IN THE SUPREME COURT OF FLORIDA

CASE NO. SC95000

ALAN H. SCHREIBER, etc.
et al.,

Petitioners,

vs.

ROBERT R. ROWE,

Respondent.
_____/

RESPONDENT'S SUPPLEMENTAL BRIEF ON SOVEREIGN IMMUNITY

Sharon C. Degnan
Diane H. Tutt
DIANE H. TUTT, P.A.
8211 W. Broward Boulevard, Suite 420
Plantation, Florida 33324
(954) 475-9933
Fla. Bar No. 329371

Appellate Counsel for Respondent

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INTRODUCTION

In accordance with this Court's Order dated September 13, 2000, this supplemental brief is filed on behalf of the Respondent/Cross Petitioner, ROBERT R. ROWE, on the Issue of Sovereign Immunity.

Throughout this supplemental brief, Respondent/Cross Petitioner will be referred to as "Rowe." Petitioners/Cross Respondents, ALAN H. SCHREIBER and RICHARD L. JORANDBY, will be referred to as "Schreiber" and "Jorandby" respectively. The Solicitor General, which has filed a supplemental amicus curiae brief, will be referred to as "The State." Collectively, they will be referred to as "Petitioners."

SUMMARY OF THE ARGUMENT

Both the plain language of F.S. § 768.28 and the applicable legislative history unequivocally establish that the Florida Legislature has waived sovereign immunity for the Office of the Public Defender, to the extent that it is liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. Consequently, because the allegations of negligence contained in Rowe's Fifth Amended Complaint would be actionable against a private criminal defense attorney based upon a breach of the common law duty of care owed by a lawyer to his client, both Schreiber and Jorandby are subject to suit in this case.

ARGUMENT

Point I

PURSUANT TO F.S. 768.28, THE FLORIDA LEGISLATURE HAS EXPRESSLY WAIVED SOVEREIGN IMMUNITY FOR THE PUBLIC DEFENDER FOR THE ACTS OF NEGLIGENCE ALLEGED BY ROWE.

Though doing it in a somewhat convoluted manner, Jorandby, Schreiber and the State all concede in their supplemental briefs that both the plain language of F.S. § 768.28 and the applicable legislative history of this statute unequivocally establish that the Florida Legislature has in fact waived sovereign immunity for state agencies, including the Office of the Public Defender, to the extent that they are liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. Nonetheless, all three parties urge this Court to determine that Rowe should be precluded from pursuing his action against Jorandby and Schreiber based not only on the doctrine of judicial immunity, but also sovereign immunity. Because the basis for Rowe's legal malpractice action is squarely within the type of negligence action that the Florida Legislature has decided to permit against the Office of the Public Defender, pursuant to § 768.28, Rowe adamantly disagrees with Petitioners' position.

Although the words used in F.S. § 768.28 are clear, it is still true, as pointed out

by the First District in ***Scott v. Florida Dept. of Transportation***, 752 So. 2d 30 (Fla. 1st DCA 2000), that the scope of the statutory waiver of sovereign immunity is one of the more vexing questions in Florida jurisprudence. Over the years, many courts, including this one on a number of occasions, have defined and re-defined the extent of the statutory waiver of sovereign immunity and have concluded that while "discretionary"[1] policy-making or planning activities of governmental entities continue to be immune from tort liability, immunity is waived for negligent activities that are operational and for which a common law duty of care exists. ***Dept. of Health & Rehabilitative Services v. B.J.M.***, 656 So. 2d 906 (Fla. 1995); ***Trianon Park Condominium Ass'n v. City of Hialeah***, 468 So. 2d 912 (Fla. 1985); ***Commercial Carrier Corp v. Indian River County***, 371 So. 2d 1010 (Fla. 1979). Moreover, this Court has recognized that the question of whether an underlying common law duty of care exists is a separate question from whether the governmental activity is a planning or operational function. ***Vann v. Dept. of Corrections***, 662 So. 2d 339 (Fla. 1995).

As correctly pointed out in Petitioners' supplemental briefs, this Court made

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[1] As recognized in ***Berry v. State***, 400 So. 2d 80 (Fla. 4th DCA 1981), courts must be careful not to ascribe a "talismanic" effect to the term "discretion" since most conscious acts of any person whether he works for the government or not involve choice and discretion in making decisions. ***Berry*** at 86 (citing to ***Smith v. United States***, 375 F.2d 243,246 (5th Cir. 1967)). Rowe submits that a number of Petitioners' arguments that the public defender's functions are discretionary are based on this overbroad notion of discretion.

clear in ***Trianon Park Condominium Ass'n v. City of Hialeah***, 468 So. 2d 912 (Fla. 1985) that the enactment of the statute waiving sovereign immunity did not establish a new duty of care for governmental entities, but rather permits recovery for breaches of existing duties of care. Consequently, the duty of care issue analyzes whether a statutory or a common law duty of care is owed to the public as a whole or to a definable class of individuals. ***First American Title Insurance v. Dixon***, 603 So. 2d 562 (Fla. 4th DCA 1992)(citing to ***Trianon***).

In ***Dixon***, the Fourth District considered whether an insurer could seek indemnity from a clerk of court, in his official capacity, for the allegedly negligent indexing of a claim of interest on a piece of property. After the trial court concluded that the clerk was entitled to sovereign immunity on such a claim, the Fourth District reversed, recognizing that the clerk had a statutory duty to an identifiable class of individuals, and not simply to the public in general and that this duty was clearly a ministerial act and thus operational in nature.

As did the clerk of court in ***Dixon***, Jorandby argues on page 7 of his supplemental brief that he and Schreiber are entitled to sovereign immunity because they, as public defenders, do not owe a duty of care to a criminal defendant such as Rowe. Likewise, both Schreiber and the State suggest that the duties owed by a public defender are not to a particular client, but rather to the general public at large. Rowe

submits this argument is, at best, mistaken and that in accordance with the analysis used by the Fourth District in ***Dixon***, *supra*, the duty of care owed by the public defender is to an identifiable class of individuals -- indigent criminal defendants. In assigning the defense of most indigent criminal defendants to the various public defenders, the state is simply complying with the constitutional requirements (Sixth and Fourteenth Amendments) set forth in ***Gideon v. Wainwright***, 372 U.S. 335 (1963), which requires counsel to be provided to such individuals in felony cases. It is the defendants' constitutional rights which are being protected and provided for, not the general public's. Consequently, a breach of such a duty of care by a public defender can serve as the basis for a negligence suit by a criminal defendant like Rowe. Moreover, if the public defenders owed their duty of care to the state, and not the criminal defendants whom they represent, this would provide a clear conflict of interest.

Unlike the other actors in this so-called "tri-partite entity" (the prosecutor and the judge), for whom it can legitimately be argued that there is no individual duty owed to anyone in particular, a public defender is a lawyer who represents his client, just like privately retained defense counsel. Consequently, there is no question that a fiduciary attorney-client relationship exists between a public defender and a criminal defendant. *See* ***State v. Abrams***, 350 So. 2d 1104 (Fla. 4th DCA 1977); ***Olsen v. State***,

338 So. 2d 225 (Fla. 3d DCA 1976); ***State v. Bryan***, 227 So. 2d 221 (Fla. 2d DCA 1969). As such, just like a private attorney, a public defender owes his client a duty to exercise the degree of reasonable knowledge and skill which lawyers of ordinary ability and skill possess and exercise. ***Home Furniture Depot, Inc. v. Entevor AB***, 753 So. 2d 653 (Fla. 4th DCA 2000); ***Atkin v. Tittle & Tittle***, 730 So. 2d 376 (Fla. 3d DCA 1999). Furthermore, he has the duty to each of his clients to marshal his time so as to be able to take care of the business that is entrusted to him in a reasonably competent manner. ***Lane v. The Most Worshipful Union Grand Lodge Free & Accepted Masons***, 180 So. 2d 187 (Fla. 1st DCA 1965). It is the breach of these precise duties of care on which Rowe bases his claim of legal malpractice in this case.

For Petitioners to argue that no common law duty is owed to a criminal defendant is simply unjustified and ignores the clearly defined attorney-client relationship between an indigent criminal defendant and a public defender. As the United States Supreme Court clearly expressed in ***Ferri v. Ackerman***, 444 U.S. 193 (1979):

> Although it is true that appointed counsel serves pursuant to a statutory authorization and in furtherance of the federal interest in ensuring effective representation of criminal defendants, **his duty is not to the public at large,** except in that general way. His principal responsibility is to serve the undivided interests of his client.

Ferri at 204.

Moreover, Rowe does not disagree with Petitioners' recitation of the law that has been developed by this Court in ***Commercial Carrier***, *supra*, ***Trianon***, *supra*, and their progeny, wherein the applicable test in determining whether the governmental function being challenged is discretionary or operational in nature was explained. Where Rowe does disagree, however, is with Petitioners' conclusion that the functions that he has challenged in his legal malpractice claim are discretionary, policy and planning type functions for which governmental immunity still exists.

Both Schreiber and the State propose that the various allegational aspects of Rowe's claim of legal malpractice should be segmented and analyzed separately. Moreover, both Schreiber and the State come dangerously close, though not actually conceding, that the claims of legal malpractice alleged against Jorandby in whole and against Schreiber in ¶ 20 of the Fifth Amended Complaint[2] fall within the performance of an operational function for which sovereign immunity has been waived in § 768.28.

This acknowledgment is appropriate since these allegations, which center upon the assistant public defenders who represented Rowe at trial and on appeal improperly

[2] The allegations in ¶ 20 concern, among other things, the failure of assistant public defender, Doug Brawley, to adequately prepare Rowe's case, to preserve appellate issues, to object to testimony and evidence presented at trial, etc. In other words, failing to adequately practice law.

and negligently performing their assigned duties, are clearly operational in nature. In ***Lee v. Department of Health and Rehabilitative Services***, 698 So. 2d 1194 (Fla. 1997), this Court acknowledged that allegations that HRS workers negligently left mentally retarded patients unattended and witnessed instances of sexual abuse and failed to file the necessary reports or to take appropriate remedial steps to prevent such activity from occurring, were actionable and that HRS was not immune from suit based on such operational negligence. In justification of this conclusion, the ***Lee*** Court recognized that the asserted negligent actions, if true, did not require the exercise of basic policy evaluations or judgment and expertise on the part of the state agency or the directors of the facility. This same analysis is applicable to the present case since the allegations in Rowe's Fifth Amended Complaint have nothing to do with the governmental aspect of the Public Defender's Office, but rather with the negligent performance in the assistant public defender's lawyering function.

Clearly, had Rowe's public defenders served as trial and appellate counsel in the private sphere, such allegations of negligent job performance could and would expose them to liability for legal malpractice based on an alleged breach of their common law duty of care to their client. As clearly pointed out by this Court in ***Trianon***, *supra*, in the analogous context of the State providing medical services under Category IV of governmental functions and activities:

> Providing professional, educational, and general services for the health and welfare of citizens is distinguishable from the discretionary power to enforce compliance with laws passed under the police power of this state. **These service activities, such as medical and educational services, are performed by private persons as well as governmental entities, and common law duties of care clearly exist.** Whether there are sufficient doctors provided to a state medical facility may be discretionary judgmental decision for which the governmental entity would not be subject to tort liability. **Malpractice in the rendering of specific medical services, however, would clearly breach existing duties and would render the governmental liable in tort.**

Trianon at 921 (emphasis added). This same analysis should be applied to the present scenario since the conduct being challenged by Rowe is essentially the same.

In regard to the other portion of the allegations of malpractice against Schreiber contained in ¶ 17 through 19, both Schreiber and the State argue that these allegations implicate Category II governmental actions under the ***Trianon*** categories insofar as they challenge the discretionary decisions regarding implementation of an accused's constitutional right to be represented by counsel for which there is no common law duty to anyone in particular, but rather to the general public at large. Rowe disagrees with these claims. Rowe disagrees with this characterization of the allegations in his pleading.

While the language contained in ¶ 17 through 19 of the Fifth Amended

Complaint uses the words "management and supervision," it is important to look at the specific nature of the allegations contained therein. Had Rowe challenged Schreiber's spending decisions or the widespread policy and planning activities of the Office of the Public Defender, then he would agree that based on prior rulings of this Court, such governmental decisions would likely be immune. *See* ***Lee v. Department of Health and Rehabilitative Services***, 698 So. 2d 1194 (Fla. 1997); ***Department of Health and Rehabilitative Services v. B.J.M.***, 656 So. 2d 906 (Fla. 1995). However, the allegations in Rowe's Fifth Amended Complaint and the conduct on the part of the Public Defender with which Rowe has taken issue are categorically different.

The allegations of "managing of resources" and "supervision" contained in Rowe's pleading primarily concern Schreiber's operational level decisions regarding lack of supervision of inexperienced attorneys. Unlike the number of employees that are assigned by an HRS facility to supervise patients, which this Court deemed to be a discretionary decision made after policy evaluation and based on the expertise of the directors of the HRS facility in ***Lee***, *supra*, Schreiber's decision to place an inexperienced lawyer as lead counsel in Rowe's defense on four capital felony charges without the benefit of any supervision whatsoever is not the same type of decision. To the contrary, this decision, which would be actionable against any supervisory lawyer or law firm who acted in the same way, is an operational level decision

subsumed in the obligation of the Office of the Public Defender to provide legal services to indigent criminal defendants, which most suitably falls under Category IV of the ***Trianon*** categories.

While it is true, as recognized by Justice Jackson in his dissent in ***Dalehite v. United States***, 346 U.S. 15, 57 (1953), that it is not a tort for the government to govern, it must be recognized that it is, in fact, a tort for a lawyer to lawyer negligently. To the extent that it is this aspect of the public defender's function that Rowe seeks to challenge in his legal malpractice suit, the express waiver of sovereign immunity to the Office of the Public Defender in F.S. § 768.28 is applicable.

The State concludes its supplemental brief by arguing that as a matter of both public policy and legislative intent, it is improper for the State to be subject to civil liability any time a criminal defendant is granted post-conviction relief based upon "ineffective assistance of counsel" and that it is "unlikely" that the legislature intended to provide a civil remedy for "all legal malpractice" committed in the course of a criminal proceeding. Contrary to the suggestion of the State, Rowe submits that any time a criminal defense lawyer, whether he is a public defender or privately retained counsel, breaches a duty of care to his client by committing legal malpractice and therein causes his client to suffer damages, the lawyer, or in the case of a public defender, the Officer of the Public Defender, should be liable. To reach any other

conclusion is to ignore the unambiguous language of F.S. § 768.28 which recognizes that a government entity is liable for tort claims in the same manner and to the same extent as a private individual under like circumstances.

Point II

BECAUSE THEIR ROLE IS FUNDAMENTALLY DIFFERENT FROM THE JUDGE AND THE PROSECUTOR, PUBLIC DEFENDERS ARE NOT ENTITLED TO JUDICIAL IMMUNITY FROM SUIT.

Despite the fact that both Schreiber and Jorandby spend a significant portion of their supplemental brief discussing the issue of judicial immunity, Rowe will rely on the arguments made in his Answer Brief in Response to Amicus Brief wherein the topic of judicial and quasi-judicial immunity were addressed in great detail. As argued therein, because the function and role of the public defender is categorically different than that of the judge or prosecutor, the absolute immunity that has been provided to the latter is not applicable to the former.

CONCLUSION

For the reasons stated in great detail above, this Court should conclude that by virtue of F.S. § 768.28, the Florida Legislature has waived sovereign immunity for the claims of legal malpractice alleged by Rowe against Schreiber and Jorandby in his Fifth Amended Complaint.

DIANE H. TUTT, P.A.
Appellate Counsel for Respondent
8211 W. Broward Boulevard
Suite 420
Plantation, Florida 33324
(954) 475-9933

By_____
SHARON C. DEGNAN
Fla. Bar No. 0061255

and

By_____
DIANE H. TUTT
Fla. Bar No. 329371

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief was furnished by mail this 23rd day of October, 2000 to, NEIL ROSE, ESQUIRE, P.O. Box 223340, Hollywood, Florida 33022, JAMES C. BARRY, ESQUIRE, 1555 Palm Beach Lakes Boulevard, Suite 1600, West Palm Beach, Florida 33401, KENNETH J. KAVANAUGH, ESQUIRE, 400 S.E. 8th Street, Fort Lauderdale, Florida 33316-5000, DAVID E. PETERSON, ESQUIRE, Befera & Peterson, 866 South Dixie Highway, Coral Gables, Florida 33146, E. BRUCE JOHNSON, ESQUIRE and CHRISTINE M. DUIGNAN, ESQUIRE, Johnson, Anselmo, et al., 790 East Broward Boulevard, Suite 400, Fort Lauderdale, Florida 33301 and THOMAS E. WARNER, ESQUIRE, Solicitor General, and T. KENT WETHERELL, II, ESQUIRE, Deputy Solicitor General, The Capitol, Suite PL-01, Tallahassee, Florida 32399-1050.

DIANE H. TUTT, P.A.
Appellate Counsel for Respondent
8211 W. Broward Boulevard, Suite 420
Plantation, Florida 33324
(954) 475-9933

By_____
DIANE H. TUTT
Fla. Bar No. 329371