IN THE SUPREME COURT
STATE OF FLORIDA

The Office of the State Attorney,
Fourth Judicial Circuit of Florida

Defendant, Petitioner,

v.

CASE NO: 81,229

Tina Parrotino as Personal
Representative of the
Estate of Diana L. McFarland,

Plaintiff, Respondent.

RESPONDENT'S INITIAL BRIEF ON THE MERITS

DARRYL D. KENDRICK
FLORIDA BAR #0558885
1817 ATLANTIC BLVD.
JACKSONVILLE, FLORIDA 32207
(904) 399-1050
ATTORNEY FOR RESPONDENT

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PREFACE

The parties will be referred to as follows:

The Personal Representative of the Estate, Tina J. Parrotino, will be referred to as "plaintiff;"

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

Diana L. McFarland will be referred to as "decedent;"

Any reference to the record will be marked by the letter "R" followed by a page number which corresponds to the Court's Index;

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STATEMENT OF THE CASE AND FACTS

The plaintiff is the Personal Representative of the Estate of the decedent. She originally brought a case against the State Attorney and the City of Jacksonville, Florida, a municipal corporation, seeking damages to the decedent's estate. Under the law at the time of the decedent's death, plaintiff did not have a cause of action for wrongful death, but she could pursue a claim for the loss of net accumulations of the estate she represented.

The basis of the lawsuit was as follows: The decedent had been continually harassed and abused by a former boyfriend, James Harrell Wilson. The decedent had contacted the City, by and through the Jacksonville Sheriff's Office, for assistance on at least eight (8) separate occasions. The decedent was referred to the State Attorney for further assistance. One her first trip to the State Attorney's Office, she was turned away; however, she returned again seeking help. Upon meeting with representatives of the State Attorney on November 12, 1986, the decedent requested that some type of injunction be entered prohibiting her former boyfriend from having any further contact with her. She was told by the State Attorney that she would be assisted. Specifically, she was told that an Injunction would be obtained on her behalf. The State Attorney did not suggest that she take any additional action or advise her that any other options were available to her. The decedent relied on the promises of the State Attorney and sought no additional legal assistance. The State Attorney then misfiled the

decedent's request and never took action against the former boyfriend. The former boyfriend subsequently killed the decedent on May 26, 1987.

Upon the filing of the Complaint, both defendants filed Motions to Dismiss. When those Motions came before the Trial Court, a Dismissal With Prejudice, was entered as to both defendants. The Plaintiff appealed the Trial Court's rulings to the First District Court of Appeal.

The Appeal was dismissed twice on procedural grounds. The Appellate Court held that the first Appeal was premature in that a Dismissal With Prejudice was not a final, appealable order. After the entry of a Final Judgment, the plaintiff refiled the Appeal. The Appeal was dismissed again on the same grounds but the Appeals Court granted the plaintiff's subsequent Motion for Rehearing and issued an Opinion. It is this Opinion, Parrotino v. City of Jacksonville, _____ So.2d _____ (1st DCA 1993) 18 FLW 61, filed December 15, 1992, which forms the basis for this Appeal.

The DCA's Opinion affirmed the dismissal of the City but reversed the Trial Court's dismissal as to the State Attorney. The DCA certified two questions as being of great public importance in its decision.

The State Attorney then filed this Appeal and submitted a Brief on Jurisdiction. On February 11, 1993, this Court issued an Order postponing its decision regarding jurisdiction and setting a schedule for the filing of Briefs.

SUMMARY OF ARGUMENT

I.

THE STATE ATTORNEY OWED A COMMON LAW DUTY TO MCFARLAND BASED ON THE STATE ATTORNEY'S VOLUNTARY AGREEMENT TO TAKE CIVIL ACTION ON BEHALF OF MCFARLAND

The State Attorney had no obligation to assist the decedent; however, upon agreeing to take action on her behalf, the State Attorney owed a common law duty to the decedent. By voluntarily assuming this responsibility, the State Attorney owed a special duty to the decedent. The State Attorney breached that duty by loosing the decedent's file and failing to take the promised action. The decedent, who was never made aware of the State's failure, failed to take any other action to protect herself.

II.

FLORIDA STATUTE SECTION 768.28 WAIVES SOVEREIGN IMMUNITY FOR THE STATE ATTORNEY FOR OPERATIONAL LEVEL ACTIVITIES SUCH AS THE SEEKING OF A RESTRAINING ORDER

Florida Statute Section 768.28 waives sovereign immunity for governmental entities in situations where private individuals could be held liable. Had a private attorney agreed to obtain an injunction for the decedent, that attorney could undoubtedly be held responsible for his or her failure to take appropriate action. Likewise, under a plain and simple reading of the Statute, the State Attorney is subject to liability in this case. The Florida Supreme Court has also drawn a distinction between discretionary

and operational activities. Immunity remains for discretionary activities but is waived for operational endeavors. Since the duty to the decedent was assumed voluntarily and did not involve any prosecutorial function, the State Attorney has no immunity in this situation. A careful application of the rules announced by this Court clearly and convincingly show the prosecutor to have been functioning at an operational level in regard to the promise made to the decedent.

III.

THERE IS NO BAR TO THE PLAINTIFF'S CLAIM UNDER FEDERAL OR STATE LAW BECAUSE THE PLAINTIFF'S CLAIM AGAINST THE STATE ATTORNEY IS NOT BASED ON ANY ACT OR FAILURE TO ACT ON THE PROSECUTION OF A CRIMINAL MATTER

Both state and federal courts recognize the inherent dangers of allowing civil actions against prosecutors in regard to decisions made on criminal prosecutions. However, when a state attorney agrees to provide services that outside the area of criminal prosecution, there can be no reasonable claim to immunity. This case is based on the State Attorney's failure to provide promised civil assistance, and has nothing to do with the prosecution of criminal charges.

IV.

THE PLAINTIFF HAS STATED A CAUSE OF ACTION IN THE COMPLAINT FILED HEREIN AND PURSUANT TO THE POLICY OF THE COURTS OF FLORIDA THE QUESTION OF FORESEEABILITY IS A MATTER TO BE RESOLVED BY A JURY

The Complaint states a cause of action and the plaintiff should be allowed an opportunity to effect discovery to determine whether or not the allegations can be proven in a court of law. Since the trial court dismissed the case prior to any discovery, the dismissal should not be upheld on issues of foreseeability and proximate cause. The plaintiff has never been allowed to develop evidence in those areas and, furthermore, those areas are traditionally jury questions. The defendant will have ample opportunity to question those areas after the plaintiff is allowed to gather factual information regarding the case.

ARGUMENT

I.

THE STATE ATTORNEY OWED A COMMON LAW DUTY TO MCFARLAND BASED ON THE STATE ATTORNEY'S VOLUNTARY AGREEMENT TO TAKE CIVIL ACTION ON BEHALF OF MCFARLAND

Prior to the enactment of Florida Statute Section 768.28, the State Attorney, and all other state and municipal entities, enjoyed an almost total immunity from tort actions. However, the harsh, and often unreasonable, results of total immunity began to become less acceptable as communications between citizens and governmental bodies became more common, more direct and more urgent. This was especially true in the case of the ability of the public at large to seek immediate police assistance via telephone. As these changes occurred, the court's were faced with situations in which people claimed failures on the part of law enforcement to protect them, despite having established a relationship with law enforcement regarding their need for help. Out of this situation, the initial exception to sovereign immunity, the so called "special duty" rule, evolved. As this Honorable Court noted in the case of Trianon Park Condominium v. The City of Hialeah, 468 So.2d 912 (Fla. 1985);

> Prior to the enactment of Section 768.28, sovereign immunity for all governmental entities, including the State and all of its agencies and subdivisions, remained in full force except for the proprietary and special duty exceptions carved out by this Court. Id. at 921.

This Court also noted this limited exception in the case

of Everton v. Willard, 468 So.2d 936 (Fla. 1985), stating that law enforcement owes no duty to prevent a criminal offense as to an individual, "absent a special duty to the victim." Id. at 938.

Although subsequent argument will show that the special duty concept is, to a large extent, outdated by new pronouncements of this Court and statutory changes, it does provide a threshold issue for review of the case at bar. That questions is: can the plaintiff establish a common law duty of care on the part of the State Attorney? This question should be answered in the affirmative.

As noted in the Complaint, the decedent went to the State Attorney twice. On her second visit, she made a report to the Domestic Violence Program as she had been advised to do by the police. She was assured by a representative of the State Attorney that some type of a Restraining Order or Injunction would be issued to assist the police in protecting her from Wilson. She relied upon these assurances and took no other legal action on her own behalf. By agreeing to act on behalf of the decedent, the State Attorney voluntarily assumed a special duty as to the decedent. This Court in Everton, noted that when the police accept the responsibility to protect an individual, a special duty is supported. Everton at 928. This Court also noted in Trianon, supra, that some law enforcement activities have always lead to a common law duty of care as to the public, citing specifically the operation of motor vehicles and the handling of firearms. Id. at

920. The State Attorney's voluntary agreement to take action on behalf of the decedent, coupled with the fact that the activity agreed to by the State Attorney was one available in the private sector, where common law duty applies, clearly demonstrate the existence of a common law duty of care.

This issue was also recently examined in the case of State of Florida, Office of the State Attorney for the 13th Judicial Circuit, v. Powell, 586 So.2d 1180 (Fla. 2d DCA 1991), rev. denied 598 So.2d 77, (Fla. 1992). In that case, Powell was subpoenaed to court by the State Attorney as a witness against an individual being tried on criminal charges. The criminal defendant had threatened Powell's safety. When powell arrived at the courthouse, the criminal defendant somehow convinced her to go outside with him. Once outside, he doused her with gasoline and set her afire, causing serious bodily injury. Powell claimed that the State Attorney had a special duty by virtue of issuing her the subpoena. The Court rejected this argument. However, in rejecting the argument, the Court stated:

> When the police assume (the) responsibility to protect an individual, they have a special duty to use reasonable care in providing that protection. The State Attorney's Office could have a similar duty to use reasonable care in providing protection to an individual if they voluntarily undertake the responsibility. Id at 1183. (emphasis added).

The Court went on to state, in discussing the lack of the State Attorney's commitment to Ms. Powell, that Ms. Powell had presented "no evidence establishing either that the State

Attorney's Office told her that they would protect her or that they took affirmative steps to provide her with protection." Id. at 1184. Applying this reasoning to the case at bar clearly shows that finding a special relationship is justifiable in the present case since the State Attorney did tell the decedent they would help her and undertook this responsibility voluntarily, and with assurance to the decedent that they would protect her.

This Court also addressed this issue in the case of Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989). This Court stated that governmental liability existed when there would have been liability on "an individual under similar circumstances." Id. at 734. In fact, the decedent could have sought an injunction through a private attorney since injunctions are civil in nature. There can be no doubt that a private attorney would be held responsible for failing to obtain an injunction when he or she had promised to do so. Likewise then, the State Attorney can be held to the same standard. Id.

The District Court of Appeal in Parrotino, supra, cited with approval the Restatement (Second) of Torts Section 323 (1965) which states:

> One who undertakes, gratuitously or for consideration, to render services to another 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 other's reliance of the undertaking. Id. at D62.

The State Attorney argues vehemently that the Restatement cannot and should not be applied to the State Attorney. In another context, this might be acceptable. However, as just noted, we are dealing here with a governmental entity which has agreed to provide a service available through the private sector. Since the Restatement could undoubtedly be applied to an actor in the private sector, there is no reason to give the State Attorney exception to the Restatement Rule. To do so would be to allow the State Attorney to avoid liability where a private individual could not. This result is directly contrary to the principles stated in Kaisner, supra. It would also run afoul of the principles stated in Powell, supra. The First DCA has tacitly acknowledged the validity of applying Section 323 to a governmental entity in the case of Hartley v. Floyd, 512 So.2d 1022 (Fla. 1st DCA 1987) rev.denied 518 So.2d 1275 (Fla. 1987). In that case, the plaintiff called a county sheriff for assistance in locating her husband, who was late returning from a fishing trip. The sheriff's office agreed to check the boat ramp to determine whether her husband had returned. When the plaintiff called back approximately forty (40) minutes later, she was erroneously told that the ramp had been checked and that her husband's vehicle was not there (indicating that he had returned safely to shore). The plaintiff relied on these representations and made no other effort to locate her husband for a period of roughly seven (7) hours. The plaintiff then contacted the Coast Guard who located her husband's boat. Her husband, had, however, drowned prior to the arrival of the Coast Guard.

The First DCA concluded that a special duty arose when the sheriff's office agreed to assist the plaintiff voluntarily. Their failure to act reasonably on that assurance, was the basis for liability since the sheriff's actions increased the risk of harm under Section 323. The case at bar is substantially akin to Hartley since the State Attorney voluntarily agreed to undertake a responsibility on behalf of the plaintiff. In doing so, the State Attorney was required to act reasonably and avoid increasing the risks to the decedent. It is also significant that the decedent, like the plaintiff in Hartley, failed to seek help that was available through other agencies. Accordingly, the State Attorney surely had a common law duty to the decedent.

II.

FLORIDA STATUTE SECTION 768.28 WAIVES SOVEREIGN IMMUNITY FOR THE STATE ATTORNEY FOR OPERATIONAL LEVEL ACTIVITIES SUCH AS THE SEEKING OF A RESTRAINING ORDER

As noted herein, the early case law on special duty has been supplanted by more detailed and concrete pronouncements regarding this area of the law. First, Florida Statute Section 768.28 was implemented to void the old rule of sovereign immunity. Section 768.28(1) "waives sovereign immunity, under circumstances in which the State or such agency or subdivision, if a private person, would be liable to the claimant..." Subsection (2) indicates this waiver applies to all state agencies. Subsection (5) states succinctly that "the state and its agencies and subdivisions shall be liable for tort claims in the same matter and to the same extent as a private individual under like circumstances..." A plain reading of this Statute would show that the State Attorney can be held liable in this case. As the DCA pointed out (page 9), no party to this case has ever suggested that a private attorney could not be held accountable for his or her failure to provide an agreed upon legal service for the protection of a client. Accordingly, no such deference should be granted to the State Attorney acting under these circumstances.

The State Attorney suggest that this plain reading of the Statute is incorrect. The State Attorney asserts that this Statute should be read to mean that the State Attorney should be compared to a common law prosecutor and not to a private attorney. The

State Attorney also asserts that the common law prosecutor be adorned with all of his original sovereign immunity. Or, stated another way, the State Attorney contends the Statute should be read to mean that a State Attorney can be held liable in the same circumstances under which a common law prosecutor could be held liable, said prosecutor being in possession of total immunity. Nothing could be more illogical. This exact reasoning has already been rejected by this Court in Commercial Carrier, Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). As this Court noted, such a reading would totally emasculate the Statute, making it meaningless and worthless. Consequently, this argument should be rejected again for the same reasons.

This Court, realizing that the waiver of immunity under Section 768.28 was not intended to be absolute, set about the process of categorizing areas in which immunity could be viewed and establishing guidelines for determining the applicability of the Statute to any given set of circumstances. A pair of cases issued by this Court are seminal to the understanding of the status of the present day immunity waiver. Those cases are Trianon, supra and Commercial Carrier, supra.

In Trianon, the Court established four categories in which governmental actions could be placed and then established basis tenets on determining immunity within those given categories. Two of the categories established are discussed in relation to this case. They are Category II and Category IV. Id. at 919.

The plaintiff believes this case should be analyzed under

Category IV, which involves governmental entities providing professional, educational and general services for the public. The Court stated: "These service activities...are performed by private persons as well as governmental entities, and common law duties of care clearly exist." Id. at 921. (emphasis added). In the case at bar, the State Attorney had agreed to perform an activity that was not exclusive to the government. The decedent could have obtained an Injunction through a private attorney, had the State Attorney advised her to do so, or had she known the State Attorney would not follow through with its promise. In undertaking its promise to the decedent, the State Attorney accepted the same duty of care as would have a private lawyer. (See Avallone v. Board of County Commissioners, 493 So.2d 1002 (Fla. 1986); Butler v. Sarasota County, Florida, 501 So.2d 579 (Fla. 1986); and Slemp v. City of North Miami, 545 So.2d 256 (Fla. 1989).

The State Attorney argues that the case at bar falls into Category II of the Trianon analysis. Category II relates to the enforcement of laws and the protection of the public. Id. at 921. Again, it is extremely important to distinguish between the State Attorney's normal prosecutorial functions and the agreement made with the decedent herein. The issues of this case do not involve the State Attorney's inherent right to make decisions regarding a prosecution of any given individual. Instead, this case revolves around the State Attorney's gratuitous promise to help the decedent through the Domestic Violence Program outside any criminal prosecution whatsoever. The promised undertaking is strictly a

matter of civil law for which the State Attorney enjoys no special rights. Therefore, the plaintiff rejects this position.

Even assuming the application of Category II, our analysis should not end there. In Trianon, 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..." Id. (emphasis added). As noted earlier in the discussion of common law duty, the developing trend has been to establish limitations on generalized governmental immunity. Of particular note is the Trianon Court's use of the word discretionary. Placement in Category II does not guarantee immunity. Instead, it means that we must examine whether we are dealing with a discretionary or operational activity. As this Court stated in City of Jacksonville v. Mills, 544 So.2d 190 (Fla. 1989), immunity attaches to "the discretionary activities carried on under Categories I and II..." Id. at 192. (emphasis added). In effect, this Court has established a division in governmental activities between the discretionary and operational functions. Accordingly, the question becomes, for a Category II activity, whether the activity involved is more properly described as discretionary, for which immunity continues to exist or operational, for which immunity has been waived.

This Court has provided guidance on this issue in the case of Commercial Carrier, supra, which adopted the reasoning of Evangelical United Brethren Church v. State, 67 Wash.2d 246, 407

P.2d 440 (1965). This four part test involves the following questions:

> 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 constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission or decision? Id. at 1019. (citing Evangelical United Brethren at 445).

This Court recently upheld and reaffirmed the use of these questions as a basis for determining whether acts are discretionary or operational. In the case of State of Florida, Department of Health and Rehabilitative Services vs. Yamuni, 529 So.2d 258 (Fla. 1988), this Court stated that:

> If these preliminary questions can be clearly and unequivocally answered yes, then the challenged act is probably policy-making, planning, or judgmental activity which is immune from tort liability. Id. at 260. (emphasis added).

Therefore, if the answer to any of these questions is other than a definite "yes," there can be liability based on a waiver of sovereign immunity. Applying these principles to the case at bar, clearly shows that the actions which formed the basis of the plaintiff's suit, are not protected by sovereign immunity. For

example, the answer to the first questions is "no." The decedent could have sought private assistance, had she known to do so. Therefore, it cannot be stated that the omission was necessarily one involving basic governmental policy. The State Attorney is not required to be a party to civil actions seeking injunctions. Therefore, it follows that question 2 must also be answered in the negative. The State Attorney's legal responsibility to carry on criminal prosecutions is not affected by existing civil actions. Likewise, question 3 must also be answered "no." The process of seeking an injunction does not require the involvement of the State Attorney or the evaluation, judgment or expertise of the State Attorney. The fourth question can be answered in the affirmative, but it is already quite clear that the actions of the State Attorney in this case are not judgmental and they are not immune.

In the Yamuni case, an action was brought against HRS for failing to protect an infant, Sean Yamuni, despite having been advised that the infant was in danger. Despite knowledge of the danger, HRS failed to act and the infant was seriously injured. This Court, in applying the Commercial Carrier questions concluded that only the fourth question could be answered affirmatively. This is identical to the case at bar. Secondly, the Court noted that HRS failed to take action because of an internal breakdown in which the case was closed without assigning it to the protective supervision unit. Similarly, in the case at bar, the decedent's case was closed due to an internal breakdown, without the State Attorney providing the services it had promised. This Honorable

Court should find that the case at bar states a cause of action just as in the Yamuni case.

The dissenting opinion from the DCA, Parrotino, supra, indicates that the State Attorney's actions in this case fall into Category II. Id. at D64. The dissent further suggests that, as such, there could be no liability, citing the following passage from Trianon, supra:

> ...there is no governmental tort liability for the action or inaction of governmental officials or employees in carrying out the discretionary functions described in Category I... and II... because there has never been a common law duty of care with respect to these legislative, executive and police power functions..." Id. at 921. (emphasis added).

As noted, this reading fails to address the distinction in this quotation which clearly states "discretionary" functions. The dissent also specifically cites wording saying "in addition, there is no common law duty to prevent the misconduct of third persons." Id. at 918. Again, this point of view fails to distinguish the State Attorney's prosecutorial responsibilities from its voluntary obligations in relation to the decedent.

The State Attorney next suggests that the DCA has improperly established the parameters for discretionary versus operational activities. The State Attorney asserts that discretionary activities, like the question of whether or not to assist the decedent, remain discretionary even after they are undertaken. The State Attorney insist that discretionary activity does not become operational simply by virtue of making a single decision. The State Attorney and plaintiff agree that the State Attorney's

decision on whether or not to offer help to the decedent was a discretionary action. The question is when, if ever, that promise moved from the discretionary to operational level. The DCA held that the responsibility of carrying out the promise was an operational level activity as in the Hartley, supra, case. The DCA established in Hartley that the sheriff had no obligation to assist the plaintiff in looking for her husband. The Court determined, however, that once the discretionary decision was made to assist, the responsibility became operational. In other words, the Sheriff had a responsibility to act in a reasonable and prudent manner toward the plaintiff once the decision was made. That finding is, of course, supportive of the plaintiff's view in this case. This Court has recognized in other cases that a single discretionary level decision can lead to operational level responsibility. In the Butler, supra, case, this Court stated (citing the Avallone, supra, case):

> (a)government unit has the discretionary authority to operate or not operate swimming facilities and is immune from suit on that discretionary question. However, once the unit decides to operate the swimming facility, it assumes the common law duty to operate the facility safely, just as a private individual is obligated under like circumstances. Id. at 1005.

Consequently, there is nothing improper in the DCA reasoning that a discretionary decision became operational as to the activity required. Every operation is, at some level, discretionary. Every decision must, at some level, become operational. Therefore, discretionary determinations must become operational at some point. The DCA's opinion finding that the State Attorney's failure in the

case at bar was operational is perfectly logical and is valid under the law of this Court.

It is also worth noting that the activity which the State Attorney wants to classify as discretionary is the act of misplacing a file. It is difficult to accept the proposition that loosing a file can be a discretionary act.

III.

THERE IS NO BAR TO THE PLAINTIFF'S CLAIM UNDER FEDERAL OR STATE LAW BECAUSE THE PLAINTIFF'S CLAIM AGAINST THE STATE ATTORNEY IS NOT BASED ON ANY ACT OR FAILURE TO ACT ON THE PROSECUTION OF A CRIMINAL MATTER

The State Attorney next contends that federal law, as stated by the United States Supreme Court, gives the State Attorney absolute immunity. This argument is, in effect, that the State is bound to recognize the State Attorney as being immune from any liability because of the unique concerns which apply to the State Attorney. Several cases are cited as support for this position. These arguments can and should be rejected by this Court.

This Court has already rejected any argument that prosecutors are exempted from the waiver of immunity under Section 768.28. See Trianon, supra, stating that Category II includes "judges, prosecutors, arresting officers and other law enforcement officials." Id. at 919. Not only has this Court already rejected this proposition, but this Court is not legally obligated to follow the case law presented by the United States Supreme Court in regard to this issue. This is true for several reasons. First, virtually all of the federal cases involve federal statutes, federal laws and federal rules. As such, they are not binding on this State in interpreting its own laws. Second, it is a well established principle of Constitutional Law that the State can give greater rights to its citizens against the government than are granted under the Federal Constitution or Federal laws. Third, the acts

discussed in the cases cited have no private equivalent. In other words, these cases do not involve situations wherein the prosecuting attorney was acting in an area of civil law open to attorneys in private practice. The cases cited by the State Attorney all revolve around the issues of sentencing, prosecution and trial of criminal matters. Lastly, and most importantly, the federal court's have already acknowledged a state's right to allow its citizens to bring claims against law enforcement personnel.

In the case of Watson v. City of Kansas City, Kansas, 857 F.2d 690 (10th Cir. 1988), the circuit court allowed to stand a state claim against the police for failure to provide protection to the plaintiff. The plaintiff had reported ongoing harassment from her ex-husband to the police. The Court noted that this aspect of the case was controlled by state law, specifically the Kansas Tort Claims Act. The Court noted that under the Kansas Tort Claims Act, a general duty to the public was insufficient and that a special duty was required. Further, the Claims Act allowed no liability for discretionary functions. Id. at 698 (footnotes 3 and 4). The Court allowed to stand a finding in favor of Watson that the failure of the police to protect Watson was not discretionary and that Watson's relation to the police was greater than that of the general public. Accordingly, none of the arguments stated by the plaintiff/respondent violate Federal law or Constitutional provisions.

The State Attorney next argues to suggest that State court decisions require the absolute immunity noted in some of the

Federal opinions. In Berry v. State, 400 So.2d 80 (Fla. 4th DCA 1981), the District Court held that Section 768.28 had no bearing on the "absolute immunity" for the actions of a state attorney "within the scope of his prosecutorial duties." Id. at 84. As noted earlier, subsequent rulings of this Court have already rejected this argument. See Trianon, supra, specifically noting that prosecutors are subject to review under 768.28.

The Court in Berry expressed fear of prosecutors being subject to suit by "those whom he accuses and fails to convict." Id. The Court went on to discuss "possible civil action in case the prosecutor saw fit to move a dismissal of the case..." Id. These concerns are clearly limited to the area of criminal prosecution; the plaintiff's case herein is not based on bringing, or failing to bring, criminal prosecution. A better way to view the Berry case would be to retroactively apply the Trianon standards noted earlier. In doing so, it becomes quite clear that the concerns of the Berry Court are more than adequately dealt with by the standards established by this Court in the case of Commercial Carrier, supra. In other words, these actions are clearly discretionary in measure and would not give rise to any civil action.

A similar statement is made by the First District Court in the case of Weston v. State, 373 So.2d 701 (Fla. 1st DCA 1979), holding that:

> It is necessary to the judicial process in the enforcement of the criminal laws of the State that that state attorney be fee from any apprehension that he or she may subject the State to liability for acts performed in the exercise of the discretionary duties of the office. Id. at 703.

This statement is not in conflict with the arguments previously set forth herein. First, the Court notes that this concern exists in the "enforcement of the criminal laws of the State." Id. The plaintiff's case is not based on any claim regarding the enforcement, or lack of enforcement, of any criminal laws. Second, the District Court noted that the immunity applied to "discretionary duties" of the state attorney. Id. Consequently, it is not in conflict with the subsequent rulings of this Court.

The Attorney General, as amicus curiae, argues that the plaintiff herein was attempting to "undertake a prosecution of sorts" and to create a new tort of "negligent failure to prosecute." This is obviously an attempt to confuse the plaintiff's claims. The Complaint is sufficiently detailed to refute these charges.

IV.

THE PLAINTIFF HAS STATED A CAUSE OF ACTION IN THE COMPLAINT FILED HEREIN AND PURSUANT TO THE POLICY OF THE COURTS OF FLORIDA THE QUESTION OF FORESEEABILITY IS A MATTER TO BE RESOLVED BY A JURY

The State Attorney has made reference throughout its Brief to information that is not available regarding this case. For example: would the State Attorney have obtained the injunction if it had attempted to do so? Did the decedent justifiably rely on the representations of the State Attorney? Would an Injunction have stopped Wilson before he killed the decedent? Is there a sufficient relation between the failure by the State Attorney to obtain the injunction and the decedent's death? As the DCA noted in its Opinion, Parrotino, supra, the question before this Court is whether the case has been plead, and not whether it can ultimately be proven. Id. at D63. There are several avenues of discovery available to the plaintiff which could lead to admissible evidence on these issues - if the plaintiff is ever given the opportunity to pursue them.

The plaintiff argued in her original Appeal to the DCA, that because this case was dismissed with prejudice within a few weeks of being filed (on the first hearing before the court), the plaintiff never had an opportunity to engage in discovery of any kind, including depositions of friends and family of both the decedent and her killer. Consequently, there is a great deal of information that we do not know about this case. However, to allow

those issues to serve as a basis for upholding the dismissal would be tantamount to assuming that the plaintiff cannot produce additional evidence given the opportunity. There is no basis for this assumption. The plaintiff has asserted that the trial court's dismissal was premature, especially considering that facts of the case. This Court should reject any argument that suggest that the lack of those facts is the fault of the Plaintiff when the plaintiff was never given the opportunity to develop those facts by the trial court.

The State Attorney argues that, because the decedent was harassed on four occasions after speaking with the State Attorney, that she could not have reasonably relied on the State to assist her. The plaintiff asserts that the behavior of the decedent proves the exact opposite of the State Attorney's contention. The decedent knew that there was a connection between the police and the State Attorney, since she was referred to the State Attorney by the police. She had reason to believe, as did her family, that the State was taking the appropriate action, and that she had no choice but to wait for this process to unfold. The fact that she continued to report harrassements occuring after the conference with the State Attorney proves that she continued to believe in the ability of the State Attorney to render assistance to her and it certainly indicates an ongoing reliance on the State as opposed to any other avenue that may have been available to her.

The dissenting Opinion of the DCA, Parrotino, supra, suggests that the killer could not have been stopped by an Injunction, even

had the State Attorney provided one, arguing that if the severe penalties for murder were not a deterrent then mere contempt of court would be an ineffective tool as well. Id. at D65. On the surface, this seems like a reasonable assertion. However, it fails to take into account several possibilities. First of all, injunctions must certainly work in some cases or our system would not be set up to obtain and allow injunctions under appropriate circumstances. The underlying assumption, therefore, must be that the early intervention of the court may stop possible harm to a victim by forcing an aggressor to face possible contempt charges. Would this have worked with Wilson? Perhaps the only person that can answer that question is Wilson. It is reasonable to assume, however, that intervention by the Court in the months prior to the killing may very well have had a bearing on the ultimate outcome. What if the State Attorney had obtained the injunction; what would have been the result? Presumably, Wilson would have been arrested and forced to appear before a judge in late 1986 or early 1987 (following the harassment of his victim). Would this have done anything to prevent the escalation of this harassment into murder? The plaintiff cannot say so with absolute certainty. However, it certainly is possible. Perhaps the question is whether or not the plaintiff should be given an opportunity to take discovery in this case to see what the evidence might suggest. People who know Wilson may be able to provide insight as to what might have occurred; or perhaps Wilson himself could address the issue. In either event, that will only be known if the plaintiff is allowed

to progress beyond the point of a simple Motion to Dismiss.

In Kaisner, supra, this Court stated that "where a defendant's conduct creates a forcible zone of risk, the law generally will recognize a duty placed upon (the) defendant... to lessen the risk..." Id. at 735. The Court went on to state "there is a strong public policy in this state that, where reasonable men may differ, the question of foreseeability in negligence cases should be resolved by a jury." Id. And furthermore, this Court went on to state "while it is true that the petitioner in this instance may have aggravated his injuries by his own conduct, we do not believe this should vitiate his claim entirely. Rather, this concern should be left to the jury to consider under the doctrine of comparative negligence..." Id. This case should be placed into the hands of jury and the admittedly difficult task of assessing the causation issue should be left in their capable hands.

CONCLUSION

The State Attorney had no obligation to provide assistance in a civil legal action. But, once that decision was made, the State Attorney had a duty to act in a reasonable manner. The decedent relied on the State Attorney. The State Attorney misplaced her file and no action was taken. The State Attorney voluntarily assumed a responsibility which gave rise to a special duty.

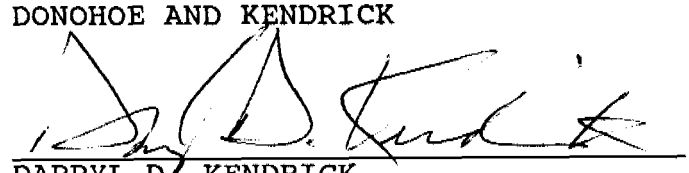
The State Attorney should be held to the same standard as private counsel under Section 768.28. The State Attorney's actions as to McFarland were clearly operational in nature and no immunity exists.

There is no prohibition against holding a prosecutor responsible for actions outside the area of criminal prosecution. Because of the unique factual circumstances of this case a finding of liability will have no ill effect on the administration of justice within the State of Florida. It will not open the floodgates of litigation nor will it cause any radical change in the way prosecuting attorneys develop their cases.

Due to the premature Dismissal of her case, the plaintiff had no opportunity for discovery. There is no sound legal basis for determining that the plaintiff will not be able to prove her case prior to discovery. The plaintiff has stated a valid cause of action.

The opinion of the First District Court of Appeal should be affirmed and the ultimate issues in this case should be determined by a jury.

DONOHOE AND KENDRICK



DARRYL D. KENDRICK
FLORIDA BAR #0558885
1817 ATLANTIC BLVD.
JACKSONVILLE, FLORIDA 32207
(904) 399-1050
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert E. Warren, Esquire, TAYLOR, MOSELEY & JOYNER, 501 West Bay Street, Jacksonville, Florida 32202; Richard Barnett, Esquire, 4651 Sheridan Street, Suite 325, Hollywood, Florida 33021; 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 mail this 27th day of March, 1993.

DONOHOE AND KENDRICK

DARRYL D. KENDRICK
FLORIDA BAR #0558885
1817 ATLANTIC BLVD.
JACKSONVILLE, FLORIDA 32207
(904) 399-1050
ATTORNEY FOR RESPONDENT