SUMMARY
July 11, 2024

**2024COA71**

**No. 21CA0111, *Wolf v. Brenneman* — Criminal Law — Grand Juries — Witnesses — Absolute Immunity**

A division of the court of appeals holds, as a matter of first impression, that witnesses enjoy absolute immunity from civil liability for their testimony to a grand jury, irrespective of whether a witness may be characterized as a "complaining witness." The division also holds that grand jury witnesses are not entitled to absolute immunity for statements made to law enforcement prior to their grand jury testimony.

COLORADO COURT OF APPEALS **2024COA71**

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Court of Appeals No. 21CA0111
City and County of Denver District Court No. 19CV31692
Honorable Michael J. Vallejos, Judge

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Daniel Wolf,

Plaintiff-Appellant,

v.

Michael J. Brenneman and Jeffrey B. Selby,

Defendants-Appellees.

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JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE BERGER*
Tow and Martinez*, JJ., concur

Prior Opinion Announced July 28, 2022, Vacated in 22SC682

Announced July 11, 2024

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 This is an appeal of the district court's dismissal of claims of malicious prosecution, abuse of process, false imprisonment, and civil conspiracy brought by plaintiff, Daniel Wolf, against defendants, Michael J. Brenneman and Jeffrey B. Selby. The district court dismissed most, but not all, of plaintiff's claims on the basis of absolute immunity and certified its dismissal order for immediate appeal under C.R.C.P. 54(b).

¶ 2 In *Wolf v. Brenneman*, (Colo. App. No. 21CA0111, July 28, 2022) (not published pursuant to C.A.R. 35(e)) (*Wolf I*), a split division of this court dismissed this appeal.[1] The division concluded, applying *Allison v. Engel*, 2017 COA 43, that the district court's C.R.C.P. 54(b) certification was ineffective to vest this court with appellate jurisdiction.

¶ 3 After granting certiorari, the Colorado Supreme Court vacated this court's dismissal order and expressly overruled *Allison*. *Wolf v. Brenneman*, 2024 CO 31, ¶¶ 18, 20 (*Wolf II*). The supreme court

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[1] The original division in this case comprised Judge John D. Dailey, now retired, Judge Michael H. Berger, now a senior judge, and Judge Ted C. Tow III. For this opinion, the division has been reconstituted with Judge Tow, Judge Berger, and former Colorado Supreme Court Justice Alex J. Martinez.

directed us on remand to determine if we have appellate jurisdiction after applying the correct test for evaluating a C.R.C.P. 54(b) order. *Id.* at ¶ 19.

¶ 4 After doing so, we conclude that we have appellate jurisdiction.

¶ 5 As to the merits of this case, we hold, as a matter of first impression, that witnesses enjoy absolute immunity from civil liability for their testimony to a grand jury, irrespective of whether a witness may be characterized as a "complaining witness." We also hold that grand jury witnesses are not entitled to absolute immunity for statements made to law enforcement before their grand jury testimony. Based on these holdings, we affirm in part and reverse in part the district court's judgment and remand for further proceedings.

## I. Relevant Facts and Procedural History

¶ 6 In the early 2000s, Brenneman and Selby (1) decided to build a Four Seasons Hotel and Private Residences (the project) in Denver and (2) created several limited liability entities through which the project was managed and operated. The two men owned nearly

100% of the project at its inception and contributed a substantial amount of capital.

¶ 7 Brenneman and Selby hired Wolf to help manage the project. On several occasions, Brenneman and Selby encountered financing issues and obtained cash investments from Solomon Marcos in return for ownership interests in the limited liability entities. Eventually, Marcos's investments in the project resulted in him owning what amounted to a majority stake in the project, with Brenneman's and Selby's interests reduced to around 1%.

¶ 8 Marcos took control of the project from Brenneman and Selby and hired Wolf as a project manager. From 2010 to 2014, Wolf and Marcos began restructuring the debt on the project. Starting in 2014, in an attempt to recoup their investment, Brenneman and Selby unsuccessfully tried to get Wolf and Marcos to buy out their interests in the project.

¶ 9 According to Wolf, in 2017, as part of an ongoing series of attempts to coerce him to buy those interests, Brenneman and Selby accused him of engaging in self-dealing by transferring over two million dollars in improper "asset management fees" to a

company under his control. Brenneman and Selby contacted the Denver District Attorney's Office (DA) about the matter, and the DA commenced a grand jury investigation, which eventually resulted in an indictment against Wolf on charges of theft and conspiracy to commit theft.

¶ 10 Following the grand jury indictment, Brenneman and Selby provided information for a front-page story on the project by Westword, a Denver newspaper. Alan Prendergast, *How the Quest to Build the Four Seasons Led to Criminal Charges*, Westword (May 16, 2018), https://perma.cc/JHX7-XXHV. The story included quotations from Brenneman and Selby accusing Wolf of "fraudulent theft" and "steal[ing] from [them]."

¶ 11 After a week-long trial in 2019, a jury acquitted Wolf of all criminal charges.

¶ 12 Following his acquittal, Wolf instituted the present action, asserting claims against Brenneman and Selby for malicious prosecution, abuse of process, false imprisonment, and civil conspiracy, based on their statements to the DA and their testimony before the grand jury. He also pleaded a claim against

them for defamation of character, based on their statements reported in Westword.

¶ 13 Brenneman and Selby moved to dismiss Wolf's amended complaint under C.R.C.P. 12(b)(5) for failing to state a claim upon which relief could be granted. The district court dismissed all but Wolf's defamation claim based on the statements to Westword because, the court said, Brenneman and Selby "are protected from civil liability and have absolute immunity from [the other] claims[,] . . . even where the accusation in the civil suit is that they lied from the outset, sparked the investigation, lied to the grand jury, and at trial."

¶ 14 The district court then certified its order as a final judgment for purposes of appeal under C.R.C.P. 54(b); a split division of this court applied *Allison* and dismissed the appeal for lack of jurisdiction, *Wolf I*, slip op. at ¶ 18; and the supreme court vacated our dismissal order and expressly overruled *Allison*, *Wolf II*, ¶ 20. The supreme court concluded that the strict rules set forth in *Allison* were inconsistent with both the language of C.R.C.P. 54(b) and that court's prior precedents. *Id.* at ¶¶ 16-18.

## II. Appellate Jurisdiction

¶ 15 The supreme court directed us on remand to determine if we have appellate jurisdiction after applying the correct test for evaluating the validity of a C.R.C.P. 54(b) order. *Id.* at ¶ 19.

¶ 16 A three-step test governs the validity of a certification order. *Id.* at ¶ 16. "First, the trial court 'must determine that the decision to be certified is a ruling upon an 'entire claim for relief.'" *Id.* (quoting *Harding Glass Co. v. Jones*, 640 P.2d 1123, 1125 (Colo. 1982)). Second, the district court "must conclude that the decision is final 'in the sense of an ultimate disposition of an individual claim.'" *Id.* (quoting *Harding Glass*, 640 P.2d at 1125). Third, the court "must determine whether there is just reason for delay in entry of a final judgment on the claim." *Id.* (quoting *Harding Glass*, 640 P.2d at 1125).

¶ 17 There is no question that the first two steps of the *Wolf II* test are met. We therefore turn to the third step.

¶ 18 In *Wolf II*, the supreme court held that "[a]ppellate courts reviewing a district court's finding that there is 'no just reason for delay' in a Rule 54(b) certification order do so only to determine

whether the court abused its discretion and may overturn those decisions only if they are 'manifestly arbitrary, unreasonable or unfair.'" *Id.* at ¶ 18 (quoting *In re Storey*, 2022 CO 48, ¶ 35).

¶ 19 In its certification order, the district court expressly found that immediate appellate review would (1) prevent the parties from being "forced to have the expense of two trials" and (2) aid the district court in conducting an eventual trial because resolution of the dismissed claims was "likely to control the remaining claim and resolution of this case."

¶ 20 Had a trial proceeded based only on the defamation claim premised on the Westword article, and then, later, an appellate court reversed in whole or in part the dismissal order (as we do in this opinion), a second jury trial would have required the presentation of most (but not all) of the same evidence. Appellate review of the absolute immunity dismissals almost certainly would have obviated the need for two jury trials.

¶ 21 We also observe that the basis for the dismissal of the claims was absolute immunity, a question of law. The very nature of the defense of absolute immunity is relevant, though not dispositive, as

to whether a C.R.C.P. 54(b) certification is a reasonable course of action by a district court. *See Hoffler v. Colo. Dep't of Corr.*, 27 P.3d 371, 373-74 (Colo. 2001). Indeed, in *Wolf II*, the supreme court stated that "[t]he fact that the underlying substantive issue is immunity from suit is one factor of many that a court may consider in deciding to certify under C.R.C.P. 54(b)." *Wolf II*, ¶ 18 n.2.

¶ 22 That said, the risk of multiple trials by itself will not usually be sufficient to support a Rule 54(b) certification. Nor will a district court's desire to have an appellate court's views on the relevant issues before conducting a trial. Rather, each certification order must be reviewed based on the specific facts and circumstances presented, not on the basis of *Allison*'s black letter rules, which the supreme court rejected in *Wolf II*.

¶ 23 When we consider the specific facts and circumstances of this case that are relevant to whether there is just reason for delay in entry of a final judgment on the claims, we cannot conclude that the district court's certification decision was "manifestly arbitrary, unreasonable or unfair." *Id.* at ¶ 18 (quoting *Storey*, ¶ 35).

¶ 24 Accordingly, the district court's C.R.C.P. 54(b) order vested us with appellate jurisdiction. We now proceed to address the merits of this appeal.

## III. Merits Analysis

¶ 25 Wolf contends that the district court erred by dismissing on grounds of absolute immunity his claims against Brenneman and Selby for malicious prosecution, abuse of process, false imprisonment, and civil conspiracy. We agree, in part.

### A. Standard of Review

¶ 26 The district court dismissed the claims because it determined that Brenneman and Selby were, as a matter of law, absolutely immune from liability on the dismissed claims.

¶ 27 Whether Brenneman and Selby are entitled to absolute immunity for those claims is a question of law that we review de novo. *See Churchill v. Univ. of Colo.*, 293 P.3d 16, 25 (Colo. App. 2010) ("Whether the Board of Regents had quasi-judicial immunity (and therefore, absolute immunity) is a question of law to be determined by the court, not the jury." (citing *Scott v. Hern*, 216

F.3d 897, 908 (10th Cir. 2000))), *aff'd on other grounds*, 2012 CO 54.

¶ 28 On appeal, Wolf contends that the district court erred by finding Brenneman and Selby immune from civil liability for allegedly (1) providing, as complaining witnesses, false testimony before a grand jury; and (2) lying to a law enforcement officer to instigate or procure a false criminal prosecution. We conclude that absolute immunity applies to the grand jury testimony but not to allegedly false statements made to law enforcement.

B. Absolute Immunity for Witnesses in Judicial Proceedings

¶ 29 At common law, witnesses are absolutely immune from civil liability for testimony given in judicial proceedings. *Wagner v. Hilkey*, 914 P.2d 460, 462 (Colo. App. 1995) (*Wagner I*), *aff'd sub nom. Wagner v. Bd. of Cnty. Comm'rs*, 933 P.2d 1311, 1312 (Colo. 1997) (*Wagner II*).

¶ 30 Absolute immunity exists "even if the witness knew the statements were false and made them with malice." *Id.*

> [T]he common law rule of absolute immunity for witnesses was created to minimize witness intimidation which might otherwise discourage persons from testifying. Further, once

> witnesses do testify, the absolute immunity enhances reliability because those who testify will be less likely to distort their testimony in favor of a future plaintiff in a civil suit for damages.

*Id.*; *see also Dalton v. Miller*, 984 P.2d 666, 669 (Colo. App. 1999).

The reason for absolute immunity is not hard to understand:

> If shadowed by the threat of liability, a witness might testify in a manner that would prevent a potential lawsuit, but would deprive the court of the benefit of candid, unbiased testimony. However, if the threat of subsequent civil liability is removed, witness reliability is otherwise ensured by oath, cross-examination, and the threat of criminal prosecution for perjury.

*Dalton*, 984 P.2d at 669.

C. Absolute Immunity for Testimony Before a Grand Jury

¶ 31 In *Wagner II*, the supreme court, applying a "functional approach," determined that "grand jury proceedings constitute judicial proceedings which entitle participants to absolute immunity from subsequent civil liability." 933 P.2d at 1313. Thus, "witnesses who testify at grand jury proceedings are entitled to absolute immunity for [their grand jury] testimony." *Id.* at 1314.

¶ 32 However, in *Wagner II*, the supreme court posited a possible exception to this rule — that perhaps a "complaining witness" was

not entitled to absolute immunity in connection with his or her grand jury testimony. *See id.*

¶ 33 A "complaining witness," the supreme court said, "is a person who actively instigates or encourages the prosecution of [another]." *Id.*

¶ 34 The supreme court did not determine whether a complaining witness is entitled to absolute immunity for his or her grand jury testimony because the witness at issue in *Wagner II* (a sheriff) was not, the court said, a "complaining witness." *See id.*

¶ 35 In contrast, Brenneman and Selby undoubtedly were complaining witnesses, and we must therefore decide the scope of absolute immunity for a complaining witness, the question left open in *Wagner II*.

¶ 36 Although the Colorado Supreme Court has not decided the question, the United States Supreme Court has. In *Rehberg v. Paulk*, 566 U.S. 356, 359 (2012), the Court recognized that "a 'complaining witness' in a grand jury proceeding is entitled to the same immunity . . . as a witness who testifies at trial," because

there is "no sound reason to draw a distinction for this purpose between grand jury and trial witnesses."[2]

¶ 37 The Court noted that, at common law, a "complaining witness" was one who made the decision to "press . . . charges."[3] *Id.* at 371. But, the Court said, "because no grand jury witness has the power [today] to initiate a prosecution," there is no "workable standard for determining whether a particular grand jury witness is a 'complaining witness.'" *Id.* at 373.

> Here, respondent was the only witness to testify in two of the three grand jury sessions that resulted in indictments. But where multiple witnesses testify before a grand jury, identifying the "complaining witness" would often be difficult. Petitioner suggests that a "complaining witness" is "someone who sets the prosecution in motion.". . . But . . . [c]onsider a case in which the case agent or lead detective testifies before the grand jury and provides a wealth of background information and then a cooperating witness appears and furnishes critical incriminating testimony. Or suppose that two witnesses each provide essential testimony regarding

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[2] *Rehberg v. Paulk*, 566 U.S. 356, 359 (2012), was a civil rights action brought in a federal court under 42 U.S.C. § 1983.

[3] The Court noted that this type of "complaining witness" might not actually ever testify, and thus the term "'witness' is misleading." *Id.* at 370 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 135 (1997) (Scalia, J., concurring)).

> different counts of an indictment or different elements of an offense. In these cases, which witnesses would be "complaining witnesses" and thus vulnerable to suit based on their testimony?

*Id.*

¶ 38 On this analysis, the Court determined there was no reason to differentiate the entitlement to absolute immunity of a "complaining witness" from that of any other type of witness appearing before a grand jury.

¶ 39 We think the Court's analysis is persuasive. Although we are not bound by it on this issue of state law, in the absence of a showing of any reason our common law in Colorado would be different, we reach the same conclusion. *See First Nat'l Bank in Fort Collins v. Rostek*, 182 Colo. 437, 441 n.1, 514 P.2d 314, 316 n.1 (1973).

¶ 40 We hold that all witnesses who testify before a grand jury, including complaining witnesses, enjoy absolute immunity from civil liability based on that testimony.

¶ 41 Consequently, the district court properly dismissed Wolf's claims to the extent they are based on testimony Brenneman and Selby gave to the grand jury.

D. Immunity for Reporting Crimes

¶ 42 The district court also granted absolute immunity to Brenneman and Selby for statements they made to the DA in reporting Wolf's alleged criminal activity. This was error.

¶ 43 As we have noted, absolute immunity bars a claim that is based on a person testifying in a prior judicial proceeding. "Immunity regarding testimony, however, does not 'relate backwards' to events that transpired prior to testifying, even if they are related to subsequent testimony." *Hinchman v. Moore*, 312 F.3d 198, 205 (6th Cir. 2002). Numerous cases support this principle. In *Spurlock v. Satterfield*, 167 F.3d 995, 1001 (6th Cir. 1999), the court held that absolute immunity did not bar the plaintiff's claim that the defendants lied to a state trooper and to prosecutors to establish probable cause to arrest, imprison, and prosecute her. The Seventh Circuit reached the same conclusion in *Stinson v. Gauger*, 868 F.3d 516, 528 (7th Cir. 2017), where the court

explained that, although witnesses at trial have absolute immunity based on their testimony, the plaintiff's claims focused on the defendants' actions while a murder investigation was ongoing, not on their testimony at trial or their preparation to testify at trial.

¶ 44 If the rule were otherwise, little, if anything, would be left of a tort like malicious prosecution. *See, e.g.*, *Hewitt v. Rice*, 154 P.3d 408, 411 (Colo. 2007) (the elements of a claim for malicious prosecution are "(1) the defendant contributed to bringing a prior action against the plaintiff; (2) the prior action ended in favor of the plaintiff; (3) no probable cause; (4) malice; and (5) damages").

¶ 45 Our holding is also consistent with section 653 of the Restatement (Second) of Torts (Am. L. Inst. 1977), which says that individuals who knowingly provide false information to a public prosecutor are liable for malicious prosecution, so long as the criminal proceedings terminate in favor of the accused.

¶ 46 We also reject any contention that Brenneman and Selby enjoy absolute immunity under the common law for their prior extrajudicial conduct. We need not decide whether the common law provides absolute immunity for such conduct because the General

Assembly's 1977 enactment of section 16-3-202(4), C.R.S. 2023, Ch. 211, sec. 1, § 16-3-202(4), 1977 Colo. Sess. Laws 851, would have abrogated any such immunity that may have existed for Brenneman and Selby. *See* § 2-4-211, C.R.S. 2023 (preserving the legislature's authority to abrogate the common law); *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004); *see also Andrade v. Johnson*, 2016 COA 147, ¶ 34.

¶ 47 Section 16-3-202(4) provides that "[p]rivate citizens, acting in good faith, shall be immune from any civil liability for reporting to any police officer or law enforcement authority the commission or suspected commission of any crime."

¶ 48 The General Assembly's "choice of language may be concluded to be a deliberate one calculated to obtain the result dictated by the plain meaning of the words." *Hendricks v. People*, 10 P.3d 1231, 1238 (Colo. 2000) (quoting *City & Cnty. of Denver v. Gallegos*, 916 P.2d 509, 512 (Colo. 1996)). We "should not read a statute to create an exception that the plain language does not suggest, warrant, or mandate." *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000).

¶ 49 As Wolf acknowledges, the statute grants immunity for citizens who report crimes to law enforcement in good faith. It necessarily follows that persons who report a crime in bad faith do not have immunity for their actions.

¶ 50 Wolf alleged that when Brenneman and Selby contacted the DA, they falsely accused him of committing crimes. Because Wolf's allegations encompassed a claim that the two men were not acting in good faith,[4] the district court erred by dismissing, on the basis of absolute immunity, the claims grounded in Brenneman's and Selby's reports to the DA.[5]

## IV. Disposition

¶ 51 The judgment dismissing Wolf's claims is affirmed to the extent the dismissal was based on grand jury testimony. The judgment is reversed to the extent the dismissal was based on

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[4] "False statements, either intentionally or recklessly made, are the antithesis of good faith." *Equitex, Inc. v. Ungar*, 60 P.3d 746, 751 (Colo. App. 2002) (quoting *People v. Kazmierski*, 25 P.3d 1207, 1214 (Colo. 2001)).

[5] Whether Brenneman and Selby are entitled to qualified immunity under section 16-3-202(4), C.R.S. 2023, and what the appropriate process is for making that determination, are not issues before us.

communications by Brenneman and Selby to the DA. The case is remanded for further proceedings consistent with this opinion.

JUDGE TOW and JUSTICE MARTINEZ concur.