to find otherwise."

The Court of Appeals goes on to set out that the decision in *Rehberg* **"comports with well-settled Kentucky law that, 'testimony to the grand jury was privileged, Reed may not maintain a civil action against Isaacs for allegedly lying to the grand jury.' *Reed v Isaacs*, 62 S. W. 3d 398, 399 (Ky. App. 2000), citing *McClarty v Bickel*, 155 Ky. 254, 159 S. W. 783, 784 (1913)."** There is no attempt here by the Court of Appeals to explain how a determination that *Rehberg* is in conformity with existing Kentucky law can lead to a determination that *Rehberg* does not apply in our present case.

Some explanation may have been attempted by the Court on Page 13 of the opinion when, without further explanation, the Court says that *Rehberg* made it clear that a §1983 action and a common law tort are not one and the same. In quoting from *Rehberg*, the Court of Appeals says specifically that a §1983 is **"broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort. ... But it is narrower in that it applies only to tortfeasors who act under color of state law."** Of course in our case we are speaking

about state actors because the suit by the Appellee was brought against each of the Appellants because of their actions as police officer, i.e. state actors. When the U. S. Supreme Court says in *Rehberg* that §1983 is "broader [than] any previously known tort," it clearly is saying that the immunity granted in *Rehberg* applied across a broader scale than what might have been offered with regard to previously established tort actions, such as malicious prosecution.

The important point for this Court to remember is that the fact situation in *Rehberg* was directly on point with the fact situation in our present case. In that case an investigator with a District Attorney's office testified before the grand jury three times, leading to three separate indictments against the plaintiff in the civil action. All three indictments were ultimately dismissed and the Court, in considering the issues of immunity, clearly stated that even if the investigator intentionally lied before the grand jury, he was still entitled to immunity from civil suit. How could this clear point of law have been missed in the decision of the Court of Appeals? In our present case, Sgt. Martin testified before the grand jury and it is alleged that he lied. The assertion that he lied is seriously contested in this action. But under the *Rehberg* doctrine, it does not matter whether Martin lied before the grand jury. He is still entitled to absolute immunity from civil suit.

Sgt. Motley and Major Sapp did not testify before the grand jury. They both testified at the Appellee's criminal trial. As explained in Appellant Sapp's original brief to this Court, it must be clear that Sapp did not testify in the criminal trial as a witness for the Commonwealth against the Appellee. Sapp was called as a witness for the defense. Now the Appellee asks to continue a suit against Sapp based on testimony given at trial that was elicited from Sapp by Appellee's own attorney. Even had Sapp testified as a witness for the Commonwealth, under *Rehberg v Paulk, supra*, and *Reed v Isaacs, 62 S. W. 3d 398 (Ky. App. 2000)* and *McClarty v Bickel, 155 Ky. 254, 159 S. W. 783 (1913)*, Sapp would have been entitled to immunity. But it is absurd for Major Sapp

to have been subjected to civil liability in a suit by the Appellee when it was the Appellee himself who called him as a witness.

3. The Court of Appeals was in error in failing to uphold the decision of the trial court that the Appellants did not initiate the action against the Appellee and therefore the Appellee failed to establish the first element of the tort of malicious prosecution.

Nowhere in his brief does the Appellee address the fact that the criminal investigation into the actions of the Appellee began when Ms. Annette Holmes of the Department of Transportation, Motor Vehicle Licensing Division contacted Kentucky State Police about what she believed to be a fraudulent application by the Appellee for title to a motor vehicle. Ms. Holmes testified before the Franklin County Grand Jury and it was her testimony that was most damning toward the Appellee. She testified that she had previously spoken to the Appellee and had personally told him he could not apply for title to the car. (Trial Tape Footage: 05-14-07/04:03:00) When she learned from her staff that the Appellee was enquiring about coming to the Department to pick up his "speed title," she had the application pulled and then called the County Clerk who had submitted the application. (R.A. 2nd Appeal, p. 487)

Ms. Holmes learned that the VIN Number for the car had been changed on the application and the model year of the car had been changed on the application. Ms. Holmes clearly stated that this was fraud in her opinion and required her to report it to the state police. (R.A. 2nd Appeal, p. 489) Therefore, it was Ms. Holmes who set in motion the events that led to criminal charges being taken against the Appellee, not the Kentucky State Police and not any of the named Appellants.

This Court must understand that the evidence in this case is that all of the critical information on the application for title to the car was false. Amazingly, the Court of Appeals on Page 4 of its opinion writes: "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." With regard to the information put on the application, the Court of Appeals is wrong in every single aspect. The VIN Number was not correct. The model year was different and the application was not for a new VIN plate, it was for title to the car. This is critical because it was this information that led to Ms. Holmes decision that a fraudulent application had been filed and that she was required by law to contact the state police.

The Court of Appeals relied almost exclusively on the decision in *Sykes v Anderson, 625 F. 3d 294 (6th Cir. 2010)* for its determination that a malicious prosecution action was viable against these Appellants. In *Sykes, supra,* the Court found that:

> **"In the instant case a reasonable jury could have concluded that the evidence introduced at trial showed that Sgt. Anderson deliberately made false and misleading statements and omitted material information from his warrant application in order to manufacture probable cause. Most strikingly, Sgt. Anderson's warrant request made several assertions as to what the store's surveillance video revealed about the robbery that were plainly misleading, if not entirely false."**

The key in *Sykes, supra,* is that Sgt. Anderson made false and misleading statements and omitted **material** information (emphasis added here). With regard to Appellant Sapp, there is not even the barest allegation that he made any false or misleading statements or that he omitted any information that was material to the investigation or criminal charges brought against the Appellee. It is critical to the Court's understanding of this matter, and so it is repeated here once again, that the Appellee did submit false information on an application for a car title. He signed his name to an official state document in order to obtain a benefit, i.e. title to a car. And on that document he

knew that the VIN was wrong, he knew that the model year of the car was wrong and he knew it contained a value for the car that was vastly different from what he had actually paid for the car. That is what is material to the criminal charges that were taken against him. There was no statement offered by any of the Appellants at any point in time that was false and material.

The Appellee argues over and over again that Sgt. Martin lied to the grand jury when he said that Eva McDaniel, the County Clerk, was interviewed twice. In making this argument, the Appellee has to completely ignore the context of the question. Martin was asked by the Commonwealth's Attorney: "In fact ***you*** (emphasis added here) went back later to Mrs. McDaniel and interviewed her with regard to this transaction?" And Martin answered: "She was interviewed twice, that's correct. They're both recorded." (R. A. 2nd Appeal, p. 471)

The Appellee conveniently ignores the fact that Martin is responding to a direct question about what he personally did. And he answered honestly and truthfully when he said he interviewed Mrs. McDaniel twice, because that is what happened. He was never asked if Sgt. Motley had also interviewed Mrs. McDaniel. Regardless, the question and answer are not material to the fraudulent application. They have nothing to do with what was material to the charges being brought against the Appellee.

The other "lie" that Sgt. Martin is supposed to have told the grand jury is that the Department of Driver's Licensing was appealing the decision of the Circuit Court ordering that the Appellee be given title to the car. Martin testified that "the best information I have at this point is Department of Transportation is appealing this." (R.A. 2nd Appeal, p. 480) He did not state it as a fact, he simply stated that that was the best information he had at that point. It turned out that he was wrong, but it was not a lie. And he clearly told the grand jury that a Jessamine Circuit Judge had ordered that title to the car be given to the Appellee. Again, regardless of the statements,

they were not material to whether the Appellee had falsified the information on the application for car title.

At that grand jury the critical testimony, with regard to what led to the criminal investigation of the Appellee, came from Annette Holmes. The following questions were asked of Ms. Homes before the grand jury and she gave the following answers as shown on the grand jury transcript beginning on Page 40, Line 19 and continuing on Page 41, through Line 4 as contained within Appendix 1 of the Appellee's Brief:

CWTH ATTY: Now, I mean, if this happened to anyone, would you report it to authorities? (referring to the previous testimony of Ms. Holmes concerning her telephone call to Eva McDaniel regarding the VIN number being changed on the application.)

WITNESS: Certainly.

CWTH ATTY: (Inaudible)

WITNESS: Certainly. That's part of our job. When we examine documents, if we find anything that is fraudulent – is the term we use – but, you know, we would turn that info – they changed the year and the VIN number of that vehicle.

CWTH ATTY: Do you consider that a fraudulent document?

WITNESS: The application that's submitted to get this application was fraudulent.

It must be clear to everyone that Annette Holmes, as was her responsibility as an employee of the Vehicle Registration Department, reported a fraudulent transaction to the Kentucky State Police. It was Ms. Holmes's action that initiated the criminal investigation that ultimately led to the indictment of the Appellee. Her testimony was very clear that because of the fraudulent

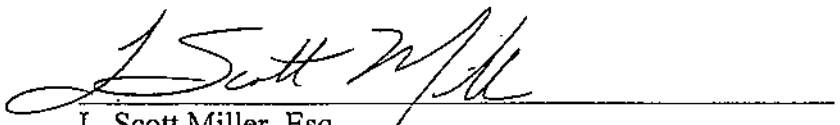
information on the title application submitted by the Appellee she considered the application to be fraudulent. The Kentucky State Police presented the evidence to the Special Prosecutor appointed to consider criminal charges in this case and based upon the advice of that prosecutor and solely at his discretion the case was presented to the grand jury. The holding in *Sykes v Anderson, supra*, is not applicable to the facts in our present case and this Court should find that the Court of Appeals was in error in finding that the police officers in our present case can be liable for malicious prosecution under our fact situation.

This Court must also recognize the fact that the trial court correctly analyzed the different methods by which criminal charges may be taken against a person in Kentucky. The trial judge pointed out that criminal charges may be instituted by: (1) an arrest made by a sworn police officer; (2) by filing a criminal complaint with the county attorney; or (3) by indictment returned by the grand jury. The Kentucky State Police officers in our instant case chose the method that requires approval by an elected prosecutor and return of an indictment by citizens of the county where the criminal act occurred. They sought the method of criminal action which removed their discretion and allowed the greatest review of their investigation, both by prosecution and by the citizenry in the form of the grand jury. For these reasons, in addition to the role of Annette Holmes in reporting the alleged crimes, the Kentucky State Police cannot be said to have "initiated" the criminal action against the Appellee.

CONCLUSION:

For all the reasons set out herein and for the reasons set out in Appellant, Mike Sapp's original brief to this Court, Appellant, Mike Sapp, respectfully asks the Court to reverse the decision of the Court of Appeals and to reinstate the summary judgment dismissing the civil action of the Appellee.

Respectfully submitted,



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