IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF EDUCATION,

Petitioner,

v.

SALLY ROE, et al.,

Respondents.
_____/

Case No. 86,061
District Court of Appeal
First District No. 94-3040

BRIEF AMICUS CURIAE OF PINELLAS SUNCOAST TRANSIT AUTHORITY

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STATEMENT OF THE CASE AND FACTS

The amicus curiae, Pinellas Suncoast Transit Authority, accepts the statement of the case and facts filed by petitioner, Department of Education. The amicus curiae will only address the issue of whether this Court should find appropriate the immediate review of an order denying a motion to dismiss, when the motion is grounded in sovereign immunity.

SUMMARY OF ARGUMENT

Florida's sovereign immunity law provides immunity from suit, not merely immunity from standing trial. In this regard, sovereign immunity is highly analogous to qualified immunity in federal civil rights claims. This court recently found a basis for the immediate appeal of a order denying qualified immunity in a civil rights action. The rationale underlying this Court's decision to provide for immediate appeal of qualified immunity claims applies equally to claims of sovereign immunity. The policy considerations supporting early resolution of qualified immunity issues in federal litigation are also equally present in state court claims of sovereign immunity. Indeed, the argument for providing immediate review of a sovereign immunity claim is more compelling then for permitting such review of a qualified immunity claim, since qualified immunity always requires a factual inquiry, which is not required in matters of sovereign immunity, which turn on the nature of the conduct alleged in the complaint. If this Court finds no right to immediate review, all governmental entities in Florida will continue to suffer the expense and burden of litigation barred as a matter of law by soverign immunity. Because it is the nature of the claim which properly determines the right to review prior to final judgment, this Court must find immediate review of a sovereign immunity claim raised by way of a motion to dismiss, as such review is compelled by the nature of the immunity right and societal costs at stake.

ARGUMENT

SINCE THE DOCTRINE OF SOVEREIGN IMMUNITY PROVIDES AN IMMUNITY FROM SUIT THIS COURT SHOULD FOLLOW THE RATIONALE OF ITS DECISIONS CONCERNING QUALIFIED IMMUNITY, THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL AND THE LAW OF MANY OTHER JURISDICTIONS TO ALLOW INTERLOCUTORY APPEALS OF ORDERS REJECTING CLAIMS OF SOVEREIGN IMMUNITY.

The Pinellas Suncoast Transit Authority files this brief in support of the Department of Education ("Department") on the issue on whether a governmental entity is entitled to an interlocutory appeal when a motion brought on sovereign immunity grounds is denied.

The Department properly invoked this Court's jurisdiction pursuant to Article V, Section 4(b) of the Florida Constitution and Rule 9.030(b)(2)(A) and (3), Fla.R.App.P. to review the trial court's order denying the Department's motion to dismiss. For the reasons set forth below, the order of the trial court departed from the essential requirements of law and will cause great injury to the Department throughout the remainder of the proceedings below because it renders moot the immunity from suit afforded the Department by sovereign immunity. If this Court agrees with the First District that interlocutory appeals are not permitted when sovereign immunity is claimed, then governmental entities throughout Florida and the public that they serve, will be greatly harmed. Although orders on motions to dismiss do not ordinarily qualify for immediate review by district courts, the ruling in this case on the issue of sovereign immunity presents a compelling basis for immediate review because sovereign immunity is not merely a legal defense to liability, but rather is a complete bar to suit, which deprives the trial court of jurisdiction. See Sebring Utilities Comm'n v. Sicher, 509 So. 2d 968 (Fla. 2d DCA 1987); Schmauss v. Snoll, 245 So. 2d 112 (Fla. 3d DCA 1971).

Governmental entities throughout Florida are frequently confronted with lawsuits in which there is serious question as to whether they are immune from suit under the doctrine of sovereign immunity. However, when a governmental body's motion to dismiss or motion for summary

judgment is denied by a trial court, the governmental body will be forced to incur tremendous litigation costs and public officials and employees will be distracted from their official duties. In some cases, governmental bodies will even settle cases, paying compensation on cases for which they are immune from suit, to avoid the costs of litigation, including appeals and protracted discovery. Indeed, amicus has been forced to proceed through protracted litigation, including extensive discovery requiring numerous personnel hours researching answers to interrogatories and responding to extensive requests for production, when it has believed it was immune from suit under the doctrine of sovereign immunity. Amicus has even settled such cases to avoid these costs, both monetary and in personnel time. Amicus could much better use these personnel hours and tax dollars to serve its riders and the citizens and taxpayers of Pinellas County. And, amicus certainly is not alone in this regard. The end result is tremendous harm and disservice to all political bodies and the public that they serve.

Indeed, this Court recently found a basis for the immediate appeal of a ruling in the closely related area of qualified immunity in civil rights actions in Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994). In Tucker, certiorari review was initially sought from an order denying a motion for summary judgment which was based upon the defendant's qualified immunity and was denied. Id. This Court reversed denial of the petition and held that an order denying a motion for summary judgment based upon qualified immunity was subject to interlocutory review as to issues of law. Tucker, 648 So. 2d at 1190. To support its decision, this Court reviewed the purposes and policies supporting qualified immunity, finding that qualified immunity involved "immunity from suit rather than a mere defense to liability." Id. at 1189 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815 (1985) (emphasis in the original). This court found that the entitlement to immunity from suit would be lost if a case was erroneously allowed to go to trial. Id. at 1189.[1] This Court also noted that society as a whole pays the social costs

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[1]. Federal courts have interpreted the doctrine of qualified immunity broadly. As explained in Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2807 2815 (1985), the entitlement is an immunity from suit rather than a mere defense to liability. Indeed, the U.S. Supreme Court has emphasized that time consuming pretrial matters such

of lost immunity, including litigation expenses, time spent by public officials addressing litigation rather than pressing public issues, and the deterrence of competent citizens from attaining public office. Id. at 1190 (citations and quotations omitted). Ultimately, this court reasoned that "if orders denying summary judgment based upon claims of qualified immunity are not subject to interlocutory review, the qualified immunity of public officials is illusory and the very policy that animates the decision to afford such immunity is thwarted." Ibid.

The policy considerations supporting early resolution of qualified immunity issues in federal litigation are equally present in state court claims of sovereign immunity. When a civil suit is barred by the doctrine of sovereign immunity, as with qualified immunity, the question of sovereign immunity should be resolved at the earliest possible point in litigation. Otherwise, as stated by the United States Supreme Court, governmental employees are distracted from their official duties and governmental entities are subjected to staggering costs of litigation, including broad reaching discovery. Mitchell, supra. Therefore, as with qualified immunity questions in federal litigation, sovereign immunity questions in state law litigation should be resolved at the "earliest possible stage in litigation." Hunter v. Bryant, 112 S. Ct. 534, 536.

Furthermore, governmental entities in Florida, such as the Department, are subject to tort actions only to the extent that sovereign immunity has been waived under §768.28, Fla. Stat. See generally, Trianon Park Condominium Ass'n v. City of Hialeah, 468 So. 2d 912 (Fla. 1985). For sovereign immunity to provide any real benefit to governmental entities, it must be available to immunize those entities from the burden and expense of litigation on claims for which sovereign immunity has not been waived. Indeed, since sovereign immunity provides a jurisdictional bar to suit, it is intended to afford protection from the risks and costs associated with protracted litigation; such protection would be meaningless if governmental bodies were forced to proceed to litigate cases when their motions seeking immunity are denied. Accordingly, the only remedy

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as discovery should be avoided if possible. Id; See also Harlow v. Fitzgerald, 457 U.S. 800, 817, 102 S. Ct. 2727, 2737 - 38 (1982). In fact, the Harlow Court suggested that discovery should not be allowed until certain threshold immunity questions are resolved. 457 U.S. at 818.

available to governmental entities to avoid irreparable harm is immediate review by the Appellate Courts.

The Fifth District Court of Appeal recently recognized a right to immediate appeal in a case procedurally indistinguishable from the instant case. In Department of Transportation v. Wallis, 659 So. 2d 429 (Fla. 5th DCA 1995), the Court found that a claim of sovereign immunity raised by the Department of Transportation in a motion to dismiss should be treated as a reviewable appeal of non-final order.[2] The Fifth District reasoned that an immediate appeal was appropriate since the entitlement to immunity from suit would be effectively lost if a case was erroneously permitted to go to trial. Id. at 430. Accordingly, the Court reversed the trial court's denial of the DOT's Motion to Dismiss and remanded with directions to dismiss the Complaint against DOT. Id. The Wallis Court found this Court's reasoning in Tucker equally applicable to a motion to dismiss grounded in sovereign immunity.

In Wallis, the dissenting opinion asserted that the majority expanded Tucker beyond the scope envisioned by this Court since most cases involving sovereign immunity issues require resolution of factual issues. Wallis, 659 So. 2d at 431 (Judge Sharp dissenting). Although the assertion of sovereign immunity requires a factual analysis in some instances, established precedent provides a firm basis for courts to apply sovereign immunity as a matter of law in many cases. For instance, in applying the readily apparent element of the test set forth in City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982), this Court has determined that certain hazards are so commonplace in our society that they are readily apparent to all persons as a matter of law. See Payne v. Broward County, 461 So. 2d 63 (Fla. 1984) (danger of crossing

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[2]. In Wallis, the Plaintiff was injured when she attempted to cross Atlantic Avenue in Daytona Beach. Plaintiff sued the Department of Transportation, claiming that its lack of a nearby stop light coupled with the lack of a sidewalk in a high tourist area created a dangerous condition which the DOT had a duty to correct. The DOT responded to the Complaint by filing a Motion to Dismiss on the grounds of sovereign immunity for a readily apparent danger. Id. at 430. When the trial court denied its Motion, the DOT sought certiorari review in the District Court of Appeal. Although the Court found the DOT was entitled to relief, it explained that a Petition for Writ of Certiorari was not the right vehicle for relief. Instead, the Court treated the DOT's Petition as an Appeal of a non-final order. Id.

roadway readily apparent as a matter of law).[3] Clearly, there are more factual issues in qualified immunity cases, as discussed infra.

The First District Court of Appeal is the only other Florida appellate court to directly address the issue of a right to immediately appeal the denial of a motion to dismiss when such motion is grounded in sovereign immunity. Without providing any rationale, the First District declined to extend Tucker to state law sovereign immunity claims.

The better reasoned decision was provided by the Fifth District in Wallis. The argument for providing immediate review of a sovereign immunity claim is more compelling than for permitting such review of a qualified immunity claim, as was at issue in Tucker. As this court noted in Tucker, claims of public official immunity are usually "qualified" and, therefore, require factual inquiry as to whether the official conduct violated clearly established rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982). In sharp contrast, sovereign immunity is absolute as defined by an evolving body of caselaw.

As a threshold matter, judicial review of sovereign immunity requires scrutiny only of the nature of the conduct challenged in the allegations of the complaint, and reference to common law, constitutional or statutory duties implicated by the allegedly negligent conduct. See e.g. B. J. M. v. Department of Health and Rehabilitative Services, 627 So. 2d 512 (Fla. 3d DCA 1993) (agency's child placement function is absolutely immune); City of Pinellas Park v. Brown, 604 So. 2d 1222 (Fla. 1992) (determined solely on the basis of the pleadings that a duty of care was owed, thus barring sovereign immunity); Parker v. Murphy, 510 So.2d 990 (Fla. 1st DCA 1987) (sovereign immunity determined on the basis of the allegations of the pleadings); Trianon Park

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[3]. Immediate review of sovereign immunity claims is not without precedent in the district courts exercised jurisdiction to review of the denial of a Motion to Dismiss. In Seminole Tribe of Florida v. Houghtaling, 589 So. 2d 1030 (Fla. 2d DCA 1991), an injured Bingo hall customer brought a negligence suit against the Seminole Tribe of Florida, which owned the Bingo hall. The Tribe filed a Motion to Dismiss for lack of subject matter jurisdiction based upon the defense of sovereign immunity, which was denied. In granting the Tribe's petition the Second District explained that the Tribe was considered a sovereign power and was therefore immune from suit.

Condominium Association, Inc. v. City of Hialeah, 568 So. 2d 912, 918 (Fla. 1985) (sovereign immunity turns on the nature of the conduct alleged to have been negligently performed); Reddish v. Smith, 468 So. 2d 929 (Fla. 1985) (sovereign immunity determined on the basis of the nature of the conduct alleged in the complaint). Sovereign immunity, in this respect, is closely related to common law judicial and prosecutorial immunity. See Office of the State Attorney v. Parrotino, 628 So. 2d 1097 (Fla. 1983) (state attorney absolutely immune from tort liability for performance of his official duties). Significantly, federal courts have long afforded interlocutory review of judicial and prosecutorial immunity claims. See Mitchell v. Forsyth, 472 U.S. 511, 525, 105 S. Ct. 2806 (1985) (noting that denials of absolute immunity claims are immediately appealable before final judgment because the essence of immunity is the "possessor's entitlement not to have to answer for his conduct in a civil damages action," and holding that non-absolute qualified immunity claims are entitled to identical review).

Reference to other jurisdictions shows that many states afford immediate review of sovereign immunity claims. See e.g. Title 24, Art. 10, Section 8, Colorado Revised Statutes Annotated (1994), (providing that "[i]f a public entity raises the issue of sovereign immunity prior to or after the commencement of discovery, the Court shall suspend discovery... . The Court's decision on such motion shall be a final judgment and shall be subject to interlocutory appeal."); Blevnis v. Denny, 114 N.C. App. 766, 443 S.E. 2d 354 (N.C. App. 1994) (affording interlocutory review of sovereign immunity claims on authority of Mitchell v. Forsyth); City of Mission v. Ramirez, 865 S.W.2d 579 (Tex. App. 1993) (affording interlocutory review of sovereign immunity claims); Lee County Board of Supervisors v. Fortune, 611 So. 2d 927 (Miss. 1992) (affording interlocutory review of sovereign immunity claims). Those jurisdictions have found federal qualified immunity principles patently applicable to state law sovereign immunity claims. Blevnis, supra.

In Tucker, this court found immediate review appropriate since the immunity rights at stake in that case could not be restored by appeal after final judgment. The Fifth District, in

Wallis, used a common sense approach in applying the rationale of Tucker to claims of sovereign immunity under Florida law. If, as the Tucker court explained, it is the nature of the claim which properly determines the right to review prior to final judgment, then there is no reasonable basis for precluding immediate review of a sovereign immunity claim raised by way of a motion to dismiss. Under this Court's reasoning in Tucker, such review is not merely proper, it is compelled by the nature of the immunity rights, and the attendant societal and personal costs at stake.

CONCLUSION

Based upon the foregoing, this Court should apply its well reasoned decision in Tucker to Florida sovereign immunity law and hold that governmental entities have the right to immediate review in the appellate courts via interlocutory appeal when their claim of sovereign immunity is rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to Laura Rush, Esquire, Office of the Attorney General, The Capitol, Suite PL01, Tallahassee, FL 32399-1050; to Thomas L. Powell, Esquire, Douglass, Powell & Rudolph, P. O. Box 1674, Tallahassee, FL 32302-1674; to Gordon D. Cherr, Esquire and Patricia Hart Malono, Esquire, McConnaughhay, Roland, Maida & Cherr, P. A., 101 N. Monroe Street, Suite 900, Tallahassee, FL 32301-1546; to John C. Cooper, Esquire, Cooper, Coppins & Monroe, P. O. Box 14447, Tallahassee, FL 32317-4447; and to Jeannette M. Andrews, Esquire, Fuller, Johnson & Farrel, P. O. Box 1739, Tallahassee, FL 32302-1739, this 13 day of December, 1995.

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