ILLINOIS OFFICIAL REPORTS

Appellate Court

***Frank v. Garnati*, 2013 IL App (5th) 120321**

Appellate Court Caption	DOROTHY KAY FRANK, Plaintiff-Appellant, v. CHARLES R. GARNATI, Defendant-Appellee.
District & No.	Fifth District Docket No. 5-12-0321
Filed	May 17, 2013
Held (*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*)	The dismissal with prejudice of plaintiff's action for malicious prosecution against defendant State's Attorney for filing an information charging plaintiff with kidnapping her grandson was affirmed on the ground that plaintiff's claim was barred by the doctrine of absolute prosecutorial immunity.
Decision Under Review	Appeal from the Circuit Court of Williamson County, No. 12-L-46; the Hon. Brad K. Bleyer, Judge, presiding.
Judgment	Affirmed.

Counsel on Appeal	Richard J. Whitney, of Murphysboro, for appellant. Elisha S. Rosenblum and Bhairav Radia, both of O'Halloran, Kosoff, Geitner & Cook, LLC, of Northbrook, for appellee.
Panel	JUSTICE WELCH delivered the judgment of the court, with opinion. Justices Stewart and Cates concurred in the judgment and opinion.

OPINION

¶ 1 The plaintiff, Dorothy Kay Frank, appeals from the dismissal with prejudice, pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)), by the circuit court of Williamson County, of her complaint for malicious prosecution against the defendant, Charles R. Garnati, State's Attorney for Williamson County. The complaint, filed March 7, 2012, alleged that the defendant, while serving as the duly elected State's Attorney for Williamson County, filed a criminal information charging the plaintiff with having kidnapped her minor grandson, that the defendant knew at the time that the charge was not true and was not based on probable cause, and that he did so with the motive of inflicting harm upon the plaintiff. The complaint alleged that the defendant filed the criminal charge against the plaintiff "not because he sincerely believed that he had probable cause to support a charge of kidnapping against Plaintiff, but did so out of malice, arising from, and in retaliation for, prior conflicts with Plaintiff." The complaint sought compensatory and punitive damages for emotional distress and economic losses.

¶ 2 The defendant filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)), which allows a motion for involuntary dismissal when the plaintiff's claim "is barred by other affirmative matter avoiding the legal effect of or defeating the claim." The defendant's motion to dismiss asserted, in pertinent part, that the plaintiff's claim against him was barred by the doctrine of absolute prosecutorial immunity.

¶ 3 The plaintiff filed a response in which she argued that, because her complaint alleged that the defendant had acted out of "malicious motives," the defendant did not enjoy *absolute* prosecutorial immunity for his actions. Relying on *Aboufariss v. City of De Kalb*, 305 Ill. App. 3d 1054 (1999), the plaintiff argued that prosecutors enjoy only a qualified public official immunity which does not apply where the public official acts out of "malicious motives."

¶ 4 The circuit court granted the defendant's motion to dismiss, finding that the actions of the defendant were taken in his prosecutorial capacity and that the doctrine of absolute prosecutorial immunity applies to shield the defendant from the plaintiff's claim. The plaintiff appeals.

¶ 5 We review *de novo* the circuit court's decision granting the defendant's motion to dismiss under section 2-619(a)(9) of the Code of Civil Procedure. *Joseph Construction Co. v. Board of Trustees of Governors State University*, 2012 IL App (3d) 110379, ¶ 17. We must construe all pleadings and supporting documents in a light most favorable to the plaintiff. 2012 IL App (3d) 110379, ¶ 17. The precise issue before us is whether a state prosecutor enjoys, in his decision to initiate a prosecution, absolute immunity from malicious prosecution suits or whether that immunity is subject to an exception where the malicious prosecution suit alleges that the prosecutor acted with malice.

¶ 6 The doctrine of absolute prosecutorial immunity has a long and widespread history in the common law of this country. In *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976), the United States Supreme Court had its first opportunity to discuss prosecutorial immunity in the context of a claim brought under section 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983 (1976)). The Court pointed out that federal courts of appeal are virtually unanimous in the view that a prosecutor enjoys absolute immunity from section 1983 suits for actions taken within the scope of his prosecutorial duties. *Imbler*, 424 U.S. at 420. This immunity is derivative of the absolute immunity afforded to judges. 424 U.S. at 420.

¶ 7 In reaching its decision, the Court also discussed at length the long common law history in the state courts of such an immunity for a prosecutor's action in initiating a prosecution. The Court pointed out that absolute immunity for a prosecutor's action in initiating a prosecution has become the clear majority rule in the country. 424 U.S. at 421-422.

¶ 8 The Court discussed the public policy supporting absolute immunity for prosecutors in initiating a prosecution:

> "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." 424 U.S. at 422-23.

The Court pronounced that "[t]he common-law rule of immunity is *** well settled." 424 U.S. at 424. The Court went on to extend this immunity to claims brought under section 1983, discussing at length the strong public policy reasons behind such a rule. 424 U.S. at 424-29.

¶ 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. In *Coleson v. Spomer*, 31 Ill. App. 3d 563, 567 (1975), this court held that a State's Attorney, while acting in his official capacity, enjoys the same immunity bestowed upon the judiciary. The court held that this immunity applies even when the judge is accused of acting maliciously and corruptly. This immunity is not, the court stated, for the benefit of a malicious or corrupt judge, "but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." (Internal quotation marks omitted.) 31 Ill. App. 3d at 566. The court stated that a judge "should not have to fear that unsatisfied litigants may hound him with litigation charging malice or

corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." (Internal quotation marks omitted.) 31 Ill. App. 3d at 566; see also *Weimann v. County of Kane*, 150 Ill. App. 3d 962, 970 (1986) (the law is clear that prosecutors are immune from liability for any activities intimately associated with the judicial phase of the criminal process).

¶ 10 The plaintiff argues, however, that the decision in *Aboufariss v. City of De Kalb*, 305 Ill. App. 3d 1054 (1999), holds that absolute immunity does not apply where malice is properly pled. In *Aboufariss*, the plaintiff filed claims against the De Kalb County State's Attorney under section 1983 of the Civil Rights Act of 1871 (42 U.S.C.A. § 1983 (West 1994)) and under state law for malicious prosecution. The prosecutor argued that absolute immunity shielded her from the federal claims and that the doctrine of public official immunity afforded her protection against the state law claims. The prosecutor did *not* argue that she enjoyed absolute immunity against the state law claims.

¶ 11 The court held that under federal decisions the prosecutor was protected by absolute immunity against the federal claims because she had been acting within the traditional roles of a prosecutor. The court continued:

> "In addition to absolute immunity barring the federal claims, [the prosecutor] is also protected by public official immunity against plaintiff's state law claims. The doctrine of public official immunity affords state officials and employees full protection for acts performed within their official discretion. [Citation.] To be protected, a public official's actions must fall within the scope of the official's authority and should not be the result of 'malicious motives.' [Citation.] A prosecutor acting within the scope of her prosecutorial duties enjoys immunity from civil liability, the same immunity afforded to the judiciary. [Citation.]" *Aboufariss*, 305 Ill. App. 3d at 1064-65.

¶ 12 The plaintiff interprets this language to mean that only a qualified public official immunity is afforded to prosecutors, but not absolute immunity where malice is alleged. Indeed, in her brief on appeal, the plaintiff argues that the holding of *Aboufariss* is that neither prosecutors *nor* judges enjoy absolute immunity, but only qualified public official immunity with the "malicious motive" exception.

¶ 13 We reject the plaintiff's interpretation of *Aboufariss*. We find the above-quoted language from *Aboufariss* to be ambiguous at best. The court first states that, in the absence of malice, the prosecutor is protected by the qualified public official immunity, but then pronounces that a prosecutor acting within the scope of her prosecutorial duties enjoys the same immunity afforded to the judiciary, which has always been held to be absolute. Accordingly, *Aboufariss* does little to resolve the question before us.

¶ 14 Furthermore, we repeat that the prosecutor in *Aboufariss* did not make an argument that she enjoyed absolute prosecutorial immunity. She argued only that she enjoyed public official immunity, a qualified immunity. Ultimately, each case is decided on its own facts and on the arguments presented to the court. The *Aboufariss* court decided the case on the basis of the arguments presented to it. The availability of absolute prosecutorial immunity was not one of those arguments.

¶ 15 Furthermore, the plaintiff's interpretation of the holding of *Aboufariss* is out of step with

all prior and subsequent Illinois and federal case law on this question. For prior cases, see *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976), *Coleson v. Spomer*, 31 Ill. App. 3d 563, 567 (1975), and *Weimann v. County of Kane*, 150 Ill. App. 3d 962, 970 (1986), cited above.

¶ 16 In *White v. City of Chicago*, 369 Ill. App. 3d 765 (2006), decided subsequent to *Aboufariss*, a complaint against a prosecutor alleging that he had concealed exculpatory information was dismissed on the basis of absolute prosecutorial immunity. The appellate court reaffirmed that a prosecutor is absolutely immune from civil suit for those activities which are intimately associated with the judicial process. 369 Ill. App. 3d at 769.

¶ 17 A multitude of federal cases applying Illinois law have also held that despite the decision in *Aboufariss*, the state and federal doctrines of prosecutorial immunity are coterminous and prosecutors acting within the scope of their prosecutorial duties are absolutely immune from liability under state law. See, *e.g.*, *Hobbs v. Cappelluti*, 899 F. Supp. 2d 738 (N.D. Ill. 2012); *Kitchen v. Burge*, 781 F. Supp. 2d 721, 736-37 (N.D. Ill. 2011); *Barham v. McIntyre*, No. 04-cv-4027-JPG, 2007 WL 1576484 (S.D. Ill. May 30, 2007).

¶ 18 The plaintiff asserts that no Illinois court has overturned *Aboufariss* and that it remains good law. Nevertheless, for the reasons already stated, to the extent *Aboufariss* implied or held that prosecutors in Illinois do not enjoy absolute immunity from civil suit for actions taken within the scope of their prosecutorial duties, we reject it and decline to follow it.

¶ 19 Both parties present public policy arguments in support of their positions. The plaintiff argues that allowing absolute prosecutorial immunity would create a class of public officials that would be above the law in certain circumstances. The plaintiff argues that if a State's Attorney is ostensibly acting within the scope of his prosecutorial duties but misuses the power and authority of his office to intentionally and maliciously injure another, immunity should not apply. This concern was addressed by the United States Supreme Court in *Imbler*, which held that absolute prosecutorial immunity applied to claims brought under section 1983 of the Civil Rights Act:

> "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." *Imbler*, 424 U.S. at 427-28.

Further, as the Court in *Imbler* pointed out, immunity from civil suits does not place prosecutors beyond the reach of the criminal law. 424 U.S. at 428-29. We are no more persuaded by the plaintiff's public policy argument than was the Supreme Court in *Imbler*.

¶ 20 We are, however, persuaded by the public policy arguments in favor of absolute prosecutorial immunity. As the United States Supreme Court said in *Kalina v. Fletcher*, 522 U.S. 118, 125 (1997), the policy considerations that justify absolute prosecutorial immunity include both the interest in 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. These considerations outweigh the concerns of the plaintiff in the case at bar.

¶ 21 Finally, the plaintiff argues as an alternative basis for reversing the judgment of the circuit court that State's Attorneys are employees of the county rather than the state and as such are subject to the Local Governmental and Governmental Employees Tort Immunity Act (the Tort Immunity Act) (745 ILCS 10/1-101 to 1-210 (West 2010)), which does not provide immunity for acts constituting willful and wanton conduct. We reject the plaintiff's argument. Like judges, prosecutors acting in the course of their duties are afforded absolute immunity from all acts, even malicious acts. The Tort Immunity Act does not lessen this immunity, nor does it create liability. Even were the plaintiff's argument that the prosecutor is subject to the provisions of the Tort Immunity Act correct, this would not diminish the defendant's absolute prosecutorial immunity.

¶ 22 Accordingly, we affirm the dismissal with prejudice of the plaintiff's complaint.

¶ 23 For the foregoing reasons, the judgment of the circuit court of Williamson County is hereby affirmed.

¶ 24 Affirmed.