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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,

v.

Tina Parrotino as personal
representative of the
Estate of Diane L. McFarland,

Plaintiff, Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

TAYLOR, MOSELEY & JOYNER

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I. PREFACE

The parties are referred to as follows:

The personal representative of the Estate, Tina J. Parrotino, will be referred to as Plaintiff;
Diana L. McFarland will be referred to as "Decedent";

The City of Jacksonville will be referred to as "City";

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

Any references to the Appendix will be indicated by the letter A. followed by the number corresponding to the Appendix attached to this brief.

II. TABLE OF AUTHORITIES

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III. STATEMENT OF THE CASE

This appeal is from the dismissal with prejudice of Plaintiff's complaint by the trial court below. On September 12, 1988, the Plaintiff, Tina Parrotino, as personnel representative of the Estate of Diane McFarland, filed a two count complaint against the City of Jacksonville and the State Attorney for the Fourth Judicial Circuit.(A.1) Plaintiff alleged that the City and State Attorney owed a duty to protect Decedent from attack by her estranged lover, James Wilson; that the Defendants breached this duty; and that this breach proximately caused her death.

Both the City and the State Attorney filed motions to dismiss for failure to state a cause of action.(A.2 & A.3) The motions were argued to the trial court on February 22, 1989. On March 6, 1989, the court entered its order granting the Defendants' motions with prejudice.(A.4) The trial court held that the actions of the City and State Attorney were discretionary actions for which no liability could arise and that Decedent was a member of the general public with whom no special relationship existed.(A.4)

Plaintiff initially appealed the trial court's order on April 4, 1989. The First District Court of Appeal dismissed the appeal, however, holding that the trial judge's order was not final and thus not appealable.(A.4)

Plaintiff returned to the trial court and after some procedural confusion, obtained a final order. She renewed her appeal on November 29, 1989.

By order dated August 7, 1991, the District Court of Appeals again dismissed the appeal for lack of jurisdiction. Plaintiff then filed a motion for rehearing or in the alternative a motion for clarification.(A.5 & A.6) On December 15, 1992, the Court of Appeals granted Plaintiff's motion for rehearing and issued the opinion which forms the basis for this appeal.(A.4 & A.7) The DCA's opinion affirmed the dismissal of the City, but recognized a cause of action against the State Attorney and reversed the trial court's order. The District Court of Appeals, however, certified two questions to be of great public importance.

Petitioner, State Attorney filed a motion for rehearing which was denied on January 20, 1993.(A.8) The State Attorney then served its Notice to Invoke the Discretionary Jurisdiction of this Court and filed its brief on jurisdiction pursuant to Rule 9.120 of the Florida Rules of Appellate Procedure. As a separate basis for appeal, Petitioner asserts the District Court's decision directly effects all State Attorneys, a class of constitutional officers. Rule 9.030(a)(2)(A)

On February 11, 1993 this Court issued an Order postponing its decision on jurisdiction and directing Petitioner's initial brief to be served on or before March 8, 1993.

IV. STATEMENT OF THE FACTS

The State Attorney does not concede any of the substantive allegations of the Complaint. Generally speaking, however, for the purposes of a motion to dismiss all well pled allegations of the complaint must be accepted as true. With this reservation, the State Attorney makes the following statement of facts.

The Decedent had a relationship with James Wilson which she terminated in the summer of 1986. Thereafter, once in July and once again in August, Wilson attacked, threatened or harassed the Decedent and members of her family. In each instance, the police were summoned.

In November of 1986, while Decedent was visiting a family member, Wilson intentionally drove his truck into Decedent's parked car. The police were again summoned. The police advised Decedent to make a report through the Domestic Violence Program with the State Attorney's Office.

The first time Decedent went to the State Attorney's Office, she was turned away and told that her complaints were a police matter. She returned to the State Attorney's Office, however, and on the second occasion apparently spoke with someone who listened to her complaints. The person she spoke with allegedly assured Decedent that they would obtain a court order restraining Wilson from having any contact with her. The Decedent

relied upon these representations and did not seek other means of protection.

The Decedent's last visit to the office of the State Attorney was on November 12, 1986. Thereafter, the State Attorney is alleged to have failed to perform its undertaking in a number of ways including having misplaced or misfiled the documents relating to the Decedent's problems with Wilson. For some reason yet to be established, no restraining order was obtained.

On one occasion in December of 1986, Wilson harassed Decedent at her residence. The police responded. In January, 1987, Wilson attacked Decedent in a public restaurant. The police were called. At that time, Wilson threatened Decedent's life in their presence. No arrest was made. In February and March similar incidents occurred. On May 26, 1987, Wilson shot and killed the Decedent.

Certain material facts are not established by the complaint. Absent is any specific allegation as to the nature of the relationship between Wilson and Decedent and whether Decedent was, based on this relationship, eligible for a restraining order. The complaint establishes only that in November of 1986, Decedent and Wilson were unmarried and had been living apart for at least 4 months.

Also absent is any reference to efforts by Decedent or anyone on her behalf to contact the State Attorney

between November 12, 1986 and May 26, 1987. Lack of such an effort is material.

V. SUMMARY OF ARGUMENT

A. THE OFFICE OF STATE ATTORNEY DID NOT OWE DECEDENT A COMMON LAW DUTY OF CARE UNDER THE FACTS OF THIS CASE

In order for a duty of care to have arisen in this case, there had to have been a "special relationship" between the Decedent and the office of the State Attorney. The request the Decedent made of the State Attorney and the promise of action the State Attorney is alleged to have made did not establish a special relationship. In an undertaking to render services to the Decedent, the State Attorney was only performing his normal function as a State Attorney and accordingly, no special duty was created.

B. THE OFFICE OF STATE ATTORNEY WAS ENTITLED TO PROSECUTORIAL IMMUNITY FOR BREACH OF ANY COMMON LAW DUTY OF CARE THAT MAY HAVE EXISTED UNDER THE FACTS OF THIS CASE

Florida Statute §768.28 did not abrogate the common law immunity afforded to prosecutors. Prosecutorial immunity stems from the unique nature of the prosecutorial function. The immunity applies to all actions taken by the prosecutor within the scope of his authority. The common law prosecutorial immunity should protect the State Attorney from the claims of the Decedent herein.

C. THE OFFICE OF STATE ATTORNEY WAS ENTITLED TO SOVEREIGN IMMUNITY SINCE THE ACTS COMPLAINED OF WERE PERFORMED IN CARRYING OUT DISCRETIONARY ACTS

The decision whether or not to pursue a prosecution is not the only discretionary function performed by the State Attorney. Following a decision to prosecute, a myriad of other decision, both discretionary and operational are made. Court would become improperly involved in the day to day operations of the State Attorney's office if each particular act of the State Attorney's office were scrutinized as to its operational or discretionary character.

D. THE ALLEGATIONS OF THE COMPLAINT FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

The cause of action found to exist by the Court of Appeals requires acceptance of the Plaintiff's representation, that an absolute promise to obtain a restraining order was made, that Decedent relied upon the representation and that her death was caused by the failure of the State Attorney's office to obtain the injunction. A finding in support of these elements, however, could only be based on speculation and conjecture. At the time Decedent sought the restraining order, she was not eligible for it. It is unrealistic to believe that a State Attorney would make an unconditional promise to obtain an order which must be issued by a

judge. It is unrealistic to accept that Decedent relied on the issuance of an injunction in light of her confrontation with Mr. Wilson after her visit to the State Attorney's office. Finally, even though this matter is pending on a motion to dismiss, it is unrealistic to believe that the failure to obtain an injunction in November of 1986 was the proximate cause of Decedent's death at the hands of a murderer in May of 1987.

VI. ARGUMENT

A. THE OFFICE OF STATE ATTORNEY DID NOT OWE DECEDENT A COMMON LAW DUTY OF CARE UNDER THE FACTS OF THIS CASE

In Trianon Park Condominium v. The City of Hialeah, 468 So.2d. 912 (Fla. 1985), this Court held that a governmental entity engaged in law enforcement and public safety functions can be liable in tort if there is breach of an underlying common law or statutory duty of care with respect to alleged negligent conduct. The Court further recognized that:

> ...there is not now, nor has there ever been, any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals. In addition, there is no common law duty to prevent the misconduct of third persons. (Trianon, at 918)

The claim of Plaintiff in this case is that the State Attorney failed to obtain and enforce a restraining order for Decedent's benefit and failed to prevent the murder of Decedent by Wilson. A plain reading of Trianon would lead to the conclusion that no claim was stated as no duty existed.

A common law duty of care has been found when a "special relationship" exists between a governmental entity and an individual on whose behalf the claim is made. This "special relationship" concept is derived from the Restatement (Second) of Torts §315 (1965), which states:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless ... (b) a special relationship exists between the actor and the other which gives to the other a right to protection.

Florida courts have adopted this position and have found a special relationship to exist when, for example, an individual is placed in custody or the governmental entity takes responsibility to protect the individual. Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989); Everton v. Willard, 468 So.2d 936 (Fla. 1985) as cited in State, Office of State Atty. v. Powell, 586 So.2d 1180, 1183 (Fla. 2d DCA 1991).

In the opinion below, the Court of Appeal found that a special relationship existed between the State Attorney and the Decedent. Accordingly, a common law duty of care was owed. This finding was based on the DCA's

interpretation of the Restatement (Second) of Torts §323 (1965) which states:

> One who undertakes gratuitously or for consideration, to render services to another for which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the others reliance upon the undertaking.

There are a number of reasons why this Restatement provision should not be interpreted as creating a "special relationship" between a State Attorney and an individual member of the public.

Section 323 is written to apply to all persons: not law enforcement or public safety officers specifically. It addresses circumstances which can give rise to a relationship when there is otherwise no relationship (i.e. any two citizens). It does not address circumstances where a fundamental obligation to render services for the protection of other's person or property already exists.

The State Attorney does not undertake to render services either gratuitously or for consideration as is meant in §323. He does so because it is his job. It is the State Attorney's obligation to enforce the laws for the protection of all citizens. There need not be a specific request in order for this obligation to exist.

Nor should a request for assistance give one citizen a greater entitlement to protection than another.

In taking any action, the State Attorney represents the State not the individual. All citizens are entitled to protection and rely on the State Attorney to provide it. Any citizen can become the victim of a criminal attack. Except in circumstances where the criminal act is totally out of character and unexpected it can always be said that something could and should have been done to prevent it.

The circumstances of Decedent's case are not different in kind from those of most other citizens except in degree. Presumably all citizens want protection of their person and property, however, few specifically ask for it. While all citizens rely on law enforcement to protect them, few get a specific promise. Decedent's case is different only in that she went to the State Attorney's office and allegedly obtained a promise. The Plaintiff's complaint is non-specific as to with whom Decedent spoke, what authority that person had, or the details of the promise made. Was the promise to get an injunction, to try to get an injunction or to consider whether an injunction was appropriate? Since an injunction is issued by a judge and not by a State Attorney it is unrealistic to believe that an unconditional promise to obtain a restraining order was made even for purposes of a motion to dismiss.

In finding a duty of care under Restatement (Second) of Torts §323 the First District relied on Hartley v. Floyd, 512 So.2d 1022 (Fla. 1st DCA (1986) reh. denied, 518 So.2d 1275 (Fla. 1987). Such reliance by the court below is misplaced. In Hartley, supra, the sheriff was held liable for the failure of a deputy to check a boat ramp for Plaintiff's husband's truck after the deputy had agreed to do so. Significant to the holding was the fact that the Plaintiff called the deputy back approximately 40 minutes later and was told that the boat ramp had been checked, when in fact it had not. The sheriff admitted that Plaintiff relied on that information and made no further effort to locate her husband for five hours. The Hartley court specifically found on those facts that the risk of harm to the Plaintiff's husband had been increased by the actions of the sheriff's deputy.

Hartley, supra, is distinguishable from our present situation. In the first instance, all the facts had been developed as to specifically who promised to do what and when. More importantly, the claimant called the deputy back after his acceptance of the undertaking and was told that it had been done. The Hartley court was not required to rule on whether a cause would have been stated had the wife not called back or if when she did the deputy had told her he had not checked the ramp.

In the instant case, Decedent had ample opportunity to know that the restraining order had not been obtained. She had at least four encounters with Wilson and the

police after the injunction was supposed to have been obtained. By March 1987, Decedent had to know that no injunction was in place. Allegations of reliance thereafter are conclusory only. Plaintiff cannot claim reliance if Decedent closed her eyes to the obvious.

The First District overlooked the fact that the "protection" afforded an individual by a civil injunction is not the same as intended in the Restatement (Second) of Torts §323. In the case at bar, the Decedent requested that a civil injunction be issued. The only "protection" the injunction could provide was in deterring Wilson from contacting the Decedent for fear of the penalties associated with violation of the injunction. The "protection" intended by the Restatement is that of physical security (i.e. physically securing an accident scene so that traffic does not come in contact with pedestrians. See Kropff, infra, or; providing insurance for one's fiscal protection, See Blackmon, and Sheridan infra). To believe that a civil injunction would provide protection from an individual intent on murder is unrealistic.

The First District cited a number of cases recognizing this theory of recovery in Florida.(A.7 p7) None of those cases, however, involve State Attorneys. See, State, Dept. of Highway Safety and Motor Vehicles v. Kropff, 491 So.2d 1252 (Fla. 3d DCA 1986); Blackmon v. Nelson, Hesse, Cyril, Webber & Sparrow, 419 So.2d 405 (Fla. 2d DCA 1982); Padgett v. School Bd. of Escambia

County, 395 So.2d 584 (Fla. 1st DCA 1981); and Sheridan v. Greenberg, 391 So.2d 234 (Fla. 3d DCA 1981). Only Kropff deals with law enforcement personnel.

The other cases applying §323 have applied it to individual conduct. It has not been applied to an office where a number of individuals may be involved.

At page 9 of its opinion, the DCA states that the duty analysis would be the same whether the defendant was a governmental entity or a private individual. This statement ignores the obvious difference between the pre-existing and fundamental duty of the state attorney to all citizens and the lack of duty owed by one citizen to another. It further ignores the fact that in truth Decedent's entitlement to the services of the State Attorney were no greater than that of any other citizen. The tragic and sympathetic facts of the case do not change Decedents basic status from that of an individual member of the public.

B. THE OFFICE OF STATE ATTORNEY WAS ENTITLED TO PROSECUTORIAL IMMUNITY FOR BREACH OF ANY COMMON LAW DUTY OF CARE THAT MAY HAVE EXISTED UNDER THE FACTS OF THIS CASE

The Court of Appeals at page 10 of its opinion acknowledges that at common law prosecutors enjoyed broad immunity citing Imbler v. Pachtman, 424 U.S. 209 (1985). The DCA then states, however,

> since the enactment of section 768.28, Florida Statutes, Florida's state attorney's offices have a more limited immunity.

No authority is cited for this statement. Petitioner would assert that this holding is in error.

Florida Statutes §768.28 concerns sovereign immunity which protects each and every state agency, (regardless of whether that agency also had a common law immunity) because of the agencies status as a functioning arm of state government. Sovereign immunity protects the State's fisc. Florida Statutes §768.28 waives sovereign immunity to a limited extent. It does not, however, affect a State officer's existing common law immunity.

The common law immunity afforded to judges and prosecutors derived from a different source. This type of immunity was absolute and was immunity from prosecution not just from judgement. No cause of action ever existed against judges or prosecutor for acts preformed within the scope of their authority even if the acts were intentional. Florida Statues §768.28 did not create any new cause of action in this regard. See Berry v. State, 400 So.2d. 80 (Fla. 4th DCA 1981)

Imbler v. Pachtman, supra concerned a California prisoner released through *habeas corpus* after it was learned the prosecuting attorney knowingly used false testimony and suppressed evidence favorable to the Plaintiff's defense. Imbler filed a civil rights action pursuant to 42 U.S.C. §1983. The United States District Court held that the prosecutor had common law immunity from civil liability for acts done as part of his official functions. The United States Supreme Court

affirmed. In discussing the rationale for prosecutorial immunity, the Court stated:

> The common law immunity of a prosecutor is based upon the same considerations that underlie the common law immunity of judges and grand jurors acting within the scope of their duties. These include 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. at 422. (emphasis added)

A prosecutor's common law immunity arises from the nature of his job. It applies to all acts within the scope of his authority; not just discretionary acts. If prosecutors were not immune from suit but only immune from judgement, the harassment by unfounded litigation and the deflection of the prosecutor's energies warned against in Imbler would be suffered because without immunity from suit a determination of the validity of a claim would only be made after trial.

The common law immunity in Imbler, was reaffirmed as to judges in Berry v. State, supra. There is no reason for treating prosecutors differently for acts or omissions within the scope of their authority. In Berry the court stated:

> For reasons of public policy, a prosecutor enjoys absolute immunity for damages when the acts fall within the scope of his prosecutorial duties. Id. at 84 (emphasis added)

In explaining the rationale of prosecutorial immunity for the acts taken in the scope of this prosecutorial duty, the Court stated:

> The office of public prosecutor is one which must be administered with courage and independence, yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious official by those who would profit thereby. There would be involved in every case possible consequences of a failure to obtain a conviction. There would always be question of possible civil action in case the prosecutor saw fit to move a dismissal of the case ... the apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which would characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement. Berry, at 84.

The reasoning of Berry should be ratified by this Court.

The fact that the seeking of a restraining order in a domestic violence case may be civil or quasi-criminal in nature should make no difference as the prosecutors need for immunity remains the same. The prosecutor is still representing the State and is bringing the force of the state to bear on an individual. He is not merely a publicly provided substitute for a private attorney even though a private attorney could seek a restraining order in a domestic violence case.

Subsection (5) of Florida Statutes §768.28 provides that a State agent may be liable for tort claims in the same manner as an individual under like circumstances. This does not mean that the actions or decisions of a prosecutor can be evaluated on the same basis as those of a private attorney. Private attorneys are not charged with the public responsibilities of a prosecutor. "An individual under like circumstances" must therefore 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 not in the same manner as a private attorney without common law immunity.

The term "within the scope of" a prosecutor's authority covers a broad range of activity. It includes both operational and discretionary acts. Petitioner cannot outline all of the acts which could be taken by a State Attorney from the time a new matter is undertaken until it ends. Suffice it to say that some acts of the State Attorney will be discretionary, some will be operational and some will be mixed or arguably one or the other. If plaintiff's allegation that the State Attorney's breach of duty derived from a failure to perform an operational act must be accepted as true, then there is no way to avoid unfounded litigation. Summary judgement would be the earliest opportunity to end the litigation and after trial would be likely in many cases.

The discretionary/operational dichotomy is not an end in itself. Rather it is a tool to assist courts and

to prevent them from becoming inappropriately entangled in the fundamental questions of policy and planning of another branch of government or from improperly infringing on the separation of powers. It is hard to imagine a greater entanglement or a greater infringement than to require a State Attorney to appear in court and to explain and justify to the court or to a jury acts taken in pursuance of his office.

Such fears of "qualified immunity" were foreseen by the United States Supreme Court when it stated:

> A qualified immunity might have an adverse effect on the functioning of the criminal justice system, not only be discouraging the initiation of prosecutions ... but also by effecting the prosecutor's conduct of the trial. Butz v. Economou, 438 U.S. 478, (1978) at 510.

C. THE OFFICE OF STATE ATTORNEY WAS ENTITLED TO SOVEREIGN IMMUNITY SINCE THE ACTS COMPLAINED OF WERE PERFORMED IN CARRYING OUT DISCRETIONARY ACTS

Assuming that there was a common law duty of care owed to the Decedent by the State Attorney, the actions or omissions of State Attorney's office in carrying out its discretionary functions are immune from liability under Florida Statutes §768.28.

In Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), the Florida Supreme Court concluded that certain "discretionary" functions of the government remain immune from tort liability, regardless of the intent of Florida Statutes §768.28. In advocating

a case-by-case analysis, the Court adopted a test initially set forth in Evangelical United Brethren Church v. State, 67 Wash. 2d 247, 407 P.2d 440 (1965). This test was designed to determine which government acts were pursuant to policy, planning or judgmental governmental functions, and thus afforded immunity. A four-part test was established:

> 1. Does the challenged act, omission or decision necessarily involve a basic governmental policy, program or objective?
>
> 2. Is the questioned act, omission or decision essential to the realization or accomplishment of that policy, program or objective as opposed to one which would not change the course or direction of the policy, program or objective?
>
> 3. Does the act, omission or decision require the exercise of basic policy evaluation, judgment and expertise on the part of the governmental agency involved?
>
> 4. Does the governmental agency involved possess the requisite constitutional, statutory or lawful authority and duty to make the challenged act, omission or decision? Commercial Carrier Corp., at 1019 (citing Evangelical United Brethren Church v. State, at 445).

The Court concluded that if these answers can be clearly and unequivocally answered "yes", the challenged decision can reasonably be classified as discretionary and therefore immune. If one or more of these questions can be answered "no", then further inquiry may become necessary. A "no" answer to any of these questions does not automatically mean that the action is not immune. The use of this test to determine the limitations of

Florida Statutes §768.28 has been reaffirmed in State of Florida, Department of Health and Rehabilitative Services v. Yamuni, 529 So.2d 258 (Fla. 1988).

In applying these principals to the case at hand, it must first be clarified what act, omission or decision is being challenged. The DCA's majority correctly found that the State Attorney's decision to assist the Decedent was discretionary action.[1] The majority next stated, however, that while it was a discretionary function to provide Decedent with a restraining order, the implementation of this discretionary activity was an operational function.[2]

The complaint sets forth eight ways in which the State Attorney is alleged to have been negligent. (A.1 subparagraph 38) The DCA seized on one. (i.e. subparagraph 38 By misplacing or misfiling the documents submitted by Ms. McFarland).

While it would be difficult to argue that the decision of where to place papers is a policy of a planning function, focusing on this particular act is not

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[1]The express language of the majorities opinion states "The office of the State Attorney's decision to provide assistance to McFarland was a fundamental policy determination that was clearly discretionary in nature. Also discretionary was the Appellee's [State Attorney's] decision about the nature of the assistance it would provide." (A.7 p.11)

[2]The express language of the majority opinion reads: "Specifically, she [Parrotino] argues that the office of the State Attorney made it's discretionary policy determination in this case when it promised to secure the restraining order for McFarland, and, thereafter, its actions in the implementation of that policy were purely operational. We agree. (A.7 p.12)

the proper way to draw the operational/discretionary distinction. In Mireles v. Waco, 502 U.S. _____, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991) a trial judge was sued for ordering deputies to bring the public defender before him and to use excessive force in doing so. In analyzing the immunity issue, the Court stated:

> ... But if only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a "non-judicial" act, because an improper or erroneous act cannot be said to be normally performed by a judge. If judicial immunity means anything, it means the a judge "will not be deprived of immunity because the action he took was error...or was in excess of his authority." (citations omitted) Accordingly, ..., 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.

Carrying this over to the instant case, the decision as to whether or not to obtain a restraining order was not the only discretionary decision to be made with regard to Decedent's case. From beginning to end, a number of discretionary decisions were to be made. Likewise, a number of operational acts were to take place. The District Court seems to assumes that after the initial discretionary decision is made, all acts thereafter are merely operational. This is an obvious over simplification of the functioning of the State Attorney's office.

As is implicit in the common law immunity provided to prosecutors, it is more appropriate to say that all actions of the State Attorney in prosecuting the laws of

the State of Florida are discretionary in nature and entitled to immunity.

In Trianon Park Condo. v. The City of Hialeah, supra, this Court held:

> ... there is no governmental tort liability for the action or inaction of governmental officials or employees in carrying out the discretionary governmental functions ... because there has never been a common law duty of care with respect to these legislative, executive and police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care. Trianon, at 921.

The sovereign immunity afforded prosecutors for discretionary activity should serve as an umbrella sheltering the prosecutor from liability for acts or omissions taken by him or his staff in the carrying out of discretionary activity. If only the discretionary activity is given sovereign immunity, it will be impossible to make the determination of when immunity applies and when it does not. Such a cluttering of presently workable case law will serve no purpose but to clog the already overburdened Courts with hopeful Plaintiffs seeking further instruction from this Court that their alleged negligent act can be categorized as operational because the negligence occurred in the carrying out of a discretionary function.

The fact that the State Attorney's Office made the discretionary decision to assist the Decedent renders the character of the action in which the State Attorney was

engaged as discretionary. The implementation of this discretionary action should not reclassify it as operational.

D. THE ALLEGATIONS OF THE COMPLAINT FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

The dissenting opinion of Judge Smith was through and well reasoned. It would not assist this court in resolving the issued presented to it by reiterating the points phrased by Judge Smith. Several additional points should be made, however, which address whether a claim was, in fact, stated by the Plaintiff.

In the first instance, it is doubtful that an injunction was available to Decedent in this case. The statute dealing with domestic violence in 1986 (Florida Statute §741.30(i) specified assault to the "spouse". The statute was amended effective August 5, 1987 to include a person residing in the same single dwelling unit. In November of 1986, Decedent was neither the spouse of Mr. Wilson nor was she residing in the same dwelling unit.

There is a tacit recognition of this inferred from the DCA's reference to Florida Statute §914.24 instead of Florida Statute §741.30. Decedent was neither the victim of the crime or a witness to a crime as is intended Florida Statute §914.24.

As this Court has stated in McCain v. Florida Power Corp., 593 So.2d 500, 502 (Fla. 1992):

> The proximate causation element, ... is concerned with whether and to what extent the Defendant's conduct foreseeably and substantially caused the specific injury that actually occurred.

In City of Pinellas Park v. Brown, 604 So.2d 1222, 1228 (Fla. 1992), this Court held that a jury question does not exist where:

> After the event and looking back from the harm to the actor's negligent conduct, it appears to the Court highly extraordinary that [the conduct] should have brought about the harm.

In Brown, the Court found that proximate cause existed since it was foreseeable that serious bodily injury could result from a high speed chase of between 14 to 20 vehicles through urban traffic at speeds of up to 120 miles per hour.

In the case at bar, the First District found that the Complaint sufficiently pled the existence of a causal nexus between the alleged inaction of the State Attorney and Decedent's death.

In the ordinary case, a determination of proximate cause is a jury question. The jury, however, must have a reasonable basis for its conclusion. The mere possibility that the defendants failure may have contributed to the harm is not enough. The jury cannot base its finding on speculation or conjecture. In this case, what evidence can be presented beyond what is set forth in the complaint. Decedent went to the State Attorney's office with regard to the injunction in

November of 1986. She thereafter never returned to the State Attorney's office. Her death occurred in May of 1987. In the interim, Decedent had four encounters with Wilson. In each instance the police were called. Each was a sufficient occasion for Decedent to realize that no injunction was in place and that she could not rely on the existence of an injunction to protect her.

It must also be considered that the murder of the Decedent was subject to criminal sanctions. Wilson was arrested, pled guilty and was incarcerated. As to probably cause, a jury could only be left to speculate whether an injunction pursuant to the domestic violence program would have altered Wilson's conduct in any way. Looking back, therefore, it cannot be said that the failure of the State Attorney to obtain an injunction was the proximate cause of Decedent's death. As the reliance and proximate cause aspect of the case are necessary elements, Plaintiff's complaint fails to state a claim upon which relief may be granted.

VI. CONCLUSION

Each individual in society has a right to the protection of the law. The charge to the State Attorney's office could easily be stated to be provide to the citizens all the protection you can. In spite of the best efforts of the State Attorney's office, however, crimes will occur. Each crime is a tragedy and offense

to the victim thereof. The interest of society, however, does not lie in finding someone responsible for all misconduct.

Present in any expansion of the Tort laws is an element of social engineering. Expanding one parties duty of care is an effort to direct the law along line which will achieve a desirable social result. The standard of care owed by any particular party must be flexible enough to achieve the good desired but must be rigid enough to be predictable. While the DCA's opinion may achieve a desirable result in this particular case, the breadth and inexact wording of the opinion will have the negative effect of subjecting the State Attorney's office to the ills warned against in City of Pinellas Park v. Brown, Mireles v. Waco, and Imbler v. Pachtman. Because the overriding public interest in the efficient and unfettered pursuit by the State Attorney of his duties outweighs the need to compensate the Decedent herein, the opinion of the District Court of Appeals should be vacated and the dismissal with prejudice by the trial court should be affirmed.

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **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**, Post Office Box 1110, Fernandina Beach, Florida 32034; **LOUIS F. HUBENER, ESQUIRE**, Assistant Attorney General, The Capitol, Suite 1603, Tallahassee, Florida 32399-1050, by U.S. Mail, this 8TH day of March, 1993.

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