MONMOUTH COUNTY PROSECUTOR'S OFFICE, Appellant, v. OFFICE OF THE ATTORNEY GENERAL DEPARTMENT OF LAW AND PUBLIC SAFETY, Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-000856-23 T4 On Appeal from the Final Agency Action of the Department of Law & Public Safety Dated: October 16, 2023

BRIEF AND APPENDIX OF APPELLANT MONMOUTH COUNTY PROSECUTOR'S OFFICE

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PRELIMINARY STATEMENT

This appeal involves the review of a final agency action taken by the Office of the Attorney General of the State of New Jersey (the "OAG") in refusing to defend and indemnify the Monmouth County Prosecutor's Office (the "MCPO"), on a claim contained in a civil lawsuit.

The underlying facts are not in dispute. An Internal Affairs ("IA") complaint was filed against the Deputy Chief of the Marlboro Township Police Department ("Marlboro PD"). Pursuant to the Attorney General's Internal Affairs Policy & Procedures (November 2022) ("IAPP") and Attorney General Law Enforcement Directive 2022-14 ("Directive 22-14") because the Deputy Chief was the subject of the IA complaint, it was referred to the MCPO to conduct the investigation.

Following an investigation by the MCPO, the IA complaint was sustained and referred back to Marlboro PD for appropriate action. Thereafter, the Township of Marlboro (the "Township") and the Deputy Chief reached an agreement whereby the Deputy Chief resigned in lieu of proceeding through the disciplinary process. As a result of termination of the disciplinary process, in order to comply with its obligations under the IAPP and Directive 2022-14, at least one of the sustained charges required Marlboro PD to post details of the report and its findings, identifying the Deputy Chief by name, on the internet.

In an attempt to circumvent this requirement, the former Deputy Chief filed the underlying complaint seeking to compel the MCPO to establish a procedure for him to challenge the findings of the Summary and Conclusions report. The OAG had refused to defend and indemnify the MCPO solely because plaintiff in the underlying case is not seeking monetary damages. However, the gravamen of the lawsuit is a challenge to the OAG's policies and procedures themselves. Specifically, the lawsuit seeks to have the MCPO supersede the authority of the OAG and re-write the OAG policies.

Accordingly, the decision of the OAG should be reversed and an Order entered requiring the State to reimburse the MCPO Defendants for legal fees and expenses incurred to date, and requiring the OAG to provide a defense and indemnification to the MCPO on the underlying complaint going forward.

PROCEDURAL HISTORY

On August 28, 2023, Fred Reck ("Reck") filed a civil action in the Superior Court of New Jersey, captioned *Fred Reck v. Monmouth County Prosecutors Office,* Docket No. MON-L-2684-23. That Complaint, was fashioned as an "Action in Lieu of Prerogative Writ,". (Pa2-9). The Complaint was served on the MCPO on September 6, 2023.

By letter dated October 2, 2023, Julia Alonso, First Assistant Prosecutor for the MCPO, forwarded a copy of the Complaint to Assistant Attorney General Daniel Vannella and requested that the OAG provide a defense to the MCPO pursuant to Wright v. State, 169 N.J. 422 (2001). (Pa1-9).

By letter dated October 16, 2023, AAG Vannella responded denying the MCPO's request for defense and indemnification under Wright. (Pa10-13).

This appeal, which was timely filed, follows. (Pa81-89).

STATEMENT OF FACTS[1]

Reck was employed as the Deputy Chief of the Marlboro PD. (Pa 3, Complaint ¶¶ 1,5). On or about September 15, 2022, Sgt. Jonathan Gramcko notified the MCPO of an IA complaint against Reck. (Pa4, Complaint ¶ 6).

[1] Given the nature of the appeal, the Statement of Facts is taken from the allegations contain in the Complaint in *Fred Reck v. Monmouth County Prosecutors Office,* MON-L-2684-23. Reliance on these facts in the context of this appeal should not be seen as adoption or endorsement of those facts for purposes other than this appeal.

Given Reck's rank, pursuant to the IAPP and Directive 2022-14, the investigation of the IA complaint was referred to the MCPO. (Pa4 Complaint ¶ 7; Pa 51-51, IAPP 5.1.8).

On or about January 18, 2023, a Summary and Conclusions report was issued concerning the allegations in the IA complaint, which sustained the allegations of the IA complaint against Reck. (Pa4, Complaint ¶ 8). Based on the MCPO findings, at least one of the sustained charges required Marlboro PD to post details of the report and its findings, identifying Reck by name, on the internet as part of its compliance obligations under the IAPP and Directive 22-14. (Pa4 Complaint ¶ 9; Pa 75-77, IAPP 9.11.2(k)).

The findings of the IA investigation were shared by the Chief of the Department with Reck, who was given the option to retire, rather than go through a disciplinary hearing and contest the charges. (Pa4 Complaint ¶ 10).

As a result of those discussions, there was an agreement between the Township and Reck that resulted in Reck retiring effective April 1, 2023. (Pa5-5 Complaint ¶¶ 11, 12).

After his retirement, Reck, through his attorney, attempted to obtain "a copy of the formal procedures by which he [could] challenge the findings of the Summary and Conclusions report. . ." (Pa5 Complaint ¶ 14).

By letter dated July 10, 2023, Assistant Prosecutor Melanie Falco, Director of the Professional Responsibility and Bias Crime Unit at the MCPO, wrote to Reck's counsel. In that letter, AP Falco advised Reck's counsel that there was no such procedure. That, having failed to challenge the findings through the administrative process prior to retirement, he was prohibited from doing it post-retirement. (Pa5-6 Complaint ¶ 15-16; Pa75-77, IAPP 9.11.2).

Presumably in response to AP Falco's letter, Reck filed the underlying lawsuit seeking to compel the MCPO to provide legal advice and/ or create a remedy to address his failure to follow those that were available to him prior to his decision to retire, a remedy which would contravene the very purpose of the OAG's IAPP and Directive 2022-14.

STANDARD OF REVIEW

Generally, a reviewing court "should not reverse the Attorney General's determination unless it is arbitrary, capricious, unreasonable or it is not supported by substantial credible evidence in the record as a whole." Prado v. State, 186 N.J. 413, 427 (2006). However, when as here the issue presented to the Court is legal in nature, this court's review is de novo. Lavezzi v. State, 219 N.J. 163, 172 (2014).

The present matter requires the court to make a finding as to whether or not the State is obligated to defend and indemnify the MCPO in a civil lawsuit. Thus,

while the Attorney General's factual determinations are subject to a deferential standard of review, as noted by the Supreme Court in Lavezzi v. State, supra, the review of the Attorney General's legal conclusions are subject to de novo review because courts are not "bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue." Id. citing Norfolk S. Ry. Co. v. Intermodal Props., LLC, 215 N.J. 142, 165 (2013).

In the present matter, there were no factual findings made by the Attorney General. Instead, the Attorney General made its determination not to defend and indemnify the MCPO based solely upon the allegations contained in the underlying complaint, and specifically based on the fact that Reck was not seeking monetary damages in his Complaint. Accordingly, as MCPO contends the decision of the OAG was wrong as a matter of law, de novo review is the appropriate standard of review.

LEGAL ARGUMENT

THE DECISION OF THE ATTORNEY GENERAL'S OFFICE DENYING COVERAGE TO THE MCPO UNDER WRIGHT V. STATE IS INCORRECT AS A MATTER OF LAW AND SHOULD BE REVERSED

(Not Raised Below)

The OAG's letter of October 16, 2023 to the MCPO denying coverage for the underlying complaint under Wright v. State, 169 N.J. 422 (2001), starts with a faulty premise, to wit: "The [MCPO's] request is being made pursuant to the Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 to 12-3, and Wright v. State of New Jersey ...." (Pa10). This is incorrect. The MCPO did not make a request pursuant to the Tort Claims Act. Rather the request was based solely upon Wright and its progeny. (Pa1).

The OAG's position in this litigation is that unless the underlying lawsuit against a prosecutor's office is seeking monetary damages for a tort allegedly committed by said prosecutor's office, the OAG has no duty to defend. While there is no dispute that historically the state's duty to defend did arise in the context of tort claims made against county prosecutors, as the present case perfectly demonstrates, such a limitation is neither legally nor logically mandated. When, as here, a county prosecutor's office is engaged in a state law enforcement function, mandated by the OAG, it stands in the shoes of the OAG, and pursuant to Wright and its progeny, it is the state, not the county, that must defend those claims. Such a defense is even more critical in the present case where the plaintiff in the underlying case is seeking

to have the MCPO supersede the authority of the OAG and come up with a remedy contrary to the IAPP.[2]

In reviewing the development of the law around when the OAG is required to defend a claim against a county prosecutor's office, the starting point for the analysis is Wright v. State, 169 N.J. 422 (2001). In Wright, the New Jersey Supreme Court held that "county prosecutors and their subordinates" are entitled to defense and indemnification from the State when discharging their law enforcement duties. Id. at 452 (emphasis added). In so doing, the Court recognized that "when prosecutors perform their law enforcement function, they are discharging a State responsibility that the Legislature has delegated to the county prosecutors, subject to the Attorney General's right to supersede. The legislative delegation, in combination with the Attorney General's supervisory authority and power to supersede, demonstrates that at its essence the county prosecutors' law enforcement function is clearly a State function." Id. at 451-52 (citations omitted) (emphasis added).

There is no dispute that the Court's analysis in Wright was premised on the vicarious liability of the State under the TCA. Such an analysis made logical and legal sense as all of the claims in Wright for which the county sought coverage were based in tort. However, since the Wright decision, the New Jersey Supreme Court

[2] One could conceive of a hypothetical situation where, faced with a denial of coverage, the MCPO simply chose not to defend the lawsuit and allowed the case to proceed. Such a scenario would leave the OAG's IAPP and Directive 22-14 undefended in the underlying lawsuit, which, presumably, would not a desirable result from the OAG's perspective.

has continued to expand the OAG's obligation to defend a county prosecutor's office when acting in a law enforcement role. Thus, in Lavezzi v. State, 219 N.J. 163 (2014), although the TCA is referenced as a part of the Court's rationale as to why the State had a duty to defend, the Court also found that

> [i]n this case, the damage and loss alleged by plaintiffs may have occurred following the conclusion of the criminal investigation, when the non-contraband items at issue were no longer potential evidence, but had not been returned to plaintiffs. If so, the continued retention of plaintiffs' property, either intentionally or by oversight, derives from and directly relates to the law enforcement function that the Prosecutor's Office fulfilled when it seized and retained the evidence. Notwithstanding the State's argument that plaintiffs could have pursued a remedy based upon the equitable doctrine of replevin, the claim in this case originated from an activity that was part of the Prosecutor's Office's performance of "the criminal business of the State. N.J.S.A. 52:17B–106.
>
> Id. at 179. (Emphasis added).

In its letter of October 16, 2023 denying coverage to the MCPO, the OAG opined that Lavezzi stands for the proposition that Wright does not extend the State's obligation to defend to equitable claims. In that regard, the state is incorrect. As quoted above, the Court simply noted that it did not matter that the plaintiff in Lavezzi could have brought a claim for replevin, because the claim originated from the "criminal business of the State." Accordingly, rather than supporting the state's position, Lavezzi focused on whether the alleged actions by the prosecutor's office were law enforcement in nature and not the specific relief requested by the plaintiff.

Our courts' focus on the law enforcement function makes sense given the

hybrid nature of a prosecutor's office. Accordingly, when a lawsuit concerns a prosecutor's administrative duties involved in running an office, Wright does not require the state to provide coverage. Thus, a discrimination claim involving a promotion, Coleman v. Kaye, 87 F.3d 1491, 1499 (3d Cir.1996), cert. denied, 519 U.S. 1084 (1977); an alleged retaliatory discharge under CEPA, DeLisa v. Cnty. of Bergen, 326 N.J. Super. 32, (App. Div. 1999); attorney fees for failure to comply with the Open Public Records Act, Courier News v. Hunterdon County Prosecutor's Office, 378 N.J. Super. 539 (App. Div. 2005), have all been found to be administrative in nature and not covered.

In Gramiccioni v. Department of Law & Public Safety, 243 N.J. 293 (2020), the Court again examined in detail when the state had an obligation to defend a county prosecutor's office. In so doing, the Court relied heavily on the fact that the actions taken by the prosecutor's office were done specifically to comply with Attorney General Law Enforcement Directive No. 2000-3, which provided guidelines to law enforcement concerning steps to be taken when a law enforcement officer was involved in a domestic violence incident. The Court specifically held that

> as the State's chief law enforcement officer, the Attorney General has been given statutory authority to guide law enforcement entities, N.J.S.A. 52:17B-98; that authority has been used "to adopt guidelines, directives, and policies" for law enforcement in this State. See N. Jersey Media Grp., Inc. v. Township of Lyndhurst, 229 N.J. 541, 565, 163

A.3d 887 (2017).

The Attorney General issued Attorney General Law Enforcement Directive No. 2000-3 to promote the uniform and expeditious handling of domestic violence issues involving a special subset of individuals: law enforcement officers -- individuals who are authorized to carry state-issued weapons in the cause of law enforcement.

The Directive is particularly geared to a specialized enforcement of the domestic violence laws as they intersect with officers of the law. The Directive's instructions are vitally important because the Attorney General is rightfully concerned about the care and circumspection necessary for a fair and correct decision about whether to re-arm a law enforcement officer accused of domestic violence. Accordingly, the Attorney General devised uniform procedures that require the county prosecutor's personnel to act in the role of a neutral assessor of the propriety of re-arming an officer in those circumstances and not leave such decisions entirely to colleagues with whom the officer serves. It is, in essence, a form of specialized enforcement of the domestic violence law as it relates to a subset of individuals.

Id. at 314-316.

The Court further held that

[t]he Directive thus imposes on the county prosecutor numerous, important discretionary decisions related to the removal and return of service weapons by law enforcement officers within their jurisdiction.

. . . .

The Attorney General took too narrow an approach to the prosecutorial law enforcement function here. The administrative determinations did not credit the nuanced, discretionary decisions that prosecutors are called on to make in the re-arming of police officers such as Seidle. The decisions of the MCPO defendants who considered whether Seidle could be re-armed and then remain armed were prosecutorial functions exercised on behalf of the State. As such, those determinations, as well as the claims of improper training and supervision of Neptune law enforcement with respect to implementation of the Directive, were entitled to defense and indemnification by the State.

Id. at 317.

In the present matter, as in Gramiccioni, the Attorney General has exercised his supervisory authority in issuing both the IAPP, as well as Law Enforcement Directive 22-14 on how IA investigations are to be conducted, and how the reporting of the investigation's conclusions are to be handled.

In this regard, Directive 22-14 specially provides that

> This Directive also clarifies and confirms the Attorney General's broad supersession authority over internal affairs. New Jersey law assigns the Attorney General responsibility to ensure the proper, efficient, and uniform handling of law enforcement business in the State and it provides him with the authority to supersede investigations and criminal actions as one tool to achieve those goals. Because proper, efficient, and uniform handling of internal affairs investigations are integral to the law enforcement business of the State, and because oversight over Internal Affairs Policy & Procedures is specifically assigned to the Attorney General by N.J.S.A 40A:14-181, this Directive confirms the Attorney General's supersession authority includes internal affairs matters.
> (Pa16) (emphasis added)

In the present matter, as it did in Gramiccioni, the OAG has taken "too narrow an approach to the prosecutorial law enforcement function." Gramiccioni, supra at 317. Because the investigation in the underlying case was initiated by the Chief of the Marlboro PD against the Deputy Chief, pursuant to Section 5.1.8 of the IAPP, when the complaint involves members of the senior executive management team, as it did in this case, the investigation shall be handled either by "the County Prosecutor or the Attorney General's Office." (Pa51-52) (Emphasis added). Thus, it is clear that

in conducting this IA investigation, the MCPO was on the same footing as the OAG, and involved in a "State law enforcement function," when it conducted the investigation. The IAPP specially states that the OAG could have handled this investigation. Instead, it was handled by the MCPO standing in the place of the OAG. However, rather than recognizing that the MCPO took on a state law enforcement function in performing the investigation, the OAG has inexplicably left the MCPO to defend the OAG's IAPP and Directive 2022-14.

It cannot be emphasized strongly enough that, in the present matter, not only is the MCPO being sued for following a law enforcement policy and directive the OAG mandated it follow; it is being sued expressly to compel the MCPO to supersede the authority of the OAG. Pursuant to the IAPP, the MCPO had to conduct the investigation. Likewise, the policy mandates what happens if a law enforcement officer retires when faced with a sustained IA.

Section 6 of the IAPP provides in pertinent part:

> 6 INVESTIGATION OF INTERNAL COMPLAINTS
> 6.0.1 All allegations of officer misconduct shall be thoroughly, objectively, and promptly investigated to their logical conclusion in conformance with this policy, regardless of whether the officer resigns or otherwise separates from the agency.
> (Pa 55).

Section 9 of the IAPP provides in pertinent part:

> 9.11 PUBLIC REPORTS
> 9.11.2

> On a periodic basis, and no later than January 31 of the following year, every agency shall submit to the County Prosecutor and the Attorney General, and publish on the agency's public website, a brief synopsis of all misconduct where an agency member:
> . . . .
> (f) Had a sustained finding that the officer was untruthful or has demonstrated a lack of candor, regardless of the type or severity of discipline imposed;
> . . . .
> (k) Resigned, retired, transferred or separated from the agency, regardless of the reason, while any internal affairs investigation or complaint was pending, and the misconduct ultimately sustained falls within categories (d) through (j) above or would have resulted in an action under categories (a) through (c) had the member not separated from the agency;
> (Pa75-77).

Accordingly, the publication of the individual's name is not something the MCPO has any control over—it is mandated by the OAG. Likewise, the OAG's policy does not allow for the hearing that plaintiff in the underlying complaint is seeking in suing the MCPO. Nonetheless, rather than step forward and defend its own policy and directive, the OAG has wrongfully attempted to make the MCPO carry its water.

In denying the MCPO's request for coverage under Wright, the OAG has relied exclusively on the fact that there is no claim for monetary damages in this matter and therefore, not covered by the TCA. However, as set forth above, given that the claims against the MCPO are tied directly to the OAG's Policy & Procedures and Directive 2022-14, based on Gramiccioni, there can be no question that the MCPO's role was solely a "State law enforcement function," and that coverage

under Wright was mandated.

The Court in Gramiccioni was not focused on the nature of the claim against the MCPO, but rather whether the claim arose from the MCPO acting in a law enforcement capacity and acting in accordance with a Law Enforcement Directive issued by the Attorney General. Here too, the MCPO was mandated to follow the Attorney General's Law Enforcement Directive in how it conducted the IA investigation of Reck. And, in that regard, it is of no import that the underlying complaint is not one based in tort.[3] Whether it be in tort or a prerogative writ, the MCPO is still being sued because it acted in a law enforcement capacity pursuant to and at the direction of the superseding authority of the OAG. It is being sued, in the place of the OAG. Coverage by the state is in keeping with the underlying purpose of having the state defend and identify a county prosecutor when they take on the role of the OAG in a law enforcement capacity.

As the Court held in Gramiccioni:

> [T]he test for determining in which capacity a county prosecutor acts should 'focus on whether the function that the county prosecutors and their subordinates were performing during the alleged wrongdoing is a function that traditionally has been understood to be a State function and subject to State supervision in its execution.' Gramiccioni v. Dep't

[3] The MCPO is mindful that there is an unreported Appellate Division decision that is contrary to this position. County of Essex v. Department of Law and Public Safety, 2022 WL 1073027, Docket No. A-0725-20 (App. Div. 2022). However, pursuant to R. 1:36-3, which provides such decisions are not precedent, this opinion is not referenced herein. It should be noted that the MCPO's position is distinguishable from the situation in said decision and the MCPO further believes said decision was incorrectly decided.

of L. & Pub. Safety, supra at 312 (2020) (quoting Wright, supra, at 454). The MCPO's action in the underlying case, meets that test.

OAG's argument that there are no potential monetary damages, rings hollow because as a result of OAG's denial of coverage, the MCPO is being forced to incur legal fees and costs to defend the litigation. Our Supreme Court has held that with regard to the duty to defend "the potential merit of the claim is immaterial: the duty to defend 'is not abrogated by the fact that the cause of action stated cannot be maintained against the insured either in law or in fact—in other words, because the cause is groundless, false or fraudulent.' Moreover, the duty to defend remains even if the asserted claims are 'poorly developed and almost sure to fail.'" Abouzaid v. Mansard Gardens Associates, LLC, 207 N.J. 67, 81 (2011). (Internal citations omitted).

For all of the foregoing reasons, it is respectfully submitted that the OAG erred as a matter of law in its position that the state's obligation to defend county prosecutor's offices, when those offices are acting in a law enforcement capacity pursuant to the dictates of the OAG, is limited to only those instances when they are sued for damages pursuant to he TCA. Accordingly, the determination of the OAG not to defend the MCPO in the underlying lawsuit should be reversed and the OAG should be required to defend the MCPO in said action going forward and reimburse the county for all fees and expenses incurred to date in defending said action.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Attorney General refusing to provide a defense and indemnity the MCPO on claims in the Reck litigation and order the Attorney General to defend and indemnify the MCPO on all claims going forward.

Respectfully submitted,
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By: /s/*Robyn B. Gigl*
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Dated: 3/20/24

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Re: Monmouth County Prosecutor's Office v. Office of the Attorney General Department of Law and Public Safety
Docket No. A-000856-23T4

Civil Action: On Appeal from a Final Agency Decision of the Office of the Attorney General Department of Law and Public Safety

Letter Brief and Appendices on Behalf of Respondent, New Jersey Office of the Attorney General

Dear Mr. Orlando:

Please accept this letter brief on behalf of Respondent, Office of the Attorney General Department of Law and Public Safety (OAG), on the merits of the appeal.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

The present appeal involves the New Jersey Office of the Attorney General's (OAG) denial of Monmouth County Prosecutor's Office's (MCPO) request for defense with respect to a prerogative action that Frederick Reck filed against MCPO on August 23, 2023, Frederick Reck v. Office of the County Prosecutor for the County of Monmouth, docket number MON-L-2864-23. (Pa2). OAG denied the request because: (1) Wright v. State of New Jersey, 169 N.J. 422 (2001), obligates the OAG to provide defense and/or indemnity only when a person or entity is being sued in a civil action seeking damages or for

[1] Because the procedural history and fact histories are closely related, they are presented together for economy and the convenience of the court.

conduct that is tortious and/or violative of 42 U.S.C. § 1983; and (2) Reck's suit against MCPO did not seek damages from MCPO and instead sought only various equitable relief. (Pa7-8).

A. The Investigation of Recks's Alleged Misconduct.

Reck's action against MCPO started with MCPO's administrative investigation into alleged misconduct by Reck, the Marlboro Police Department Deputy Chief, as a result of a complaint that MCPO had received concerning Reck on September 15, 2022. (Pa3-Pa4). After the investigation concluded, MCPO issued a "Summary and Conclusions Report" (Report) to the Marlboro Police Department Chief, Peter Pezzullo. (Pa4). After reviewing the Report, which concluded that Reck was guilty of misconduct, Pezzullo offered Reck an opportunity to retire rather than face discipline, and Reck accepted that offer as part of a formal agreement with the Township of Marlboro (Township). (Pa4-Pa5).

According to Reck, a conclusion of guilt regarding one of the charges against him required the Township to post certain details of the Report and Reck's name on the internet, as part of its compliance obligations pursuant to Attorney General Law Enforcement Directive 2019-6, Attorney General Law Enforcement Directive No. 2022-14, and the Attorney General's Internal Affairs Policy & Procedures (IAPP). (Pa4). Reck further claims that paragraph six of

his agreement with the Township provides him "the right to challenge the findings made by the Prosecutor's Office," and if he succeeds, the Township "shall so amend its records." (Pa5).

After retiring, Reck requested from MCPO "a copy of the formal procedures" to "challenge the findings of the Summary and Conclusions Report and a copy of the Prosecutor's complete investigation Report." (Pa5). MCPO's Professional Responsibility and Bias Crime Bureau Director responded that Reck was required to challenge the merits of the findings in the Report through the administrative process, pursuant to Section I.E. of Directive 2019-6 and that Reck's decision to leave employment while charges were pending would, by itself, require public reporting under the IAPP. Ibid.

B. Reck's Lawsuit Against MCPO.

Reck thereafter filed his action against MCPO on August 28, 2023. (Pa2-Pa9). Reck's complaint seeks mandamus relief via a prerogative writ in the Superior Court that would require MCPO to provide him with an administrative process to challenge the Report's findings.[2] (Pa7). Reck further demands

[2] Section 9.11.2 of the Attorney General's IAPP, effective November 2022, states that "if the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the charge is dismissed, the charge would still be considered sustained, if there was sufficient credible evidence to prove the allegation, and the officer does not challenge the finding and obtain a

judgment: (1) dismissing the "sustained findings" against him (Pa6); (2) expunging his "personal and/or disciplinary records" (Pa6); (3) removing his name, the investigation, and the report from MCPO's records (Pa7); (4) removing his name and all references to the complaint and the report from all Brady/Giglio reports and online postings (Pa7); (5) "affirming [his] right to a procedure by which he may challenge the findings of the Monmouth County Prosecutor's Office's investigation" (Pa8); (6) "directing the Monmouth County Prosecutor's Office to establish or identify the procedure by which [he] may challenge [its findings]" (Pa8); and (7) "directing the Monmouth County Prosecutor's Office to provide [him] with a copy of the formal procedures detailing the particulars and standards for the procedures." (Pa8). Reck's complaint does not seek monetary damages, and does not assert any claim of constitutional violation or tort. (Pa7-Pa8).

C. The OAG's Denial of MCPO's Request for Defense.

On October 2, 2023, MCPO sent a letter to the OAG, advising of the filing of Reck's lawsuit and requesting "representation in accordance with the Wright decision." (Pa1).

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favorable ruling by a hearing officer, arbiter, Administrative Law Judge, Civil Service Commission or the Superior Court." (Pa21-Pa22).

On October 16, 2023, OAG provided its final agency decision (Denial) (Pa10-Pa13), denying MCPO's request for representation because: (1) OAG's duty under Wright to defend and indemnify county prosecutor's office employees only obligates OAG "to provide defense and indemnification to State employees when they are being sued in civil actions seeking damages for conduct that is tortious and/or violative of 42 U.S.C. § 1983"; and (2) Reck's complaint, which sought only various forms of equitable relief, did not assert any claims for monetary damages related to a tort or § 1983 claim. (Pa10-Pa12). The Denial identified numerous decisions by the New Jersey Supreme Court supporting the conclusion that the OAG is not required to provide defense for a defendant public entity or employee who is sued only for equitable claims or non-monetary damages. (Pa10-Pa11).

This appeal followed.

ARGUMENT

THE OAG'S DENIAL OF MCPO'S REQUEST TO DEFEND IT WAS NOT AN ABUSE OF DISCRETION.

This appeal requires this Court to review a final agency decision of the OAG. As shown herein, this Court applies a very deferential standard of review to such a challenge, and MCPO's challenge here cannot overcome the heavy burden imposed on one seeking to reverse a final agency decision.

New Jersey appellate courts review agency decisions under an "arbitrary and capricious standard." Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019). An Attorney General's final administrative decision in the exercise of the agency's statutorily-delegated responsibilities enjoys a "strong presumption of reasonableness," and an appellate court "should not reverse the Attorney General's determination unless it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." Lavezzi v. State, 219 N.J. 163, 171 (2014) (quoting Prado v. State, 186 N.J. 413, 427 (2006)). The party challenging the administrative action bears the burden of making that showing. Ibid.

Here, MCPO cannot make that showing. The OAG's conclusion that its obligation to provide a defense under Wright applies only to instances in which a public defendant has been sued for monetary damages under the Tort Claims Act (TCA) and/or § 1983 relies on well-established and unambiguous New Jersey Supreme Court precedent and the plain language of the TCA. (Pa12) Chasin v. Montclair State Univ., 159 N.J. 418, 428 (1999).

As a starting point, the TCA governs the defense and indemnification of State employees. N.J.S.A. 59:l0A-l; 59:10-1. According to N.J.S.A. 59:l0A-l, "the Attorney General shall, upon a request of an employee or former employee of the State, provide for the defense of any action brought against such State

employee or former State employee on account of an act or omission in the scope of his employment." Two other provisions pertain to the Attorney General's representation of State employees: (1) N.J.S.A. 59:10A-2 specifies three instances when such representation of tort cases may be refused by the Attorney General, see also Gramiccioni v. Department of Law & Public Safety, 243 N.J. 293, 310 n.5 (2020); and (2) N.J.S.A. 59:10A-3, vests the Attorney General with the discretion to defend a State employee or former State employee "[i]n any other action or proceeding, including criminal proceedings . . . if he concludes that such representation is in the best interest of the State."

Accordingly, our Supreme Court held that, because N.J.S.A. 59:10A-1 mandates the OAG to defend state employees against "civil actions for damages based upon an employee's tortious conduct," and N.J.S.A. 59:10A-2 specifies the three instances when representation of tort cases may be refused, N.J.S.A. 59:10A-3 merely preserves the "discretionary authority" of the OAG to defend a State employee in cases seeking a remedy other than tort damages. Chasin, 159 N.J. at 428.

Here, MCPO contends that the decision in Wright, 169 N.J. at 444-48 -- which describes the circumstances under which a prosecutor's office may be entitled to a defense by the OAG -- requires OAG to defend MCPO with respect to Reck's claims for injunctive relief because MCPO was engaging in a "State

law enforcement function" when applying OAG's directives, so that MCPO's employees would be considered "State employees" in that action. (Pb14). MCPO also argues that, because Reck demands in his complaint that MCPO must "supersede the authority of the OAG and come up with a remedy contrary to the IAPP," the OAG must indemnify and defend here. (Pb8).

Those arguments miss the crucial point. Even if MCPO and its employees were acting as "State employees" in their dealings with Reck, and/or even if MCPO's response to Reck's demands involves consideration of the obligations under an Attorney General's Directive, that is immaterial. That is because the Denial was not based on the conclusion that MCPO and its employees were not considered "State actors" at the time, but rather rested on the fact that no claim for defense and indemnity under the TCA is available -- even to defendants who are plainly employees of the State -- when the complaint filed against the State defendant does not seek monetary damages and pursues instead only non-monetary or equitable relief.

The law on this issue is abundant and unambiguous.

First, the text of the TCA is clear in this regard -- N.J.S.A. 59:1-4 explicitly notes that the TCA does not extend to any "right to obtain relief other than damages against the public entity or one of its employees."

The case law is likewise clear. For instance, in Chasin v. Montclair State

University, 159 N.J. at 428, the Court held that OAG's obligation under the TCA to provide defense and indemnity is "intended to apply only to civil actions seeking damages for tortious conduct." See also In re Petition for Review of Op. 522 of the Advisory Comm. on Prof'l Ethics, 102 N.J. 194, 200 (1986) ("With respect to responsibility for compensatory relief, government bodies often are contractually obligated to indemnify their officials for such damages. Any money judgment against an individual would ultimately be paid by the governmental body.")

In Chasin, 159 N.J. at 421, a student sought a court order that would require a college professor, Chasin, to change a grade because the student had not completed the course due to military service. Chasin requested that the Attorney General's office defend her in the lawsuit and later sought her defense costs when the Attorney General declined to defend her. Id. at 423-24. The Court held that the Attorney General had not been obligated to defend Chasin, noting that its ruling was consonant with two prior Appellate Division decisions that held that the mandatory duty to defend and indemnify did not apply if the underlying action was not a civil suit seeking monetary damages: In re Napoleon, 303 N.J. Super. 630, 633-34 (App. Div. 1997) and Helduser v. Kimmelman, 191 N.J. Super. at 493, 503 (App. Div. 1983). Chasin, 159 N.J. at 429-31. The Court then stated:

> Thus, both Napoleon and Helduser stand for the proposition that the Attorney General's obligation to defend and indemnify arises only in the context of civil actions seeking damages for tortious conduct. We agree that the mandatory defense and indemnification provisions apply only to those civil actions. The defense of any other action is left to the Attorney General's discretion.
>
> [Id. at 431.]

Likewise, prior case law also plainly holds that actions in lieu of prerogative writ -- the precise nature of Reck's action -- do not involve claims under the TCA (and thus would not trigger the Attorney General's defense and/or indemnity obligation under that act). See Greenway Dev. Co. v. Borough of Paramus, 163 N.J. 546, 555-56 (2000) (finding the TCA's notice provisions not applicable to cases such as inverse condemnation, which "is more akin to an action in lieu of prerogative writ"). Similarly, our courts have held that "actions for equitable relief are not subject to the [TCA]." First Am. Title Ins. Co. v. Twp. of Rockaway, 322 N.J. Super. 583, 595 (Ch. Div. 1999). The TCA specifically states that "[n]othing in this act shall affect liability based on contract or the right to obtain relief other than damages against the public entity or one of its employees." N.J.S.A. 59:1-4. In short, no duty to defend exists in the absence of a claim for monetary damages under the TCA.

With this appeal, MCPO inaptly suggests that Gramiccioni, 243 N.J. at 314-17, and Lavezzi v. State, 219 N.J. 163, 179 (2014), have reversed course

from Chasin and require the OAG to defend prosecutorial employees in any instance in which a prosecutor's office claims it was performing a "law-enforcement function." (Pb9-Pb13). That position is unsupportable.

By way of background, in Gramiccioni, 243 N.J. at 299-300, MCPO and several of its employees or former employees were sued in connection with a police officer having fatally shot his ex-wife after MCPO had authorized the return of the officer's seized weapon pursuant to procedures outlined in an Attorney General Directive pertaining to seizure and return of weapons for officers involved in domestic-violence incidents. MCPO and its employees requested that the OAG defend them, the OAG declined to provide a defense, and the Court ultimately concluded that a defense was owed because the decision whether to authorize rearming was a "law-enforcement function" that made MCPO employees "State" employees when making that decision. Id. at 317.

In Lavezzi, 219 N.J. at 166, the plaintiffs claimed that the Essex County Prosecutor's Office and three of its employees damaged and lost property seized during the course of a criminal investigation. The plaintiffs' filed a complaint alleging negligence, conversion, and unlawful taking. Ibid. Essex County, requested that the OAG defend and indemnify the Essex County Prosecutor's Office and all the individual employees named in the complaint, pursuant to N.J.S.A. 59:10A-1 and Wright. Ibid. The OAG denied the County's request on

the grounds that the Prosecutor's Office had assumed administrative responsibility to safeguard the plaintiffs' property, which is not a law enforcement function. Ibid. The County appealed. Ibid. The Supreme Court found the plaintiff sufficiently alleged that the county prosecutor's office damaged the property in the context of handling evidence during their criminal investigation. Id. at 179-80. Thus, because these acts seemingly involved "performance of law enforcement duties," at least initially, the OAG was required to defend the County. Id. at 167. However, the Court opined that if a more complete record later revealed that property was "stored in a facility at the direction of the County," and that the damage resulted from the condition or maintenance of that facility, which is not part of law enforcement duties, the State "may seek reimbursement of all or part of the costs incurred in its defense and indemnification of the Prosecutor's Office employees. Id. at 180.

As a first matter, both Gramiccioni and Lavezzi grounded their decisions on the obligation to defend owed under the TCA. See Gramiccioni, 243 N.J. at 309-10 ("The State's obligation to defend and indemnify county prosecutors and their employees for actions arising out of their employment stems from the Tort Claims Act (the TCA), N.J.S.A. 59:1-1 to 12-3."); Lavezzi, 219 N.J. at 178 ("Any allegations of loss or damage incurred at the time of the items' seizure implicate the defense and indemnification obligations of the State under

N.J.S.A. 59:10-1 and N.J.S.A. 59:10A-1."). As such, each case noted that the touchstone for determining the scope of the duty is the TCA. Thus, Gramiccioni and Lavezzi confirm that any duty to defend must arise from the text of the TCA and the case law applying it, and -- as already noted -- both the TCA's plain terms and judicial precedent negate MCPO's arguments on appeal.

Second, both Gramiccioni and Lavezzi involved claims for monetary damages, making them completely inapplicable to the facts here.[3] See Gramiccioni, 243 N.J. at 299 ("Based on the assertions that defendants knew Seidle was unfit for duty, failed to properly investigate Wilson-Seidle's domestic abuse complaints, improperly returned Seidle's weapon to him, and failed to seize it when it should have been taken from him, plaintiffs brought claims for damages."); Lavezzi, 219 N.J. at 179 ("In this case, the damage and loss alleged by plaintiffs may have occurred following the conclusion of the criminal investigation, when the non-contraband items at issue were no longer potential evidence, but had not been returned to plaintiffs.").

[3] MCPO attempts to make hay of the following aside from the Court in Lavezzi: "Notwithstanding the State's argument that plaintiffs could have pursued a remedy based upon the equitable doctrine of replevin, the claim in this case originated from an activity that was part of the Prosecutor's Office's performance of "the criminal business of the State." (Pb9 (quoting Lavezzi, 219 N.J. at 179)). That effort fails. The claim in Lavezzi was brought as one for damages, so the fact that the plaintiff there might have pursued the same claim under an alternative label would not matter to the disposition of that case.

In addition, MCPO briefly argues that, even though there are no alleged monetary damages in Reck's action, the OAG's denial of coverage forces MCPO to incur legal fees and costs to defend the litigation. (Pb16). MCPO cites to Abouzaid v. Mansard Gardens Associates, LLC, 207 N.J. 67, 81 (2011), for the misleading holding that the duty to defend is not abrogated where the cause of action is groundless. The Court has already explicitly considered and rejected this argument in Chasin, in which the professor sued to recover the fees incurred in defending the underlying suit for injunctive relief. Chasin, 159 N.J. at 424, 441.

Third, neither Gramiccioni and Lavezzi indicated that the Court was stepping away from its unambiguous holding in Chasin that the duty to defend under the TCA extended only to civil claims for damages. Chasin 159 N.J. at 429. Indeed, Gramiccioni contains no mention at all of Chasin, and Lavezzi makes only passing reference to Chasin. See Lavezzi, 219 N.J. at 172 ("The TCA was enacted 'to supersede the patchwork of statutory provisions providing for the defense and indemnification of state employees.'" (quoting Chasin, 159 N.J. at 425)). The suggestion that the Court intended these decisions to be a sea change from its prior rulings on the scope of the OAG's defense obligation as described in Chasin (which was issued only fifteen years before Lavezzi) cannot be sustained.

The OAG's obligation to defend State employees in lawsuits is triggered by a plaintiff seeking damages. N.J.S.A. 59:10A-1. Only after a Plaintiff makes the appropriate request for relief would one need to undertake additional analysis under Wright, Gramiccioni and Lavezzi to determine whether a prosecutor's office employee qualifies as a State employee under N.J.S.A. 59:10A-1. Thus, to find that the OAG must defend prosecutor's offices whenever those offices can claim to have been performing a "law-enforcement function," regardless of the type of relief requested, would produce an absurd result in which prosecutorial defendants -- and no other State employees -- can secure a defense for claims other than civil claims for monetary relief. No statutory support exists for the position that prosecutorial defendants were intended to receive a greater right to defense that other public employees, nor does any reported case law indicate that prosecutorial employees alone have a superior right to defense to all other State employees. Likewise, no public-policy considerations justify treating prosecutorial employees as an exclusive class entitled to greater protections under the TCA than all other public employees.

In short, the MCPO cannot meet its burden to show that OAG acted arbitrarily and capriciously in denying the request to defend Reck's action in lieu of prerogative writ seeking only injunctive relief because the OAG retains

statutorily defined discretion to deny such a request.

CONCLUSION

For these reasons, the court should affirm the Attorney General's final agency decision that declined to defend MCPO in the prerogative writ action brought by Fred Reck.

Respectfully submitted,

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MONMOUTH COUNTY PROSECUTOR'S OFFICE, Appellant, v. OFFICE OF THE ATTORNEY GENERAL DEPARTMENT OF LAW AND PUBLIC SAFETY, Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-000856-23 T4 On Appeal from the Final Agency Action of the Department of Law & Public Safety Dated: October 16, 2023

REPLY BRIEF OF APPELLANT MONMOUTH COUNTY PROSECUTOR'S OFFICE

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PRELIMINARY STATEMENT

The question presented on this appeal is whether the Office of the Attorney General ("OAG") is obligated to defend and indemnify a county prosecutor's office in a lawsuit filed against said prosecutor's office when it has acted as the proxy for the OAG and followed the law enforcement procedures established by the OAG even if the underlying lawsuit does not seek damages. The OAG has premised its denial of coverage, and its argument on this appeal, solely on its position that it is not required to defend and indemnify a county prosecutor's office unless the office is sued under the New Jersey Tort Claims Act ("TCA") for damages. This argument, which relies on early case law involving the OAG's duty to defend and indemnify, not only fails to account for developments in the law since that time, but in this case, ignores the equities involved in forcing a county prosecutor's office to defend a **law enforcement directive designed, implemented and mandated by the OAG.**

In November 2022, the OAG issued Law Enforcement Directive 2022-14 ("Directive 22-14"), which has the force of law, binding on all law enforcement agencies across that state, including Appellant, the Monmouth County Prosecutor's Office ("MCPO" or "Appellant"). In support of Directive 22-14, the OAG also issued Internal Affairs Policy & Procedures (November 2022) (hereinafter "IAPP") mandating certain law enforcement actions be taken when an Internal Affairs ("IA") complaint is filed against either a chief or deputy chief of a police department. In

those instances, either the OAG or the appropriate county prosecutor's office is required to conduct the IA investigation.

In this matter, an IA complaint was filed against the Deputy Chief of the Marlboro Township Police Department ("Marlboro PD") implicating the OAG's IAPP and Directive 22-14. Pursuant to Directive 22-14 and the IAPP, either the OAG or the MCPO was required to conduct the IA investigation. Thus, when the MCPO conducted the IA investigation in the underlying matter, it stood in the shoes of the OAG and was required to follow the mandates of Directive 22-12 and the IAPP. Moreover, after the IA investigation was concluded and the deputy chief chose to resign rather than challenge the findings of the investigation, in order to comply with its obligations under the IAPP and Directive 22-14, Marlboro PD was required to post on the internet details of at least one of the sustained charges and the findings, identifying the Deputy Chief by name. The required posting was mandated by the OAG, not the MCPO. However, rather than suing the OAG, the underlying lawsuit by the former deputy chief is directed against MCPO seeking to compel MCPO to provide him with a remedy not afforded under Directive 22-12 or the IAPP.

Thus, in its simplest terms, this case involves the OAG, under its supervisory authority, issuing a Law Enforcement Directive and IAPP that MCPO was mandated to follow. Then, when the MCPO was sued seeking to compel it to create a remedy

not provided for by the OAG, rather than defend its own Directive and IAPP, the OAG walked away and left MCPO on its own to defend the OAG's position. Such a failure to take responsibility should not be countenanced, and, on this appeal the court should clarify that when a county prosecutor's office follows a mandated law enforcement directive and policy issued by the OAG, the OAG must be held accountable to defend and indemnify the local county prosecutor when the directive and policies are challenged.

STANDARD OF REVIEW

In Respondent's brief, the OAG has taken the position that the standard of review in this matter is abuse of discretion. (Respondent's Brief at 6-7). And while it's generally true that a reviewing court "should not reverse the Attorney General's determination unless it is arbitrary, capricious, unreasonable or it is not supported by substantial credible evidence in the record as a whole," Prado v. State, 186 N.J. 413, 427 (2006), when, as here, the issue presented to the Court is legal in nature, this court's review is de novo. Lavezzi v. State, 219 N.J. 163, 172 (2014). Thus, Respondent's brief is premised on an incorrect standard of review.[1]

As a general proposition, an appellate court is "in no way bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973). And while a directive from the Attorney General is not a statute or an administrative rule, our courts have held that such directives do have "the force of law for police entities." O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371, 382–83 (App. Div. 2009). The Court in O'Shea went on to hold that:

> ... the Attorney General's "Use of Force Policy", issued in 1985 and revised in 2000, that requires the completion of UFRs and their maintenance in the files of police departments, has the force of law for police entities.

[1] Even if the applicable standard of review were abuse of discretion, Respondent's failure to defend its own Directive and IAPP, is arbitrary, capacious and unreasonable and Appellate had met its burden.

> Under the Criminal Justice Act of 1970, N.J.S.A. 52:17B–97 to –117, the Attorney General (AG), as the "chief law enforcement officer of [this] State," see N.J.S.A. 52:17B–98, is charged with adopting guidelines, directives and policies that bind local police departments in the day-to-day administration of the law enforcement process. See In re Gen. Disciplinary Hearing of Carberry, 114 N.J. 574, 577–78, 556 A.2d 314 (1989), the articulated design is to promote the "uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State." N.J.S.A. 52:17B–98. Such provisions "shall be liberally construed." Ibid.
>
> Accordingly, consistent with statutory authority, the AG issues guidelines, directives and policies concerning appropriate application of the State's criminal laws. See In re Carroll, 339 N.J. Super. 429, 439, (App. Div.), certif. denied, 170 N.J. 85, 784 A.2d 718 (2001). Indeed, our courts have "acknowledged the validity of various guidelines issued by the Attorney General," such as the plea offer guidelines, the sex offender registration guidelines, the drug screening guidelines, and the guidelines assisting prosecutors in rendering uniform decisions concerning drug testing. Ibid.; see also, e.g., State v. Henderson, 397 N.J. Super. 398, 411, 937 A.2d 988 (App. Div. 2008) (addressing AG guidelines regarding eyewitness identification).

O'Shea v. Twp. of W. Milford, supra, at 382-383.

As in O'Shea, in the present matter, the OAG has exercised its supervisory authority in issuing both the IAPP, as well as Law Enforcement Directive 22-14 on how IA investigations are to be conducted, and how the reporting of those investigations' conclusions are to be handled.

In this regard, Directive 22-14 specially provides that

> This Directive also clarifies and confirms the Attorney General's broad supersession authority over internal affairs. New Jersey law assigns the Attorney General responsibility to ensure the proper, efficient, and uniform handling of law enforcement business in the State and it provides him with the authority to supersede investigations and

> criminal actions as one tool to achieve those goals. Because proper, efficient, and uniform handling of internal affairs investigations are integral to the law enforcement business of the State, and because oversight over Internal Affairs Policy & Procedures is specifically assigned to the Attorney General by N.J.S.A 40A:14-181, this Directive confirms the Attorney General's supersession authority includes internal affairs matters.
> (Pa16) (emphasis added).

Accordingly, this Court's review of the Attorney General's application of Directive No. 22-14 and the IAPP are legal in nature, and thus subject to de novo review.

LEGAL ARGUMENT

THE DECISION OF THE OFFICE OF THE ATTORNEY GENERAL DENYING COVERAGE TO THE MCPO UNDER WRIGHT V. STATE IS INCORRECT AS A MATTER OF LAW AND SHOULD BE REVERSED

(Not Raised Below)

As Appellant has conceded from the outset, the present matter is unique, and based on research, appears to be a matter of first impression.[2] To be clear, the MCPO's request for coverage is not premised on the TCA. As previously noted, the underlying claim is not a tort claim, it is an Action in Lieu of Prerogative Writ. The OAG's position in denying coverage, and in its responding brief, is premised entirely on the OAG's position that its obligation to provide coverage arises only in cases where the underlying cause of action arises under the TCA. This position is both factually and legally incorrect.

Leaving aside the present matter, the OAG routinely provides coverage to prosecutor's offices and employees when they are sued in federal or state court under 42 U.S.C. § 1983 ("section 1983") or the New Jersey Civil Rights Act ("CRA"). It is well settled that section 1983 claims and/or claims under the CRA are not torts

[2] As noted in the MCPO's initial brief, there is an unreported Appellate Division decision dealing with a request for defense and indemnification under Wright v. State, 169 N.J. 422 (2001), arising in the context of an Action in Lieu of a Prerogative Writ, County of Essex v. Department of Law and Public Safety, 2022 WL 1073027, Docket No. A-0725-20 (App. Div. 2022). However, pursuant to R. 1:36-3, which provides such decisions are not precedent, this opinion is not referenced herein. It should also be noted that the facts in the present matter, as well as the MCPO's position, are distinguishable from the situation in said decision.

covered by the TCA. Tice v. Cramer, 133 N.J. 347, 375 (1993). Yet, despite the fact that these types of constitutional claims do not fall within the purview of the TCA, coverage is mandated under existing case law when those claims arise in the context of a prosecutor's office's law enforcement function. This is borne out by the New Jersey Supreme Court's decision in Gramiccioni v. Department of Law & Public Safety, 243 N.J. 293 (2020) where, in large part, the claims in the underlying case arose under section 1983 yet the Court unanimously decided that the OAG was required to provide the prosecutor's office and its employees with a defense.

Moreover, the OAG's reliance on the argument that it is only obligated to defend a prosecutor's office when there are claims made for damages is not consistent with the intent of the New Jersey Supreme Court.

Since the seminal decision in Wright v. State, 169 N.J. 422 (2001), the New Jersey Supreme Court has recognized that county prosecutors occupy a hybrid position serving both the county and the state. Id. at 455-456. The Wright Court further recognized that the county prosecutor had both administrative functions, such as a decision whether to promote an investigator, and law enforcement functions. Id. at 454. In sorting through these roles, the Court held that the county prosecutor's office and its employees are entitled to a defense and indemnification from the State when discharging their law enforcement duties. Id. at 452 (emphasis added). In so doing, the Court recognized that "when prosecutors perform their law enforcement

function, they are discharging a State responsibility that the Legislature has delegated to the county prosecutors, subject to the Attorney General's right to supersede. The legislative delegation, in combination with the Attorney General's supervisory authority and power to supersede, demonstrates that at its essence the county prosecutors' law enforcement function is clearly a State function." Id. at 451-52 (citations omitted) (emphasis added).

MCPO does not dispute that the initial starting point for the Court's analysis in Wright was the mandate of the TCA. Such a starting point made sense in the context of that case because it was a suit against a prosecutor's office and its employee seeking damages. However, since the Wright decision, the Court has continued to emphasize the critical role that the OAG's supervisory authority over law enforcement has in determining when the OAG has a duty to defend and indemnify a county prosecutor's office. Indeed, a fair reading of the Court's recent decisions supports Appellant's position that when a county prosecutor stands in the shoes of the OAG by performing a mandated law enforcement function, it is that role, and not the TCA, that plays the pivotal role in coverage obligations.

As Appellate noted in its initial brief, the Gramiccioni Court in holding that the OAG had a duty to defend and indemnify the prosecutor's office and its employees, stated: "In sum, in this case, all claims related to petitioners' acts or alleged omissions associated with duties imposed by the Directive constitute state

prosecutorial functions." Gramiccioni v. Department of Law & Public Safety, 243 N.J. supra at 318.

Contrary to Respondent's argument, MCPO has not taken the position on this appeal that Lavezzi v. State, 219 N.J. 163 (2014) and Gramiccioni have "reversed course." (Rb11). Rather, MCPO has argued that in Lavezzi and Gramiccioni the Court's analysis has evolved and although the TCA was referenced, the Court has focused on the prosecutor's law enforcement role and the OAG's supervisory authority, and not the TCA, as the primary basis for finding that the OAG had an obligation to defend and indemnify the respective county prosecutor's offices. This is especially true with regard to Gramiccioni, because as noted earlier, the underlying case in that matter was based on causes of action under section 1983 and the CRA, which are not tort claims.

Respondent relies heavily on Chasin v. Montclair State University, 159 N.J. 418 (1999), in support of it position that the TCA is determinative of the coverage issue. In this regard, Respondent's reliance is misplaced. Chasin involved a professor at a college who was sued for refusing to change the grade of a student who was called to active duty in the military service, despite a statute requiring her to do so. As a state employee, the defendant requested the OAG to defend her. Her request was denied, and she subsequently filed a lawsuit to recover her legal fees. In the context of the OAG's duty to defend a state employee, the Supreme Court found that

there was no duty to defend under the TCA. That is not this case. First of all, no employees of the MCPO are being sued. The underlying claim is only against the MCPO. More importantly, the employee in Chasin was not involved in law enforcement and was not acting pursuant to a law enforcement directive or the supervisory authority of the OAG. In fact, the plaintiff in Chasin ignored the OAG's advice. Here, Appellant had no choice but to comply with Directive 22-14 and the IAPP.

Similarly, the OAG's reliance on Greenway Dev. Co. v. Borough of Paramus, 163 N.J. 546 (2000) and First Am. Title Ins. Co. v. Twp. of Rockaway, 322 N.J. Super. 583 (Ch. Div. 1999) is misplaced as neither case involves a county prosecutor's office, acting in a law enforcement capacity, pursuant to a mandated law enforcement policy issued by the OAG pursuant to its supervisory authority. It is that unique combination of factors that the Court focused on in Gramiccioni to find that the OAG was required to defend the county prosecutor's office and it is those same factors that this court should focus on in this matter.

Respondent's argument that MCPO is looking for greater rights than state employees is a misplaced. MCPO's position is that when a prosecutor's office stands in the shoes of the OAG on a law enforcement issue, it is entitled to representation. It cannot be over emphasized that in the present matter, pursuant to the IAPP and Directive 22-14, either the OAG or the MCPO was required to conduct the IA

investigation because the subject of the IA was the Deputy Chief of the police department. Clearly, under those circumstances, both the OAG and the MCPO stood on an equal footing as either of them could have done the investigation. The fact that the OAG routinely has the local prosecutor handle those investigations, does not detract from the equal status shared under Directive 22-14 and the IAPP.

The need for the OAG to provide coverage is especially critical when the underlying lawsuit directly challenges Directive 22-14 and the IAPP and argues for a remedy not afforded by either—a remedy that MCPO could not provide even if it wanted to because it is bound by the OAG's Directive and IAPP.

Despite that, rather than defend its own Directive and IAPP, the OAG walked away and has taken the position it does not have to defend MCPO, or its own Directive and IAPP. To use a euphemism, the OAG left the MCPO "holding the bag" for the OAG's actions. To be clear, the MCPO is not arguing that it has greater rights, rather MCPO is asserting that when it stands in the place of the OAG, it should be treated as if the OAG was the real party in interest.

The position taken by the OAG in denying coverage flies in the face of the New Jersey Supreme Court's decisions in Lavezzi v. State and Gramiccioni v. Department of Law & Public Safety and accordingly the OAG's decision to deny coverage should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Attorney General refusing to provide a defense and indemnity to the Appellant on the claims in the underlying litigation and order the Attorney General to defend and indemnify the Appellant on all claims going forward and to reimburse Appellant for all attorneys' fees and costs incurred to date.

Respectfully submitted,
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By: /s/ Robyn B. Gigl
Robyn B. Gigl

Dated: 6/11/24