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IN THE SUPREME COURT
STATE OF FLORIDA

First District Court of Appeal Case No.: 89-3210

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 REPLY BRIEF ON THE MERITS

TAYLOR, MOSELEY & JOYNER

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II. ARGUMENT

Petitioner makes the following argument applicable to all four issues on appeal.

Much is made in Respondent's Brief of the "civil" nature of the alleged undertaking by the State Attorney's Office in this case. Both Respondent and the DCA majority compare the State Attorney's alleged commitment to obtain an injunction to a similar undertaking by a private attorney. Each claims a private attorney would owe a common law duty to McFarland and would therefore be negligent for failing to obtain the injunction under the facts of this case. Relying then on the language of F.S.A. §768.28(1) and (5), each concludes the State Attorney's office must be liable.

The language of §768.28 has not been applied literally. For example, judges and grand jurors are exempt. The discretionary/operational dichotomy is not articulated in the statute but has been judicially imposed to limit the literal application of the language. The fact that the State Attorney's office was to proceed in a civil rather than a criminal forum should make no difference to the immunity analysis. The deterrent effect on the decision making process, the shading of independent judgement, the harassment by unfounded litigation and the time consumed in defending such

actions would be present just as much in the one forum as it would be in the other.

Generally speaking a State Attorney's office considers criminal prosecutions. If sufficient evidence exists for a criminal complaint then one can be filed. If sufficient evidence does not exist then the State Attorney's Office can decline prosecution. These types of decisions are clearly discretionary.

The situation with which the State Attorney's office was dealing in this case was domestic violence. Wilson was allegedly threatening and harassing McFarland. The State Attorney's office did not create this situation. It was being asked to respond to it. The most common response would be to consider criminal prosecution.

In the area of domestic violence, however, problems and policy considerations are often presented which make criminal prosecution undesirable, inappropriate or not possible. It sometimes happens that a spouse will decline to assist a criminal prosecution. Thus, while activity may occur which would support a criminal complaint, it may be deemed to be in the best interest of all concerned not to proceed criminally. In these cases, a civil injunction may be preferable. The availability of a civil injunction, therefore, functions to expand the remedies available to the State Attorney's office: to provide an alternative to criminal proceedings. In considering whether to seek this remedy, however, the

State Attorney would still be carrying out a prosecutorial function and would still be acting as the State Attorney. Opting to proceed with a civil remedy would not convert the State Attorney to the victim's private civil attorney.

If the State Attorney is immune only when proceeding criminally his judgment will clearly be influenced by that fact. If he faces civil liability for alleged negligence, the State Attorney may be wise to proceed criminally or not proceed at all. Society in general and victims of domestic violence in particular, would not be better served.

The fact that a private attorney could have been asked to obtain the injunction and may have been liable for failing to do so is only superficially analogous. The State Attorney's office, in the area of domestic violence, is not a legal clinic available to provide free legal assistance to victims of domestic violence who do not choose to retain private counsel. The State Attorney's client remains the State of Florida. Accordingly, the State Attorney's decision as to how to proceed in cases involving domestic violence should not be fettered by considerations of liability. Here, as Respondent concedes, there would be no claim had the State Attorney agreed to initiate a criminal prosecution and then failed to follow-up.

A private attorney is an advocate for his client only. He need not be mindful of the interests of anyone other than his client. The State Attorney, however, is not acting on behalf of an individual and must consider the defendant's rights as well as the victim's and the State's. In acting pursuant to section 741.2901, et.seq., he both decides and effectuates policies of governance. The State Attorney's office cannot make decisions on the same basis as a private attorney.

The step-by-step application of the discretionary/operational dichotomy proposed by the Respondent and adopted by the DCA is unworkable. It is true that the performance of any discretionary function by the State Attorney' office will inevitably involve acts that Respondent calls "operational". The focus of the analysis, however, should not be on any particular isolated act. Immunity should not depend on a jury's determination that a particular act was discretionary or operational. Rather, the entire process must be looked at to determine whether all the acts involved were performed in "carrying out" a discretionary or operational function. Each step in carrying out a discretionary, prosecutorial function, whether it be a thought process or not, should be immune because it is necessary to effectuate a basic act of governance. If it were otherwise, any complaint which alleged that the loss complained of was caused or contributed to by an

operational act whether it be in a discretionary process or not would require a trial, and any determination of immunity would have to await the verdict of the jury. This would result in an unjustifiable intrusion by the judicial branch of government on the executive branch. Even in those cases where immunity is ultimately found, it would only be after the State Attorney's Office was required to justify its conduct. In such circumstances, immunity is effectively lost. The instant case is a good example.

In the course of prosecuting domestic violence, whether through criminal or civil action or both, a prosecutor engages in many implementing acts, e.g., research, marshaling evidence, locating and interviewing witnesses, getting them to trial, seeking or agreeing to delays. It is easy to allege that any one of these acts was negligently undertaken and had some proximate (and injurious) result. But immunity is a bar to trial, not just liability, even when there is a reasonable prospect that fault is present. Otherwise immunity would not be needed. The dissenting opinion of Judge Smith is correct in saying that "under the majority's reasoning, a prosecutor enjoys immunity only so long as there is no negligence." (See, 1st DCA Opinion p. 19, 20) In other words, there is no immunity when a prosecutor acts in a "civil" capacity. If this is so, many State Attorneys

will be reluctant to assume the risk of acting in that capacity.

Unless the Court is prepared to accept the Respondent's contention that the State Attorney was acting as a private attorney in a "civil" capacity in which he may be held liable for acts of operational negligence, prosecutorial immunity should control and this case should stand dismissed. If, however, the Court is of the opinion that Respondent has been denied an adequate day in court, this case may be remanded for repleading. In that event, the decision of the District Court must still be vacated.

There is one more reason for counsel's vacating or reversing the District Court's decision. In essence, it finds a "special relationship" was created merely because the State Attorney said he would follow a statutory procedure. This is not consistent with case law and bodes ill for any law enforcement official who represents to a crime victim or potential crime victim that he will take action of any kind on which the victim may later claim "reliance". As a narrow exception to the doctrine of immunity and the principle that a law enforcement official's duty to protect is a general duty owed to the public as a whole, such a relationship should not be established by anything less than an explicit promise of actual, physical protection.

III. 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; **RICHARD BARNETT, ESQUIRE**, 4651 Sheridan Street, Suite 325, Hollywood, Florida 33021; **BRIAN J. DAVIS, ESQUIRE**, Duval County Courthouse, Suite 605, Jacksonville, Florida 32202; **ARTHUR I. JACOBS, ESQUIRE**, Post Office Box 1110, Fernandina Beach, Florida 32034; and **LOUIS F. HUBENER, ESQUIRE**, Assistant Attorney General, The Capitol, Suite 1603, Tallahassee, Florida 32399-1050, by U.S. Mail, this 12th day of April, 1993.

Robert E. Warren
Attorney