

2025 IL App (4th) 240552

NO. 4-24-0552

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 7, 2025

Carla Bender

4th District Appellate
Court, IL

RANDY KIRICHKOW,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Winnebago County
JOSEPH BRUSCATO, Individually and in His Official)	No. 18L255
Capacity as State’s Attorney of Winnebago County,)	
Defendant-Appellant.)	Honorable
)	Mark Andrew Pheanis,
)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court, with opinion.

Justices DeArmond and Cavanagh concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Randy Kirichkow, filed a complaint against defendant, Joseph Bruscato, alleging a claim of malicious prosecution. Specifically, plaintiff claimed defendant, the former state’s attorney of Winnebago County, initiated a criminal prosecution against him without probable cause and solely for personal and political reasons. Defendant filed a motion for summary judgment arguing, *inter alia*, that plaintiff’s claim was barred by the doctrine of absolute prosecutorial immunity. The trial court denied defendant’s motion for summary judgment, finding it was conceivable that a jury could infer from the evidence that defendant acted with malice, “thereby blunting the immunities.”

¶ 2 The trial court subsequently certified the following question for immediate appeal

pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019): “Whether, for purposes of prosecutorial immunity, a prosecutor’s decision to prosecute a criminal defendant for solely malicious reasons is an act outside of the scope of prosecutorial duties.” We answer the certified question in the negative and remand the matter for further proceedings.

¶ 3

I. BACKGROUND

¶ 4

On August 29, 2018, plaintiff filed a complaint against defendant alleging a claim for malicious prosecution. The complaint was subsequently amended twice. The second amended complaint, filed April 30, 2019, alleged that plaintiff was the mayor of South Beloit and defendant was the state’s attorney of Winnebago County during the time period at issue. The second amended complaint alleged that defendant “used his office for the criminal prosecution of alleged crimes by Plaintiff without reasonable and legal justification or cause based on *** personal dislike and political divisions.” Specifically, the second amended complaint alleged that defendant disliked plaintiff because they belonged to different political parties and plaintiff fought for the continued existence of the South Beloit Police Department, while defendant wanted it disbanded.

¶ 5

The second amended complaint alleged that, in January 2011, plaintiff was approached by the South Beloit city attorney, who stated she was working with defendant. The city attorney asked plaintiff to help fire as many city police officers as possible before leaving office so that the sheriff’s department could take over the police department. In March 2011, the city attorney again approached plaintiff and asked him to assist in firing city police officers, stating he would be arrested if he did not help. Plaintiff refused her demands.

¶ 6

The second amended complaint alleged that on April 28, 2011, after plaintiff’s term as mayor had ended, plaintiff was arrested and a criminal indictment was filed against him

at the insistence of defendant. Plaintiff was charged with obstructing justice in connection with an incident that occurred in March 2010 at a city council meeting in which plaintiff played a shortened video clip (rather than the full video recording) of an incident at the police department. The second amended complaint alleged that this case was eventually dismissed in March 2018 after the trial court found there was no probable cause for the charges against plaintiff. The second amended complaint further alleged that defendant brought the criminal case to the grand jury and prosecuted it solely because plaintiff refused to assist in eliminating the city police department and that defendant's motivation was "evident" from the fact that plaintiff was threatened with arrest if he did not participate in this scheme.

¶ 7 Defendant filed a motion to dismiss the second amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2022)), which was denied without prejudice. Defendant then filed an answer to the second amended complaint, which raised the affirmative defenses of sovereign immunity, absolute prosecutorial immunity, and public official immunity.

¶ 8 On April 6, 2023, defendant filed a motion for summary judgment arguing, *inter alia*, defendant's alleged actions were protected by the doctrine of absolute prosecutorial immunity.

¶ 9 On May 19, 2023, plaintiff filed a response to the motion for summary judgment. Relevant here, plaintiff argued defendant was not entitled to summary judgment based on prosecutorial immunity because a question of fact existed as to defendant's motives for the criminal prosecution against plaintiff. Plaintiff argued that the evidence showed defendant lacked probable cause to prosecute him and "acted outside of his authority as a prosecutor based on a personal vendetta."

¶ 10 On August 15, 2023, the trial court entered an order denying defendant’s motion for summary judgment. The court stated that the “key question” was whether the record contained any facts from which the trier of fact could conclude defendant acted with malice, “thereby blunting the immunities.” The court noted that defendant’s office agreed or conceded in plaintiff’s criminal case that no law enforcement agency was investigating or attempting to apprehend plaintiff or the police officers at issue at the time plaintiff allegedly committed the acts on which the obstructing justice charge was based. The court stated: “[W]hile it is not a strong case, it is conceivable that a jury could infer the existence of malice in this situation wherein it is admitted that the Defendant lacked the basic facts necessary to argue the elements of the crime charged.”

¶ 11 On October 27, 2023, defendant filed a motion to reconsider the trial court’s order denying his motion for summary judgment arguing, *inter alia*, that his prosecutorial immunity was absolute and covered all prosecutorial conduct, including allegations of malicious conduct.

¶ 12 Defendant also filed a “Motion to Certify Questions of Law for Immediate Appeal Under Supreme Court Rule 308.” The motion requested that the trial court certify two questions of law, including, relevant to this appeal, “[w]hether prosecutorial immunity is absolute, thereby immunizing any prosecutorial conduct, including malicious conduct and the decision to prosecute a criminal defendant.”

¶ 13 On January 26, 2024, the trial court entered a written order denying defendant’s motion to reconsider. The court stated that a prosecutor’s immunity was contingent on the prosecutor acting within the scope of his or her statutory prosecutorial duties, and the court found a question of fact existed as to whether defendant prosecuted plaintiff solely based on political differences rather than the existence of evidence of criminal activity. The court stated: “Inherent

in the Court’s ruling is the determination that a prosecution based solely upon malicious reasons is not within the scope of a prosecutor’s duties. Stated differently, an unbridled right to prosecute political foes solely for political advantage cannot possibly be within a prosecutor’s job description.” The court stated the question of whether plaintiff could prove defendant was acting outside the scope of his duties as a prosecutor was an issue to be decided at trial.

¶ 14 In the same written order, the trial court granted, in part, defendant’s “Motion to Certify Questions of Law for Immediate Appeal Under Supreme Court Rule 308.” The court found certifying a question to the appellate court was appropriate given defendant’s argument that prosecution solely for malicious reasons was still within the scope of a prosecutor’s duties and therefore immunized. However, the court found defendant’s proposed certified questions, as drafted, would inappropriately result in an “advisory or provisional” answer, and the court continued the matter to afford the parties an opportunity to submit a revised question for certification.

¶ 15 On February 27, 2024, the trial court entered an order certifying the following question for review by the appellate court: “Whether, for purposes of prosecutorial immunity, a prosecutor’s decision to prosecute a criminal defendant for solely malicious reasons is an act outside of the scope of prosecutorial duties.”

¶ 16 On March 27, 2024, defendant filed in this court an application for leave to appeal pursuant to Rule 308 . On April 26, 2024, we entered an order allowing defendant’s application for leave to appeal.

¶ 17 **II. ANALYSIS**

¶ 18 Pursuant to Rule 308 , the appellate court may review an interlocutory order not otherwise appealable when the trial court finds the order “involves a question of law as to which

there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” Ill. S. Ct. R. 308 (eff. Oct. 1, 2019). Appellate review under Rule 308 is limited to the certified question of law presented, and the appellate court does not consider the propriety of any particular order of the trial court.

Thompson v. Whalen, 2023 IL App (4th) 220668, ¶ 18; *Combs v. Schmidt*, 2015 IL App (2d) 131053, ¶ 6. Certified questions are, by definition, questions of law subject to *de novo* review. *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21.

¶ 19 Here, we are tasked with answering the following certified question: “Whether, for purposes of prosecutorial immunity, a prosecutor’s decision to prosecute a criminal defendant for solely malicious reasons is an act outside of the scope of prosecutorial duties.”

¶ 20 Defendant asserts that plaintiff’s malicious prosecution action is barred by the doctrine of absolute prosecutorial immunity. “A malicious prosecution action is a civil tort brought by a plaintiff for recovery of damages which have proximately resulted to person, property or reputation from a previous unsuccessful civil or criminal proceeding, which was prosecuted without probable cause and with malice.” (Internal quotation marks omitted.)

Beaman v. Freesmeyer, 2019 IL 122654, ¶ 23.

¶ 21 Both Illinois and federal courts have recognized the common-law doctrine of absolute prosecutorial immunity. *Bowes v. Alvarez*, 2024 IL App (1st) 230749, ¶ 27 (“The doctrine of absolute prosecutorial immunity is well-established in the common law of the United States.”); *Frank v. Garnati*, 2013 IL App (5th) 120321, ¶ 9 (“Indeed, the common law in Illinois has long recognized such an absolute immunity for prosecutors when acting within the scope of their prosecutorial duties.”). Thus, “[l]ike judges, prosecutors acting in the course of their duties are afforded absolute immunity from all acts, even malicious acts.” *Frank*, 2013 IL App (5th)

120321, ¶ 21. “[A] prosecutor’s motives, in determining absolute immunity, are ‘irrelevant’ to the court’s analysis where the prosecutor’s acts are associated with the judicial phase of the criminal process.” *Bowes*, 2024 IL App (1st) 230749, ¶ 33.

¶ 22 In considering the application of absolute prosecutorial immunity, “[t]he United States Supreme Court has adopted a ‘functional approach,’ which analyzes the nature of the function performed, rather than the identity of the actor who performed it.” *Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶ 52 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)). This approach has also been utilized in several Illinois appellate decisions that have looked to United States Supreme Court precedent for guidance in evaluating the application of absolute prosecutorial immunity. See *Bowes*, 2024 IL App (1st) 230749, ¶ 28; *Bianchi*, 2016 IL App (2d) 150646, ¶ 52; *White v. City of Chicago*, 369 Ill. App. 3d 765, 769-71 (2006). Pursuant to this approach, “[a] prosecutor is absolutely immune only for those activities intimately associated with the judicial phase of the criminal process.” (Internal quotation marks omitted.) *White*, 369 Ill. App. 3d at 769-71. However, a prosecutor is not entitled to absolute immunity when he or she performs investigative functions normally performed by a police officer. *Id.*

¶ 23 Determining whether to initiate a criminal proceeding and maintain a prosecution against a criminal defendant have been held to be activities “intimately associated with the judicial phase of the criminal process” and subject to absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 431 n.33 (1976); see *Bowes*, 2024 IL App (1st) 230749, ¶ 32 (holding that the decision to prosecute is a “quintessential function[] of the judicial process”); *Frank*, 2013 IL App (5th) 120321, ¶¶ 7-9. The decision to indict has been found to be subject to absolute prosecutorial immunity even when the prosecutor lacks probable cause. *Bowes*, 2024 IL App (1st) 230749, ¶¶ 37-40; see *Buckley*, 509 U.S. at 274 n.5 (“The reason that we grant [absolute

immunity] for [malicious prosecution] is that we have found a common-law tradition of immunity for a prosecutor’s decision to bring an indictment, whether he has probable cause or not.”). Also, acts undertaken by a prosecutor in the role of an advocate for the State in preparation for the initiation of judicial proceedings—like evaluating evidence assembled by the police and preparing it for presentation to a grand jury or at trial—have been held to be subject to absolute immunity. *Bianchi*, 2016 IL App (2d) 150646, ¶ 52.

¶ 24 Pursuant to the foregoing authority, we conclude that a prosecutor’s decision to prosecute a criminal defendant, even when the prosecutor is motivated by “solely malicious reasons,” is subject to absolute prosecutorial immunity because it is intimately associated with the judicial phase of the criminal process. See *Imbler*, 424 U.S. at 430-31, 431 n.33; *Bowes*, 2024 IL App (1st) 230749, ¶ 32; *Frank*, 2013 IL App (5th) 120321, ¶¶ 7-9. Accordingly, we answer the certified question in the negative.

¶ 25 In reaching our conclusion, we reject plaintiff’s argument that answering the certified question in the negative “would give prosecutors ‘carte blanche’ to prosecute their political foes (or any other citizen for that matter) for any reason.” In *Frank*, 2013 IL App (5th) 120321, ¶ 19, the Fifth District rejected a similar public policy argument. The *Frank* court noted that the United States Supreme court had addressed this concern as follows:

“ ‘To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor’s immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor’s duty that is essential to the proper functioning of the criminal justice system.’ ” *Id.* (quoting *Imbler*, 424 U.S. at 427-28).

The *Frank* court also noted that absolute immunity from civil suits did not “place prosecutors beyond the reach of the criminal law.” *Id.* The court further found the policy arguments in favor of absolute prosecutorial immunity to be persuasive—specifically, “protecting the prosecutor from harassing litigation that would divert his time and attention from his official duties and the interest in enabling him to exercise independent judgment when deciding which prosecutions to bring and in conducting them in court.” *Id.* ¶ 20.

¶ 26 We agree with the *Frank* court’s balancing of the public policy considerations for and against absolute prosecutorial immunity. Like the *Frank* court, we find that the public policy considerations supporting absolute prosecutorial immunity outweigh the concerns expressed by plaintiff.

¶ 27 Finally, we reject plaintiff’s argument that answering the certified question in this case would be improper because it would not materially advance the ultimate termination of the litigation and cannot be answered without resolving factual issues in dispute. Plaintiff asserts: “Intertwined with the certified question is whether or not [defendant’s] wrongful acts were associated with the *judicial phase* of the criminal process.” (Emphasis in original.) Plaintiff argues there was evidence that defendant committed wrongful acts before the criminal prosecution against plaintiff commenced—specifically, that a city attorney working with defendant threatened or pressured plaintiff to fire police officers. Plaintiff contends that answering the certified question would not “conclusively dispose of this litigation” because a question would still remain as to which of defendant’s acts, if any, were within the scope of his prosecutorial duties.

¶ 28 Defendant argues that plaintiff forfeited this objection to the certified question by failing to raise it in the trial court or in response to defendant’s petition for interlocutory review.

See *Razavi v. Walkuski*, 2016 IL App (1st) 151435, ¶ 8. Putting aside the issue of forfeiture, we disagree with plaintiff that answering the certified question in this case would be improper. The certified question presented—whether, for purposes of prosecutorial immunity, a prosecutor’s decision to prosecute a criminal defendant for solely malicious reasons is an act outside of the scope of his or her prosecutorial duties—is a question of law. Contrary to plaintiff’s argument, answering this question does not require us to engage in a factual analysis concerning whether specific acts purportedly taken by defendant in this case were within the scope of his prosecutorial duties.

¶ 29 We recognize plaintiff may be correct in his assertion that answering the certified question would not “conclusively dispose of this litigation.” However, the trial court’s stated basis for denying defendant’s motion for summary judgment was its finding that the record contained facts from which a trier of fact could infer that defendant acted with malice, which, in the court’s words, would “blunt” defendant’s assertion of absolute prosecutorial immunity. Accordingly, answering the question of whether, for the purposes of absolute prosecutorial immunity, prosecuting a criminal defendant for solely malicious reasons falls outside of a prosecutor’s prosecutorial duties “may materially advance the ultimate termination of the litigation” (Ill. S. Ct. R. 308 (eff. Oct. 1, 2019)), which is what Rule 308 requires.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we answer the certified question in the negative and remand the matter for further proceedings.

¶ 32 Certified question answered; cause remanded.

Kirichkow v. Bruscato, 2025 IL App (4th) 240552

Decision Under Review: Appeal from the Circuit Court of Winnebago County, No. 18-L-255; the Hon. Mark Andrew Pheanis, Judge, presiding.

**Attorneys
for
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