IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BELLE WHITNEY and JOHN DOE WHITNEY; ANDREW THOMAS and ANN THOMAS,	)	1 CA-SA 12-0171
Petitioners,	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
THE HONORABLE ROBERT H. OBERBILLIG, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,	)	**FILED 9/27/2012**
Respondent Judge,	)	
LISA RANDALL, individually; BRENNA RANDALL, individually; TRACY ALLEN individually,	)	
Real Parties in Interest.	)	

Petition for Special Action
from the Superior Court in Maricopa County

Cause No. CV 2011-011867

The Honorable Robert H. Oberbillig, Judge

JURISDICTION ACCEPTED, RELIEF GRANTED

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P O R T L E Y, Judge

¶1 We are asked to resolve whether the trial court erred by denying absolute prosecutorial immunity to Belle Whitney ("Whitney") and Andrew Thomas ("Thomas") from the civil lawsuit brought by Lisa Randall ("Randall"). For the following reasons, we accept special action jurisdiction and grant relief subject to the trial court allowing Randall to amend her complaint.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Randall operated a home day care business. She discovered a four-month-old child unconscious on her floor on April 18, 2007. She called 911. Paramedics transported the child to Banner Thunderbird Hospital. He was then moved to Phoenix Children's Hospital. The youngster was taken off of life support the following day, and passed away.

¶3 Kevin Horn, M.D. ("Horn") performed an autopsy. A CT scan revealed a "possible skull fracture, secondary to brain swelling." The Peoria police were notified and Detective Kevin

Moran was assigned as the lead investigator. Subsequently, Dr. Horn concluded that the youngster died from "blunt force trauma of the head and neck."

¶4 A grand jury indicted Randall for the child's death in November 2007. She was arrested and bond was set at $500,000. After her bond was reduced to $160,000, Randall posted bond and was released. The State then filed a notice of intention to seek the death penalty, and Randall was arrested and held without bond.

¶5 After Randall successfully challenged the probable cause determination, the trial court remanded the case for another probable cause determination. Because of snafus, the case was not presented to the grand jury as ordered. As a result, the court dismissed the case without prejudice and Randall was released.

¶6 Four days later, the State filed a direct complaint, again sought the death penalty, and Randall was again arrested. After a preliminary hearing, a judge found that probable cause existed, but concluded that there was no substantial proof that Randall had committed the charged crimes. As a result, she was released from custody, but placed on electronic monitoring and allowed only restricted contact with children.

¶7 Nearly two years later, the State withdrew its notice seeking the death penalty. The State later moved to dismiss the

charges without prejudice. After argument, the charges were dismissed with prejudice on August 4, 2010.

¶8 Randall subsequently filed a Notice of Claim pursuant to Arizona Revised Statutes ("A.R.S.") section 12-821.01 (West 2012). She filed her complaint on July 18, 2011, and later amended it. The amended complaint alleged eleven causes of action[1] and the named defendants included Maricopa County, the Maricopa County Attorney's Office,[2] Thomas, Whitney, Horn, Moran, and the City of Peoria. As part of the general allegations, the amended complaint alleged that Moran stated that the County Attorney had been "very involved with the entire investigation" and that Moran and Whitney had presented "biased, inaccurate, and incomplete . . . facts and medical information" about the child's death to the grand jury, and multiple times to the superior court until the criminal case was dismissed with prejudice.

¶9 Whitney and Thomas filed separate motions to dismiss. Whitney argued that she had absolute prosecutorial immunity from the claims, and attached a copy of the notice of claim. Thomas

[1] The eleven causes of action include malicious prosecution, abuse of process, false arrest and imprisonment, defamation, false light/invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, negligence per se, aiding and abetting tortious conduct, and racketeering. The negligence per se count was dismissed by stipulation.

[2] The Maricopa County Attorney's Office was dismissed because it is a non-jural entity.

also asserted absolute immunity, but conceded that immunity did not preclude the defamation and false light claims.[3]

¶10 Before Randall responded to the motions, the trial court commented at a hearing that the motions could be better characterized as motions for summary judgment. Whitney conceded that her motion could be treated as a motion for summary judgment, but Thomas disputed the characterization. After Randall responded, both motions were denied because there was insufficient factual support to allow the court to "evaluate . . . what is an investigative role versus perhaps a quasi judicial role," which would illuminate the issue of qualified immunity. The court also found that "the record's just not sufficient" to find absolute immunity.

¶11 Whitney then filed her petition for special action challenging the denial of her motion. Thomas filed a joinder.

DISCUSSION

I. Special Action Jurisdiction

¶12 Although we generally do not accept special action jurisdiction to review the denial of a motion to dismiss or summary judgment, *U.S. v. Superior Court,* 144 Ariz. 265, 269, 697 P.2d 658, 662 (1985), we accept jurisdiction where the issue involves prosecutorial immunity. *State v. Superior Court,* 186

[3] Because of his admission, we do not address the defamation or false light claims and they are outside of this decision.

Ariz. 294, 296, 921 P.2d 697, 699 (App. 1996); *see also Henke v. Superior Court,* 161 Ariz. 96, 100, 775 P.2d 1160, 1164 (App. 1989) (agreeing with the reasoning in *Mitchell v. Forsyth*, 472 U.S. 511, 524-25 (1985), to "allow[] interlocutory appeals of motions to dismiss or for summary judgment based on qualified immunity"). Consequently, we exercise our discretion and accept special action jurisdiction.

II. Prosecutorial Immunity

¶13 Generally, a government official exercising his or her duties has qualified immunity,[4] and "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486-87 (1991). Absolute immunity, however, attaches to prosecutors' activities carried out in their roles as advocates. *See Kalina v. Fletcher*, 522 U.S. 118, 127 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *Forrester v. White*, 484 U.S. 219, 229 (1988). Conversely, if a prosecutor is acting in an administrative or investigative capacity, rather than as an advocate, only qualified immunity is appropriate. *Buckley*, 509 U.S. at 273 (noting that "the actions of a

[4] "Qualified immunity protects government officials from liability for acts within the scope of their public duties unless the official knew or should have known that he was acting in violation of established law or acted in reckless disregard of whether his activities would deprive another person of their rights." *Chamberlain v. Mathis*, 151 Ariz. 551, 558, 729 P.2d 905, 912.

prosecutor are not absolutely immune merely because they are performed by a prosecutor"). It is, however, sometimes difficult to determine whether the prosecutor was acting as an advocate or conducting an investigation because the Supreme Court has "resisted any attempt to draw a bright-line between the two." *Donahoe v. Arpaio*, 2012 WL 1161580 at *23 (D. Ariz. April 9, 2012) (quoting *Genzler v. Longanback*, 401 F.2d 630, 637 (9th Cir. 2005)) (internal quotation marks omitted).

¶14 The Supreme Court has, however, provided guidance. For example, in *Buckley v. Fitzsimmons*, the Court held that the prosecutors did not act as advocates when they acted "before they convened a special grand jury to investigate the crime." 509 U.S. at 274. The Court found that before there is "probable cause to have anyone arrested, a prosecutor "neither is, nor should consider himself to be, an advocate." *Id.* at 274 (internal quotation marks omitted). In fact, before there is probable cause to arrest or to initiate judicial proceedings, a prosecutor's "mission . . . [is] entirely investigative in character."[5] *Id.; see also Challenge, Inc. v. State ex rel. Corbin*, 138 Ariz. 200, 205, 673 P.2d 944, 949 (App. 1983)

[5] However, "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Buckley*, 509 U.S. at 275 n.5.

(stating that "assisting the police in obtaining evidence was investigative") (citing *Marrero v. City of Hialeah*, 625 F.2d 499, 505-06 (5th Cir. 1980)). Additionally, a prosecutor acts in an investigative capacity when he or she "gives advice to police during a criminal investigation," *Van de Kamp v. Goldstein*, 555 U.S. 335, 343 (2009), or otherwise "performs the investigative functions normally performed by a detective or police officer." *Buckley*, 509 U.S. at 273 (internal quotation marks omitted); *see also Cousins v. Lockyer*, 568 F.3d 1063, 1068 (9th Cir. 2009) (explaining that investigative conduct would include the prosecutor "performing the evidence gathering and witness interviewing functions 'normally performed by a detective or police officer'") (quoting *Buckley*, 509 U.S. at 273).

¶15 Prosecutors, however, are entitled to absolute immunity when "prepar[ing] to initiate a judicial proceeding." *Van de Kamp*, 555 U.S. at 343; *see also Burns*, 500 U.S. at 492 (stating that "pretrial court appearances by the prosecutor in support of taking criminal action against a suspect" deserve absolute immunity); *Challenge, Inc.*, 138 Ariz. at 204, 673 P.2d at 948 (holding that "state prosecutors have absolute immunity from liability for their actions in initiating prosecutions") (internal quotation marks omitted). Moreover, activities which "necessarily require legal knowledge and the exercise of related

discretion" are entitled to absolute immunity. *Van de Kamp*, 555 U.S. at 344.

¶16 Arizona has followed the Court's guidance. In *State v. Superior Court (Ford),* another special action case, we explained that prosecutorial "immunity is absolute when the prosecutor acts within the scope of his or her authority and in a quasi-judicial capacity." 186 Ariz. at 297, 921 P.2d at 700 (citing *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989)). Quasi-judicial activities include "activities with some connection to the general matters committed to the prosecutor's control or supervision" or "those that are intimately associated with the judicial process" but not administrative or investigative conduct. *Id.* (internal quotation marks omitted). Thus, "[a]bsolute immunity is warranted when the prosecutor acts as an advocate in initiating a prosecution and presenting the state's case," even when the "prosecutor has knowledge that the charge is baseless" because these are activities "within the scope of [the prosecutor's] authority" that are conducted "in a quasi-judicial capacity." *Id.* at 298, 921 P.2d at 701 (internal quotation marks omitted).

¶17 Here, there is no uncertainty that Thomas and Whitney were acting in a quasi-judicial role once the case was presented to the grand jury that indicted Randall. *See*, *e.g.*, *Donahoe v. Arpaio*, 2012 WL 1161580 at *24 (D. Ariz. April 9, 2012) (opining

that it sometimes may be difficult to "glean[] from the complaint whether the conduct objected to was performed by the prosecutor in an advocacy or an investigatory role") (quoting *Hill v. City of New York*, 45 F.3d 653, 663 (2d Cir. 1995) (internal quotation marks omitted). Because absolute immunity attaches to the initiation of criminal prosecutions, *Van de Kamp*, 555 U.S. at 343; *see also Burns*, 500 U.S. at 492, Whitney and Thomas are entitled to absolute immunity for the prosecution regardless of their motive or intent and even if the prosecution was baseless. *Superior Court*, 186 Ariz. at 297-98, 921 P.2d at 700-01. Consequently, the trial court should have granted Whitney and Thomas absolute immunity from the time the case was presented to the grand jury until it was dismissed with prejudice.

III. Whitney and Thomas's Motions to Dismiss

A.

¶18 Although Whitney filed a motion to dismiss for failure to state a claim pursuant to Ariz. R. Civ. P. ("Rule") 12(b)(6), the trial court treated it as a motion for summary judgment after eliciting her agreement that it should be treated as one. Because we find that her motion was a motion to dismiss as it related to the issue of immunity, the court erred by treating it as one for summary judgment.

¶19 Although "[a] motion to dismiss merely challenges the pleader's failure to properly state a claim," Rule 12(b)(6) "permit[s] introduction of affidavits and other matters extraneous to the pleadings on a motion to dismiss" and may convert it to a motion for summary judgment. *Brosie v. Stockton*, 105 Ariz. 574, 576, 468 P.2d 933, 935 (1970). The motion may become one for summary judgment when "a challenge to the sufficiency of the pleader's claim [is] supported by extra-pleading material" that is "presented to and not excluded by the court." *Id.* at 576, 468 P.2d at 935; *Strategic Dev. & Const., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 63, ¶ 7, 226 P.3d 1046, 1049 (App. 2010) (citing *Frey v. Stoneman,* 150 Ariz. 106, 109, 722 P.2d 274, 277 (1986)). The additional information can be presented during oral argument or can be attached as an exhibit. *See*, *e.g.*, *Carter v. Stanton*, 405 U.S. 669, 671 (1972) (opining that because the trial court considered "matters outside the pleadings [that] were presented and not excluded by the court" during the "hearing on the [12(b)(6)] motion to dismiss," the trial court "was therefore required . . . to treat the motion to dismiss as one for summary judgment"); *Frey*, 150 Ariz. at 109, 722 P.2d at 277 (holding that because plaintiffs and defendants attached exhibits to their response and reply to the motion to dismiss, the trial

court should have treated "the motion to dismiss . . . as one for summary judgment").

¶20 A motion to dismiss does not necessarily become one for summary judgment merely because the motion "cites a document that is central to the complaint." *Strategic Dev.*, 224 Ariz. at 64, ¶ 14, 226 P.3d at 1050. For example, a motion to dismiss which attaches a notice of claim, a public record,[6] does not require it to be treated as a summary judgment motion. *See id.* at ¶ 13 (stating that "a Rule 12(b)(6) motion that presents a document that is a matter of public record need not be treated as a motion for summary judgment"). The rationale is straight forward: the motion challenges the pleadings and not the facts, and a plaintiff need not respond with proof of facts to create a genuine issue of material fact. *Id.*

¶21 Here, Whitney attached Randall's notice of claim to her motion to dismiss. Because the notice of claim, a public document, is referenced in the amended complaint, Whitney's challenge was straight forward — she was arguing that she was entitled to immunity given the allegations in the amended complaint as supported by the notice of claim. Moreover, because Randall only filed a statement of facts that referred to

[6] *See Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 272, ¶ 17, 159 P.3d 578, 582 (App. 2007) ("Based on its nature and purpose, we easily conclude that the Notice of Claim is a public record.").

the notice of claim, there were no additional facts outside of the amended complaint and notice of claim that needed to be examined. As a result, the motion to dismiss should not have been considered or treated as one for summary judgment.

¶22 Thomas also filed a motion to dismiss, but did not attach the notice of claim. When pressed by the court, he did not concede it should be treated as a motion for summary judgment. Moreover, he did not present any additional information during the oral argument. Therefore, his motion was properly treated as one to dismiss.

B.

¶23 We review the denial of both motions to dismiss for an abuse of discretion. *State v. Villegas*, 227 Ariz. 344, 345, 258 P.3d 162, 163 (App. 2011) (citing *State v. Mangum*, 214 Ariz. 165, 167, ¶ 6, 150 P.2d 252, 254 (App. 2007)). And, we "look only to the pleading itself and consider the well-pled factual allegations contained therein," *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008), construing "the facts alleged in the complaint . . . in a light most favorable to the plaintiff." *Goddard v. Fields*, 214 Ariz. 175, 177, ¶ 6, 150 P.3d 262, 264 (App. 2007) (quoting *Douglas v. Governing Bd. of the Window Rock Sch. Dist. No. 8*, 206 Ariz. 344, 346, ¶ 4, 78 P.2d 1065, 1067 (App. 2003)) (internal quotation marks omitted). Moreover, "[b]ecause Arizona courts

evaluate a complaint's well-pled facts, mere conclusory statements are insufficient to state a claim upon which relief can be granted" if the complaint does not also contain "supporting factual allegations." *Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346. Similarly, we will not "speculate about hypothetical facts that might entitle the plaintiff to relief." *Id.* at 418-19, ¶ 14, 189 P.3d at 345-46 (citing *Cullen v. Koty-Leavitt Ins. Agency, Inc.*, 216 Ariz. 509, 515, ¶ 12, 168 P.3d 917, 923 (App. 2007)).

¶24 Moreover, when reviewing a motion to dismiss that claims prosecutorial immunity, we "look to the actions alleged in . . . [the] complaint and, assuming them to be true, determine whether they were performed in a quasi-judicial capacity and within the prosecutor's scope of authority." *Ford*, 186 Ariz. at 297-98, 921 P.2d at 700-01. We note that "a court must apply a 'functional analysis' to determine whether absolute immunity exists": it must examine the nature of the prosecutor's activities "without regard to the intent, motive or state of mind" of the prosecutor. *Id.* at 297, 921 P.2d at 700 (citing *Gobel*, 867 F.2d at 1203, and *Challenge, Inc.*, 138 Ariz. at 204, 673 P.2d at 948).

¶25 We have already determined that Whitney and Thomas are entitled to absolute prosecutorial immunity from the time the case was presented to the grand jury until it was ultimately

dismissed with prejudice. *See* ¶ 17. We turn to whether the amended complaint pled sufficient allegations to determine that Whitney, Thomas, or both were involved in the law enforcement investigation, such as directing the police investigation, *Buckley*, 509 U.S. at 273-74 (stating that a prosecutor who "plans and executes a [police investigation] . . . has no greater claim to complete immunity than activities of police officers allegedly acting under his direction") (internal quotation marks omitted), as opposed to actions a prosecutor might "perform[] as part of the preparation of the case, even if they can be characterized as 'investigative' or 'administrative.'" *Demery v. Kupperman*, 735 F.2d 1139, 1143 (9th Cir. 1984).

¶26 After alleging that Thomas and Whitney were acting within the scope of their employment, the amended complaint asserts that Moran stated that the County Attorney was actively involved in the law enforcement investigation. The statement is conclusory, undefined, and is unsupported by well-pled factual allegations. *See Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346. Consequently, the allegation that Whitney and Thomas were involved in the investigation is insufficient to conclude that one or both of them did anything more than generally participate in anticipation of seeking an indictment. The trial court should have granted both motions to dismiss subject to allowing

Randall the opportunity to amend her complaint to allege any additional facts that would highlight the participation of Whitney and/or Thomas in the time that Moran began to investigate the case until it went to the grand jury.

CONCLUSION

¶27 Based on the foregoing, we accept special action jurisdiction and grant relief subject to Randall having the opportunity to amend the amended complaint.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
ANDREW W. GOULD, Judge

/s/
_____
JON W. THOMPSON, Judge