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This Ex-Judge Was Wrongfully Convicted, but She Can't Touch 3 of 4 Texas Prosecutors Behind Her Indictment

The litigation can proceed against Christopher Milner, a Collin County assistant district attorney, who headed an investigation from 2008 to 2010 that ended with the then-judge's indictment.

By Angela Morris | July 07, 2020



Suzanne Wooten, a McKinney, Texas, solo practitioner.

The U.S. Court of Appeals for the Fifth Circuit has dismissed Texas Gov. Greg Abbott from a former judge's lawsuit that alleged while he was the Texas attorney general, a lawyer in his office maliciously prosecuted the judge, securing a wrongful conviction.

When absolute prosecutorial immunity applies—and when it doesn't—is the major issue in the appeal.

The Fifth Circuit ruled (<https://drive.google.com/file/d/1zin3elu9dCPNz4fh5PW3pahELXhn2MDo/view?usp=sharing>) Monday that Abbott was shielded by prosecutorial immunity, which is a protection for state prosecutors that applies to their work in initiating a prosecution and representing the state in court. That same protection tossed the claims against a former assistant attorney general, Harry White, who prosecuted Wooten, as well as the then-Collin County district attorney, John Roach Sr.

But the litigation can proceed against Christopher Milner, who was a Collin County assistant district attorney who headed an investigation from 2008 to 2010 that ended with the then-judge's indictment.

The plaintiff is Suzanne Wooten, who was wrongfully convicted in 2011 of nine felonies alleging she accepted bribes in the form of campaign contributions during her 2008 election to Collin County's 380th District Court. Wooten was acquitted in 2017 in a ruling that determined the allegations were not a crime under Texas law.

Read more: Wrongfully Convicted Ex-Judge Wins Ruling in Malicious Prosecution Lawsuit (<https://www.law.com/texaslawyer/2019/03/28/wrongfully-convicted-ex-judge-wins-ruling-in-malicious-prosecution-lawsuit/>)

In 2018, Wooten sued Collin County and the prosecutors in her case for violations of due process, violations of the Fourth Amendment, conspiracy to deprive constitutional rights, malicious prosecution and more.

Abbott, White, Roach and Milner claimed they had prosecutorial immunity, but the trial court disagreed. However, now the Fifth Circuit has granted protection to three of those four defendants.

The difference: Wooten can still sue Milner because he was acting like a law enforcement investigator instead of a trial lawyer.

Wooten's attorney, Scott Palmer, said that Milner was the "target defendant" and that Wooten's claims against Collin County can also move forward.

"We've got the main culprit in this case, Mr. Milner, who clearly was carrying the torch," said Palmer, president of Scott H. Palmer P.C. in Addison. "I wish we had more facts to support Judge Roach, because I do believe he has a bigger hand in this than it would appear at this point. We may be able to come up with more proof once the depositions start unfolding."

An email by Bob Davis, the lawyer for Milner and Roach, said his clients are pleased with the ruling. Milner can still argue he has other legal immunities from the claims later in the litigation, Davis added.

Acting as an Investigator

The ruling by Judge Stuart Kyle Duncan, joined by Judges Rhesa Hawkins Barksdale and Stephen A. Higginson, explained that while prosecutorial immunity protects a prosecutor's work preparing for trial, it does not extend to administrative work or investigations.

"According to allegations we must accept as true, Milner was performing investigative functions that do not qualify for absolute immunity," the opinion said. "Wooten alleges facts showing that Milner functioned as an investigator rather than a prosecutor."

The district attorney's office—not law enforcement—started the investigation. Milner issued grand jury subpoenas for evidence over an extended period, using at least four of the six grand juries that were impaneled in the time period. The office kept helping investigate Wooten even after White became an appointed special prosecutor from the attorney general's office.

"In short, Milner fulfilled the fact-finding role generally filled by law enforcement, and thus he is entitled to claim only the level of immunity available to law enforcement—qualified immunity," the ruling said.

However, Roach, who was the district attorney at the time, would enjoy prosecutorial immunity from Wooten's lawsuit, the opinion said. Wooten only lodged general allegations against Roach. None of them showed he acted like an investigator instead of a prosecutor, it said.

The same reasoning extended to the Fifth Circuit's decision to grant prosecutorial immunity to White, the assistant attorney general, and Abbott.

Even if Wooten's allegations against White were true, they wouldn't show he engaged in non-prosecutorial activity, the opinion said. She claimed he appeared before one grand jury, but the Fifth Circuit decided that activity was a function of being a prosecutor. Other allegations against White regarding withholding evidence, attempting a plea bargain and appearing at a hearing would have been a prosecutor's duties as well.

Abbott would get the same protection, the court ruled.

Assistant Attorney General Christopher D. Hilton, who represents White and Abbott, didn't return an email seeking comment before deadline.

Kayleigh Date, spokeswoman for the Attorney General's Office, declined to comment.

Read the opinion:

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 19-40315

United States Court of Appeals
Fifth Circuit

FILED

July 6, 2020

Lyle W. Cayce
Clerk

SUZANNE H. WOOTEN,

Plaintiff - Appellee

v.

JOHN ROACH, SR.; CHRISTOPHER MILNER; GREG ABBOTT, IN HIS
INDIVIDUAL CAPACITY; HARRY EUGENE WHITE,

Defendants - Appellants

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for the Eastern District of Texas

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