No. 16-3555

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MATTHEW STEPHEN AKINS,	**)**
Plaintiff/Appellant,	**)**
	)
vs.	**)**
	)
DANIEL KNIGHT and	**)**
STEVEN BERRY and	**)**
BRENT NELSON and	**)**
KENNETH BURTON and	**)**
ROB SANDERS and	**)**
ERIC HUGHES and	**)**
ROGER SCHLUDE and	**)**
MICHAEL PALMER and	**)**
BOONE COUNTY, MISSOURI, and	**)**
CITY OF COLUMBIA, MISSOURI	**)**
Defendants/Appellees	**)**

Appeal from the United States District Court
Western District of Missouri, Central Division
The Honorable Nanette Laughrey, United States District Judge

BRIEF OF APPELLEES DANIEL KNIGHT, STEVEN BERRY, BRENT NELSON AND BOONE COUNTY, MISSOURI

Elizabeth H. Weber #44122
Joshua C. Devine #59895
ROGERS, EHRHARDT, WEBER & HOWARD, L.L.C.
302 Campusview Dr., Ste 204
Columbia, MO 65201
573-442-0131 (phone)
573-442-9523 (fax)
Attorneys for Appellees Knight, Berry, Nelson & Boone County, MO

SUMMARY OF THE CASE

Matthew Akins brought his claim for damages against Boone County, Missouri ("Boone County" or "the County"), Boone County's elected Prosecutor, Daniel Knight, and Assistant Prosecutors Steven Berry and Brent Nelson ("the Prosecutors") under §1983. Specifically, Mr. Akins asserted claims for alleged constitutional violations pertaining to the filing of charges against him and an alleged delay in recommending the return of seized weapons to him. The District Court dismissed each of those parties, finding that the Prosecutors were absolutely immune from the claims asserted against them and that Boone County had no liability due to the absence of any underlying Constitutional violations. Boone County and the Prosecutors argue herein that the dismissal was appropriate due to the application of absolute immunity.

Appellees Knight, Berry, Nelson and Boone County request ten (10) minutes for argument.

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STATEMENT OF THE CASE

In his Amended Complaint filed in the U.S. District Court for the Western District of Missouri, Matthew Akins asserted claims against Assistant Prosecuting Attorneys Steven Berry and Brent Nelson, Prosecuting Attorney Daniel Knight and Boone County, Missouri, arising out of the filing of charges against him and an alleged delay in returning his seized firearm. (Appx., pp. 14-53). Akins alleged violations of his First, Second, Fourth, Fifth, Sixth, Seventh and Fourteenth Amendment rights by the Prosecutors and Boone County. (Appx., pp. 50-53). He further alleged that the Prosecutors were engaged in a conspiracy with police to deprive him of his Constitutional rights. (Appx., p. 48-50).

In his forty-page, fact-specific Amended Complaint, Akins detailed numerous alleged acts by police. His allegations against the County and Prosecutors, however, pertain only to the filing of charges against him, the retention of his pistol, and an alleged conspiracy with the police department. (Appx., p. 20-21, 26-27, 48-50).

On August 18, 2015, the District Court dismissed the claims against the Prosecutors, finding that they were entitled to absolute prosecutorial immunity as to the allegations of improperly filing charges against Akins, retaining his firearm, and conspiracy. (Appx., pp. 206-08). The Court also dismissed the claims against Boone County, finding that liability could not extend to the County due to the absence of

any underlying Constitutional violation attributable to the Prosecutors. (Appx., p. 208-09). In his Brief, Akins addresses only the claim for improper filing of charges.

2010 Charge for Unlawful Use of a Weapon

Akins alleges in his Amended Complaint that he was arrested by Columbia Police for felony possession of a firearm on May 9, 2010, following a stop at a DWI checkpoint. (Appx., p. 19-20). The probable cause statement indicated that Akins had a concealed handgun capable of immediate use on his waistband under his shirt. (Appx., p. 20). The gun, a .380 Bersa pistol, was seized by police at the time of arrest. (Appx., p. 19-20). Assistant Prosecutor Berry filed a criminal charge against Akins for the Class D felony of unlawful use of a weapon, alleging he had unlawfully concealed a firearm on his person. (Appx., p. 20). A *nolle prosequi* was filed on that charge in November of 2010. (Appx., p. 21). The .380 Bersa pistol was retained by the Columbia Police Department until April 15, 2013. (Appx., p. 21). The three-year statute of limitations on the felony unlawful use of a weapon charge ran on May 9, 2013. §556.036.2(1) RSMo.

2012 Charge for Unlawful Use of a Weapon

Mr. Akins' Amended Complaint alleges that Assistant Prosecutor Nelson wrongfully filed charges against him for felony unlawful use of a weapon and misdemeanor unlawful possession of a prohibited weapon. (Appx., p. 26). The charges followed the arrest of Mr. Akins after he was stopped and found to be in

possession of a concealed butterfly knife. (Appx., p. 24-25). Those weapons offenses were later dismissed.[1] (Appx., p. 26).

[1] In his brief, Mr. Akins mentions that the butterfly knife was retained and destroyed. No such allegation is contained in the Amended Complaint, nor does Mr. Akins' brief contain any argument regarding retention or destruction of the butterfly knife by the Prosecutors.

SUMMARY OF THE ARGUMENT

The Court should affirm the District Court's dismissal of Appellees Daniel Knight, Steven Berry, Brent Nelson and Boone County, Missouri, and should further affirm the District Court's rulings denying Matthew Akins' Motions to Disqualify.

Prosecuting attorneys are protected by absolute immunity for actions taken in their role as advocates for the State, including the filing of criminal charges and other actions intimately associated with the judicial process. Absolute immunity applies to the initiation of prosecutions even when there are allegations of lack of probable cause, malice or improper motive. Mr. Akins' claims against the individual prosecutors are barred by the application of absolute immunity. Because there is no individual liability on the part of any named prosecutor, Boone County, Missouri, likewise has no liability.

The District Court properly denied Mr. Akins' motions to recuse or disqualify. There is no evidence of bias or the appearance of bias on the part of the judge.

ARGUMENT

Issue 1

1. Are prosecutors entitled to absolute immunity for the filing of charges against a criminal defendant?

The District Court's dismissal of all claims asserted against Boone County and the Prosecutors in Matthew Akins' Amended Complaint was proper. The Amended Complaint, though lengthy, contains a limited number of allegations against Boone County and the Prosecutors. Paragraphs 22-23, 34-35, 40 and 99-100 are the only paragraphs that allege any supposed actions by Boone County and the Prosecutors that involve Mr. Akins. (Appendix, pp. 20-21, 26-27, 29, 48-50). Those allegations pertain to the filing of charges against him, the retention of his pistol, and an alleged conspiracy with the police department. The District Court properly found that the Prosecutors were absolutely immune from the claims against them, that no liability could therefore extend to Boone County, and that all of the claims against those defendants should be dismissed. (Appendix, p. 205-209).

Point III of Appellant's Brief is the only one of Mr. Akins' fourteen points that addresses his claims against Boone County and the Prosecutors. In Point III of his Brief, Mr. Akins complains of two actions: the 2010 filing of a charge against him for unlawfully concealing a firearm and the 2012 filing of a charge against him

for possessing and concealing a butterfly knife.[2] He appears to argue that the filing of charges constituted a violation of due process for which Boone County and the Prosecutors are not entitled to absolute immunity.

Absolute immunity applies to filing decisions.

All of Mr. Akins' §1983 claims pertaining to the filing or pursuit of charges against him are defeated by absolute immunity. Absolute immunity has been granted by the United States Supreme Court to prosecutors, the judiciary and others performing quasi-judicial functions. *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985).

[2] Point III focuses only on the filing of charges by the Prosecutors. Though he mentions alleged recommendations by Prosecutors to retain his pistol and butterfly knife (p. 5, 17, 51), Mr. Akins never argues these issues and therefore abandons them. *See Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 740 (8th Cir. 1985)(party's failure to raise or discuss an issue in his brief is deemed an abandonment of that issue)(further citations omitted); *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004); *U.S. v. Darden*, 70 F.3d 1507, 1518 n.3 (8th Cir. 1995) (declining to address issues mentioned in passing but without any argument or citations to the record that would assist in judging the merits of the claims of error); *Anderson v. Larson*, 327 F.3d 762, 767-771 (8th Cir. 2003)(appellants pointed to no error in the decision finding immunity for state law claims and thus abandoned those claims); *Schleeper v. Groose*, 36 F.3d 735, 737 (8th Cir. 1994) ("perfunctory reference to due process without discussion does not bring the issue before this court"). *See also* Fed. R. App. P. 28(a)(8) (argument portion of the appellant's brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies..."). Similarly, Mr. Akins has abandoned the issue of the liability of Boone County, Missouri, and the issue of conspiracy, as Point III contains absolutely no discussion, argument, or explanation of error as to these issues. Boone County and the Prosecutors have not responded to any of these issues because Mr. Akins makes no argument to which they can respond.

The purpose of absolute immunity is to protect prosecutors for acts occurring during the adversarial process. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269-70 (1993).

In *Imbler v Pachtman*, the Supreme Court established that state prosecuting attorneys have the same absolute immunity from civil suits under § 1983 as they have for malicious prosecution under the common law. 424 U.S. 409, 427-28 (1976). That immunity applies to activities that are an integral part of the judicial process. *Id.* at 430-31. The filing of charges is a prosecutorial function which has consistently and repeatedly been held to fall within the parameters of absolute immunity. *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1266 (8th Cir. 1996); *Buckley*, 509 U.S. at 272-73; *Imbler*, 424 U.S. at 430-31 n.33; *Schenk v. Chavis*, 461 F.3d 1043, 1045-46 (8th Cir. 2006); *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987) (disapproved on other grounds by *Burns v. Reed*, 500 U.S. 478, 483 n.2 (1991)).

Absolute immunity encompasses "prosecutorial functions such as the initiation and pursuit of a criminal prosecution, the presentation of the state's case at trial, and other conduct that is intimately associated with the judicial process." *Brodnicki*, 75 F.3d at 1266 (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 272-73 (1993)); *Imbler*, 424 U.S. at 430-31 n.33. As noted by the court in *Brodnicki*, "decisions relating to the initiation and dismissal of cases are at the very heart of a prosecutor's function as advocate for the state, and absolute immunity thus attaches to those decisions." *Brodnicki*, 75 F.3d at 1268. *See also Myers*, 810 F.2d at 1446

(decision to file charges is within scope of absolute immunity). The Eighth Circuit has specifically held that in signing the criminal complaint, a prosecutor was entitled to absolute immunity because this act was *intimately associated* with the judicial process. *Schenk*, 461 F.3d at 1045-46.

Absolute immunity applies even if probable cause is lacking.

Mr. Akins attempts to circumvent the defense of absolute immunity by suggesting that the charge against him had no legal basis or lacked probable cause. (Appellant's Br., pp. 51-54). Arguing that absolute immunity does not apply in the absence of probable cause, Mr. Akins relies upon dicta contained within the Supreme Court's *Bordenkircher* decision. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). He quotes the following language: "…so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." 434 U.S. at 364. The court made this statement in discussing the details of plea bargaining and whether a prosecutor may threaten the filing of a more serious charge in order to persuade the defendant to plead guilty, not as a statement of the parameters of absolute immunity. *Id.* Mr. Akins uses this language to imply that a prosecutor who lacks probable cause has no discretion and thus no absolute immunity. This is an incorrect statement of the law.

Since *Bordenkircher*, the Supreme Court has specifically acknowledged that a prosecutor, pursuant to common law tradition, is entitled to absolute immunity for the decision to bring an indictment, **whether he had probable cause or not**. *See Buckley*, 509 U.S. at 274 n.5 (emphasis added). The Supreme Court recognized that common law tradition in its *Imbler* decision, *supra*, where it discussed absolute immunity for prosecutors in malicious prosecution cases dating back to 1896, including the Supreme Court's affirmation of the principle in *Yaselli v. Goff*, 275 U.S. 503 (1927). *Imbler*, 424 U.S. at 421-22. The Eighth Circuit, too, has upheld the principle that absolute immunity applies whether or not probable cause exists. *See Rodgers v. Knight*, 781 F.3d 932, 939 (8th Cir. 2015)(affirming dismissal of prosecutor defendants due to absolute immunity where plaintiffs alleged they filed charges without probable cause).

The basis for Akins' argument that absolute immunity applies only where probable cause exists appears to stem from a misunderstanding of court decisions involving prosecutor actions *other than* the filing of charges. He cites probable cause language from cases in which prosecutors gave advice to police, ordered warrantless arrests, or acted as a witness or administrator. (Appellant's Br., pp. 52-53). He fails to recognize that the principles espoused in those cases do not extend to the simple prosecutorial act of filing charges. The Sixth Circuit explained the distinction this way:

> A prosecutor performing an investigative function before she has probable cause to arrest a suspect cannot expect to receive the protection of absolute immunity, but a prosecutor who initiates criminal proceedings against a suspect she had no probable cause to prosecute is protected by absolute immunity.

Prince v. Hicks, 198 F.3d 607, 614 (6th Cir. 1999)(citing *Buckley*, 509 U.S. at 274 n.5).

Akins' Amended Complaint contains no allegations that Prosecutors provided advice to police, ordered warrantless arrests, acted as witnesses, or performed some other act outside their roles as advocates for the State. Instead, he complains therein and in his brief that the Prosecutors simply filed charges against him. Despite Mr. Akins' argument to the contrary, there need not be any inquiry into whether the Prosecutors had probable cause to file the charges against him. Absolute immunity applies to his claims whether or not probable cause existed.[3]

[3] Incidentally, the Prosecutors note that Mr. Akins' own Amended Complaint establishes probable cause for filing the complained of charges – a fact observed by the District Court in denying Mr. Akins' Motion to Reconsider. (Appx., pp. 237-38). As to the 2010 felony charge for unlawful use of a weapon, he alleges that he had a firearm on his person when he was removed from his vehicle and that the Probable Cause statement said the weapon was loaded and concealed in his waistband under his shirt. (Appx., pp. 19-20). As to the 2012 unlawful use of a weapon charge, Akins alleges that the Probable Cause statement described the knife, concealed in his pants pocket, as one designed to be opened by gravity or centrifugal force and quotes the Missouri statute prohibiting concealment of such a weapon. (Appx., pp. 24-25).

Absolute immunity applies even if the prosecution is retaliatory or malicious.

Mr. Akins further attempts to circumvent absolute immunity by arguing that the filing of charges was somehow retaliatory or malicious. (Appellant's Br., pp. 51-52). Again, he is incorrect. *Imbler* established that prosecutors are absolutely immune from suits akin to *malicious* prosecution under § 1983. *Imbler*, 424 U.S. at 427. Such immunity would be rendered completely meaningless if conclusory allegations of malice or retaliation were sufficient to escape its application.

Mr. Akins cites to *Hartman v. Moore*, 547 U.S. 250 (2006) *vacated and remanded*, 132 S.Ct. 2740 (2012), *and cert. denied*, 134 S.Ct. 295 (2013) in suggesting that a prosecutor is not entitled to absolute immunity when the filing of charges is in retaliation for the criminal defendant "speaking out". (Appellant's Br., p. 52). *Hartman* has no application here, as it was a *Bivens* action for retaliatory prosecution brought against federal officials. *Id.* at 252. The *Hartman* court specifically noted that "[a] Bivens action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute." *Id.* at 261-62 (citing *Imbler*, 424 U.S. at 431). In fact, the *Hartman* case initially included a claim against the prosecutor but that was dismissed due to application of absolute immunity. *Id.* at 255.

Akins also quotes from *Bordenkircher, supra*, to imply that a prosecutor does not enjoy absolute immunity if charges are brought to punish or retaliate against a person for exercising his rights. (Appellant's Br., p. 51). The quoted language, however, is taken from the court's discussion of plea bargaining and refers to the principle that a prosecutor cannot penalize or be vindictive towards a criminal defendant who successfully fought for a new trial. *Id.* at 362-63. That portion of *Bordenkircher* has no application here.

The Eighth Circuit has repeatedly found that absolute immunity applies even in the face of allegations that a prosecution was improper, vindictive or malicious. For instance, in *Sample v. City of Woodbury*, 836 F.3d 913 (8th Cir. 2016), the court upheld the dismissal of a complaint against city prosecutors who filed charges against a criminal defendant while at the same time representing the victim of his alleged crime. *Id.* at 914. The plaintiff alleged that absolute immunity did not apply because the prosecutors' motive in filing charges was to advance the claims of their civil client. *Id.* at 916. The court held that absolute immunity "is not defeated by allegations of malice, vindictiveness, or self-interest, and applies even if the prosecutor's steps to initiate a prosecution are patently improper." *Id.* at 916 (citing *Reasonover v. St. Louis County*, 447 F.3d 569, 580 (8th Cir. 2006) and *Saterdalen v. Spencer*, 725 F.3d 838, 842 (8th Cir. 2013). *See also Myers*, 810 F.2d at 1446 (allegations of abusive, illegal or unethical conduct must fail if they represent an

attempt to impose damages liability for acts encompassed in the initiation or conduct of adversarial proceedings by a prosecutor); *Rachuy v. Murphy Motor Freight Lines, Inc.*, 663 F.2d 57, 58 (8th Cir. 1981)(absolute immunity for alleged conspiracy to prosecute a crime that never occurred).

Matt Akins' claims that the Prosecutors violated his civil rights by filing charges against him must fail. Absolute immunity applies to prosecutors for the initiation of criminal proceedings whether or not probable cause exists and regardless of any alleged improper motive, retaliatory or otherwise.

Absolute Immunity is properly resolved in a motion to dismiss

The resolution of the absolute immunity question at the Motion to Dismiss stage was proper. When absolute immunity applies, it defeats a civil lawsuit at the outset. *Patterson v. Von Riesen*, 999 F.2d 1235, 1237 (8th Cir. 1993) (citing *Imbler*, 424 U.S. at 419, n.13). Absolute immunity prevents parties from harassing prosecutors, which could cool the pursuit of justice. *See Imbler*, 424 U.S. at 423-24. The use of absolute immunity is especially appropriate in §1983 suits because these suits can undermine the process as much as a common law claim for malicious prosecution. *Id.* at 424.

Early dismissal of such cases makes sense because the purpose of absolute immunity is to protect prosecutors from the time, effort and expense of civil lawsuits. As the Supreme Court stated in *Imbler*, "[i]f the prosecutor could be made to answer

in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." *Imbler*, 424 U.S. at 425.

Akins asserted claims that simply are not viable and were properly dismissed due to the application of absolute immunity. His claims for constitutional violations arising out of the filing of charges fail due to the application of absolute immunity. See *Imbler*, *Buckley*, and *Sample*, *supra.*

Issue 2

2. Did the District Court judge have an obligation to recuse herself from this case?

Mr. Akins argues in Points XIII and XIV of his brief that District Court judge Laughrey erred in failing to recuse herself from ruling on his two Motions to Recuse or Disqualify and in failing to grant those Motions to Recuse or Disqualify.[4] He contends that Judge Laughrey exhibited actual bias or the appearance of bias, thus requiring recusal. (Appellant's Br., p. 75-76).

Mr. Akins cites to both 28 U.S.C. §144 and 28 U.S.C. §455(a) in arguing that Judge Laughrey was required to disqualify herself. Under 28 U.S.C. Section 455(a), the district judge must determine whether her "impartiality might reasonably be questioned." *In re Federal Skywalk Cases*, 680 F.2d 1175, 1183 (8th Cir. Mo. 1982) (citing 28 U.S.C. § 455(a)). Relief under 28 U.S.C. §144 requires the filing of a sufficient affidavit that alleges bias or prejudice. 28 U.S.C. §144. The requirements of the two statutes are similar in that they require the sufficient demonstration of actual or apparent bias. *See United States v. Gamboa*, 439 F.3d 796, 817 (8th Cir.

[4] Akins' second Motion to Recuse or Disqualify (Supp. Appx., p. 1107-1119) was filed *after* Boone County and the Prosecutors were dismissed from the case and thus has no bearing upon Judge Laughrey's ability to grant their dismissal. Nonetheless, because Mr. Akins' Brief combines his arguments regarding the two motions, Boone County and the Prosecutors address all of his arguments.

2006) ("Under either possible applicable federal statute, recusal is required if the judge bears a bias or prejudice that might call into question his or her impartiality.")

The party introducing the motion to recuse "carries a heavy burden of proof; a judge is presumed to be impartial and the party seeking disqualification bears the substantial burden of proving otherwise." *Pope v. Fed. Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992). *See also Davis v. Commissioner*, 734 F.2d 1302, 1303 (8th Cir. 1984) (Judges must review motions to disqualify for legal sufficiency and avoid disqualifying themselves when it is not necessary). The standard of review on appeal is abuse of discretion. *In re Federal Skywalk Cases*, 680 F.2d at 1183 (citing *Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979)).

Mr. Akins cannot establish actual or apparent bias.

Akins argues three distinct reasons why he believes Judge Laughrey exhibited such bias: 1) her husband acted as chair of a City of Columbia mayoral task force; 2) the instant case included potential video evidence of Mr. Akins criticizing a prior ruling by Judge Laughrey in a different case; and 3) Akins' attorney once filed a judicial complaint against the judge for conduct in a previous case. None of these demonstrate actual or apparent bias and none required recusal.

First, the service of the judge's spouse on a City of Columbia task force does not indicate bias. Mr. Akins cites to no evidence that Judge Laughrey's spouse had a financial or other interest in the outcome of this lawsuit or that his service on the

task force had even a remote connection to the issues raised herein. Judge Laughrey's own service as a judge for the City of Columbia has been previously addressed by this court and found to be insufficient evidence of bias in favor of the City. *Rodgers v. Knight,* 781 F.3d 932, 943 (8th Cir. 2015). The service of her spouse on a City task force is even further removed and in no way indicates an appearance of impartiality or bias on the part of the judge that would require recusal. *See Sensley v. Albritton*, 385 F.3d 591, 599-600 (5th Cir. 2004)(recusal not required where judge's spouse worked for office of defendant's attorney).

Mr. Akins also appears to suggest that the existence of media reports, specifically a local blog questioning the judge's impartiality due to her husband's service on the task force, are indicative of an appearance of bias. He is incorrect. Media reports critical of a Court's ruling are not determinative regarding whether a judge should recuse herself. *See Miller v. Tony & Susan Alamo Found.*, 924 F.2d 143, 147 (8th Cir. 1991).

Mr. Akins also argues that the existence of a video in which he personally criticizes Judge Laughrey's ruling in a prior case forms a basis for her recusal in this case. (Appellant's Br., p. 75). He does not explain how his own critique of the judge can create the circumstances that require recusal. The Fourth Circuit has noted that "[p]arties cannot be allowed to create the basis for recusal by their own deliberate actions." *United States v. Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990). Indeed, this

is a sensible policy, as "to allow prior derogatory remarks about a judge to cause the latter's compulsory recusal would enable any defendant to cause the recusal of any judge merely by making disparaging statements about him." *United States v. Bray*, 546 F.2d 851, 858 (10th Cir. 1976)(quoting *United States v. Garrison*, 340 F.Supp 952, 957 (E.D. La. 1972)).

Finally, the prior filing of a judicial complaint by counsel for Mr. Akins does not create bias or an appearance of bias against Mr. Akins himself. Mr. Akins refers to statements allegedly made by Judge Laughrey in a prior unrelated case to which he was not a party, but significantly he cites to no statements or actions by the judge *in the current action* that show even the slightest hint of bias against Mr. Akins or his counsel. There simply is no indication that the judge was in any way influenced by the existence of a prior judicial complaint by counsel or that she acted in any way that would appear to be biased against Matthew Akins. Furthermore, this Court has previously ruled on this precise issue involving the very same judicial complaint filed by counsel for Mr. Akins. *See Rodgers*, 781 F.3d at 943 ("That the Rodgerses' counsel filed a judicial complaint against the district judge in previous unrelated litigation is insufficient to establish that the judge's impartiality in this matter might reasonably be questioned.")

Mr. Akins did not provide a sufficient affidavit.

28 U.S.C. §144 requires a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party…." The Affidavit, "shall be accompanied by a certificate of counsel of record stating that it is made in good faith." *Id*. Here, Mr. Akins' first motion to recuse or disqualify does not contain any language which purports to be an affidavit. (Appx. p. 78-88). As a result, 28 U.S.C. § 144 does not apply to the first motion to recuse or disqualify.

Mr. Akins' second motion to recuse or disqualify does contain language which might be construed as an affidavit. (Supp. Appx. p. 1112). However, the purported affidavit does not contain a "certificate of counsel of record stating that it is made in good faith." 28 U.S.C. § 144; *United States v. Rosenberg*, 806 F.2d 1169, 1173 (3d Cir. 1986) ("Recusal motions pursuant to this statute must be timely filed, contain a good faith certificate of counsel, and include an affidavit stating material facts with particularity which, if true, would lead a reasonable person to the conclusion that the district judge harbored a special bias or prejudice towards defendants.")

The affidavit attached to the second motion to disqualify fails to comply with the formal requirements of 28 U.S.C. §144. More importantly, as discussed at length above, the facts alleged in the affidavit (and in the motions) do not objectively

demonstrate a special bias or prejudice towards Mr. Akins. Mr. Akins failed to satisfy the affidavit requirement, failed to demonstrate even the appearance of bias or prejudice, and consequently, cannot obtain relief pursuant to 28 U.S.C § 144.

There is no requirement that a separate judge rule on the motion to recuse or disqualify.

Mr. Akins' argument that a second judge should have ruled on his second Motion to Recuse or Disqualify is also without merit. Mr. Akins emphasizes the language contained in 28 U.S.C. § 144, which states, "but another judge shall be assigned to hear such a proceeding." (Appellant's Br., p. 73). His statutory interpretation is incorrect. The first paragraph of 28 U.S.C. §144 states as follows:

> Whenever a party to any **proceeding** in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such **proceeding**.

28 U.S.C. §144 (emphasis added). Mr. Akins errs in his statutory interpretation because he assigns two different meanings to the word "proceeding". The first line's use of "proceeding" in 28 U.S.C. §144 clearly refers to any underlying action or case in which the affidavit alleging the bias or prejudice of a judge is filed. Thus, it is logical that the use of the word "proceeding" at the end of the same sentence likewise refers to the underlying action or case. The language is simply a recitation of the principle that a judge who is shown to be biased or prejudiced shall not continue to

preside over the case. There simply is no requirement that a different judge must hear and decide upon the motion to recuse.

CONCLUSION

For the above set forth reasons, Appellees Daniel Knight, Steven Berry, Brent Nelson, and Boone County, Missouri, respectfully request that this Court affirm the dismissal in their favor and affirm the District Court's denial of the Motions to Recuse or Disqualify.

Respectfully submitted,

/s/ Elizabeth H. Weber
Elizabeth H. Weber, MO Bar #44122
Joshua C. Devine, MO Bar #59895

CERTIFICATE OF SERVICE

The undersigned has filed the foregoing Brief of Appellees Knight, Berry, Nelson and Boone County, Missouri, with the Court using the ECF system and has served an electronic copy upon counsel for all parties on the 20th day of February, 2017.

/s/ Elizabeth H. Weber
Elizabeth H. Weber, MO Bar #44122

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief has been prepared using 14-point Times New Roman typeface and proportional spacing. According to the word processing system used to prepare this brief, Microsoft Word 2010, the brief contains 5,785 words, including the table of contents, the table of authorities, and the certificates of service and compliance.

The undersigned further certifies that the brief has been scanned for viruses and is virus-free.

/s/ Elizabeth H. Weber
Elizabeth H. Weber, MO Bar #44122