COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

WORCESTER, ss. NO. 2022-J-____

JOAO DEPINA

v.

WORCESTER COUNTY DISTRICT ATTORNEY'S OFFICE, et al.

COMMONWEALTH DEFENDANTS' MEMORANDUM IN SUPPORT OF PETITION FOR INTERLOCUTORY RELIEF PURSUANT TO G. L. c. 231, § 118, FIRST PAR.

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INTRODUCTION

This Petition pursuant to G. L. c. 231, § 118, ¶ 1 seeks vacatur of an October 27, 2022 order from the Superior Court (Dupuis, J.) denying a motion to stay discovery and for a protective order ("motion to stay") pending the resolution of an already-served motion to dismiss asserting defenses of absolute prosecutorial immunity, qualified immunity, and sovereign immunity. RA 124. The Petitioners-Defendants (the "Commonwealth Defendants") are: Rachael Rollins, the former District Attorney of Suffolk County and current United States Attorney for the District of Massachusetts; Joseph D. Early, Jr., the District Attorney of Worcester County; Anthony Melia, an Assistant District Attorney; and the Worcester County District Attorney's Office. RA 9-10.

As a matter of settled law, defenses of absolute immunity, qualified immunity, and sovereign immunity confer immunity from suit, not just protection from liability. The Superior Court abused its discretion by stripping the Commonwealth Defendants of their immunity from suit without explanation and requiring the Commonwealth Defendants to engage in invasive, improper, and unnecessary discovery into their prosecutorial decision-making before their defenses have been examined by the court. If absolute prosecutorial immunity is to be meaningful at all, it must prohibit attempts to subject prosecutors to civil discovery in a case, like this one, where even the plaintiff already appears to concede that his suit is largely or

entirely barred by absolute immunity under Massachusetts law as it now stands. RA 24. The Commonwealth Defendants respectfully request that the Single Justice vacate the Superior Court's Order with instructions to stay discovery pending a ruling on the Commonwealth Defendants' motion to dismiss. *See A.J. v. E.J.*, No. 2022-J-0243, 2022 WL 2286092, at *2 (Mass. App. Ct. June 17, 2022) (vacating interlocutory discovery order for abuse of discretion).

BACKGROUND

I. Factual Background.

Plaintiff is a "community activist and past candidate for the Boston City Council." RA 11. He was also, during 2021, a criminal defendant in three pending criminal cases being prosecuted by the Suffolk County District Attorney's Office. RA 12. On November 9, 2021, Defendant Rachael Rollins, then the District Attorney of Suffolk County, spoke at a televised press conference concerning a shooting in Dorchester earlier that day. RA 11. Plaintiff attended the press conference and, according to his allegations, "questioned Rollins over . . . the incompetency of the District Attorney's Office" in investigating his brother's 2014 murder, and "criticiz[ed] Rollins for abusing her power as a public official." RA 11.

On November 12, 2021, the Boston Municipal Court issued a criminal complaint against Plaintiff charging him with intimidation under G. L. c. 268, § 13B on the theory that "DePina intended to intimidate Rollins because the Suffolk District Attorney's

Office, which Rollins was overseeing at the time, had three active pending criminal cases against DePina." RA 12. Plaintiff alleges that Rollins caused the criminal complaint to be filed. RA 12.

The Suffolk County District Attorney's Office recused itself from the prosecution and the case was transferred to Defendant the Worcester County District Attorney's Office for prosecution. RA 12-13. Defendant Joseph D. Early, Jr. is the District Attorney of Worcester County. RA 10. Defendant Anthony Melia was the Assistant District Attorney assigned to prosecute the intimidation case against Plaintiff. RA 10, 13-14. In January 2022, Plaintiff filed a motion to dismiss the prosecution for lack of probable cause. RA 13. In May 2022, the Boston Municipal Court (Fraser, J.) allowed Plaintiff's motion, concluding that Plaintiff had not referenced his pending criminal cases at the press conference and, as a result, Plaintiff's speech was protected by the First Amendment and there was no probable cause for the charge. RA 15-16. The Commonwealth did not appeal from the dismissal. *See* RA 15-16.

II. Procedural Background.

On August 24, 2022, Plaintiff filed a five-count complaint against the Commonwealth Defendants, the Boston Police Department, and Detective Williams. RA 17-22. The complaint asserted claims for Malicious Prosecution under the Massachusetts Civil Rights Act ("MCRA"), G. L. c. 12, § 11I; Malicious Abuse of Process under the MCRA; Retaliation under the MCRA; Intentional or Reckless

Infliction of Emotional Distress; and Negligent Infliction of Emotional Distress. RA 17-22. The Chief Justice of the Superior Court thereafter specially assigned the case to Judge Renee Dupuis. RA 6.

Immediately after filing the complaint, Plaintiff also filed what he called a "Notice of Plaintiff's Certification Pursuant to Rule 11(a)(1)." RA 24-28. In it, Plaintiff appears to concede that his claims are largely if not entirely barred by absolute prosecutorial immunity, but asserts that the lawsuit has been brought in "good faith" for purposes of Mass. R. Civ. P. 11 because he intends to challenge the "currently controlling law" of absolute immunity on appeal:

> This case presents novel theories – but they are brought in good faith . . . . Plaintiff is well aware of the doctrine[] of . . . absolute prosecutorial immunity and that this court may very well dismiss some of the claims, at least, as a matter of currently controlling law. However, this "settled law" should be disturbed and reversed. *See*, *e.g.*, *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022) (even 49 years' worth of "settled" law can be unseated if it receives scrutiny) . . . .
>
> Mass. R. Civ. P. 11(a)(1) permits good faith challenges to these immunity doctrines . . . . The Plaintiff has brought these claims in impact litigation to challenge these immunity doctrines as a matter of public interest . . . .
>
> Enough is enough. Absolute immunity stands on a foundation far more porous and weak than *Roe v. Wade*. This ignoble judicial activist doctrine must be terminated.

RA 24-25, 27. Plaintiff followed this "Notice" with a motion to recuse Judge Dupuis, reiterating that he seeks to create new "legal and economic exposure" for prosecutors and to end protective doctrines that prosecutors (and former prosecutors)

have "enjoyed for decades." RA 30-38. The Superior Court (Dupuis, J.) denied the motion to recuse. RA 7.

On October 6, 2022, Plaintiff served the Commonwealth Defendants with discovery requests. RA 43. On October 24, 2022, the Commonwealth Defendants served Plaintiff with their motion to dismiss under Superior Court Rule 9A. RA 7. The motion to dismiss argues, in relevant part, that: (i) all claims against the Commonwealth Defendants are barred by absolute prosecutorial immunity under *Chicopee Lions Club v. Dist. Atty. for Hampden Dist.*, 396 Mass. 244, 251 (1985), consistent with Plaintiff's acknowledgments in his "Certification Pursuant to Rule 11(a)(1)," RA 104-108; (ii) all claims against the Commonwealth Defendants in their individual capacities are barred by qualified immunity, RA 112-116; and (iii) all claims against the Commonwealth Defendants in their official capacities are barred by sovereign immunity, RA 109. By agreement, Plaintiff's opposition to the motion to dismiss is due on December 5, 2022 and the 9A package for the motion will be filed soon thereafter. RA 7, 121-122.

On October 26, 2022, the Commonwealth Defendants filed the Rule 9A package for their motion to stay, arguing that discovery was not appropriate in light of the forthcoming motion to dismiss asserting absolute, qualified, and sovereign immunity defenses. RA 7, 42-46. Plaintiff opposed the motion and the Commonwealth Defendants submitted a reply, attaching their already-served

Memorandum in Support of Motion to Dismiss. RA 7, 48-54, 93-119. On October 27, 2022, the Superior Court (Dupuis, J.) denied the motion to stay without issuing a written decision, entering a margin order stating: "DENIED." RA 124.

ARGUMENT

The Superior Court abused its discretion by denying the motion to stay discovery pending a ruling on the motion to dismiss. The Commonwealth Defendants respectfully request that the Single Justice vacate the Superior Court's order with instructions to stay discovery pending a ruling on the Commonwealth Defendant's motion to dismiss.

I. Plaintiff Is Not Entitled to Discovery When Absolute Immunity, Qualified Immunity, and Sovereign Immunity Defenses Are Pending.

As the Commonwealth Defendants raise substantial defenses of absolute, qualified, and sovereign immunity, no discovery can properly be taken from them until after a ruling on the motion to dismiss. The rule in this regard is as straightforward as it is firmly entrenched. Indeed, the Commonwealth Defendants are aware of no Massachusetts state or federal case—and Plaintiff cited no such case below—in which pre-motion to dismiss discovery has ever been allowed in a case such as this.

Absolute immunity is an "immunity from suit, rather than a mere defense to liability," which must be "resolved at the earliest possible stage of litigation." *Dinsdale v. Commonwealth*, 424 Mass. 176, 181 n.10 (1997) (internal citations and

quotation marks omitted); *see also Lynch v. Crawford*, 483 Mass. 631, 635 (2019) ("[W]e have interpreted [absolute] immunity to provide protection from suit, not merely from liability"). Where a complaint challenges prosecutorial conduct, the absolute prosecutorial immunity defense must be resolved on the pleadings because "[o]ne of the primary purposes of absolute immunity is to spare public officials the burden of having to defend their official actions in a civil lawsuit," and "[m]erely requiring a prosecutor to file a responsive pleading could involve him in vexatious and harassing litigation." *Chicopee Lions Club*, 396 Mass. at 253; *see Imbler v. Pachtman*, 424 U.S. 409, 425-26 (1976).

Last year, in *Hornibrook v. Richard*, the Supreme Judicial Court discussed the relationship between immunity defenses and discovery. 488 Mass. 74, 83-84 (2021). There, the defendant raised absolute immunity in a motion to dismiss and the Superior Court denied the motion and ordered limited discovery. *Id.* at 78, 83-84. The Supreme Judicial Court reversed, emphasizing that "the question whether a defendant is entitled to absolute immunity is not one that should be determined through 'narrowly tailored discovery.'" *Id*. at 83-84. Rather, "it is incumbent on the plaintiff to set forth factual allegations plausibly suggesting that the defendant acted outside her [protected] jurisdiction" before discovery is allowed. *Id.* at 84. Consistent with these principles, trial courts routinely stay pre-motion to dismiss discovery in cases against prosecutors, judges, and other officials entitled to absolute

immunity. *See*, *e.g.*, *Bettencourt v. Bd. of Registration In Med. of Com. of Mass.*, 904 F.2d 772, 776 (1st Cir. 1990); Wright & Miller, 33 Fed. Prac. & Proc. § 8355 (2d ed.) ("To minimize disruption and expense, a court should not permit discovery until resolution of the threshold issue of immunity.").[1]

Like absolute immunity, qualified immunity defenses "provide protection from suit, not merely from liability[.]" *Lynch*, 483 Mass. at 635. Indeed, "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including avoidance of disruptive discovery." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009), (internal citations and quotation marks omitted); *see Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985). "The qualified immunity principles developed under [42 U.S.C.] § 1983 apply equally to claims under the MCRA." *Howcroft v. City of Peabody*, 51 Mass. App. Ct. 573, 595 (2001), citing *Duarte v. Healy*, 405 Mass. 43, 46–48 (1989). Accordingly, state and federal courts alike routinely emphasize the critical importance of resolving qualified immunity defenses prior to the commencement of discovery. *See Caron v. Silvia*, 32 Mass. App. Ct. 271, 273 (1992) ("[I]t [is] important that the immunity issue be resolved at

[1] For much the same reason that pre-motion to dismiss discovery is not permitted in absolute immunity cases, orders denying motions to dismiss asserting absolute immunity are subject to interlocutory appeal. *Lynch*, 483 Mass. at 635; *see also Fabre v. Walton*, 436 Mass. 517, 521 (2002), quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (denials of absolute immunity are immediately appealable because "[t]he entitlement is an immunity from suit rather than a mere defense to liability" and "is effectively lost if a case is erroneously permitted to go to trial").

the earliest possible stage of litigation, preferably before any discovery . . . ."); *Hudson v. Comm'r of Correction*, 46 Mass. App. Ct. 538, 549 (1999), *aff'd*, 431 Mass. 1 (2000) (affirming stay of discovery pending qualified immunity motion to dismiss); *Mitchell*, 472 U.S. at 526 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until [a] threshold [qualified] immunity question is resolved, discovery should not be allowed."); *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (where qualified immunity defense is raised in a motion to dismiss, a trial court "should resolve that threshold question before permitting discovery" so that "officials are not subjected to unnecessary and burdensome discovery or trial proceedings"); *Est. of Rahim by Rahim v. Doe*, __F.4th__, 2022 WL 11602542, at *7 (1st Cir. Oct. 20, 2022) (trial court erred by permitting discovery prior to resolution of qualified immunity defense).[2]

Finally, where a claim is barred by sovereign immunity, a trial court lacks subject matter jurisdiction over the claim. *See Donahue v. Trial Ct.*, 99 Mass. App.

[2] For much the same reason that pre-motion to dismiss discovery is not permitted in qualified immunity cases, orders denying motions to dismiss asserting qualified immunity are subject to interlocutory appeal. *See Duarte*, 405 Mass. at 44 n.2 ("The case is properly before us because of the importance of determining immunity issues early if immunity is to serve one of its primary purposes: to protect public officials from harassing litigation.").

Ct. 180, 183 (2021). The Supreme Judicial Court has therefore stated that, where sovereign immunity is at issue, "even such pretrial matters as discovery are to be avoided if possible, as [i]nquiries of this kind can be peculiarly disruptive of effective government." *Brum v. Town of Dartmouth*, 428 Mass. 684, 688 (1999) (internal citations and quotation marks omitted). "In light of the desirability of resolving immunity issues quickly, it is preferable to dispose of the question before discovery, as on a motion to dismiss." *Id.*; *see also* Mass. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

Plaintiff here has failed to allege plausible factual allegations suggesting that the Commonwealth Defendants are not immune from suit. *Hornibrook*, 488 Mass. at 84. Indeed, even Plaintiff already appears to concede that his suit is largely or entirely barred by absolute immunity. RA 24-28. A prosecutor's actions are protected by absolute immunity when "directing the efforts of the police in regard" to a "specific suspect" who might be prosecuted, when evaluating information to determine whether the law was being violated, and when initiating prosecution. *Chicopee Lions Club*, 396 Mass. at 250-51; *see* RA 104-108. Here, Rollins allegedly targeted DePina for prosecution and the Worcester County District Attorney's Office and Melia allegedly prosecuted the case and opposed DePina's motion to dismiss. RA 12-15. Early is not alleged to have had any personal involvement in DePina's

criminal case; he has only been named, so far as it appears, because he was the District Attorney of Worcester County with the "power" to "decline" DePina's prosecution if he had wished. RA 10. The Commonwealth Defendants were all engaged in prosecutorial activity and are therefore immune from suit. *Chicopee Lions Club*, 396 Mass. at 250-51. While this Petition does not request a ruling on these dispositive immunity issues from the Single Justice, the manifest strength of the Commonwealth Defendants' absolute immunity arguments—highlighted by Plaintiff's Rule 11(a) "certification" below—strongly weighs in favor of a grant of relief from the unexplained denial of the motion to stay discovery pending the lower court's resolution of the motion to dismiss.

II. The Trial Court Erred When Denying the Commonwealth Defendants' Motion to Stay Discovery.

While it is true that a motion judge has discretion regarding discovery rulings, *Hudson v. Comm'r of Correction*, 431 Mass. 1, 7 n.8 (2000), the Superior Court here acted beyond the scope of its discretion. Massachusetts courts have uniformly rejected similar attempts to seek discovery prior to resolution of pending qualified and absolute immunity defenses. *Hornibrook*, 488 Mass. at 83-84 (reversing trial court's order permitting discovery regarding absolute immunity); *Hudson*, 46 Mass. App. Ct. at 549 (affirming stay of discovery pending resolution of motion to dismiss

on qualified immunity grounds).[3] So too have the federal courts. *Siegert v. Gilley*, 500 U.S. 226, 229-32 (1991) (trial court erred by ordering discovery prior to resolution of qualified immunity defense; "[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit"); *Est. of Rahim*, __F.4th__, 2022 WL 11602542, at *7 (trial court erred by permitting discovery prior to resolution of qualified immunity defense); *see Hornibrook*, 488 Mass. at 83-84 (relying on federal immunity cases). All parties appear to agree that such immunity defenses are at issue in this case—indeed, Plaintiff has filed a certification in the Superior Court characterizing absolute prosecutorial immunity as the "controlling law." RA 24. The Superior Court has thus acted against the Supreme Judicial Court's admonition to decide immunity defenses prior to allowing discovery. *Brum*, 428 Mass. at 688; *Hornibrook*, 488 Mass. at 83-84.

In doing so, the Superior Court has offered no rationale to support its order. RA 124. Nor can such support be discerned from Plaintiff's opposition to the motion to stay. RA 48-54. Plaintiff does not identify a single case in which a Massachusetts

[3] *See also* 18 Mass. Prac., Municipal Law and Practice § 14.8 (5th ed.) ("When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way which protects the substance of the qualified immunity defense so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.").

court has denied a similar motion to stay discovery while awaiting a ruling on a motion to dismiss. And while the Commonwealth Defendants now face the prospect of having their immunities from suit vitiated—including by being subjected to the very kind of discovery into their prosecutorial decision-making that absolute immunity is designed to prevent, *see Chicopee Lions Club,* 396 Mass. at 253; *Imbler*, 424 U.S. at 425-26—Plaintiff has not identified a single harm he might suffer from a stay on pre-motion to dismiss discovery. Rather, Plaintiff acknowledges that he seeks pre-motion to dismiss discovery to "allow[] him to gain a full and complete picture of the behind-the-scenes communications between the Defendants to understand their roles more fully" and to "allow the Supreme Judicial Court a wider lens if this case is taken on appeal." RA 53. Such a fishing expedition cannot and should not be permitted prior to a ruling on the motion to dismiss. *See Alphas Co. v. Kilduff*, 72 Mass. App. Ct. 104, 114 (2008) ("Parties may not 'fish' for evidence on which to base their complaint in hopes of somehow finding something helpful to their case in the course of the discovery procedure.") (internal citations and quotations omitted); *see also Iqbal*, 556 U.S. at 685-86. The Single Justice can and should instead remedy this clear abuse of discretion forthwith. *See Gibbs Ford, Inc. v. United Truck Leasing Corp*., 399 Mass. 8, 10 (1987), quoting *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 614 (1980) (recognizing the single justice's

"broad discretion to . . . 'modify, annul, or suspend the execution of the interlocutory order'").

CONCLUSION

For the foregoing reasons, the Commonwealth Defendants respectfully request that the Single Justice vacate the Superior Court's decision denying the motion to stay discovery pending resolution of the Commonwealth Defendants' motion to dismiss, with instructions that discovery shall be stayed pending a ruling on the motion to dismiss.

Respectfully submitted,

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Date: November 1, 2022

CERTIFICATE OF SERVICE

I, Hannah C. Vail, Assistant Attorney General, hereby certify that I have this day, November 1, 2022, served the foregoing document, upon all parties appearing in this action by emailing a copy to:

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CERTIFICATION PURSUANT TO APPEALS COURT RULE 20.0

I, Hannah C. Vail, hereby certify that the foregoing Memorandum complies with all of the rules of court that pertain to the filing. The Memorandum complies with the applicable length limit in Rule 20.0 because it contains 3,489 non-excluded words in 14-point Times New Roman font, as counted in Microsoft Word (version: Word 2016).

/s/ Hannah C. Vail____
Hannah C. Vail
Assistant Attorney General