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MAR 8 1995
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IN THE SUPREME COURT
STATE OF FLORIDA

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

Defendant/Petitioner,

CASE NO. 81,229

v.

TINA PARROTINO, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
DIANA L. MCFARLAND

Plaintiff, Respondent.

_____/

Florida Prosecuting Attorneys Association Brief Of Amicus Curiae In Support Of The Petitioner, OFFICE OF THE STATE ATTORNEY, FOURTH JUDICIAL CIRCUIT OF FLORIDA

Arthur I. Jacobs, P.A.
Box I
Fernandina Beach, Florida 32034
Bar No. 108239

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PRELIMINARY STATEMENT

The Florida Prosecuting Attorneys Association will be referred to as "FPAA".

The Office of the State Attorney, Fourth Judicial Circuit will be referred to as "State Attorney".

Diana L. McFarland will be referred to as "Decedent".

The First District Court of Appeals will be referred to as "Court of Appeals" or "the majority".

Tina Parrotino as personal representative of the Estate of Diana L. McFarland will be referred to as "Parrotino".

Any References to the record will be indicated by [R at _____.]

SUMMARY OF THE ARGUMENT

The Court of Appeals failed to recognize the significance of United States Supreme Court decisions and a Florida District Court of Appeals decision concluding that the common law rule of immunity for prosecutors is well settled. The majority has painted with a broad brush in tossing aside prosecutorial immunity at the alter of the Restatement of Torts. A prosecutor's common law immunity arises from the nature of the job and his responsibility to the public he protects. The prosecutor holds a unique position among government officials, one that is analogous to the judiciary. It is in the public interest that prosecutors, like judges be free to concentrate their energies on the performance of their public duties unhampered by suit or judgment.

Section 768.28 of the Florida Statutes is a waiver of sovereign immunity, it is not an abrogation of the pre-existing common law immunities. The Court of Appeals eroded the prosecutors common law immunity by applying the Restatement (second) of Torts § 323 (1965), even though this duty of care has never been applied to prosecutors in Florida. The logical extension of this "qualified immunity" is that a member of the public can now state a cause of action against a state attorney anytime a defendant is not successfully prosecuted and that failure is perceived to increase the risk or harm to that person. A parade of horribles is sure to befall this court, the judiciary of Florida and the state attorneys if the Court of Appeal's abrogation of common law prosecutorial immunity is allowed to stand.

The Court of Appeals found that the state attorneys decision to assist or not assist the decedent was a discretionary act and one that is immune from civil redress. But, that once the state attorney implemented that decision it

has crossed the discretionary/operational line and become operational and thus susceptible to civil redress. The majority has reduced the immune discretionary function to a thought process only. This reasoning can only lead to the conclusion that a state attorney undertaking a discretionary activity such as the decision to render assistance or to prosecute a defendant, must be concerned that he may be civilly liable for any negligence that occurs during the "carrying out" of this discretionary act transmuted by the Court of Appeals into an operational act.

All would agree that the decision by the state attorney to assist the decedent was a discretionary act. The FPAA submits that the actions or omissions by the state attorney in the exercise, implementation or carrying out of this discretionary decision should be immune from liability.

ARGUMENT

POINT ONE

THE OFFICE OF THE STATE ATTORNEY OWED NO COMMON LAW DUTY OF CARE TO DECEDENT

The Court of Appeals held that Parrotino sufficiently alleged a common law duty of care owed by the State Attorney to decedent. This finding is predicated on a special relationship alleged to have occurred when the State Attorney agreed to secure a restraining order and assist police in protecting decedent from further violence. The Court of Appeals further held that Parrotino had sufficiently alleged that decedent relied on the promises, that decedent failed to seek protection elsewhere, that the state attorney negligently failed to carry out the promised protection and that she died as a result.

To reach this conclusion, based on the Restatement (second) of Torts § 323 (1965), the majority had to ignore United States Supreme Court decisions regarding prosecutorial immunity under the common law and 42 U.S.C. § 1983. The majority's analysis necessitated a narrow reading or misreading of Berry v. State, 400 So.2d 80 (Fla. 4th DCA 1981). And finally, the majority had to contend that the duty analysis is the same whether the defendant is a governmental entity or a private individual.

At common law, prosecutors were immune from civil liability for acts taken in their official capacity. Yaselli v. Goff, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927); Imbler v. Pachtman, 424 U.S. 209, 96 S.Ct. 984, 47 L.Ed.2d 128 (1975). The rule was reaffirmed in Butts v. Economou, 438 U.S. 478, 510, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); Virginia

v. Consumers Union of the U.S., 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed. 641 (1980); Harlow v. Fitzgerald, 457 U.S. 809, S.Ct. 2727, 73 L.Ed.2d 396 (1982); and Nixon v. Fitzgerald, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed. 349 (1982).

The court in Imbler confronted the issue of whether a state attorney could be held civilly liable under 42 U.S.C. § 1983. The court first noted that § 1983 would be read in harmony with the common law and predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind the immunity. Imbler, 424 U.S. at 419. The court surveyed various government officials and their related common law liability and concluded that: judges had an absolute common law immunity for acts committed within their judicial discretion, governors and other executive officials had a qualified immunity and finally that prosecutors are absolutely immune at common law for acts within the scope of their prosecutorial duties. Id at 422-23. The court reasoned that public policy dictates that judges and prosecutors not be held liable for acts within their judicial/prosecutorial jurisdiction.

> "The common law immunity of prosecutors is based upon the same considerations that underlay the common law immunity of judges and grand jurors acting within the scope of their duties. These include concerns that harassment by unfounded litigation would cause a deflection of the prosecutors energies from his public duties, and the possibility that he shade his decisions instead of exercising the independence of judgments required by this public trust." Id at 423.

The court went on to hold that the absolute common law immunity of prosecutors dictates the same result here - absolute immunity under § 1983. This is so even though the result is a person without civil redress against a dishonest

or malicious prosecutor. But, the alternative of qualified immunity would disserve the broader public interest. Id at 427.

> "It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, ... Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials."

Imbler at 425, 426 quoting Bradley v. Fisher, supra, 13 Wall. at 349, 20 L.Ed. 646.

If prosecutors are immune from suit under the common law and § 1983 for actions within the scope of their duties they are equally immune from suit based on the Restatement of Torts. Because no duty of care was owned by the state attorney to the decedent, liability cannot be premised on any negligence alleged to have occurred in the handling of decedent's case.

In Berry v. State, 400 So.2d 80, 84 (Fla. 4th DCA 1981), rev. denied 411 So.2d 380 (Fla. 1981), the court unequivocally stated that the statutory waiver of sovereign immunity in Section 768.28, Florida Statutes, did not abrogate "the long-held common law immunity of public prosecutors." The Berry court continued, "[f]or reasons of public policy, a prosecutor enjoys absolute immunity for damages when the [sic] acts within the scope of his prosecutorial duties." Id (emphasis added). Accordingly, the court concluded, the prosecutor was immune from an action for damages arising from his failure to prosecute as a multiple offender a defendant who, upon being paroled, beat and murdered an eight year-old child. The court cites Imbler v. Pachtman, 424 U.S. 409 as authority for the

rationale of prosecutorial immunity. Berry was cited with approval in Trianon Park Condominium Assoc., Inc. v. City of Hialeah, 468 So.2d 912, 920 (Fla. 1985).

Finally, § 768.28(5), Florida Statutes expressly provides that, "[t]he state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances[.]" The Court of Appeals reads this to conclude that the duty analysis is the same whether the defendant is a governmental entity or a private individual. This is simply not a proper reading of the statute. This court in Trianon, 468 So.2d 912, 917 (Fla. 1983) interpreted § 768.28(5): "this effectively means that the identical existing duties for private persons apply to governmental entities." Thus, the actions or decisions of a prosecutor cannot be evaluated on the same basis as a private attorney. Private attorneys are not charged with the public responsibilities of a prosecutor. "An individual under like circumstances," must be read to mean that a state attorney can be held liable in the same manner as a common law prosecutor (with his common law immunity) and not in the same manner as a private attorney. Further, in Trianon this court found persuasive the argument by the city that law enforcement is not the kind of activity for which the state intended to waive its immunity since it is not the type of activity engaged in by private individuals. Id at 917. Similarly, decisions or omission by the state attorney at bar, relating to the domestic violence program and restraining orders are obviously not the type of activity engaged in by private individuals/attorneys. Therefore, Florida Statute 768.28 does not waive the common law immunity of prosecutors.

POINT TWO

THE ACTIONS AND OMISSIONS OF THE OFFICE OF THE STATE ATTORNEY IN CARRYING OUT ITS UNDERTAKING TO SECURE A RESTRAINING ORDER ARE DISCRETIONARY ACTIVITIES FOR WHICH THE OFFICE OF THE STATE ATTORNEY IS IMMUNE FROM LIABILITY.

The majority finds that the actions/omissions of the state attorney were not immune under the discretionary/operational dichotomy outlined in Trianon. Essential to the holding is the assumption that an act is transformed from a discretionary one for which immunity is provided, such as enforcement of laws and protection of public safety, into an operational one for which no immunity exists simply by virtue of the fact that action is taken. The majority would seem to limit a discretionary function to a thought process only. It would be for example a decision. Any action taken in furtherance, however, would be operational. Surely, this is not the framework the honorable majority meant to leave for states attorneys. Fortunately, in Trianon this court drew a distinction not only between thought and action but between discretionary activity and operation activity.

> "How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance for which there has never been a common law duty of care."

Trianon, 468 So.2d at 919.

> Additionally, "[i]n considering governmental tort liability under these four categories, we find that there is no governmental tort liability for the action or inaction of governmental officials or employees in carrying out the discretionary functions described in categories I [legislative, permitting,

> particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a "nonjudicial" act, because an improper or erroneous act cannot be said to be normally performed by a judge. If judicial immunity means anything, it means that a judge "will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority." Id at 356, 98 S.Ct., at 1105. See also Forrester v. White, 484 U.S., at 227, 108 S.Ct., at 544 (a judicial act "does not become less judicial by virtue of an allegation of malice or corruption of motive"). Accordingly, as the language in Stump indicates, the relevant inquiry is the "nature" and "function" of the act, not the "act itself". Id, 435 U.S., at 362, 98 S.Ct., at 1108. In other words, we look to the particular acts relation to a general function normally performed by a judge, in this case the function of directing police officers to bring counsel in a pending case before the court. (Emphasis added). Id at ____ U.S. ____, 112 S.Ct. at 288-9.

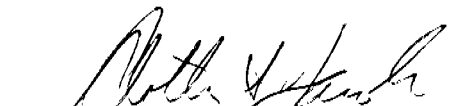
Thus, the discretionary decision by the state attorney to assist the decedent was not transmuted into an operational act by virtue of the carrying out of this discretionary decision.

CONCLUSION

The state attorney did not owe a common law duty of care to the decedent.

Acts and omissions of the state attorney in carrying out its undertaking to secure a restraining order is a discretionary activity for which the Office of the State Attorney is immune from liability.

Respectfully submitted,



Arthur I. Jacobs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Darryl D. Kendrick, Esq., Attorney for the Plaintiff, 1817 Atlantic Boulevard, Jacksonville, Florida 32207; Robert E. Warren, Esq., 501 West Bay Street, Jacksonville, Florida 32202; Louis F. Hubener, Esq., Assistant Attorney General, THE CAPITOL, Suite 1603, Tallahassee, Florida 32399-1050, by United States Mail, this 10th day of March, 1993.

Attorney