

Presiding Justice Moore and Justice Barberis* concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting the defendants' motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure where the affirmative matter of absolute prosecutorial immunity is not apparent on the face of the third amended complaint.

¶ 2 The circuit court of Crawford County dismissed Stephen D. Tracy's claims against the Crawford County State's Attorney Matthew Hartrich (State's Attorney Hartrich), and the County of Crawford (County), pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)), based upon the common law doctrine of absolute prosecutorial immunity. Stephen appeals. For the reasons that follow, we reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 On February 17, 2015, plaintiffs, Stephen D. Tracy (Stephen) and Kym Tracy, filed a 20 count, third amended complaint against defendants Colt Duke (Duke), Shaun Wheeler, Ann Parrish, Robinson police officer David G. Marqua (Officer Marqua), Robinson Chief of Police Bill Ackman (Police Chief Ackman), the City of Robinson, State's Attorney Hartrich, and the County. This appeal is limited to those causes of action filed by Stephen against State's Attorney Hartrich and the County. Therefore, we make no further reference to Kym Tracy's claims or the claims against the other party-defendants.

*Justice Schwarm was originally assigned to participate in this case. Justice Barberis was substituted on the panel subsequent to Justice Schwarm's retirement and has read the briefs and listened to the tape of oral argument.

¶ 5 Stephen filed claims for malicious prosecution, false arrest, tortious interference with business relationship, civil conspiracy, violation of his civil rights, and for conspiracy to violate his civil rights against State's Attorney Hartrich in his individual and official capacity as State's Attorney. Stephen also filed a cause of action for attorney fees against State's Attorney Hartrich. Additionally, Stephen alleged a single cause of action against the County as the potential indemnitor of Hartrich for damages incurred by Stephen for actions taken in Hartrich's official capacity as the Crawford County State's Attorney.

¶ 6 The factual allegations alleged in support of Stephen's causes of action against the defendants are considered to be true for purposes of this appeal. See *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 4. In regard thereto, Stephen alleged that on July 27, 2010, a settlement agreement was reached regarding the Estate of Mary Martha Gumm. Gumm was Duke's grandmother. Under the terms of the settlement agreement, when Duke turned 23, he was entitled to receive \$10,000 from a trust that was to be created by his stepfather, Stephen. Stephen was to be named as trustee, and the trust to be created would be known as the Colt Duke Trust. The money to fund the Colt Duke Trust was to be deducted from a separate family trust already in existence. Duke's uncle, Shaun Wheeler (Wheeler), was the successor trustee of that separate family trust. As of August 16, 2010, after Duke turned 23, Wheeler had not provided Stephen with the \$10,000 to fund the Colt Duke Trust. Therefore, on that date, Wheeler drafted a check in the amount of \$10,000 made payable to the Colt Duke Trust, and mailed it to Stephen. Stephen deposited the \$10,000 check into his personal

checking account. He claimed that he did so as a matter of convenience in order to promptly distribute the funds to Duke. Once the check cleared his account, Stephen issued a check for \$10,000, payable to Duke, who accepted and deposited the check into his own account on September 1, 2010.

¶ 7 Stephen also alleged that between August 7, 2013, and August 13, 2013, Duke and Wheeler obtained Stephen's private financial records from the First National Bank of Olney. Thereafter, on August 12, 2013, Duke and Wheeler falsely accused Stephen of theft by claiming he deposited the \$10,000 check made payable to the Colt Duke Trust into his personal checking account. Duke and Wheeler allegedly provided Stephen's bank and financial records to Officer Marqua, Police Chief Ackman, and State's Attorney Hartrich, thereby convincing them to investigate the so-called crime. Two days later, Officer Marqua issued an incident report recommending that theft charges be considered against Stephen by the State's Attorney's Office. The incident report is not part of the record on appeal.

¶ 8 Stephen further claimed that on August 19, 2013, as a part of the investigation, Wheeler met with Officer Marqua and State's Attorney Hartrich. Three days later, State's Attorney Hartrich issued a subpoena *duces tecum* to the First National Bank of Olney requesting Stephen's banking records. The subpoena requested records for all deposits made by Stephen from August 1, 2010, to September 1, 2010. The subpoena specifically requested information concerning the \$10,000 check payable to the Colt Duke Trust. The bank responded to the subpoena by sending the records directly to State's Attorney Hartrich, not to the circuit court. State's Attorney Hartrich and Police Chief Ackman

reviewed the bank's response, without having filed a motion or obtaining an order authorizing the *ex parte* review of the records that had been produced pursuant to the subpoena.

¶ 9 According to the complaint, while the investigation was ongoing, Wheeler corresponded on two occasions with State's Attorney Hartrich via facsimile. Both Wheeler and Duke also had phone conversations with State's Attorney Hartrich during the investigation of the alleged theft. At the conclusion of the investigation, on October 18, 2013, State's Attorney Hartrich filed an Information charging Stephen with theft. The Information stated:

"That on or about 25th day of August 2010, in Crawford County, Illinois, STEPHEN D. TRACY, committed the offense of THEFT in that said Defendant exerted unauthorized control over property of Colt Duke when he deposited a \$10,000 check for the 'Colt Duke Trust' into the defendant's personal checking account, in violation of SECTION 16-1(a)(1) of ACT 5 of CHAPTER 720 of the Illinois Compiled Statutes of said State. Class 3 Felony. Furthermore, the Defendant had a fiduciary obligation to Colt Duke, as he was acting as Trustee for Colt Duke's Trust, and Colt Duke discovered the theft by the defendant on August 7, 2013, which pursuant to 720 ILCS 5/3-6(a)(2) extends the statute of limitations for one year after August 7, 2013."

The charge was based upon the affidavit of Police Chief Ackman, who swore and attested to the facts and the truthfulness of the allegations set forth in the Information. Stephen

alleged that State's Attorney Hartrich advised Police Chief Ackman to sign the Information.

¶ 10 Stephen further averred that the Crawford County Sheriff's Department notified Stephen that a warrant had been issued for his arrest for the crime of theft. Upon being informed of the arrest warrant and criminal charge, Stephen immediately obtained counsel, and gathered documentary evidence demonstrating that no criminal offense had occurred. Stephen showed State's Attorney Hartrich that Duke received payment of the \$10,000 on September 1, 2010. Stephen then requested that the arrest warrant be recalled. The warrant was not quashed, and Stephen was arrested on October 18, 2013, for the crime of theft. Approximately one month later, on November 21, 2013, the criminal charge against Stephen was dismissed, with prejudice.

¶ 11 Stephen alleged that neither State's Attorney Hartrich nor the police contacted Stephen or obtained the appropriate bank records to determine whether he paid Duke the amount of \$10,000. Had they done so, State's Attorney Hartrich and the police would have known that Stephen promptly paid Duke the amount of \$10,000 on September 1, 2010. State's Attorney Hartrich and the police would also have known that Duke did not first discover the theft on August 7, 2013. Stephen claimed that State's Attorney Hartrich and the police acted intentionally, or with reckless disregard, of Stephen's rights while investigating and advising Police Chief Ackman as to the legal sufficiency of the theft charge. Accordingly, the police and State's Attorney Hartrich did not have probable cause to arrest Stephen. Stephen alleged that despite the lack of probable cause, the

police and State's Attorney Hartrich arrested Stephen, thereby depriving him of his constitutional rights.

¶ 12 The defendants moved to dismiss Stephen's claims, arguing, among other things, that pursuant to section 2-619(a)(9) of the Code, State's Attorney Hartrich was entitled to the protection of the common law doctrine of absolute prosecutorial immunity. In support of that argument, defendants contended that Stephen's allegations affirmatively established that State's Attorney Hartrich acted solely in his capacity as an advocate for the State. Thus, the defendants maintained that Stephen's allegations were insufficient to establish that State's Attorney Hartrich conducted an investigation that deprived him of his protection based upon absolute prosecutorial immunity. The defendants further argued that because there was no liability against State's Attorney Hartrich, there could be no liability for the County as the indemnitor. Therefore, the defendants claimed they were entitled to a dismissal on all counts directed against them.

¶ 13 In response to the defendants' motion, Stephen argued that the allegations contained in the third amended complaint established that State's Attorney Hartrich never collected enough evidence to establish probable cause to arrest Stephen for the crime of theft. Stephen further argued that he pled sufficient facts demonstrating that State's Attorney Hartrich functioned as an investigator, as opposed to a prosecutor, when he investigated the alleged theft by Stephen, and provided legal advice to police. Accordingly, Stephen asserted that State's Attorney Hartrich was not entitled to absolute prosecutorial immunity.

¶ 14 The trial court found the defendants' argument persuasive that the common law doctrine of absolute prosecutorial immunity applied to this case. In reaching that decision, however, the court indicated it was "troubled by the Prosecutor's actions and judgment in this case." The court further stated that, "[f]rom an outside observer, it appears that the prosecutor listened to the loudest voice and filed the charge in order to quiet that voice." Nevertheless, the court accepted the argument by State's Attorney Hartrich that all of his actions were within his role as a prosecutor, including the issuance of the subpoena *duces tecum*, and granted the motion to dismiss. This appeal followed.

¶ 15

ANALYSIS

¶ 16 On appeal, Stephen contends that the trial court erred by granting defendants' motion to dismiss under section 2-619(a)(9) of the Code of Civil Procedure claiming that the third amended complaint contained sufficient allegations to preclude the court from applying the common law doctrine of absolute prosecutorial immunity to shield State's Attorney Hartrich and the County from liability. Stephen contends that State's Attorney Hartrich is not entitled to absolute immunity because he: acted as an investigator or detective; never amassed probable cause to arrest Stephen; and provided legal advice to police on the existence of probable cause. Stephen's final argument on appeal is that the trial court committed reversible error by relying on facts that were not supported by affidavit in contravention of section 2-619 of the Code (735 ILCS 5/2-619(a) (West 2014)).

¶ 17 Our review of the circuit court's dismissal pursuant to section 2-619(a)(9) is *de novo*. *Frank v. Garnati*, 2013 IL App (5th) 120321, ¶ 5. A motion to dismiss pursuant to

section 2-619 admits the legal sufficiency of the complaint, but asserts a defense that defeats it. *Doe*, 2015 IL App (1st) 133735, ¶ 35. When considering a section 2-619 motion, a court must accept as true all well-pled facts in the complaint, as well as any inferences that may reasonably be drawn in plaintiffs' favor. *Doe*, 2015 IL App (1st) 133735, ¶ 35. Dismissal under this section is appropriate only if the plaintiffs can prove no set of facts that would support a cause of action. *Doe*, 2015 IL App (1st) 133735, ¶ 35.

¶ 18 The defendants' motion to dismiss was based upon subsection (a)(9) of the Code, which permits dismissal where the claims asserted are barred by "other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014). The "affirmative matter" must be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. *Doe*, 2015 IL App (1st) 133735, ¶ 37. The defendant bears the initial burden of demonstrating that the affirmative matter defeats plaintiffs' claims. *Doe*, 2015 IL App (1st) 133735, ¶ 37. This burden requires the defendant to do more than contradict well-pled allegations because the allegations of the complaint are taken as true. *Doe*, 2015 IL App (1st) 133735, ¶ 39. A motion that merely attempts to refute well-pled allegations in the complaint serves as nothing more than an answer that denies factual allegations and is not a basis for dismissal under section 2-619. *Doe*, 2015 IL App (1st) 133735, ¶¶ 40-41.

¶ 19 The affirmative matter in this case is the common law doctrine of absolute prosecutorial immunity. The burden to prove that immunity exists is on the party or parties seeking the immunity. *Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶ 52. The

Supreme Court of the United States has adopted a "functional approach," which analyzes the nature of the function being performed, rather than focusing on the identity of the actor who performed the function. *Bianchi*, 2016 IL App (2d) 150646, ¶ 52 (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)). In Illinois, the common law has long recognized absolute immunity for prosecutors when acting within the scope of their prosecutorial duties. *Garnati*, 2013 IL App (5th) 120321, ¶ 9. Thus, when a prosecutor performs acts that are intimately associated with the judicial phase of the criminal process, absolute immunity applies. *White v. City of Chicago*, 369 Ill. App. 3d 765, 769 (2006) (citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). Such acts include the evaluation of evidence assembled by the police, and "preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Buckley*, 509 U.S. at 273. Conversely, absolute immunity does not apply when a prosecutor performs investigative functions normally performed by a police officer or detective. *Buckley*, 509 U.S. at 273. The Supreme Court in *Buckley* noted that such investigative functions normally performed by a police officer or detective include searching for the "clues and corroboration that might give him [or her] probable cause to recommend that a suspect be arrested." *Buckley*, 509 U.S. at 273.

¶ 20 In reaching its decision that absolute immunity applied in the instant case, the circuit court attached significance to the defendants' argument that State's Attorney Hartrich's actions were clearly performed within his role as a prosecutor. The defendants did not support their position with affidavits or other documentary evidence. As a consequence, the trial court's determination that State's Attorney Hartrich functioned as a

prosecutor, and not as an investigator, will only be upheld if his actions as a prosecutor are apparent from the face of the third amended complaint.

¶ 21 Assuming Stephen's assertions to be true, and drawing all reasonable inferences in his favor, we find that the circuit court's basis for dismissal is not apparent on the face of the third amended complaint. The allegations of the complaint depict an investigation that was performed in tandem by State's Attorney Hartrich and the police into whether probable cause existed to arrest Stephen for theft. Duke and Wheeler complained and convinced Hartrich, Marqua, and Ackman to investigate whether the crime of theft had been committed. Moreover, Wheeler met with both Officer Marqua and State's Attorney Hartrich during the investigation, and Wheeler and Duke had further communications with Hartrich while the investigation was ongoing. All of these acts allegedly occurred before State's Attorney Hartrich and the police completed their investigation into whether probable cause existed to arrest Stephen for theft.

¶ 22 Furthermore, we are not persuaded by the defendants' argument that when State's Attorney Hartrich issued the subpoena, he was merely fulfilling his duty to confirm, verify, and evaluate the evidence produced during the police investigation, and is, therefore, entitled to absolute immunity for his conduct. While we accept that the issuance of a subpoena is normally a duty of the State's Attorney that is ordinarily within the umbrella of absolute immunity, the facts and circumstances of this case do not allow us to draw that conclusion after examining the nature and timing of State's Attorney Hartrich's actions. The third amended complaint links the issuance of the subpoena to the investigative phase of the criminal process, which allegedly occurred prior to a

determination of probable cause. Based upon Stephen's allegations in the third amended complaint, State's Attorney Hartrich was not confirming, verifying, or evaluating evidence produced during the police investigation. Rather, his actions were more akin to producing evidence in an attempt to search for the "clues and corroboration" that might give him probable cause to arrest Stephen. Additionally, the subpoena was allegedly issued prior to charging Stephen with theft. As noted above, absolute prosecutorial immunity is afforded to a prosecutor when his actions are associated with the judicial phase of the criminal process, but based upon the allegations of Stephen's third amended complaint, there is no indication that State's Attorney Hartrich issued the subpoena as part of any judicial process. All of these alleged facts lend support to our conclusion that under the circumstances presented herein, State's Attorney Hartrich's action of issuing the subpoena *duces tecum* was associated with the investigative phase, and not the judicial phase of the criminal process. We share the concern of the trial court that based upon the third amended complaint, it appears that State's Attorney Hartrich was listening to the loudest voice, and sought to quiet that voice by filing the charge of theft against Stephen. In our view, Stephen's pleading reveals that State's Attorney Hartrich actively investigated Stephen for the crime of theft, along with the police, and thereby exceeded the scope of those actions protected by the common law doctrine of absolute prosecutorial immunity. As a consequence, the circuit court erred in granting the defendants' motion to dismiss as the affirmative matter of absolute prosecutorial immunity is not apparent from the face of Stephen's third amended complaint.

¶ 23 We note in passing that the defendants' allegations are simply just that—allegations. In the motion to dismiss, the defendants offered no affidavits or other documentary evidence in support of their argument that Hartrich functioned as a prosecutor as opposed to an investigator. Simply put, their argument does nothing more than contradict the well-pled factual allegations of the third amended complaint, which at this point in the proceedings must be taken as true. A motion that merely attempts to refute well-pled factual allegations in a complaint is inappropriate under section 2-619 and is not a proper basis for dismissal. See *Doe*, 2015 IL App (1st) 133735, ¶ 41. Accordingly, we reverse the circuit court's dismissal of those counts in Stephen's third amended complaint directed against State's Attorney Hartrich and the County, and remand for further proceedings. In light of our determination, we need not address Stephen's remaining contentions of error on appeal.

¶ 24 Finally, it is of interest that in their briefing, the defendants have raised an alternative argument regarding whether the trial court's order dismissing the case should be affirmed. Their argument was based upon the doctrine of qualified immunity. The circuit court did not consider this issue in granting the defendants' motion to dismiss, and given the current posture of the pleadings, we decline to address this issue.

¶ 25 **CONCLUSION**

¶ 26 For the foregoing reasons, we reverse the circuit court's judgment and remand for further proceedings.

¶ 27 Reversed and remanded.