OA 10-8-93

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IN THE SUPREME COURT STATE OF FLORIDA
FIRST DISTRICT COURT OF APPEAL

CASE NO.: 89-3210

81,229

THE OFFICE OF THE STATE ATTORNEY,
FOURTH JUDICIAL CIRCUIT OF FLORIDA,

Defendant/Petitioner,

vs.

TINA PARROTINO as personal representative of the Estate of DIANE L. McFARLAND,

Plaintiff/Respondent.
_____/

AMICUS BRIEF IN SUPPORT OF RESPONDENT

ACADEMY OF FLORIDA TRIAL LAWYERS
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Amicus respectfully argues that the promise by the State Attorney to obtain a restraining order not only created the "special relationship" that was the source of the duty for the State Attorney to act but also avoided the prosecutorial immunity since the action promised was not within the contemplated scope of prosecutorial discretion.

I. "SPECIAL RELATIONSHIP"

A recent Fourth District case St. George v. City of Deerfield Beach, 568 So.2d 931 (4th DCA 1990) cert. denied 581 So.2d 1307 reversed a Summary Judgment in favor of a 911 emergency service that mishandled a call for help from the ex- wife of a drunk, bleeding ex-husband who then died due to gasterointestial hemorrhaging.

The Court found that when the ex-wife completed her second call to 911 a special relationship came into being between herself and the 911 service requiring a duty of reasonable care. The Court cited the example of the duty of police to protect an informant who was endangered because he assisted them.

The Fourth District relied upon Chambers-Castanes v. King County, 669 P.2d 451 (Wa.1983) in which a dismissal with prejudice against a county was reversed where numerous calls for help were made after a husband and wife were beaten driving through an area and operators gave assurances that officers had been sent but arrived eighty minutes later. The duty to the individual was held to arise from the privity between the police and the individual

which sets that person apart from the general public and where assurances, explicit or implicit, have been given upon which the person relies. Eg. City of Tampa v. Davis, 226 So.2d 450, 454 (2nd DCA 1969) (municipality liable its agent in privity on contact with tort victim). Sapp v. City of Tallahassee, 348 So.2d 363, 365-366 (1st DCA 1977) cert. denied 354 So.2d 985 (Fla.1977) (city not liable where authorities did not undertake a responsibility to particular member of the public).

II. SOVEREIGN IMMUNITY

Although a governmental entities exercise of discretionary acts at a basic policy level is immune from suit, the exercise of discretionary acts at an operational level is not. State v. Yamuni 529 So.2nd 258 (Fla.1988). Determining whether a particular act falls within the ambit of sovereign immunity requires at least one no answer to the four part test enunciated in Evangelical United Brethren Church v. State, 67 Wash.2d 246, 407, P.2d 440 (1965).

Evaluating the promise by the State Attorney to obtain a restraining order in light of the Evangelical test leads to the following conclusions. This action does not involve a basic governmental policy. Obtainig or failing to obtain a restraining order is not essential to the accomplishment of basic policy but an action which does not change the course of policy. The promise to obtain and the actual issuance of the restraining order does not require the exercise of basic policy evaluation. The District Attorney does possess the requisite authority to make the decision.

A discretionary act must not only involve a basic policy

determination but also be the product of a considered policy decision.

The decision to obtain a restraining order does neither. It does not require a basic policy decision by a high level executive. Rather, it is operational for it involves a type of discretion exercised at the everyday operational level.

III. RELIANCE

Reliance is present for the purposes of a Motion to Dismiss in that reliance was alleged in the Complaint. Although Parrotino may have difficulty proving her claims and the damages caused by the alleged reliance, the allegations alone are sufficient to withstand a Motion to Dismiss. Chambers-Castances v. Kings County, p.34

The Court need not determine whether the story related by the Complaint is true or even that it is supported by some evidence, to use it as a context for consideration of the State's Dismissal Motion. The sufficiency of the evidence will be tested on Summary Judgment, Directed Verdict or Jury Verdict, all the Court need now decide is whether the facts described, if established, would entitle Respondents to relief under the allegations in their Complaint.

IV. PROSECUTORIAL IMMUNITY

A State Judge was not absolutely immune when he demoted and discharged a State employee for discriminatory reasons. Forrester v. White, 484 U.S.219 (1988). The Court stated that the immunity is justified and defined by the functions it protects and serves not by the person to whom it attaches. Forrester, p.227. Accordingly the Supreme Court held the Judge's actions were not immune because they were administrative and not judicial in nature.

In Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965) prosecuting attorneys claimed immunity from suit alleging they filed a complaint with malicious motive. The Court declared the prosecuting attorneys were entitled to quasi-judicial immunity only when acting in their official capacity, but not when acting in a capacity other than quasi-judicial for the reason for his immunity deceases to exist. The function performed, not the person who performs it, is the focus of the inquiry.

Parole officers have been held entitled to quasi-judicial immunity limited to those functions that they perform which are an integral part of a judicial or quasi-judicial proceeding. Taggart v. Washington, 822 P.2d, 243,252. There, the allegation was that the probation officer neither required a particular parolee to submit to drug testing nor contacted his friends or employers to inquire as to his progress. When a parole officer takes purely supervisory or administrative actions no such immunity arises.

Taggart also relied upon the Restatement Second Section 315 for the proposition that the State had a duty to take

reasonable precautions to protect against the dangerous propensities of a State Hospital patient.

> "There is no duty so as to control the conduct of a third person so as to control the conduct of a third person as to prevent him from causing physical harm to another unless small (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third persons conduct or; (b) a special relationship exists between the actor and the other which gives the other a right to protection".
>
> "A duty will be imposed under reinstatement 315 only upon a showing of a definite established and continuing relationship between the defendant and the third party."

Since Parrotino's Complaint against the State Attorney specifically alleges: (1) a "special relationship" giving rise to a duty to her; (2) unrelated to the determination or execution of a basic policy or program; (3) her reliance on their performance of that duty and; (4) performance of that duty is unrelated to the decision whether to criminally prosecute, it states a cause of action for negligence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to: **Robert E. Warren, Esquire, J. Baxter Gillespie, Esquire,** 501 West Bay Street, Jacksonville, Florida 32202, **Darryl D. Kendrick, Esquire,** 1817 Atlantic Boulevard, Jacksonville, Florida 32207, **Brian J. Davis, Esquire,** Duval County Courthouse, Suite #605 Jacksonville, Florida 32202, **Arthur I. Jacobs, Esquire,** P.O. Box 1110, Fernandina Beach, Florida 32034, **Louis F. Hubener, Esquire,** Assistant State Attorney, The Capitol, Suite #1603, Tallahassee, Florida 32399-1050 on this 2nd day of June, 1993.

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By: _____
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