Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **5th day of May, 2023** are as follows:

BY McCallum, J.:

2022-CC-01784 GABRIELLE C. JAMESON AND KIM L. JAMESON WIFE OF/AND BOBBY A. JAMESON VS. HONORABLE WARREN L. MONTGOMERY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS THE DISTRICT ATTORNEY OF ST. TAMMANY PARISH, IAIN DOVER, IN HIS INDIVIDUAL CAPACITY AND UNDERWRITERS AT LLOYD'S LONDON A/K/A LLOYD'S ILLINOIS, INC. (Parish of St. Tammany)

REVERSED; EXCEPTION OF NO CAUSE OF ACTION SUSTAINED. SEE OPINION.

Weimer, C.J., concurs in the result and assigns reasons.
Hughes, J., dissents in part and assigns reasons.
Genovese, J., dissents.

SUPREME COURT OF LOUISIANA

No. 2022-CC-01784

GABRIELLE C. JAMESON AND KIM L. JAMESON WIFE OF/AND BOBBY A. JAMESON

VS.

HONORABLE WARREN L. MONTGOMERY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS THE DISTRICT ATTORNEY OF ST. TAMMANY PARISH, IAIN DOVER, IN HIS INDIVIDUAL CAPACITY AND UNDERWRITERS AT LLOYD'S LONDON A/K/A LLOYD'S ILLINOIS, INC.

On Supervisory Writ to the 22nd Judicial District Court, Parish of St. Tammany

McCALLUM, J.

We granted certiorari to consider the continuing validity of the doctrine of absolute prosecutorial immunity, adopted by this Court in *Knapper v. Connick*, 1996-0434 (La. 10/15/96), 681 So. 2d 944. This case presents the issue of whether Louisiana law recognizes a cause of action for claims asserted against an assistant district attorney ("ADA"), who, during the plea and sentencing phase of a prosecution, misrepresents, either directly or by omission, a victim's preference as to the sentence to be imposed upon a defendant, and thereafter, attempts to conceal this alleged misconduct. A secondary question concerns whether a cause of action can be maintained against the district attorney ("DA") who employed the ADA, under a theory of vicarious liability or for employment-related claims (*e.g.*, negligence in hiring, training, retaining, guiding, supervising and establishing certain policies and procedures). Necessarily, if no cause of action exists against the ADA in this case, there can be no cause of action against the DA under either theory.

Having reviewed the relevant case law and considered the purposes and policies for which prosecutors are accorded immunity, we reaffirm our holding in *Knapper* and further find that, under the circumstances of this case, both the ADA

and the DA are entitled to immunity. We thus find that the lower courts erred in overruling the defendants' peremptory exception of no cause of action. For the reasons that follow, we reverse those rulings and sustain the exception of no cause of action.

FACTS AND PROCEDURAL HISTORY

In 2019, Jeremy Ryan Schake ("Mr. Shacke") was charged with one count of felony carnal knowledge of a juvenile, stemming from the allegation that Mr. Schake coerced his then 16-year-old co-worker, Gabrielle Jameson ("Ms. Jameson"), into engaging in oral sex. Mr. Schake originally pled not guilty to the charge, but subsequently withdrew that plea and entered a plea of guilty in June, 2021. The trial court sentenced Mr. Schake to ten years in prison;[1] it suspended the sentence, placed Mr. Schake on probation, and ordered that he register as a sex offender for fifteen years.

On March 9, 2022, plaintiffs, Ms. Jameson and her parents, Kim L. Jameson and Bobby A. Jameson, filed the instant lawsuit against Warren L. Montgomery, individually and in his capacity as the District Attorney of St. Tammany Parish ("DA Montgomery"), and Iain Dover, the assistant district attorney who handled Mr. Schake's prosecution ("ADA Dover") (collectively, "defendants").[2] The petition alleges misconduct on ADA Dover's part in connection with Mr. Schake's sentencing.

According to the petition, prior to Mr. Schake's plea, several pre-trial conferences and plea discussions were held between ADA Dover, Mr. Schake's attorney and the trial judge, Judge William H. Burris. During these conferences, Mr. Schake's attorney advised that Mr. Schake would plead guilty only in the event that

[1] Carnal knowledge of a juvenile carries a maximum sentence of ten years. La. R.S. 14:80 D (1).

[2] Also named as a defendant is Certain Underwriter's at Lloyd's, London, which provided insurance coverage to DA Montgomery and ADA Dover.

he received probation and served no time in jail. In March, 2021, Judge Burris instructed ADA Dover to determine plaintiffs' viewpoint of a proposed plea agreement allowing Mr. Schake to plead guilty in exchange for a suspended sentence of ten years. Several discussions ensued between ADA Dover and plaintiffs, who made clear their desire that Mr. Schake serve one year of his sentence in jail. According to plaintiffs, rather than relaying their wish to Judge Burris, ADA Dover:

> . . . fraudulently communicated to and led Judge Burris to believe that [plaintiffs] had consented to a sentence of probation and a suspension of [the] entire ten year sentence for Schake when, in fact, [plaintiffs and plaintiffs'] undersigned counsel had clearly, repeatedly, and consistently advised Dover that [plaintiffs] had requested a sentence of one year of jail time to be imposed upon Schake without suspension of one year of a ten year sentence.
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> Notwithstanding Dover's clear understanding of the demand by [plaintiffs] for jail time for Schake, Dover, by affirmative acts and/or silence tantamount to fraud and prosecutorial misconduct, led Judge Burris to believe that [plaintiffs] had no objection to Schake pleading guilty. . . and to [be] placed on probation with no jail time.

The petition further alleges that, on the day of sentencing, plaintiffs' attorney met with ADA Dover and "received assurance that Judge Burris would be sentencing Schake to an agreed plea. . . of one year in jail without suspension of sentence." After Ms. Jameson gave a victim impact statement and Judge Burris again met with ADA Dover and Mr. Schake's attorney, Judge Burris sentenced Mr. Schake to ten years, with full suspension of that sentence.

According to plaintiffs, ADA Dover advised them that Judge Burris had agreed that Mr. Schake serve one year in jail, "but at the time of sentencing had apparently 'changed his mind' without warning to him and instead decided to. . . [suspend] his entire ten year sentence." Plaintiffs requested that ADA Dover question Judge Burris about his reasons for the suspended sentence. When ADA Dover failed to report back to them, plaintiffs and their attorney met with him and

DA Montgomery and asked that the State file a motion to reconsider the sentence. Although ADA Dover attempted to dissuade its filing, the State ultimately filed the motion, which Judge Burris thereafter denied. In his written reasons, Judge Burris noted that the plea had been acceptable "to the Court *only* if the Victim was agreeable to the plea." (Emphasis supplied). He further commented that "[a]t no time did the State inform the Court that the Victim was not satisfied with the plea agreement" and that he "would not have accepted the plea agreement" had he known. The State sought supervisory review of the denial of this motion, and both the court of appeal and this Court denied its writ applications.[3]

In this lawsuit, plaintiffs contend that "representations by Dover were intentional misrepresentations and fraudulent to [plaintiffs]" as Judge Burris had never agreed to give Mr. Schake any jail time. ADA Dover's inactions throughout the sentencing process amount to "intentional tort, fraud, ill practices, misrepresentations, and a total disregard for the Louisiana Constitution of 1974 and legal rights under Louisiana law of [Ms. Jameson] as a minor victim of a sex crime."

Plaintiffs further maintain that DA Montgomery failed in his responsibility for the "hiring, training and supervision of Dover and for enacting and enforcing policies, practices, and customs" of his office "to best ensure that no such fraudulent conduct could or would occur." DA Montgomery is thus liable both in his individual capacity and vicariously under the doctrine of *respondeat superior*. Plaintiffs contend that Ms. Jameson, "as a crime victim, has the right to due process and equal protection of the laws. . . and a district attorney is responsible to adopt and enforce policies and procedures to ensure that a crime victim is not deprived of those Constitutional rights."

[3] *State v. Schake*, 2021-0851 (La. App. 1 Cir. 10/19/21), --- So. 3d ----, 2021 WL 4866351 (*unpub.*), *writ denied*, 2021-01719 (La. 2/8/22), 332 So. 3d 665.

The petition seeks reasonable compensatory damages, past and future, including: emotional trauma and depression, loss of enjoyment of life, and medical and prescription expenses," "all other special and general damages as allowed under Louisiana law," punitive damages, attorney's fees and legal interest.[4]

Defendants responded to the petition by filing a peremptory exception of no right of action and no cause of action. The trial court denied the exception of no cause of action and, by a two-to-one decision, the court of appeal denied defendants' writ application.[5] *Jameson v. Montgomery*, 2022-0857 (La. App. 1 Cir. 11/7/22), --- So. 3d ----, 2022 WL 16753550 (*unpub*.). Judge Lanier dissented and wrote:

> A District Attorney and his assistants are absolutely immune from civil liability for actions taken within the scope of their duties in initiating and pursuing a criminal prosecution. *Sinclair v. State ex rel. Dep't of Pub. Safety & Corr.*, 99-2290 (La. App. 1st Cir. 11/3/00), 769 So.2d 1270, *writ denied*, 2000-3331 (La. 1/25/02), 806 So.2d 665, *cert. denied*, 536 U.S. 910, 122 S. Ct. 2369, 153 L.Ed.2d 189 (2002). Plaintiffs, Gabrielle C. Jameson and Kim L. Jameson wife of/and Bobby A. Jameson, assert claims of prosecutorial misconduct and negligent hiring and supervision against defendants, District Attorney Warren Montgomery and Assistant District Attorney Iain Dover. The allegations contained in the pleadings involve actions that were performed within the course and scope of their prosecutorial functions in connection with a judicial proceeding, as opposed to administrative or investigative functions. As such, I find the conduct complained of falls within the ambit of absolute immunity protection. *See Knapper v. Connick*, [19]96-0434 (La. 10/15/96), 681 So.2d 944. Accordingly, I would reverse the trial court's July 22, 2022 judgment, grant the exception of no cause of action, and dismiss with prejudice plaintiffs' claims against defendants.

Id., 2022-0857, 2022 WL 16753550 at *1.

[4] Ms. Jameson's parents allege that "they too were victims of an intentional infliction of emotional distress by Dover, of which District Attorney Montgomery is vicariously liable." As a result, they allege, they have "suffered, past, present and future" damages.

[5] The hearing on the exceptions was limited to the exception of no cause of action.

We granted defendants' writ application to examine the correctness of the lower courts' determination that plaintiffs' petition states a cause of action. *Jameson v. Montgomery,* 2022-01784 (La. 1/18/23), 352 So. 3d 964.

DISCUSSION

A peremptory exception of no cause of action "questions whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition." *Kendrick v. Est. of Barre*, 2021-00993, p. 3 (La. 3/25/22), 339 So. 3d 615, 617. For purposes of this exception, a cause of action "is defined as the operative facts that give rise to the plaintiff's right to judicially assert the action against the defendant." *Ramey v. DeCaire*, 2003-1299, p. 7 (La. 3/19/04), 869 So. 2d 114, 118. In deciding an exception of no cause of action, a court is to consider the petition, alone, and no evidence may be introduced to support or controvert the exception; as such, all well-pleaded allegations of fact are accepted as true. *See State ex rel. Tureau v. BEPCO, L.P.*, 2021-0856 (La. 10/21/22), 351 So. 3d 297, 310; *Everything on Wheels Subaru, Inc. v. Subaru S., Inc*., 616 So. 2d 1234, 1235 (La. 1993). Because a trial court's judgment relating to an exception of no cause of action is based solely on the petition and raises a question of law, a reviewing court should conduct a *de novo* review. *Ramey*, 2003-1299, pp. 7-8, 869 So. 2d at 119.

Resolution of the questions before us turns on whether the doctrine of absolute immunity as set forth in *Knapper* shields ADA Dover from civil liability for the claims asserted or, as plaintiffs maintain, the *Knapper* Court was "in error" in "pronouncing that the prosecutorial immunity doctrine. . . was controlling in Louisiana state law actions because the Louisiana Legislature had already enacted *LSA-R.S. 9:2798.1*. . . in 1985."[6] This statute, plaintiffs submit, "only gives civil

[6] La. R.S. 9:2798.1 B generally provides immunity to "public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties," subject to exceptions set forth in subpart C, discussed *infra*.

immunity to prosecutors for negligent acts and omissions and clearly expresses that civil immunity is not granted for intentional torts and other described purposeful bad acts." Plaintiffs further contend that crime victims have certain rights under La. Const. art. I, § 25 and La. R.S. 46:1844, the Crime Victims Bill of Rights ("CVBR"), neither of which "prohibit the causes of action" plaintiffs assert in this lawsuit. Plaintiffs thus argue that their petition states a cause of action under our general tort law – La. C.C. art. 2315, which imposes liability for "[e]very act whatever of man that causes damage to another."

Accepting as true, as we must, the allegations of fact in plaintiffs' petition, we find that they do not give rise to a legally enforceable cause of action against ADA Dover and DA Montgomery. We do not condone improper conduct of a prosecutor, nor disregard the importance of crime victims' rights. However, our case law supports a finding that a prosecutor is afforded absolute immunity for acts or omissions that "fall within the scope of the prosecutor's role as an advocate for the state and are intimately associated with the conduct of the judicial phase of the criminal process." *Knapper*, 1996-0434, p. 10, 681 So. 2d at 950. Similarly, where claims are made against a DA for an ADA's misconduct, where no cause of action exists against the ADA, necessarily, there can be no cause of action against the DA.[7]

[7] Like other employment-related scenarios, an employer's liability is premised on a cognizable claim against the employee. Here, two theories are advanced for DA Montgomery's liability: vicarious liability and negligence involving ADA Dover's employment.

Vicarious liability arises from La. C.C. art. 2320, which imposes liability on employers "for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." Where an employee is accorded immunity, necessarily, his employer cannot be held vicariously liable for his actions or inactions.

Similarly, as this Court recently explained, "an employer can *only* be liable under theories of negligent hiring, supervision, training and retention. . . if the employee is at fault[;]. . . [T]he employer cannot be liable if the employee is not at fault." *Martin v. Thomas*, 2021-01490, p. 13 (La. 6/29/22), 346 So. 3d 238, 247. (Emphasis supplied). Again, where an employee is immune from suit, there can be no claim against his employer for negligence in hiring, retaining, training or supervising that employee.

The doctrine of absolute prosecutorial immunity evolved from the decision of the United States Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976). *Imbler* involved allegations against a prosecutor and others for acts of misconduct, including the knowing use of false testimony at trial and the suppression of evidence favorable to Imbler.[8] The *Imbler* Court first observed that the considerations underlying common-law prosecutorial immunity are the same as those for common-law judicial immunity, including:

> . . . concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Id., 424 U.S. at 423. The Court further noted that "affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system." *Id*. 424 U.S. at 426. The Court then held that the prosecutor's activities in *Imbler* were "intimately associated with the judicial phase of the criminal process," and, thus, were "functions to which the reasons for absolute immunity apply with full force." *Id*., 424 U.S. at 430. *Imbler* fully recognized that:

> [T]his immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest.

Id. 424 U.S. at 427.[9]

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[8] Procedurally, the case was before the Court on a motion to dismiss under Fed. R. Civ. Pro. art. 12(b)(6), which, similar to an exception of no cause of action, is based on the "failure to state a claim upon which relief can be granted."

[9] In this regard, the Court cited commentary by Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949):

> "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

Imbler, 424 U.S. at 428.

Although *Imbler* was re-examined and clarified by later decisions of the Supreme Court, the rule of absolute immunity for activities associated with the judicial phase of the criminal process remained constant. In *Burns v. Reed*, 500 U.S. 478 (1991), the Court held that absolute immunity barred claims against a prosecutor for alleged misconduct in a probable cause hearing (during which the prosecutor, seeking to obtain a search warrant, failed to disclose that a confession had been made by a defendant under hypnosis). The Court reasoned that appearing before a judge and presenting evidence to obtain a search warrant "clearly involve the prosecutor's 'role as advocate for the State,' rather than his role as 'administrator or investigative officer,' " and that "appearing at a probable-cause hearing is 'intimately associated with the judicial phase of the criminal process.' " *Id*., 500 U.S. at 491-92. However, that same prosecutor had no immunity for giving legal advice to police officers as this is not a function closely related to the judicial process. The Court observed:

> [E]ven if a prosecutor's role in giving advice to the police does carry with it some risk of burdensome litigation, the concern with litigation in our immunity cases is not merely a generalized concern with interference with an official's duties, but rather is a concern with interference with the conduct closely related to the judicial process. . . . Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation.

Id., 500 U.S. at 494. (Emphasis supplied, internal citations omitted).

Later, in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Supreme Court examined what claims, if any, fall outside the scope of a prosecutor's absolute immunity. Noting that "the *Imbler* approach focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question [of] whether it was lawful," the Court held that "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Id*., 509 U.S. 271-73.

The *Imbler* decision, and its progeny, was adopted by this Court in *Knapper*, *supra*, a case involving the claim that a prosecutor "with malice or reckless disregard of" the plaintiff's rights, failed to turn over exculpatory information. *Id*., 1996-0434, p. 2, 681at 945. While *Imbler* was not binding law because it dealt with a federal cause of action, the *Knapper* Court found its reasoning to be persuasive, observing that "we have harmonized our own state immunity rules with federal immunity principles in the past." *Id*., 1996-0434, p. 5, 681 So. 2d 947.

Although prosecutorial immunity was a matter of first impression in *Knapper*, the Court recognized that it had been "long held on grounds of necessity and public policy that judges acting within the scope of their subject matter jurisdictions cannot be held liable for acts done in their judicial capacities." *Id*., 1996-0434, pp. 2-3, 681 So. 2d at 946. The Court looked to its prior decision of *Diaz v. Allstate Insurance Co*., 433 So. 2d 699 (La. 1983), for the principle that "state prosecuting attorneys are constitutional officers who serve in the judicial branch of the government." *Id*., 1996-0434, p. 3, 681 So. 2d at 946. It also took into account other cases holding that prosecuting attorneys acting within the scope of their prosecutorial duties are entitled to the same absolute immunity extended to judges. The Court observed that the overwhelming majority of cases from other states provide absolute immunity to prosecutors when acting within the scope of their traditional prosecutorial duties.

After analyzing *Imbler*, *Burns*, *Buckley* and other relevant federal cases, the *Knapper* Court found:

> [A] functional analysis of the role a prosecutor is fulfilling when the alleged misconduct occurs is the touchstone to determining the type of immunity available. We are persuaded that granting absolute immunity to prosecutors from malicious prosecution suits is appropriate when the activities complained of fall within the scope of the prosecutor's role as an advocate for the state and are intimately associated with the conduct of the judicial phase of the criminal process.

Id., 1996-0434, p. 10, 681 So. 2d at 950.

This absolute immunity applies even where a prosecutor's conduct is intentional or malicious. The Court reasoned:

> Criminal defendants who are convicted as a consequence of prosecutorial misconduct will be afforded post-conviction relief where appropriate. If misconduct is detected during the original trial, prosecutors are subject to sanctions pursuant to the inherent authority of the trial judge. Moreover, prosecutorial misconduct can be the basis of independent criminal charges against a prosecutor. Misconduct can also rise to the level of justifying professional disciplinary proceedings. Finally, prosecutorial conduct, whether that of the District Attorney or his assistants, is subject to the ultimate test of public approval at the ballot box.
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> [T]he checks on prosecutorial misconduct already inherent in our justice system undermine the argument that the imposition of civil damages is the only way to insure the integrity of prosecutions. We are convinced that the interests of justice as a whole are best served by extending absolute immunity in cases of the type before us, even though it may result in the denial of an individual's potential recovery of money damages.[10]

Id., 1996-0434, p. 11, 681 So. 2d at 950-51. *See also*, *Hayes v. Par. of Orleans*, 1998-2388, p. 4 (La. App. 4 Cir. 6/16/99), 737 So. 2d 959, 961 (prosecutorial immunity "extends even to prosecutorial actions taken in bad faith or with malice.").

Cases following *Knapper* have consistently and uniformly applied the doctrine of absolute prosecutorial immunity to bar certain claims against prosecutors. Our review of these cases leads us to reaffirm our holding in *Knapper* and reiterate that, where a prosecutor acts within the scope of his prosecutorial duties as an advocate for the state and the alleged misconduct arises from "conduct intimately associated with the judicial phase of the criminal process," he is entitled to absolute immunity. *Knapper*, 1996-0434, p. 11, 681 So. 2d at 951. We do so because the considerations for which the absolute immunity doctrine was initially

[10] Certain types of prosecutorial misconduct have lead to disciplinary action. *See*, *e.g*., In *re Jordan*, 2004-2397 (La. 6/29/05), 913 So. 2d 775, 784 (imposing sanctions for failure to disclose exculpatory evidence).

created continue to be relevant and compelling.[11] Indeed, as the Supreme Court made clear, absolute prosecutorial immunity " is not grounded in any special 'esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself.' " *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).

Necessarily, whether absolute immunity will apply to bar claims against a prosecutor will depend on the facts of each case. A court will be required to evaluate the role the prosecutor was fulfilling when the alleged misconduct occurred. This entails a consideration of whether the alleged misconduct is intimately associated with the judicial phase of the criminal process.

In the instant case, although there is no precedent involving alleged misconduct in communicating with a victim in connection with a defendant's sentencing, we find useful guidance from other cases. In *Fine v. Senette*, 1997-1851, p. 2 (La. App. 1 Cir. 6/29/98), 714 So. 2d 1263, 1264, for example, suit was filed against an ADA who was alleged to have falsely advised the parole board during a clemency hearing "that the mother of the victim was 'pressured' by [the defendant's] family to support [his] request for clemency." In finding that the ADA was absolutely immune from the defendant's claim that he engaged in misconduct by knowingly providing false information to the parole board, the court of appeal held that:

> [T]he requisite communications between the prosecutor and clemency authorities, *as a portion of the sentencing process*, are within the scope of the prosecutor's role as an advocate for the state and are entitled to absolute immunity.

[11] Those concerns include the "concern that constant fear of later civil suits for damages may chill the vigorous prosecution of those charged with violating state statutes; that such fears may deter competent people from seeking office; and that defense of claims for malicious prosecution may drain valuable time and effort." *Knapper*, 1996-0434, p. 5, 681 So. 2d at 947.

Id., p. 4, 714 So. 2d at 1265. (Emphasis added).[12] The same result was reached in *Sinclair v. State ex rel. Dep't of Pub. Safety & Corr.*, 1999-2290 (La. App. 1 Cir. 11/3/00), 769 So. 2d 1270, where the ADA was alleged to have disseminated false information in opposition to the defendant's release on parole. The court of appeal agreed with the trial court that the ADA's conduct was entitled to absolute immunity. It quoted, with approval, the trial court's reasoning:

> [T]he District Attorney's role at a parole hearing is simply a continuation of his role as 'advocate for the state' which begins with the institution of prosecution and would follow the defendant throughout his incarceration and completion of any parole period until his release. At all such stages the State is obviously an interested party in the status and progress of the defendant and therefore this court finds the actions of the District Attorney in disseminating the criminal history of the defendant in conjunction with his parole hearing was acting within his capacity as the 'advocate for the State'.

Id., p. 4, 769 So. 2d at 1272.

Our jurisprudence is replete with other cases in which the absolute prosecutorial immunity doctrine was found to bar claims against prosecutors.[13]

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[12] The *Fine* court cited *Quartararo v. Catterson*, 917 F.Supp. 919, 953 (4 E.D.N.Y.1996), which dealt with the identical issue, and found that "the prosecutor's transmission of information to parole authorities was. . . 'intimately associated with the judicial phase of the criminal process' and was entitled to absolute immunity." *Fine*, pp. 3-4, 714 So. 2d at 1265.

[13] *See, e.g.*, *Painter v. Clouatre*, 2021-1276 (La. App. 1 Cir. 6/3/22), --- So. 3d ----, ----, 2022 WL 1829598 at *3, *writ denied*, 2022-00987 (La. 10/12/22), 348 So. 3d 79 (a prosecutor's decision to convene a grand jury, albeit for allegedly improper and malicious purposes, "is within the purview of the duties of the district attorney, intimately associated with the judicial phase of the criminal process, and occurred in the course of his role as an advocate for the state," warranting the grant of the prosecutor's exception of no cause of action based on absolute immunity); *Gauthier v. Ard*, 2018-0861 (La. App. 1 Cir. 7/23/19) --- So. 3d ----, ----, 2019 WL 3311965 at *2 (absolute immunity barred claims against a prosecutor for allegedly conspiring to falsely report and allege criminal conduct and continuing prosecution with knowledge of the falsity of the charges; "[p]rosecutors, acting within the scope of their traditional prosecutorial duties as advocates for the state, are entitled to absolute immunity"); *Tickle v. Ballay*, 2018-0408, p. 14 (La. App. 4 Cir. 11/14/18), 259 So. 3d 435, 444 (claims for malicious prosecution stemming from the allegation that there was no probable cause for defendant's arrest were properly dismissed on an exception of no cause of action, as the claims fell "within the ambit of prosecutorial immunity"); *Miller v. Desoto Reg'l Health Sys*., 2013-639, p. 12 (La. App. 3 Cir. 12/11/13), 128 So. 3d 649, 659 (claims against a DA for malicious prosecution following a physician's arrest, lengthy incarceration and the subsequent dismissal of charges by the DA were properly dismissed on exception of no cause of action as DA's conduct fell "squarely within his role as a prosecutor"); *Hayes v. Par. of Orleans*, 1998-2388 (La. App. 4 Cir. 6/16/99), 737 So. 2d 959 (allegations that there had been no probable cause to arrest and hold the plaintiff, that trial was not timely commenced, and that the State re-

Conversely, where claims against a prosecutor arise from administrative, investigative, or ministerial roles, the prosecutor has only a qualified immunity rather than absolute immunity. *See Buckley*, 509 U.S. at 273; *Knapper*, 1996-0434, p. 10, 681 So. 2d at 950; *Suarez v. DeRosier*, 2017-770 (La. App. 3 Cir. 3/7/18), 241 So. 3d 1086, 1091. *See also*, *Walls v. State*, 1995-1133, 4 (La. App. 3 Cir. 1/31/96), 670 So. 2d 382, 384 ("a prosecutor is not entitled to absolute immunity for administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of prosecution *or for judicial proceedings*") (emphasis added); *Gauthier*, 2018-0861, p. 6 n.5, --- So. 3d at ----, 2019 WL 3311965 at *3 ("a prosecutor is afforded only a qualified immunity for actions taken in an investigatory, administrative, ministerial, or other role that has no functional tie to the *judicial process*") (emphasis added).

There is scant state law in Louisiana defining what conduct falls within the qualified immunity of a prosecutor whose alleged misconduct arises from administrative, investigative or ministerial activities; the vast majority, if not all, of the cases allege misconduct occurring within the scope of a prosecution. However, cases in other jurisdictions have considered what types of conduct fall within this qualified immunity. In *Singleton v. Cannizzaro*, 956 F.3d 773, 777 (5th Cir. 2020), a case on which plaintiffs heavily rely, the Fifth Circuit found that prosecutors who were alleged to have created and issued fake " 'subpoenas' to pressure crime victims and witnesses to meet with them" were not entitled to absolute immunity. The court, noting that the prosecutors "allegedly intentionally avoided the judicial process that Louisiana law requires for obtaining subpoenas," concluded that the "creation and use of the fake subpoenas thus fell 'outside the judicial process.' " *Id.*, 956 F.3d at 784. Additionally, the court observed that the prosecutors' "information-gathering

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indicted plaintiff knowing that there was no probable cause were properly dismissed as this conduct fell within the course and scope of the prosecutor's functions).

is more analogous to investigative police work than advocatory conduct." *Id*., 956 F.3d at 783.

Similarly, in *Buckley*, the Court found that prosecutors were entitled to only a qualified immunity where they engaged in pre-indictment investigations and allegedly fabricated false evidence to present to a grand jury; because this conduct "occurred well before they could properly claim to be acting as advocates." *Buckley*, 509 U.S. at 275. Likewise, a prosecutor who gave pre-arrest advice to police officers was not entitled to absolute immunity because this conduct was not "intimately associated with the judicial phase of the criminal process." *Burns*, 500 U.S. at 493.[14]

There can be no question that a prosecutor's participation in plea bargaining is conduct "intimately associated" with the judicial process. While no court in this state has expressly addressed this issue, numerous cases from other jurisdictions have invariably concluded that this is conduct for which absolute immunity applies.[15] Courts have consistently found that conduct associated with plea bargaining warrants absolute prosecutorial immunity as the conduct "is clearly not administrative or investigative but rather is. . . intimately associated with the prosecutor's role as an advocate of the State in the judicial process." *Cole v. Smith*, 188 F.3d 506 (6th Cir. 1999). In *Taylor v. Kavanagh*, 640 F.2d 450, 453 (2d Cir. 1981), where claims were made that a prosecutor lied during plea negotiations, the court held that, a "prosecutor's activities in the plea bargaining context merit the

[14] Other decisions finding that a prosecutor's conduct fell outside the scope for which absolute immunity would apply include: *Loupe v. O'Bannon*, 824 F.3d 534, 540 (5th Cir. 2016) (prosecutor's order of a warrantless arrest was "not part of [the assistant district attorney's] prosecutorial function"); *Wendrow v. Mich. Dep't of Human Servs*., 534 F. App'x 516, 527 (6th Cir. 2013) ("[p]rosecutors who supervise and participate in unconstitutional police interrogations of a criminal suspect are not entitled to absolute immunity"); *Prince v. Hicks*, 198 F.3d 607 (6th Cir. 1999) (prosecutor was not entitled to absolute immunity when he undertook a preliminary investigation and advised police that probable cause existed to make an arrest).

[15] As the Supreme Court, too, observed, "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971).

protection of absolute immunity. The plea negotiation is an 'essential component' of our system of criminal justice."

Notably, one court found that claims that a district attorney's office "did not meaningfully interview [the victim] concerning her version of the events and ignored her input when negotiating a plea deal," were barred by the doctrine of absolute prosecutorial immunity. *Caruso v. Zugibe*, 646 F. App'x 101, 105 (2nd Cir. 2016) ("[i]nsofar as these allegations concern the District Attorney's Office's conduct in the plea bargaining process, it is absolutely immune."). *See also*, *Rouse v. Stacy*, 478 F. App'x 945, 951 (6th Cir. 2012) (following *Imbler*, "[t]he resulting body of case law, without exception, expresses the principle that plea bargains are 'so intimately associated with the prosecutor's role as an advocate of the State in the judicial process as to warrant absolute immunity.' "); *Doe v. Phillips*, 81 F.3d 1204, 1210 (2d Cir. 1996) ("[T]he negotiation of a plea bargain is an act within a prosecutor's jurisdiction as a judicial officer."); *Weary v. Foster*, 33 F.4th 260, 269-70 (5th Cir. 2022) ("A plea negotiation—in which charging, sentencing, and other purely prosecutorial decisions are bargained for—is quintessentially advocatory in function."); *Pfeiffer v. Hartford Fire Ins. Co*., 929 F.2d 1484, 1492 (10th Cir. 1991) (plea bargaining activity warrants absolute immunity "due to its intimate association with the judicial process.").

Courts of other jurisdictions have also held that the sentencing phase of a prosecution is "intimately associated with the judicial phase of the criminal process," thus affording prosecutors absolute immunity for claims of alleged misconduct. *See Rodriguez v. Lewis*, 427 F. App'x 352, 353 (5th Cir. 2011) (per curiam) ("Because [the United States attorney] was acting within the scope of his employment as a prosecutor during the sentencing hearing, he enjoys absolute immunity from *Bivens* [v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] liability."); *Donaghe v. McKay*, 81 F. App'x 925, 926 (9th Cir. 2003) ("The district

court properly concluded that United States Attorney McKay was entitled to absolute immunity, because his role in the sentencing recommendation was 'intimately associated with the judicial phase of the criminal process.' "); *Pinaud v. Cnty. of Suffolk*, 52 F.3d 1139, 1149-50 (2d Cir. 1995) ("we have previously said that conduct in a 'sentencing proceeding' would be protected by absolute prosecutorial immunity,. . . [W]e are bound to hold that a prosecutor's communications with other officials directly pertaining to matters of sentencing are entitled to absolute immunity."); *Taylor*, 640 F.2d at 451-52 ("the Assistant District Attorney's conduct in. . . the sentencing proceeding in state court is protected by the doctrine of absolute prosecutorial immunity.").

With these principles in mind, we now turn to the claims made in the instant matter. This case presents a unique set of circumstances, and there are no reported Louisiana decisions involving prosecutorial misconduct in the context of communications with a victim regarding a defendant's plea bargaining and sentencing. However, based on the foregoing jurisprudence, we disagree with plaintiffs that a prosecutor's conduct during sentencing is "not an integral part of that prosecutor's role in a criminal proceeding." We further disagree with plaintiffs' position that absolute immunity does not apply in this instance because there is no statutory duty of a prosecutor to engage in "pleas discussions" and Judge Burris' request that ADA Dover inquire as to plaintiffs' desire for Mr. Schake's sentence was not "an integral part of the prosecutor's responsibilities as an advocate for the state."

In our view, the jurisprudence fully supports a finding that plea bargaining and sentencing are phases of the "judicial process" for which absolute immunity applies. This is true whether the party harmed by the alleged misconduct is a

defendant, a victim, or some other party.[16] The focus of absolute prosecutorial misconduct is not on the harm suffered or the identity of the injured party. Instead, the focus is on whether the prosecutor's conduct is intimately associated with the judicial process of the prosecution and occurred while the prosecutor was acting within the role of a prosecutor. *See, Knapper*, 1996-0434, pp. 9-10, 681 So. 2d at 950. We agree with the jurisprudence from other jurisdictions that conduct associated with plea bargaining and sentencing is clearly neither administrative nor investigative. We further agree that a prosecutor's alleged misconduct during plea bargaining and sentencing merit the protection of absolute immunity. The petition in this matter, therefore, fails to state a cause of action against ADA Dover; it is clear that all of plaintiffs' allegations arise from ADA Dover's alleged actions or inactions during the judicial phase of the criminal process and while he was acting within the scope of his role as an advocate for the state.

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[16] Notably, at least one court expressly rejected the claim that absolute immunity does not bar claims against a prosecutor when the person harmed is not a defendant but rather an "innocent third party." In *S.J.S. by L.S. v. Faribault Cnty.*, 556 N.W.2d 563 (Minn. Ct. App. 1996), a malicious prosecution suit was filed against a prosecutor for providing an unedited copy of a minor victim's sexual assault interview to a defendant's attorney in discovery who, in turn, provided it to the defendant. The defendant shared the statement with friends and kept it on his coffee table at home. The court rejected the claim that the prosecutorial immunity defense was intended "to protect a prosecutor only from civil liability to former defendants in criminal cases brought by the prosecutor. . . [and not to a] suit by innocent third parties." *Id.*, 556 N.W.2d at 565-66. The Court found as follows:

> [T]he vigorous and fearless performance of prosecutorial duties is essential to the proper functioning of the criminal justice system and, therefore, to the broader public interest. *Brown [v. Dayton Hudson Corp.]*, 314 N.W.2d [210,] 213 (citing *Imbler v. Pachtman*, 424 U.S. 409, 427, 96 S.Ct. 984, 993, 47 L.Ed.2d 128 (1976)). The purpose of extending absolute immunity to prosecutors is to prevent the possibility that the risk of having to defend a lawsuit would deter a prosecutor from the fearless and vigorous performance of the prosecutorial function. *Id*. at 213 (citing *Imbler*, 424 U.S. at 423, 427, 96 S.Ct. at 991, 993).
>
> The deterrent effect of the threat of litigation exists regardless of the plaintiff's status as a former criminal defendant or innocent third party. Thus, to ensure vigorous and fearless performance of the prosecutorial function, and thereby promote the broader public interest, absolute immunity must protect prosecutors from civil liability to any plaintiff for acts that occur in the performance of prosecutorial duties.

Id., 556 N.W.2d at 566.

Plaintiffs submit that, because sentencing is a "function exclusive to the sentencing judge," it "is not a **necessary** function of prosecutors." (Emphasis supplied). An analogous argument was made in *Geter v. Fortenberry,* 849 F.2d 1550 (5th Cir. 1988), where suit was filed against a prosecutor for allegedly improperly influencing a trial judge to set trial with only two days-notice to the defendant's counsel. Plaintiffs argued that, because the setting of trial in criminal cases is within the control of a trial judge, the prosecutor was not entitled to absolute immunity. The court rejected this argument, stating:

> If we parse the activities of a prosecutor incident to the bringing and trial of a case so closely, the cloak of immunity would be tattered. There is no principled way to distinguish this conduct from other actions in the course of a prosecution that have previously been held absolutely immune. To accept Geter's rationale would conflict with *Imbler's* holding that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages. . . ."

Geter, 849 F.2d at 1555. We agree with the reasoning of *Geter* and find no merit in this argument. While only a judge may sentence a defendant, the sentencing phase is clearly part of the "judicial phase" of a prosecution.

Nor are we persuaded by plaintiffs' argument that a "prosecutor's integral function in the prosecution of a criminal defendant ends upon a guilty plea or a jury or judge verdict." Numerous cases reflect that a prosecutor's role extends well beyond that time. *See, e.g., Jenkins v. Walker*, 620 F. App'x 709, 711 (11th Cir. 2015) (A "prosecutor's actions 'intimately associated with the judicial phase of the criminal process' are protected by absolute immunity. . . This immunity extends to the post-sentencing conduct of a prosecutor. . . Thus, a prosecutor has absolute immunity for [the] presentation of evidence at post-sentencing habeas corpus proceedings.") (internal citations omitted); *Hart v. Hodges,* 587 F.3d 1288, 1298 (11th Cir. 2009) (where the prosecutor was attempting "to advocate the judicial sentence he understood (whether correctly or mistakenly) had been imposed by the

state trial court," this activity was "so intimately associated with the judicial phase of the criminal process" that it "cloak[ed] [the prosecutor] with absolute immunity from suits for damages."); *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994) (absolute immunity was affirmed where prosecutor "was handling the postconviction motions [sic] and the initial direct appeal . . . [and thus] still functioning as an advocate for the State, and not in an investigatory capacity.").

Plaintiffs suggest that ADA Dover's conduct is especially egregious because it was intentional and involved a vulnerable minor victim of a sexual crime and for this reason, he should not be afforded absolute prosecutorial immunity. We are mindful of plaintiffs' position but note that virtually every case seeking damages for prosecutorial misconduct involves some act of an egregious nature, often intentional; and, as *Knapper* made clear, prosecutors are protected by absolute immunity regardless of whether there is evidence of malice. *See also, Cousin v. Small*, 325 F.3d 627, 635 (5th Cir. 2003) ("Wilful or malicious prosecutorial misconduct is egregious by definition, yet prosecutors are absolutely immune from liability for such conduct if it occurs in the exercise of their advocatory function."); *Bernard v. Cnty. of Suffolk*, 356 F.3d 495, 504-05 (2d Cir. 2004) (" 'absolute immunity spares the official any scrutiny of his motives' so that allegations of 'bad faith or. . . malice [cannot] defeat[ ] a claim of absolute immunity' ") (quoting *Dorman v. Higgins*, 821 F.2d 133, 139 (2d Cir.1987)).

As one court explained:

> [I]t would be inappropriate here to engage in "judicial scrutiny of the motives for the prosecutor's actions. . . ." **"[A] judicial act 'does not become less judicial by virtue of an allegation of malice or corruption of motive**.' " The converse of this maxim must also be true: an act does not become more judicial by claiming a worthy motive. . . . Because [i]t is the nature of the function performed . . . that inform[s] our immunity analysis," we decline to ponder the motive. . . . "we look to the [act's] relation to a general function normally performed by a

> [prosecutor]" to determine the applicability of prosecutorial immunity.

Rouse, 478 F. App'x at 950-51 (6th Cir. 2012) (emphasis added; internal citations omitted).[17] We reiterate that our opinion should not be construed as sanctioning improper conduct by a prosecutor, particularly when that conduct impacts a minor victim. However, we decline to adopt an exception to the rule of prosecutorial immunity when a minor victim is involved in the alleged misconduct.

We now turn to plaintiffs' argument that La. R.S. 9:2798.1, entitled "Policymaking or discretionary acts or omissions of public entities or their officers or employees," as positive legislation on the issue of a public official's immunity, supercedes case law and thus, the *Knapper* Court erroneously adopted the absolute immunity doctrine.

Louisiana Revised Statute 9:2798.1 provides immunity to "public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties." La. R.S. 9:2798.1 B. There are exceptions to this immunity as provided in subpart C, as follows:

> C. The provisions of Subsection B of this Section are not applicable:
>
> (1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or
>
> (2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

[17] One decision applied the doctrine of absolute immunity to bar claims for prosecutorial misconduct even where the accused was a ten-year old minor. *Drake v. Howland*, 463 F. App'x 523 (6th Cir. 2012) involved a malicious prosecution lawsuit against a prosecutor who was alleged to have improperly and without probable cause pursued felony charges against the minor for unlawful sexual conduct with a five-year-old. The Court, finding the prosecutor to be absolutely immune, dismissed the case with prejudice.

In our view, this statute does not override the absolute immunity doctrine. First, the statute was enacted in 1985, prior to our decision in *Knapper*. In the more than thirty-five years since that time, it has never been applied to find a prosecutor liable for acts performed during the course and scope of his employment and in the context of the judicial process, even where the alleged conduct could fall within the exception set forth in subpart C (2). Nor has any court found that an exception of no cause of action founded on a prosecutor's absolute immunity is defeated by pleading allegations falling within that subpart. To the contrary, as noted herein, this Court, consistent with virtually every decision of other jurisdictions, has given prosecutors absolute immunity for such actions.

Second, we note the "long line of jurisprudence [holding] that those who enact statutory provisions are presumed to act deliberately and with full knowledge of existing laws on the same subject, *with awareness of court cases* and well-established principles of statutory construction, with knowledge of the effect of their acts and a purpose in view. . . ." *Borel v. Young*, 2007-0419, p. 7 (La. 11/27/07), 989 So. 2d 42, 48 (emphasis added). *See also*, *Par. of Jefferson v. Kennedy*, 2009-145, pp. 4-5 (La. App. 5 Cir. 10/27/09), 28 So. 3d 301; *Buckley*, 509 U.S. at 268 ("[c]ertain immunities were so well established in 1871. . . that 'we presume that Congress would have specifically so provided had it wished to abolish' them."). For decades, courts of this state have consistently dismissed claims against prosecutors based on the doctrine of absolute prosecutorial immunity. The lack of any legislative change to this statute confirms that absolute prosecutorial immunity remains a valid doctrine under Louisiana law.

One recent appellate decision considered the interplay between a judge's absolute immunity and La. R.S. 9:2798.1. In *Johnson v. Jasmine*, 2019-365 (La. App. 5 Cir. 1/29/20), 289 So. 3d 1209, the plaintiff filed suit against a trial judge alleging that she abused her authority when she issued an order in connection with a

child custody hearing. At the hearing, only the plaintiff, the father of the children, appeared. The lawsuit alleged that, after the hearing concluded, the children's mother appeared and the judge engaged in *ex parte* communications. Because the judge issued a custody order that differed from the proposed custody plan submitted by the father, he alleged that the trial judge "willfully, negligently, maliciously, and recklessly abused her authority." *Id*., 2019-365, p. 2, 289 So. 3d at 1211. In response to the lawsuit, the judge filed an exception of no cause of action based on the principle that judges are afforded absolute immunity while performing judicial acts.

Among the arguments plaintiff raised in opposition to the exception was that, under La. R.S. 9:2798.1 C, a judge "is not insulated from liability in this case because La. R.S. 9:2798.1, often called the 'discretionary immunity doctrine' " does not grant immunity to public officials for. . . 'acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.' " *Id*., 2019-365, p. 4, 289 So. 3d at 1212. The court of appeal rejected this argument, observing that, when a judge performs judicial acts, "the immunity from civil liability has been considered absolute, even in cases in which the judge acts with malice." *Id*. (citing *Knapper*). The court reiterated that "public officials are immune from liability for discretionary acts 'when such acts are within the course and scope of their lawful powers and duties.' " *Id*., 2019-365, p. 5, 289 So. 3d at 1212.

In our view, as discussed herein, case law clearly recognizes the doctrine of absolute prosecutorial immunity, even where the alleged misconduct falls within the scope of paragraph C. We agree with the reasoning of the *Rouse* Court that this immunity applies irrespective of a prosecutor's motive. *See Rouse*, 478 F. App'x at 950 ("[A] judicial act 'does not become less judicial by virtue of an allegation of malice or corruption of motive.' ") (quoting *Mireles v. Waco*, 502 U.S. 9, 13 (1991)). It would be wholly incongruous to provide prosecutors with absolute immunity even

where alleged misconduct is intentional or malicious, as courts have consistently held, yet subject them to the provisions of paragraph C. To hold otherwise would invalidate the doctrine of absolute prosecutorial immunity altogether. Immunity for conduct falling within the scope of the prosecutor's role as an advocate for the state and which is intimately associated with the conduct of the judicial phase of the criminal process is *absolute*, La. R.S. 9:2798.1 notwithstanding.

Plaintiffs' final contention concerns victims' rights under Louisiana law, both under our constitution and by statute. The provision of our constitution pertaining to victims' rights is found in Article I, § 25 and it states:

> Any person who is a victim of crime shall be treated with fairness, dignity, and respect, and shall be informed of the rights accorded under this Section. As defined by law, a victim of crime shall have the right to reasonable notice and to be present and heard during all critical stages of preconviction and postconviction proceedings; the right to be informed upon the release from custody or the escape of the accused or the offender; the right to confer with the prosecution prior to final disposition of the case; the right to refuse to be interviewed by the accused or a representative of the accused; the right to review and comment upon the presentence report prior to imposition of sentence; the right to seek restitution; and the right to a reasonably prompt conclusion of the case.

The CVRB provides similar rights, including, but not limited to: advance notification concerning judicial proceedings or probation hearing with a right to be present; the right to retain counsel to confer with law enforcement and judicial agencies regarding the disposition of the case; notification of scheduling changes; the right to review and comment on presentence or postsentence reports; the right to be present and heard at all critical stages of the proceeding; and the right to be notified of pardon or parole.

Importantly, both La. Const. art. I, § 25 and the CVBR explicitly state that no cause of action is conferred therein. The constitutional provision states:

> Nothing in this Section shall be construed to inure to the benefit of an accused or to confer upon any person the

> right to appeal or seek supervisory review of any judicial decision made in a criminal proceeding. Nothing in this Section shall be the basis for an award of costs or attorney fees, for the appointment of counsel for a victim, *or for any cause of action for compensation or damages* against the state of Louisiana, a political subdivision, a public agency, or a court, or any officer, employee, or agent thereof.

(Emphasis added). Similarly, the CVBR states that "[n]othing in this Section shall be construed as creating a cause of action by or on behalf of any person for an award of costs or attorney fees, for the appointment of counsel for a victim, *or for any cause of action for compensation or damages* against the state of Louisiana, a political subdivision, a public agency, or a court, or any officer, employee, or agent thereof." La. R.S. 46:1844 U. (Emphasis added). These provisions are explicit; neither our constitution nor the CVBR provide a cause of action for the claims asserted in this lawsuit.

Accordingly, we find that ADA Dover is entitled to absolute immunity for the claims alleged in this lawsuit and, thus, the petition fails to state a cause of action against him. It follows that there can be no cause of action against DA Montgomery, either under a theory of vicarious liability or for employment-related claims. As noted, we recently explained that "an employer can only be liable under theories of negligent hiring, supervision, training and retention. . . if the employee is at fault[;]. . . the employer cannot be liable if the employee is not at fault." *Martin*, 2021-01490, p. 13, 346 So. 3d at 247.

We note, too, that the Supreme Court found that absolute prosecutorial immunity bar such claims. In *Van de Kamp v. Goldstein*, 555 U.S. 335, 339 (2008), the Court considered whether prosecutorial immunity extends to claims "that the prosecution failed to disclose impeachment material. . . due to: (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about

informants." The Court held that "a prosecutor's absolute immunity extends to all these claims" as well. *Id*.

DECREE

Based on the foregoing, the judgments of the lower courts are reversed and we enter judgment sustaining the exception of no cause of action and dismissing the suit with prejudice.

REVERSED; EXCEPTION OF NO CAUSE OF ACTION SUSTAINED.

SUPREME COURT OF LOUISIANA

No. 2022-CC-01784

GABRIELLE C. JAMESON AND KIM L. JAMESON WIFE OF/AND BOBBY A. JAMESON

VS.

HONORABLE WARREN L. MONTGOMERY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS THE DISTRICT ATTORNEY OF ST. TAMMANY PARISH, IAIN DOVER, IN HIS INDIVIDUAL CAPACITY AND UNDERWRITERS AT LLOYD'S LONDON A/K/A LLOYD'S ILLINOIS, INC.

On Supervisory Writ to the 22nd Judicial District Court, Parish of St. Tammany

WEIMER, C.J., concurring in the result.

I respectfully concur in the result because I believe plaintiffs are not afforded a remedy in law for damages against ADA Dover and DA Montgomery based on the facts alleged in the pleading.

The majority opinion indicates "our case law supports a finding that a prosecutor is afforded absolute immunity for acts or omissions that 'fall within the scope of the prosecutor's role as an advocate for the state and are intimately associated with the conduct of the judicial phase of the criminal process.'" **Jameson v. Montgomery**, 22-01784, slip op. at 7 (La. 5/__/23) (quoting **Knapper v. Connick**, 96-0434, p. 10 (La. 10/15/96), 681 So.2d 944, 950). The majority opinion recognizes "[t]he doctrine of absolute prosecutorial immunity evolved from the decision of the United States Supreme Court in **Imbler v. Pachtman**, 424 U.S. 409 (1976)." **Jameson**, 22-01784, slip op. at 8. However, as a civil law jurisdiction, Louisiana court decisions should be based on statutory enactments, the primary source of law,

when statutory authority exists. See La. C.C. arts. 1[1] and 2;[2] but see La. C.C. art. 4,[3] which provides an exception if there is no applicable legislation or custom. Judicial decisions are not generally intended to be an authoritative source of law in Louisiana. **Spencer v. Valero Refining Meraux, L.L.C.**, 22-00469, 22-00539, 22-00730, p. 1 (La. 1/1/23), 356 So.3d 936, 953 (Weimer, C.J., concurring) (citing **Doerr v. Mobil Oil Corp.**, 00-0947, p. 13 (La. 12/19/00), 774 So.2d 119, 128).

Louisiana C.C. art. 2315 is the fountainhead of civil liability, as it requires that "(e)very act whatever of man that causes damage to another" be redressed by "him by whose fault it happened." See **Lejeune v. Rayne Branch Hosp.**, 556 So.2d 559, 563 (La. 1990).

Louisiana R.S. 9:2798.1 addresses the immunity afforded to a "public entity" and the employees of a public entity. The following are included in the list of public entities: "the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions." La. R.S. 9:2798.1(A). Nothing in Section 2798.1 excludes the district attorney's office or the employees of the district attorney's office from the provisions of the statute. As recognized by the majority, immunity is statutorily provided "to 'public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts

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[1] "The sources of law are legislation and custom." La. C.C. art. 1.

[2] "Legislation is a solemn expression of legislative will." La. C.C. art. 2.

[3] "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." La. C.C. art. 4.

are within the course and scope of their lawful powers and duties.'" **Jameson**, 22-01784, slip op. at 21 (quoting La. R.S. 9:2798.1(B)). However, immunity does not apply when:

> (1) ... acts or omissions ... are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or
>
> (2) ... acts or omissions ... constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

La. R.S. 9:2798.1(C).

In their petition, the plaintiffs allege acts or omissions that "constitute ... fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct." The majority opinion discounts the applicability of La. R.S. 9:2798.1 to a district attorney's office or its employee because the statute was enacted in 1985, prior to **Knapper**, and was not applied in **Knapper**. However, these facts are not determinative. The absence of a reference to Section 2798.1 in the **Knapper** case does not evidence the legislature's intent to exempt the district attorney's office or its employees from the provisions of Section 2798.1. As indicated, it is the language of the statute, not the absence of the mention of a statute in a judicial decision, that must be considered in determining the applicability of La. R.S. 9:2798.1. Possibly, the applicability of the statute was simply not argued in **Knapper** or missed by the court. The fact that 35 years has elapsed without the statute being applied to a district attorney's office or its employees is also not determinative. Based on a civil law analysis, the only relevant factors in determining the applicability of Section 2798.1 in this case are the language of the statute and the facts alleged by the plaintiffs. In our civil law system, an applicable statute is not rendered inapplicable or eradicated simply because the statute is missed or ignored by courts or not argued by litigants.

A statute cannot be rendered inapplicable by case law unless the statute is declared unconstitutional by a court.

Although La. R.S. 9:2798.1 does not entitle the assistant district attorney or district attorney to absolute immunity under the facts alleged in the instant pleadings, I nevertheless believe that the plaintiffs have failed to state a cause of action because the law does not provide for a civil remedy in the form of damages for the court's failure to impose the sentence desired or requested by the victim and not relayed by the assistant district attorney.

I am not insensitive to the wrong inflicted on the victim of this crime, and I realize this ordeal has created distress. However, the criminal defendant, because of his actions directed to a plaintiff, was punished by the court when a criminal sentence was imposed. The system of justice does not entitle the victim to decide the sentence; that is the obligation of the court. Clearly, the victim of a crime can and should have input. However, ultimately, the question is whether compensatory damages should be awarded if the assistant district attorney, for whatever reasons, fails to promote or communicate the sentence expected by the victim. I do not find plaintiffs here are entitled to such compensation or damages. Notably, not each and every type of damage is legally compensable. **Spencer**, 22-00469 at 1, 356 So.3d at 953 (Weimer, C.J., concurring). Here, the victim's remedy relative to the district attorney's office instead lies at the ballot box.

Furthermore, it is challenging for the legal system to quantify damages for the failure of a judge to impose a sentence preferred by the victim, regardless of the actions of an assistant district attorney. For many of the same reasons articulated by the majority for applying immunity for alleged damages, the alleged acts of the

assistant district attorney should not be legally compensable. I note that a civil suit has been filed by the plaintiffs against the criminal defendant.

For these reasons, I respectfully concur with the majority's sustaining of the exception raising the objection of no cause of action.

SUPREME COURT OF LOUISIANA

No. 2022-CC-01784

GABRIELLE C. JAMESON AND KIM L. JAMESON WIFE OF/AND BOBBY A. JAMESON

VS.

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On Supervisory Writ to the 22nd Judicial District Court, Parish of St. Tammany

Hughes, J., dissents in part.

The assistant district attorney was dishonest with both the victim and the judge. These intentional dishonest acts were outside the course and scope of his duties as an assistant district attorney. I would therefore deny the exception of no cause of action as to the assistant district attorney.