No. 18-1280

IN THE SUPREME COURT OF IOWA

JOSHUA VENCKUS,

Plaintiff-Appellee,

v.

CITY OF IOWA CITY, ANDREW RICH, JOHNSON COUNTY IOWA, ANNE LAHEY, NAEDA ELLIOTT, and DANA CHRISTIANSEN,

Defendants-Appellants.

Appeal from the Johnson County District Court,
District Court No. LACV079763,
The Honorable Judge Chad Kepros, presiding.

FINAL BRIEF OF DEFENDANTS-APPELLANTS JOHNSON COUNTY IOWA, ANNE LAHEY, NAEDA ELLIOTT, and DANA CHRISTIANSEN

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INTRODUCTION

Faced with evidence implicating Joshua Venckus in the horrific and violent sexual assault of a young female victim and conflicting evidence proffered by Plaintiff, the Johnson County Attorneys utilized their independent prosecutorial judgment and decided that a jury should ultimately weigh the evidence. The case resulted in an acquittal.

As with similarly situated former criminal defendants, Plaintiff has transformed his resentment at being prosecuted into the ascription of improper and malicious actions by the Johnson County Attorneys and has filed the present civil lawsuit. *See Imbler v. Pachtman*, 424 U.S. 409, 425, 96 S. Ct. 984, 992 (1976).

Plaintiff's lawsuit may be directed at the Johnson County Attorneys, but it threatens vital components of the judicial process that would be sacrificed if this lawsuit, and ones like it, begin to be permitted by this Court. In all similar cases throughout the various jurisdictions of this Country, lawsuits against prosecutors acting in their quasi-judicial role are blocked by the doctrine of absolute immunity in order to protect the judicial process. In order to maintain the integrity of the judicial process, critical public policy concerns require that absolute immunity be provided to the individual Johnson County Attorneys and the County.

ROUTING STATEMENT

This case presents the Court with three issues. Most importantly, this case presents the Court with its first opportunity to affirm the doctrine of absolute immunity for prosecutors sued under the newly recognized private right of action for violations of certain components of the Iowa Bill of Rights. *See Godfrey v. State of Iowa*, 898 N.W.2d 844 (Iowa 2017).

This case also presents two additional issues – applying Iowa's longstanding tradition of applying absolute immunity to common law torts, like abuse of process, and extending that immunity to a municipality on the basis of public policy under Iowa law. *See, e.g., Moser v. County of Black Hawk*, 300 N.W.2d 150, 152 (Iowa 1981), *Gartin v. Jefferson County*, 281 N.W.2d 25, 29-30 (Iowa Ct. App. 1979), *and, Burr v. City of Cedar Rapids*, 286 N.W.2d 393, 394 (Iowa 1979) (collectively affirming dismissal of abuse of process and malicious prosecution claims against county attorneys based on absolute immunity and extending immunity to the municipality as a matter of public policy). These secondary issues, while important, will be resolved easily and play a minor role in the appeal. As such, the secondary issues should not detract from the criteria supporting retention of the case by the Iowa Supreme Court. *See* Iowa R. App. P. 6.1101(2)(c, d, f).

It is respectfully submitted that this case should be retained by the Iowa Supreme Court because: (1) it is dominated by a substantial issue of first impression requiring the Court to enunciate the application of absolute immunity doctrine to *Godfrey* claims; and, (2) that issue of first impression involves a fundamental issue of broad public importance affecting the judicial process - the need to protect independent prosecutorial judgment from the risk of subsequent civil attack. *See* Iowa R. App. P. 6.1101(2)(c, d, f).

STATEMENT OF THE CASE

On March 15, 2018, Plaintiff filed a Petition against Iowa City and Johnson County. (Petition). On April 5, 2018, Iowa City filed a motion to dismiss (Iowa City MTD). On April 11, 2018, the Johnson County Defendants filed a motion to dismiss. (Johnson County MTD).

On April 13, 2018, Plaintiff filed his Amended Petition – adding individual law enforcement officers and prosecutors as defendants. (Amended Petition, App. 34-43). In his Amended Petition, Plaintiff sought civil damages against the Johnson County Defendants based upon the theories of abuse of process and certain Iowa Constitutional claims under *Godfrey*. (Petition). Regarding Plaintiff's *Godfrey* claim, he asserted violations of the right: to freedom of movement and association; to liberty;

to due process, a fair trial, and equal protection; and, against unreasonable seizure of his person. (Petition, p. 8).

In pertinent part, Plaintiff alleged that the Johnson County Attorneys: prosecuted and refused to dismiss the criminal charge even though Plaintiff presented them with evidence of an alibi and expert testimony challenging the reliability of the DNA evidence, (Amended Petition, ¶¶ 4, 31-32, 36-42, 47, 48, App. 34, 38, 39, 40); entered into a plea agreement with Ryan Markley, (Amended Petition, ¶ 43-45, App. 39); decided which DCI witness would testify and pressured the DCI criminalist to testify in a manner contrary to Plaintiff's theory, (Amended Petition, ¶¶ 49-53, App. 40); and, tried a criminal case, deemed by Plaintiff as unworthy in light of his acquittal, (Amended Petition, ¶¶ 57-59, App. 40-41).

Over the next two months, the Parties filed additional pleadings resisting, replying, and augmenting their positions on the pending motions to dismiss.

On June 13, 2018, the District Court granted, in part, the pending motions to dismiss. (6.13.18 Order, App. 65-75). The District Court held that the Johnson County Defendants were entitled to absolute immunity on Plaintiff's abuse of process claim and *Godfrey* constitutional claims because Plaintiff had alleged no conduct that fell outside their prosecutorial role.

(6.13.18 Order, pp. 6-8, App. 70-72). The District Court also held that the Municipal Tort Claims Act (hereinafter "MTCA") preempted Plaintiff's *Godfrey* claims or, phrased in terms of *Godfrey,* that the MTCA provided a sufficient remedy provided by statute. (6.13.18 Order, p. 10, App. 74).

On June 21, 2018, Plaintiff filed a Rule 1.904(2) Motion to Reconsider. (Motion to Reconsider). On July 4, 2018, Plaintiff filed a Supplement to his 1.904(2) Motion. (Supplement to Motion to Reconsider). This Supplement came on the heels of the *Baldwin v. City of Estherville* decision in which this Court created and applied a new all due care defense to be used for Iowa direct constitutional claims in place of the, otherwise applicable, doctrine of qualified immunity. (Supplement to Motion to Reconsider). The Parties resisted, replied, and augmented their arguments regarding Plaintiff's Motion to Reconsider.

On July 17, 2018, the District Court ruled on Plaintiff's 1.904(2) Motion to Reconsider. (7.17.18 Order, App. 102-109). In this Order, the District Court was persuaded by Plaintiff to diverge from the applicable standard for motions to dismiss and, instead, permit the case to proceed to the discovery stage and determine "what action, yet to be discovered, might fall outside of the quasi-judicial role . . . ." (7.17.18 Order, p. 4, App. 105). Stated another way, the District Court said it would "allow the allegations

against both the City and County to proceed to discovery and directed the defendants to raise their defenses as to immunity again at an appropriate time when the actual facts underlying these allegations are more fully known." 7.17.18 Order, p. 5, App. 106).

Citing the *Baldwin* decision, the District Court also reversed its ruling regarding the sufficiency of the MTCA remedy as precluding Plaintiff's *Godfrey* claim. (7.17.18 Order, p. 6, App. 107). The District Court went on to reserve ruling regarding Iowa City's claim of qualified immunity pending discovery and a fully presentation of the facts. (7.17.18 Order, p. 6, App. 107).

Apparently, having found that additional record would need to be established on the availability of the new all due care defense (qualified immunity) to the Iowa City Defendants, the District Court also reversed its prior absolute immunity holding regarding the Johnson County Defendants. (7.17.18 Order, p. 7, App. 108). Plaintiff had still not alleged any conduct that fell outside of the Johnson County Attorneys' prosecutorial role. (Amended Petition, App. 34-43). Nonetheless, the District Court denied absolute immunity of the Johnson County Defendants on Plaintiff's *Godfrey* and abuse of process claims. (7.17.18 Order, pp. 6-7, App. 107-108).

Following the District Court's Order Reconsidering the Motions to Dismiss, the Iowa City and Johnson County Defendants sought a stay of the District Court proceedings and sought permissive interlocutory appeal from this Court. (Iowa City Johnson County Application for Interlocutory Appeal and Stay). On September 12, 2018, the Iowa Supreme Court allowed immediate interlocutory appeal and stayed the District Court proceedings pending appeal. (9.12.18 Order re Interlocutory Appeal).

STATEMENT OF THE ALLEGATIONS

The pertinent allegations of Plaintiff's lawsuit and a summary of prior proceedings of the case follow. Plaintiff's allegations[1] should not be taken by the casual reader as evidence of the truth of the allegations, which are disputed for all purposes other than the appellate arguments herein.

On February 15, 2013, a sexual assault occurred following a "Cowboys and Indians" theme party at Plaintiff's residence. (Amended Petition, ¶ 8, 15, App. 35, 36). Initial law enforcement investigation of the sexual assault focused on Ryan Markley. (Amended Petition, ¶ 18, App. 36). The law

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[1] Because this is an appeal from an order related to a motion to dismiss, the record is set by assuming that the well-pleaded factual allegations of Plaintiff's Amended Petition are true. *See Iowa Individual Health Ben. Reinsurance Ass'n v. State Univ. of Iowa*, 876 N.W.2d 800, 804 (Iowa 2016) (accept the well-pleaded allegations as true when ruling on a motion to dismiss).

enforcement investigation expanded its focus after testing of DNA found on the victim's body revealed DNA profiles of Markley and an unknown male, which was later determined to be Plaintiff's DNA profile. (Amended Petition, ¶ 22, 23, App. 36). In other words, Plaintiff's sperm was found on the victim's cervix. (Amended Petition, ¶ 25, App. 37).

Plaintiff claimed he was in Chicago at the time of the sexual assault. (Amended Petition, ¶¶ 5-8, App. 35). He attempted to convince law enforcement of this alibi by turning over his mobile phone and bank card. (Amended Petition, ¶ 28, App. 37). Plaintiff also attempted to bolster his alibi defense by revealing names of individuals who would vouch for Plaintiff's presence in Chicago during the sexual assault. (Amended Petition, ¶ 29, App. 37).

On January 24, 2014, law enforcement arrested Plaintiff for violation of Iowa Code Section 709.3 – Sexual Abuse in the Second Degree. (Amended Petition, ¶ 5, App. 35). The Johnson County Attorney's Office then prosecuted Plaintiff and Markley. (Amended Petition, ¶¶ 31, 32, App. 38).

Plaintiff obtained and provided to the Johnson County Attorney's Office an expert's opinion trying to explain away the presence of Plaintiff's sperm on the victim's cervix. (Amended Petition ¶ 48, App. 39-40).

According to Plaintiff's expert, Plaintiff's sperm made its way to the victim's cervix after being rehydrated and transferred from a blanket that was "replete with Plaintiff's DNA." (Amended Petition, ¶ 14, 48, 50, App. 35, 39, 40). A DNA criminalist from the Iowa Department of Criminal Investigation (hereinafter "DCI") rejected Plaintiff's transference theory, but another DNA technician from the Iowa DCI thought it was possible a single dry sperm could be rehydrated and transferred from the blanket. (Amended Petition, ¶¶ 50-52, App. 40).

The criminal trial against Plaintiff began on September 7, 2016. (Amended Petition, ¶ 57, App. 40-41). Plaintiff was subsequently acquitted. (Amended Petition, ¶ 57, App. 40-41).

STANDARD OF REVIEW

The standard of review is for corrections of errors at law. *See Iowa Individual Health Ben. Reinsurance Ass'n v. State Univ. of Iowa*, 876 N.W.2d 800, 804 (Iowa 2016) (other citations omitted) (when reviewing a district court ruling on a motion to dismiss, the standard of review is for corrections of errors at law). The Court need not accept Plaintiff's legal conclusions. *See id.* As the District Court ought to have done, however, this Court must take the well-pleaded factual allegations in Plaintiff's Petition/Amended Petition as true (for purposes of deciding the motion

only). *See id.* (other citations omitted). When a petition on its face shows no right of recovery under any state of facts, the petition should be dismissed. *Ritz v. Wapello Cnty Bd. Of Supervisors*, 595 N.W.2d 786, 789 (Iowa 1999).

STANDARD FOR ABSOLUTE IMMUNITY

The doctrine of absolute immunity is well established in Iowa. Iowa Courts have applied the *Imbler* functional approach making prosecutors immune from activities that are intimately associated with the judicial phase of the criminal process. *White v. Molder*, 30 F 3d 80, 83 (8th Cir. 1993) (citing Hike v Hall 427 N.W. 2d 158, 159 (Iowa 1988)). Although the application of the doctrine of absolute immunity has evolved over time in Iowa, the Supreme Court specifically acknowledged the functional approach in *Burr v. Cedar Rapids*, 286 N.W. 2d 393 (Iowa 1979) and reaffirmed the *Imbler* functional approach in *Beck v Phillips*, 685 N.W.2d 637 (Iowa 2004) recognizing that absolute immunity applies to quasi-judicial activities. Although decided in the specific context of a claim brought under 42 U.S.C. Section 1983, *Minor v. State*, 819 N.W.2d 383 (Iowa 2012) relied on Iowa case law regarding absolute immunity to find that social workers who were acting in a role that was analogous to a prosecutor executing quasi- judicial activities should be protected by

absolute immunity. A review of Iowa case law applying absolute immunity in the context of prosecutor's duties directly related to the initiation and continuation of a criminal case demonstrates the critical importance of affirming this doctrine both in the context of common law tort claims and in regard to any tort claims arising out of a damages action for alleged violations of the Iowa Constitution.

Early Analysis of Absolute Immunity to Prosecutors Remains Instructive

The Iowa Supreme Court first addressed civil liability of a county attorney in *Blanton v. Barrick*. 258 N.W.2d 306, 308 (Iowa 1977). For guidance, the Iowa Supreme Court looked to established principles in this jurisdiction and developments elsewhere – *Imbler v. Pachtman,* its adoption in other federal jurisdictions, American Jurisprudence Legal Encyclopedia, and the Restatement (Second) of Torts. *Id.* at 308-311.

Important to the Court was the recognition that prosecutors are quasi-judicial officers. *Id.* at 308 (citing *State v. Hospers*, 147 Iowa 712, 126 N.W.2d 818 (Iowa 1910)). As such, they are "generally cloaked with the same immunity afforded judges when their duties are primarily judicial – the filing and vigorous prosecution of criminal charges." *Id.* (citing *Wilhelm v. Turner*, 431 F.2d 177, 182 (8th Cir. 1970), *cert. denied*, 401 U.S. 947, 91 S. Ct. 919, 28 L.Ed.2d 230).

> The prosecuting attorney is, as a matter of public policy, immune from civil liability for acts done in his official capacity, and this is true even though he has acted willfully or maliciously, where he has acted in the proper performance and course of his duties. Acting as he does in a judicial or quasi-judicial capacity, he enjoys the same immunity from liability for damages that protects a judge. However, since immunity is conferred on the prosecuting attorney solely by virtue of the office he holds, the rule is different if he acts in a matter clearly outside the authority or jurisdiction of his office.

Id. (citing 63 Am.Jur.2d, *Prosecuting Attorneys*, section 34, p. 361).

The Iowa Supreme Court examined Iowa cases on the scope of judicial authority or jurisdiction in absolute immunity cases and extended the scope to that of prosecutors by implication. *See id.* at 308-09. As such, absolute immunity is available even though a judge (and by implication prosecutor) exceeds his jurisdiction. *See id.* at 309 (citing *Osbekoff v. Mallory*, Iowa, 188 N.W.2d 294, 299, 300 (Iowa 1971) and *Huendling v. Jensen*, Iowa, 168 N.W.2d 745, 749, 750) (Iowa 1969)). "In other words, so long as the judge (and by implication prosecutor) is acting within the scope of his authority, his acts are absolutely privileged." *See id.*

The Court also looked at the Restatement (Second) Torts for guidance on absolute immunity. *See id.* at 310. In this regard, a "public prosecutor acting in his official capacity is absolutely privileged to initiate, institute, or continue criminal proceedings." *Id.* at 310 (citing Restatement (Second) Torts § 656). The immunity protects the prosecutor from an inquiry into

the prosecutor's motive. *Id.* (citing Restatement (Second) Torts § 656, cmt. b). Even if lacking probable cause or initiating criminal proceedings for an improper purpose the immunity applies. *See id.*

The Court also considered the policy considerations identified by the Supreme Court of the United States to support the doctrine of absolute immunity. *See id.* at 309-10 (citing *Imbler v. Pachtman*, 424 U.S. 409, 422-423, 96 S. Ct 984, 991-992, 47 L.Ed.2d 128, 139-40 (1976)). Absolute immunity of prosecutors "is based on the same considerations as that underlying the same immunity for judges and grand jurors acting within the scope of their duties." *Id.* at 309 (citing *Imbler* 424 U.S. at 422-423, 96 S. Ct at 991-992, 47 L.Ed.2d at 139-40). There is a concern that the energies and attention of prosecutors will be deflected from public duties due to concern over harassment by unfounded litigation. *Id.* Additionally, there is concern that the risk of civil liability would cloud independent judgment, which is necessary for a prosecutor to fulfill the public trust. *Id.* at 309-310. Without absolute immunity, a prosecutor would be expected to be the subject of civil litigation by those who are accused but not convicted, people like Plaintiff in the case at bar. *See id.* at 310 (additional citations omitted). In every criminal case, there is the possibility that a conviction will not be obtained. *Id.* at 310 (additional citations omitted). As such, a

prosecutor would always risk subsequent civil litigation. *See id.* That concern could also discourage a prosecutor from dismissing a case for fear that the decision would be transformed into civil litigation. *Id.* at 310 (additional citations omitted). The risk associated with the pursuit of criminal justice would lead to erosion of the impartial prosecutorial decision making that should be the hallmark of criminal prosecutions. *Id.* at 310 (additional citations omitted).

Suffice it to say, absolute immunity derives from policy needs and operates to ensure that prosecutors can execute their duties with courage and independence, both of which would be threatened by the apprehension of harassment by unfounded litigation brought by those who the prosecutor fails to convict. *See id.*

With the policy and standard for absolute immunity fully considered, the Iowa Supreme Court dispatched with the plaintiff's malicious prosecution claim against the county attorney. *See id.* at 311. Even though the county attorney represented plaintiff's wife in a pending divorce and filed criminal charges against the plaintiff for child stealing, absolute immunity barred the plaintiff's claim. *See id.* at 307-308, 311.

While *Blanton* looks to *Imbler*, among other guiding sources, the case did not expressly approve and adopt the *Imbler* functional approach. *See*

id. This acknowledgment-without-adoption was recognized two years later. *See Gartin v. Jefferson County,* 281 N.W.2d 25, 29-30 (Iowa Ct. App. 1979). At the time, Iowa had not expressly adopted the status of functional analysis used by *Imbler*. *Id.* Instead, the Iowa Supreme Court emphasized that "prosecutors performing their official duties are quasi-judicial officials . . . and should be able to vigorously proceed with their tasks unhampered by the fear of unlimited civil litigation." *See id.*

The *Imbler* Functional Approach Becomes Ingrained in Iowa's absolute immunity doctrine.

In *Gartin,* the plaintiff alleged that a county attorney used previously suborned witnesses to testify falsely at trial. *See id.* at 26. The Iowa Court of Appeals reviewed *Blanton* and *Imbler*. *See id.* at 29-30. In the end, the Court found that absolute immunity covers a prosecutor's role as an advocate when preforming actions preliminary to initiation of a prosecution and added that prosecutors should be able to vigorously proceed with their duties unhampered by the fear of civil litigation. *See id.* at 29-30. As such, use of witness testimony suborned before trial and presentation of that allegedly false evidence at trial were held to be absolutely immune because they were taken as part of the prosecutor's official duties. *See id.* at 30.

Municipalities also immunized as a matter of public policy.

Gartin also stands for the rule that absolute immunity of a prosecutor must extend as a matter of public policy to the municipality. *See id*. at 30-31.

> The public policy which requires immunity for the prosecuting attorney, also requires immunity for both the state and the county for acts of judicial and quasi-judicial officers in the performance of the duties which rest upon them; otherwise, the objectives sought by immunity to the individual officers would be seriously impaired or destroyed. If the prosecutor must weigh the possibilities of precipitating tort litigation involving the county and the state against his action in (the) criminal case, his freedom and independence in proceeding with criminal prosecutions will be at an end. The public advantage of free, independent, and untrammeled action by the prosecuting attorney outweighs the disadvantage to the private citizen in the rare instance where he might otherwise have an action against the county and state, either or both.

Id. at 31 (quoting Creelman v. Svenning, 67 Wash.2d 882, 410 P.2d 606, 608 (1966)).

Because the prosecutor was held absolutely immune from the plaintiff's claims, that immunity extended to the county under the policy and logic quoted above[2]. *See id*.

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[2] And, regarding the plaintiff's section 1983 claim against the county there can be no municipal vicarious liability under Monell v. New Yort City Dept.

Six months following *Gartin,* the Iowa Supreme Court announced in the case, *Burr v. Cedar Rapids*, that it had followed *Imbler* in the *Blanton* case. 286 N.W.2d 393, 395 (Iowa 1979). "Implicit in *Imbler* and *Blanton* is a concern with the functional purpose of the activity under scrutiny." *Id.* Absolute immunity applies to prosecutors for acts including the decision to initiate a criminal prosecution and signing and filing the complaint or information. *Id.* In this regard, absolute immunity protects prosecutors who sign and file a complaint or information, including making the requisite oath or affirmation. *Id.* at 396. It does not apply to "investigative activities such as directing police activity, planning police raids, obtaining search warrants, and supervising investigations." *Id.* at 395 (other citations omitted). Absolute immunity also applies to assistant county attorneys. *See id.*

In *Burr*, these absolute immunity guidelines were applied by the Iowa Supreme Court to defeat a plaintiff's claim of malicious prosecution against a county attorney who signed and acknowledged the complaint and information against the plaintiff. *See id.* at 394, 396. "Signing and filing a complaint or information, including making the requisite oath or

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Social Services, 436 U.S. 658, 692, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).

affirmation, are acts intimately associated with the judicial phase of the criminal process and functions to which the reasons for absolute immunity apply with full force. *Id.* at 396 (citing *Imbler*, 424 U.S. at 430, 96 S. Ct. at 995, 47 L.Ed.2d at 143).

Immunity is Extended to Municipalities on the Basis of Public Policy.

Burr is also important because it approved and adopted the policy based extension of absolute immunity to municipalities, as announced by the Court of Appeals in *Gartin*. *See id.* at 396 (other citations omitted).

Absolute Immunity is Extended to Associate Prosecutors.

Two years later, the Iowa Supreme Court decided another absolute immunity case – *Moser v. County of Black Hawk*, 300 N.W.2d 150 (Iowa 1981). In this case, we simply learn that an assistant county attorney is absolutely immune from claim of malicious prosecution when the prosecutor signed and filed an information charging who would become the plaintiff after a key witness was unable to testify and the charges were dropped. *Id.* at 150-152. Claims that the charges were levied without probable cause and with malice did nothing to diminish the immunity, of course. *See id.* at 151.

Despite *Imbler's* Functional Approach, Iowa Courts Continue to Assess the Scope of Office and Duties of a Prosecutor.

Absolute immunity shields a prosecutor for actions "within the scope of his or her jurisdiction, even though perhaps exceeding it." *Hike v. Hall*, 427 N.W.2d 158, 160 (Iowa 1988) (citing *Blanton*, 258 N.W.2d at 311). Such jurisdiction has been defined to include actions "not manifestly or palpably beyond the prosecutor's authority, but rather having more or less connection with the general matters committed to the prosecutor's control or supervision." *Id.* (citing *Yabarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 678 (9th Cir. 1984) *and, quoting, Briggs v. Goodwin*, 569 F.2d 10, 16 (D.C. Cir. 1977), *cert. denied,* 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978)).

In *Hike*, the plaintiff alleged claims for violations of his civil rights under Section 1983[3]. *Hike*, 427 N.W.2d at 158. The plaintiff claimed the prosecutor offered to drop the criminal charges against the plaintiff if the plaintiff settled with the prosecutor's private civil client and owner of the vehicle the plaintiff damaged. *Id.* at 159. In other words, the plaintiff alleged the prosecutor filed meritless criminal charges against the plaintiff,

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[3] The plaintiff also had a claim for common law fraud, but it was dismissed and was preserved for appeal. *Hike*, 427 N.W.2d at 158-159.

used his position to persuade the plaintiff to settle with the prosecutor's private civil client, and continued the charges as leverage to obtain payment for damage to the vehicle. *See id.* at 160.

The Court assessed the claim as one pertaining to the prosecutor's decision to initiate, maintain, or dismiss criminal charges. *See id.* (other citations omitted). The Court found that these are functions at the core of the prosecutorial function and protected by absolute immunity. *See id.* (other citations omitted). The Court also cited to a case from the Eighth Circuit holding that a "prosecutor's activities in the plea bargaining context warrant absolute immunity." *See id.* (citing *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987)). To the extent the plaintiff asserted actions by the prosecutor within the context of plea bargaining, they too would be absolutely immune. *See id.*

Absolute Immunity Applies to Claims Challenging Inadequate Training, Supervision, or Control.

The *Hike* court also extended the doctrine of absolute immunity to cover claims of inadequate training, supervision, or control by a prosecutor over an associate prosecutor. *See id.* at 161. Because "absolute immunity protects prosecutorial decisions, supervision of the prosecutors who make these decisions is similarly immune." *See id.* (citations omitted).

Broader Public Interest in the Judicial Process Valued Higher than an Individual's Allegations of Wrongdoing.

In *Hike,* the Iowa Supreme Court addressed the concern raised in *Imbler,* that, while absolute immunity leaves the genuinely wronged defendant without civil redress against a prosecutor, the alternative would disserve the broader public interest. *Id.* at 161-162 (citing *Imbler,* 424 U.S. at 427, 96 S.Ct at 993, 46 L.Ed.2d at 142). The Court also found adequate additional safeguards present to mitigate against the risk of a genuinely wronged plaintiff. *See id.* In this regard, prosecutor's actions are subject to professional discipline and potential criminal punishment. *See id.*

More Modern Federal Absolute Immunity Concepts Become Part of the Iowa Doctrine.

In *Beck v. Phillips,* the Iowa Supreme Court implemented many of the more modern developments of the doctrine of absolute immunity. *See Beck v. Phillips,* 685 N.W.2d 637, 642 (Iowa 2004). In this regard, the Iowa Supreme Court recommitted to the *Imbler* functional approach for which absolute immunity applies to "quasi-judicial activities, i.e. activities that are closely associated with the judicial phase of the criminal process." *Id.* (citing *Hike,* 427 N.W.2d at 159, *Imbler*, 424 U.S. at 430, 96 S.Ct. at 995, 47 L.Ed.2d at 143, *Burr*, 286 N.W.2d at 394, and *Blanton*, 258 N.W.2d at 309. The Court recommitted to the rationale for absolute immunity of

prosecutors being akin to judges or grand jurors acting within their scope of duty. *Id.* (citations omitted). The Court recommitted to the downside risks that would hamper the administration of the criminal justice system if absolute immunity were unavailable to prosecutors – danger that harassment by unfounded litigation would encourage a prosecutor to act defensively instead of fulfilling the public duty to ensure justice. *Id.* (citations omitted).

The Court drew from newer developments in the absolute immunity law of the Supreme Court of the United States, including *Buckley v. Fitzsimmons,* which segregated a prosecutor's investigative and administrative functions from that which absolute immunity generally would protect. *See id.* (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 2615, 125 L.Ed.2d 209, 226 (1993)). In this regard, *Buckley* instructs that a prosecutor's "role in evaluating evidence and interviewing witnesses as he [or she] prepares for trial" is one of advocate and protected by absolute immunity. *See Buckley*, 509 U.S. at 273, 113 S. Ct. at 2615, 125 L.Ed.2d at 226. This is markedly true when the probable cause has already been established to suspect criminal activity because a prosecutor should not be considered an advocate before having probable cause to arrest. *See Buckley*, 509 U.S. at 274, 113 S. Ct. at 2616, 125 L.Ed.2d at 227.

Beck is instructive because it shows that Iowa Supreme Court was willing to look to other federal decisions to assess functions for which absolute immunity was and was not available. *See Beck,* 685 N.W.2d at 643-644. Ultimately, the Court determined that absolute immunity would not insulate the prosecutor for writing letters to the plaintiff's supervisors indicating that the plaintiff would be subject to criminal prosecution for assisting with the suicide of his wife and other things. *See id.* at 641, 645. On the other hand, absolute immunity would apply to decisions by a prosecutor not to prosecute in the same way as decisions by a prosecutor to prosecute a case. *See id.* at 643-644.

Absolute immunity of prosecutors so well-established that it formed the starting point for extension of immunity to social workers – to protect the judicial process.

In the 2012 case of *Minor v. State*, the Iowa Supreme Court examined whether to apply absolute immunity to a social worker. *Minor v. State,* 819 N.W.2d 383, 393-399 (Iowa 2012). The Court started its analysis in this regard by reciting the established standard for absolute immunity – drawing on Iowa and federal cases involving its application to prosecutors. *Id.* at 393-396. Absolute immunity for prosecutors was so well established that the question of applicability was never considered – nor should it.

The absolute immunity cases recited in *Minor* confirm that there is universal application of the immunity to prosecutors. *See id.*

While the cause of action in *Minor* was for violations of the United States Constitution under Section 1983, *Minor* must be read against the backdrop of cases discussed above – cases in which the Court sought to protect the judicial process with the doctrine of absolute immunity regardless of whether the cause of action was based on common-law tort or constitutional injury.

Freedom of the Judicial Process Becomes the Touchstone of Absolute Immunity.

After considering the tapestry of cases comprising the doctrine, the key to absolute immunity becomes evident – absolute immunity is designed to "free the *judicial process* from the harassment and intimidation associated with litigation." *Minor*, 819 N.W.2d at 394 (citing *Burns v. Reed*, 500 U.S. 478, 494, 111 S. Ct. 1934, 1943 114 L.Ed.2d 547, 563 (1991), and *Butz v. Economou*, 438 U.S. 478, 512, 98 S. Ct. 2894, 2913, 57 L.Ed.2d 895, 919 (1978)). While the primary beneficiary of the immunity appears to be the prosecutor at first glance, and the prosecutor necessarily must benefit from the immunity; the absolute immunity doctrine operates to protect the judicial system. *See Minor*, 819 N.W.2d at 394 (citing *Rehberg v. Paulk*, 566 U.S. 356, 363, 132 S. Ct. 1497, 1503, 182 L. Ed. 2d 593, 601

(2012), and *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288, 294 (1967)).

ERROR PRESERVATION

In the Pre-Answer Motion to Dismiss and Amended and Substituted Motion to Dismiss, the Johnson County Defendants raised the issues of absolute immunity and its public policy based extension to the County. (Johnson County MTD; Johnson County ASMTD). These issues were resolved by the District Court, which dismissed Plaintiff's abuse of process and *Godfrey* claims and extended immunity to Johnson County. (6.13.18 Order, App. 65-75). The District Court subsequently reconsidered these issues and denied the motion to dismiss filed by the Johnson County Defendants. (7.17.18 Order, App. 102-109).

The issues of absolute immunity and its extension to the County are preserved because they were raised and decided upon by the District Court. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (ordinarily, issues must be raised and decided by a district court before the can be decided on appeal).

ARGUMENT

The District Court erred when it reconsidered and denied the motion to dismiss filed by the Johnson County Defendants. More specifically, the District Court erred by failing to: (I) apply absolute immunity and dismiss Plaintiff's abuse of process and *Godfrey* claims; (II) protect the judicial process and apply absolute immunity to *Godfrey* claims; and, (III) extend immunity to Johnson County as a matter of public policy under Iowa law.

I. The District Court erred in failing to dismiss Plaintiff's abuse of process and constitutional claims against the individual Johnson County Attorneys, who are protected by absolute immunity.

The District Court initially and properly dispensed with Plaintiff's abuse of process and constitutional claims by finding that Plaintiff had alleged no facts taking the Johnson County Attorneys outside of their quasi-judicial and prosecutorial role and, thus, they were absolutely immune. (6.13.18 Order, pp. 7, 8, App. 71, 72). It erred by reconsidering that holding, ignoring the standard applicable to motions to dismiss, and permitting the case to continue for further discovery to determine if the County Attorneys acted outside their quasi-judicial role. (7.17.18 Order, p. 4, App. 105).

The District Court should have constrained its analysis to the well-pleaded factual allegations in Plaintiff's Amended Complaint and

determine, based on those allegations, whether to dismiss Plaintiff's abuse of process and *Godfrey* claims. *See Iowa Individual Health Ben. Reinsurance Ass'n*, 876 N.W.2d at 804. When this Court applies that correct standard, dismissal is necessary because the individual Johnson County Attorneys are absolutely immune for the conduct complained of by Plaintiff – regardless of the theory of recovery as tort or constitutional injury.

The conduct complained of by Plaintiff in his Amended Complaint consists of allegations that the Johnson County Attorneys: (A) prosecuted and refused to dismiss the criminal charge even though Plaintiff presented them with evidence of an alibi and expert testimony challenging the reliability of the DNA evidence, (Amended Petition, ¶¶ 4, 31-32, 36-42, 47, 48, App. 34, 38, 39, 40); (B) entered into a plea agreement with Ryan Markley, (Amended Petition, ¶ 43-45, App. 39); (C) decided which DCI witness would testify and pressured the DCI criminalist to testify in a manner contrary to Plaintiff's theory, (Amended Petition, ¶¶ 49-53, App. 40); and, (D) tried an unworthy criminal case resulting in an acquittal, (Amended Petition, ¶¶ 57-59, App. 40-41).

Each of these alleged acts generally falls within the official capacity and scope of duty of the Johnson County Attorneys. *See Blanton*, 258

N.W.2d at 308. Prosecution, weighing of evidence, plea bargaining, witness selection and trial preparation, and actual trial work are all part of the judicial process. In other words, they are quasi-judicial activities – activities closely associated with the judicial phase of the criminal process. *See Beck,* 685 N.W.2d at 642, *Hike*, 427 N.W.2d at 159, *Imbler*, 424 U.S. at 430, 96 S.Ct. at 995, 47 L.Ed.2d at 143, *Burr*, 286 N.W.2d at 394, *and*, *Blanton*, 258 N.W.2d at 309.

As recited above in the Section, Standard for Absolute Immunity, enumerable cases from across the Nation, including Iowa, have elected to protect the judicial process from the civil lawsuits challenging quasi-judicial acts of prosecutors. Because Plaintiff challenges actions of the Johnson County Attorneys taken in their quasi-judicial and official role, absolute immunity bars Plaintiff's claims. *See id.* Absolute immunity would continue to apply, even if there are allegations or evidence that the Johnson County Attorneys acted with malice or improper intentions. *Beck,* 685 N.W.2d at 642, *and, Buckley*, 509 U.S. at 273, 113 S. Ct. at 2615, 125 L.Ed.2d at 226. In addition to being generally barred by the doctrine of absolute immunity, each of Plaintiff's allegations of wrongdoing is barred by on-point case law.

A. Absolute immunity bars Plaintiff's claims that are based on the initiation, institution, or continuation of legal proceedings.

Plaintiff's claim for compensatory and punitive damages rests, in part, on the allegation that the Johnson County Attorneys prosecuted and refused to dismiss the criminal charge even though Plaintiff presented them with evidence of an alibi and expert testimony challenging the reliability of the DNA evidence. (Amended Petition, ¶¶ 4, 31-32, 36-42, 47, 48, App. 34, 38, 39, 40). These acts amount to the initiation, institution, or continuation of legal proceedings. *See Blanton,* 258 N.W.2d at 310, *and,* Restatement (Second) Torts § 656. Under *Blanton* and Restatement (Second) Torts, these acts are at the heart of the judicial process and must be insulated from attack. *See id.* As such, the Johnson County Attorneys are entitled to absolute immunity for their acts of prosecuting and refusing to dismiss charges against Plaintiff. *See id.*

Absolute immunity remains a bar to Plaintiff's claims even though he couples the prosecution with the claim that evidence supported the Plaintiff's criminal defense strategy. Implicitly, it seems Plaintiff is claiming that the Johnson County Attorneys should have valued the evidence he mustered in support of his criminal defense over the presence of Plaintiff's DNA on the victim's cervix.

According to *Buckley*, which was relied upon by the Iowa Supreme Court in *Beck*, a prosecutor's "role in evaluating evidence and interviewing witnesses as he [or she] prepares for trial" is one of advocate and protected by absolute immunity. *See Buckley*, 509 U.S. at 273, 113 S. Ct. at 2615, 125 L.Ed.2d at 226, *also see, Beck,* 685 N.W.2d at 642. This is particularly true because probable cause has already been established to suspect Plaintiff of sexual assault because his sperm was found on the victim's cervix. *See Buckley*, 509 U.S. at 274, 113 S. Ct. at 2616, 125 L.Ed.2d at 227.

B. Absolute immunity bars Plaintiff's claims based upon plea bargaining.

Plaintiff's claim for compensatory and punitive damages rests, in part, on the allegation that the Johnson County Attorneys entered into a plea agreement with Ryan Markley. (Amended Petition, ¶ 43-45, App. 39). In *Hike,* the plaintiff challenged the prosecutor's acts of pressuring a plea or settlement in exchange for dismissal of criminal charges. *Hike*, 427 N.W.2d at 159. After finding support in the Eighth Circuit, the Iowa Supreme Court held that plea bargaining was absolutely immune. *See id*. (relying on *Myers,* 810 F.2d at 1446. This is necessary because a prosecutor's act in plea bargaining is intimately associated with the judicial phase of the criminal process, and the process must be insulated from the potential for

subsequent civil litigation. *See id.* (citing *Imbler*, 424 U.S. at 424-32, 96 S.Ct. at 992-95, 47 L.Ed.2d 140-44).

Just as plea bargaining was absolutely immune in *Hike* and *Meyers,* so too are the Johnson County Attorneys immune from Plaintiff's claims based upon plea bargaining. *See id.*

C. Absolute immunity bars Plaintiff's claims related to the weighing evidence and use of expert witnesses.

Plaintiff's claim for compensatory and punitive damages rests, in part, on the allegation that the Johnson County Attorneys decided which DCI witness would testify and pressured the DCI criminalist to testify in a manner contrary to Plaintiff's theory. (Amended Petition, ¶¶ 49-53, App. 40).

"The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify, as is illustrated by the history of this case [*Imbler* and the one at bar]." *Imbler*, 424 U.S. at 426, 96 S. Ct. at 993. "If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence." *Id.* The judicial process must be protected from such risks.

In this regard, *Buckley* instructs that a prosecutor's "role in . . . interviewing witnesses as he [or she] prepares for trial" is one of advocate

and protected by absolute immunity. *See Buckley*, 509 U.S. at 273, 113 S. Ct. at 2615, 125 L.Ed.2d at 226 (cited and relied upon by the Iowa Supreme Court in *Beck,* 685 N.W.2d at 642). Here, the advocacy role of the Johnson County Attorneys is particularly evident because there was already probable cause to suspect Plaintiff due to his sperm being found on the cervix of the victim. *See Buckley*, 509 U.S. at 274, 113 S. Ct. at 2616, 125 L.Ed.2d at 227 (probable cause is a precursor to a prosecutor's role as advocate, for which the judicial process requires protection by absolute immunity). The Johnson County Attorneys are immune from Plaintiff's claims based on the weighing of evidence and use of expert witnesses, whose opinions are contrary to Plaintiff's theory.

D. Absolute immunity bars Plaintiff's claims related to the criminal trial.

Plaintiff's claim for compensatory and punitive damages rests, in part, on the allegation that the Johnson County Attorneys tried a criminal case, deemed by Plaintiff as unworthy in light of his acquittal. (Amended Petition, ¶¶ 57, App. 40). "Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence." *Imbler*, 424 U.S. at 426, 96 S. Ct. at 993.

Viewed solely with the hindsight implied by this particular jury's acquittal, Plaintiff has been empowered to ascribe wrongdoing to the Prosecutors as a result. That the ultimate factfinder in the underlying criminal case found the evidence insufficient to establish proof beyond a reasonable doubt should not establish civil liability for the prosecutors. "The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to . . . [such] liability." *See id.*

Trial of the underlying criminal case is the paramount function of the judicial process and falls within the initiation, institution, or continuation of legal proceedings. *See Blanton,* 258 N.W.2d at 310, *and,* Restatement (Second) Torts § 656. Under *Blanton* and Restatement (Second) Torts, these acts must be insulated from attack. *See id.* As such, the Johnson County Attorneys are entitled to absolute immunity for their acts of trying the underlying criminal case against Plaintiff. *See id.*

II. Like all other legal theories of recovery, Plaintiff's *Godfrey* claims are subject to the doctrine of absolute immunity because it is the judicial process that must be protected.

Following the creation of a private right of action for violations of the equal protection and due process clauses of the Iowa Constitution in *Godfrey v. State*, the Iowa Supreme Court was presented with a certified question from the United States District Court for the Northern District of

Iowa. *See Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018). The Iowa Supreme Court assessed whether the doctrine of qualified immunity would apply to those Iowa Constitutional claims brought pursuant to *Godfrey*. *See id.* at 265-281. The Court eschewed the adoption of qualified immunity as it has been developed in the State and Federal Courts and developed an all due care defense. *See id.* at 280-281.

The rejected doctrine of qualified immunity is designed to protect governmental officers from civil liability when a plaintiff fails to plead a viable constitutional claim or relies on a constitutional right that is not clearly established. *See, e.g., Sherbrooke v. City of Pelican Rapids,* 513 F.3d 809, 813 (8th Cir. 2008), *Saucier v. Katz,* 533 U.S. 194, 201 (2001), *Pearson v. Callahan,* 555 U.S. 223, 242 (2009). There was concern by the Iowa Supreme Court that such protection may go too far and undermine the protections the framers had in mind when implementing the Iowa Bill of Rights. *See Baldwin*, 915 N.W.2d at 284 (dissenting opinion).

Unlike qualified immunity, the doctrine of absolute immunity is designed to protect the judicial process, albeit that judicial and quasi-judicial functions of governmental officers are the immunized acts. *See Minor*, 819 N.W.2d at 394 (citing *Burns v. Reed*, 500 U.S. 478, 494, 111 S. Ct. 1934, 1943 114 L.Ed.2d 547, 563 (1991), and *Butz v. Economou*, 438

U.S. 478, 512, 98 S. Ct. 2894, 2913, 57 L.Ed.2d 895, 919 (1978)) (absolute immunity designed to free the *judicial process* from the harassment and intimidation associated with subsequent civil litigation). There is room for a private right of action to enforce Iowa's Bill of Rights and an absolute immunity protection to protect the judicial process. Indeed, the Iowa Supreme Court was convinced that *Godfrey* claims should be subject to some limit. *Baldwin,* 915 N.W.2d at 275. In this regard, the Iowa Supreme Court recognized that "common law absolute immunities, such as judicial or quasi-judicial immunity, could apply to state constitutional claims." *Id.* at 281.

Some commentators, judges, and laypersons may initially balk at the doctrine of absolute immunity because they mischaracterize or misunderstand it as a doctrine designed to permit wrongful acts to go unpunished. The reality is that the immunity provides protection for the judicial process. *See Minor*, 819 N.W.2d at 394, *Burns*, 500 U.S. at 494, 111 S. Ct. at 1943, 114 L.Ed.2d 563, and *Butz*, 438 U.S. at 512, 98 S. Ct. at 2913, 57 L.Ed.2d at 919. Without protection of the legal process, the effectiveness of the Iowa Constitution would be threatened and undermine the intent of Iowa's Framers.

In January of 1857, Iowa held a Constitutional Convention to frame a new constitution. W. Blair Ward, *Official Report of the Debates and Proceedings of the Convention of 1857*, Vol I., Preface, p. 1, (1857). During that constitutional convention there was discussion regarding the, then current use of county attorneys, and the proposal to use district attorneys instead. *Id.* at 475-77. That discussion revealed the desire of the Framers to attract quality prosecutors who were able to deter the commission of crime. *Id.*

According to the constitutional convention member and lawyer from Pottawattamie County, Mr. Daniel W. Price, the proper administration of the criminal law could not be had under the then-existing county attorney system because smaller counties are unable to pay enough to attract good lawyers. *Id.* at 475. It was proposed that the aggregation of counties into districts would provide sufficient resources to fund district attorneys at a level that would attract quality lawyers. *Id.* at 476.

According to the constitutional convention member and lawyer from Mills County, Mr. Daniel H. Solomon, he had a greater interest in the change from county to district attorneys "than any other provision of this report [on the Constitutional Convention]" and that sentiment was shared

by people of his district "who generally approved of the constitution in every other respect." *Id.* According to Mr. Solomon,

> I think it is for the benefit of the community that the State should have able prosecutors. It will have a tendency to deter the commission of crime. The facility with which criminals are able now to scrape under our present system, has a great tendency, I have no doubt, to induce crime rather th[a]n prevent it.

Id. at 477.

While the provisions of the Iowa Constitution regarding the establishment of District Attorneys was repealed in 1970, the intent of the framers pertaining to the vigorous enforcement of the criminal law by prosecutors remains valid. The intent of the Framers would be thwarted if the doctrine of absolute immunity was not available in direct constitutional claims under *Godfrey*.

As set out above in the Standard for Absolute Immunity, there are risks to the judicial process if absolute immunity was not applicable to a *Godfrey* claim. For example, without absolute immunity to protect the judicial process, prosecutors would be deflected from their public duties due to concern over harassment by unfounded litigation. *Blanton*, 258 N.W.2d at 309 (citing *Imbler*, 424 U.S. at 422-23, 96 S.Ct. 991-992, 47 L.Ed.2d at 139-140. Also, there would be a risk that the independent

judgment of prosecutors would be clouded by the risk of civil liability. *See id.*

If the policies supporting the implementation of absolute immunity to quasi-judicial actions are eschewed, the doctrine of absolute immunity would have little basis for application to prosecutors or judges. *See Blanton*, 258 N.W.2d at 398 (citing *Wilhem*, 431 F.2d at 182) (prosecutors and judges cloaked with the same immunity). Imagine, if the defendants in this case included as a defendant the district court judge, who did not prevent the case from being tried and permitted the State to use the DCI witnesses now criticized by Plaintiff.

If the principles underlying absolute immunity do not apply with equal effect to *Godfrey* claims as they do with all other legal causes of action, it would move the Iowa Bill of Rights toward a model of strict liability that the Iowa Supreme Court has disavowed. *See Baldwin*, 915 N.W.2d at 275 (rejecting strict liability for Iowa's direct constitutional claims).

In *Baldwin*, the Iowa Supreme Court surveyed fourteen other states permitting direct constitutional claims to analyze how those states handled qualified immunity. *See Baldwin*, 915 N.W.2d at 266-276. In regard to

absolute immunity, several of those states have applied the doctrine of absolute immunity in cases involving state constitutional claims.

In Connecticut, for example, a direct state constitutional claim against a claims-commissioner failed because he was acting "within the limited spectrum of quasi-judicial officers who enjoy absolute immunity." *See Day v. Smith*, No. CV074027999S, 2008 Conn. Super. LEXIS 319, at *13, *26-*27 (Super. Ct. Feb. 11, 2008), *also, see, Diaz v. Palmese*, No. HHBCV105015049S, 2010 Conn. Super. LEXIS 3115, at *4-*12 (Super. Ct. Nov. 22, 2010) (pro se plaintiff alleged unspecified state constitutional claims in addition to federal claims under Section 1983 against an assistant state's attorney and others; the court undertook fairly extensive *Imbler* absolute immunity analysis only to hold that plaintiff plead insufficient facts to abrogate the application of absolute immunity).

In Indiana, absolute immunity was applied to defeat claims against prosecutors for violations of common law, state constitutional claims, and federal claims under Section 1983. *Collins v. King County*, 49 Wash. App. 264, 267, 742 P.2d 185, 187-273 (1987).

In Louisiana, absolute immunity was applied to Louisiana's constitutional claims in a manner identical to the federal law. *See Lester v.*

Caddo Par., No. 15-2008, 2016 U.S. Dist. LEXIS 148414, at *33 (W.D. La. Oct. 26, 2016).

In Montana, quasi-judicial immunity barred a direct state constitutional claim for violation of a right to privacy brought against an individual who was commanded by a judge to execute a facially valid search warrant. *Nickel v. Faycosh*, 2008 Mont. Dist. LEXIS 837 *13, *19 (courts have consistently held that officials acting pursuant to a facially valid court order have a quasi-judicial absolute immunity from damages for actions taken to execute that order).

In Texas, the *Imbler* functional approach was utilized to determine whether a prosecutor was entitled to absolute immunity sued under the Texas direct constitutional equivalent to *Godfrey*. *See Font v. Carr*, 867 S.W.2d 873, 875, 878 (Tex. App. 1993). Ultimately, the Court held that the prosecutor's act of giving advice to law enforcement was not a quasi-judicial function and denied the application of absolute immunity. *See id.* However, is it evident that Texas was inclined to protect the judicial process with the doctrine of absolute immunity if the functions undertaken by the prosecutor would have been quasi-judicial. *See id.*

In Utah, absolute immunity doctrine was utilized to defeat state constitutional claims against two physicians that the Court determined to

be acting in a quasi-judicial role. *Jensen v. Cunningham*, 250 P.3d 465, 480 (Utah Sup.Ct. 2011).

While the clear weight of federal and state cases apply the doctrine of absolute immunity to prosecutors, only the preceding cases were found to discuss the application of absolute immunity to direct state constitutional claims. It is expected that all jurisdictions permitting direct state constitutional claims would follow the universal trend. Furthermore, no cases were found that rejected the doctrine of absolute immunity in the context of direct state constitutional claims.

The doctrine of absolute immunity has been developed over hundreds of years and helped maintain a robust judicial system capable of permitting governmental wrongs to be remedied, while protecting the central and vital components of the judicial process itself. As it relates to our new *Godfrey* remedy, absolute immunity should be permitted to play its vital role.

III. The District Court erred in failing to apply immunity to Johnson County as a matter of public policy under Iowa law.

The objectives sought to be protected by application of absolute immunity to the Johnson County Attorneys – the judicial process – would be seriously impaired or destroyed if Plaintiff's claims survive as against Johnson County. *See Burr,* 286 N.W.2d at 395, 396, *and, Gartin,* 281

N.W.2d at 31 (other citations omitted). "The public policy which requires immunity for the prosecuting attorney, also requires immunity for both the state and the county for acts of judicial and quasi-judicial officers in the performance of the duties which rest upon them; otherwise, the objectives sought by immunity to the individual officers would be seriously impaired or destroyed." *Gartin,* 281 N.W.2d at 31.

Allowing liability against Johnson County would end the freedom and independence necessary for the Johnson County Attorneys to pursue criminal cases in which the criminal defendant alleges an affirmative defense, as it was in the underlying criminal case. *See id.* "The public advantage of free, independent, and untrammeled action by the prosecuting attorney outweighs the disadvantage to the private citizen in the rare instance where he might otherwise have an action against the county and state, either or both." *Id.*

Johnson County must be included in the protection of absolute immunity in order for the doctrine to effectively protect the judicial process. *See id.*

CONCLUSION

There is irony in Plaintiff's position that a criminal jury ought not have decided his case when there was conflicting evidence, but a civil jury

should now decide whether the Johnson County Attorney should pay damages for prosecuting a case that did not result in a conviction.

When prosecutors, like the Johnson County Attorneys, are faced with conflicting evidence and an affirmative defense from criminal defendants, they should be empowered to exercise independent decision-making, free of concern that their decision to move forward with prosecution or dismiss the case will not result in subsequent civil liability. If prosecutors had to assess whether tough cases would, in fact, result in conviction, the result would put in the hands of prosecutors the role traditionally and properly left to the fact finder. No criminal case involving conflicting evidence could proceed to a criminal jury without raising the specter of civil liability. Absolute immunity allows such cases to get decided on the evidence – something the judicial process is designed to allow.

This Court should reverse the District Court, hold that the Johnson County Attorneys are absolutely immune from the Plaintiff's abuse of process and *Godfrey* claims. This Court should also reverse the District Court and apply immunity to Johnson County on the basis of public policy and Iowa law. The motion to dismiss filed by the Johnson County Defendants should be granted.

REQUEST FOR ORAL ARGUMENT

This appeal is predominated by straightforward legal issues and limited pertinent factual allegations. At first blush, then, it may appear that oral argument is unnecessary. The importance of affirming the recognition of the established doctrine of absolute immunity in the context of newly created *Godfrey* claims, however, counsels in favor of permitting full and complete argumentation before the Court. As such, it is respectfully submitted that oral argument would likely assist the decisional process. This matter should be set for oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume limitation of Iowa Rules of Appellate Procedure 6.903 (1)(d), 6.903(1)(e)(1) and 6.903(1)(g)(1) because this brief has been prepared with Microsoft Word in a proportionally spaced typeface, Georgia, size 14; and contains 9,191 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Robert M. Livingston

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on January 10, 2019, the above and foregoing Final Brief was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

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