IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF EDUCATION,

Petitioner,

vs. Case No. 86,061

SALLY ROE, et al,

Respondents.

ANSWER BRIEF OF RESPONDENTS SCHOOL BOARD AND MERRICK

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INTRODUCTORY NOTE

The parties to this proceeding are referred to as follows:

1. Respondents Roe are plaintiffs in the lower court. They shall be referred to as "Roe".

2. Respondents Leon County School Board, Superintendent Richard Merrick, Nancy Russell and Samuel Alderman are defendants in the lower court and shall be referred to as the "School Board", "Superintendent", "Russell" and "Alderman", respectively.

3. Petitioner Department of Education is a defendant in the lower court. Petitioner shall be referred to as "DOE".

4. Respondent Billy Campbell is a defendant in the lower court. He shall be referred to as "Dr. Campbell".

Certain matters of record are attached to the School Board's Answer Brief. They are referenced by "A" followed by the appropriate page citation.

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner's case statement is somewhat deficient. Respondents Leon County School Board and Richard Merrick, in his official capacity, serve the following Statement of the Case and of the Facts:

Plaintiffs (presently Respondents) Roe brought suit against the School Board, Superintendent[1], principal Alderman, unknown employees of the School Board, and Dr. Billy Campbell. The Complaint alleged that Campbell, as an elementary school teacher, sexually molested and battered the minor plaintiff. The School Board was sued for negligent hiring and retention of Campbell. The School Board, Superintendent and Alderman were sued for violation of 42 USC 1983 (civil rights violations). Campbell was sued for battery.

Eventually an Amended Complaint was filed and served. The allegations against the School Board, Superintendent, Alderman and Campbell remained unchanged. Another principal, Nancy Russell, who had supervised Campbell at another school and at a time other than when and where the minor plaintiff was allegedly molested, was added as a defendant in the civil rights claim under 42 USC §1983. More germane to the present matter, the Florida Department of Education ("DOE") was added as a defendant, also, based upon the

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[1]At that time Billy Woolley, since substituted for by Richard Merrick, in his official capacity only.

several allegations against that agency, as set out in the Amended Complaint (A 1-13).[2],[3]

DOE moved to dismiss the Amended Complaint in October, 1993, based upon an asserted violation of Rule 1.070(i), Florida Rules of Civil Procedure (the "120 day rule"). DOE also asserted that it was sovereignly immune from suit under Section 768.28, Florida Statutes (A 14-24). That motion to dismiss based upon the defense of sovereign immunity was denied by Order of August 22, 1994 (A 25).

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[2]There was substantial discovery accomplished in this case before DOE was joined as a party defendant. Discovery has continued despite the pendency of this appeal. Further, the present case has proceeded simultaneously with another identical lawsuit, Doe v. Leon County School Board, et al, Case No. 92-2504, also pending in the Circuit Court for the Second Judicial Circuit, In and For Leon County, Florida. Roe and Doe arise out of the same or similar transactions and occurrences, counsel for all defendants in both cases are the same, as is the sitting circuit judge. There has been cross-discovery in both cases and counsel in Roe have agreed to utilize discovery depositions accomplished in Doe.

[3]It was alleged in Plaintiffs' Amended Complaint or learned through discovery that Campbell failed to disclose certain misdemeanor convictions when requested to do so on application forms tendered by Campbell to some potential employers including both the Gadsden County School Board and the Leon County School Board. DOE was advised of this in 1985 and commenced an investigation. In its investigation DOE learned or was given information that Campbell had been accused of sexual molestation of an elementary school child while he was a principal at a school in Rock Hill, South Carolina, in 1979. DOE investigated these complaints and "flagged" Campbell's file, all prior to the time he was hired by the School Board. Nevertheless, DOE inexplicably closed its investigation and then ignored its own instructions to its own personnel, to not renew Campbell's teaching certificate, when it came up for renewal in June, 1986. Campbell's teaching certificate was renewed in June, 1986 and Campbell was subsequently hired by Leon County in September, 1986. Dr. Campbell could not have been hired by the School Board without a valid teaching certificate.

Thereafter, DOE challenged the Order denying its motion to dismiss based upon the defense of sovereign immunity, by filing a Petition for Writ of Certiorari in the First District Court of Appeal (A 26-48, appendix not attached). After much haggling, the filing of responsive pleadings and other motions before the First District[4], an opinion was rendered on March 14, 1995 (A 49-54). In its opinion the First District treated the Petition for Writ of Certiorari as an appeal from an interlocutory order, citing as authority for such a procedure this court's previous opinion in Tucker v. Resha, 19 FLW S570 (Fla. November 10, 1994). The First District reversed the lower court Order of August 22, 1994, and ordered the matter dismissed as to DOE because the plaintiffs "failed to allege any common law or statutory duty owed to them by DOE." The First District also concluded that because there was no duty owed, it was unnecessary to reach the issue of whether DOE's conduct was discretionary and thus immune from liability. 20 FLW D686.

Rendition of the opinion of March 14, 1995 was immediately followed by Leon County's Motion for Rehearing, Motion for Rehearing En Banc and a Motion for Certification of Conflict (A 55-73, 74-76, 77-79, respectively).[5] On May 12, 1995 the First

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[4]First District Case No. 94-3040.

[5]While not attached to the School Board's Appendix hereto, Plaintiffs Roe, Defendants Alderman and Russell all filed similar motions.

District issued an Opinion granting the motions of rehearing, and withdrawing its previous opinion. The First District indicated that perhaps its previous reliance on Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994) had been misplaced and that it therefore did not have jurisdiction to construe DOE's petition as an appealable nonfinal order (A 80-82). The First District noted that a denial of a motion to dismiss did not ordinarily qualify for certiorari review, citing Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987) and Fieselman v. State, 566 So. 2d 768 (Fla. 1990). Certiorari was denied. 656 So. 2d 507 (Fla. 1st DCA 1995)

DOE filed a Motion for Rehearing which was denied. DOE then filed its Notice to Invoke Discretionary Jurisdiction in this court and after the filing of briefs directed to that issue, this court accepted jurisdiction by Order of November 7, 1995.

In the meanwhile, the underlying lawsuit filed in Leon County Circuit Court[6] continued on, unabated. On November 8, 1995, the School Board filed a crossclaim for contribution against DOE, asserting among other things that the School Board and DOE had entered into a long standing voluntary course of conduct whereby the School Board would contact DOE regarding a potential teacher's fitness for employment, including whether any information existed in DOE's records which would militate against any potential hire, that DOE would voluntarily communicate any such negative

[6]Leon County Circuit Court Case No. 92-363.

information to the School Board, that DOE was so contacted in May, 1986, regarding Dr. Campbell, that DOE had relevant negative information readily available in its files, but failed to communicate that relevant information to the School Board. It was alleged that Leon County reasonably relied upon this previous course of dealings with DOE, and with the lack of information given by DOE relative to the specific inquiry regarding the fitness of Dr. Campbell, that this reliance was to its detriment in this case and that DOE was negligent under the circumstances (A 83-88). DOE responded with another Motion to Dismiss, again asserting, among other things, that it was sovereignly immune from suit (A 89-91).

SUMMARY OF ARGUMENT

POINT I: The rationale expressed by this court in Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994) does not relate to interlocutory review of orders denying motions to dismiss based upon sovereign immunity. Sovereign immunity is not an absolute immunity and the State of Florida has consented to suit in its own courts pursuant to Section 768.28, Florida Statutes. Interlocutory review of orders denying motions to dismiss based upon sovereign immunity under the present circumstances does not pass muster under the "collateral order doctrine" expressed by Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Sovereign immunity in Florida is immunity from liability or the payment of damages. Sovereign immunity in Florida is not liability from suit.

POINT II: There is no overriding public policy requiring modification of the "Final Judgment Rule", to allow for interlocutory review of orders denying motions to dismiss based upon sovereign immunity. Such a change in procedure would not be based upon sound legal reasoning and is an attempt to shift expense off of the executive branch of government and onto the judiciary. If interlocutory review is allowed under the present circumstances, then there is nothing to recommend against similar review of dozens of other similar immunities from liability enacted throughout the Florida Statutes.

POINT III: Given the present factual development of this lawsuit, it is not possible to conclude, at this juncture, that DOE

is immune from suit. This sovereign immunity issue is fact sensitive and cannot be resolved as a matter of law at this time.

ARGUMENT

Point I

Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994) and the rationale expressed therein does not permit or even relate to interlocutory review of an order denying a motion to dismiss based upon the defense of sovereign immunity. An Order denying a motion to dismiss based upon the defense of sovereign immunity is not entitled to interlocutory review.

This matter was before the First District Court on DOE's Petition for Writ of Common Law Certiorari, filed in an effort to have the First District reach the issue of whether DOE was sovereignly immune from liability, in view of the specific allegations set forth in Roes' Amended Complaint. It is apparent that if there was error in the trial court's ruling on the issue of the applicability of the doctrine of sovereign immunity, then that was a matter which could be reached on plenary appeal. One essential element of certiorari, irreparable harm, does not occur due to inconvenience or the time and expense incurred in litigation. These are insufficient grounds for granting any petition for writ of certiorari. Martin-Johnson v. Savage, 509 So. 2d 1097 (Fla. 1987); Barnett Bank v. Statewide Mortgage Corp., 464 So. 2d 187 (Fla. 4th DCA 1985). Certiorari review of the trial court's order denying DOE's motion to dismiss based upon the defense of sovereign immunity, was not available under the limited circumstances set out by this court, for example, in Brooks v. Owens, 97 So. 2d 693 (Fla. 1957).

Insofar as reaching the issue by "interlocutory appeal", the denial of a motion to dismiss is not one of the enumerated nonfinal orders set forth in Rule 9.130, Florida Rules of Appellate Procedure, and which qualify for interlocutory review. In this context, an order denying a motion to dismiss based upon the defense of sovereign immunity has not yet been found to be a proper subject of interlocutory appeal in this state. Page v. Ezell, 452 So. 2d 582 (Fla. 3d DCA 1984); State Road Department v. Brill, 171 So. 2d 229 (Fla. 1st DCA 1964). Accord, Florida Dept. of Highway Safety v. Desmond, 568 So. 2d 1354 (Fla. 2d DCA 1990).[7]

Despite and contrary to the above historical background, DOE asserts that the rationale set forth by this court in Tucker v. Resha is a sufficient basis for appellate courts to review trial court orders denying motions to dismiss based upon the defense of sovereign immunity. DOE misconstrues the thrust of Tucker v. Resha. Moreover, review of the philosophical underpinnings of Tucker v. Resha, and the federal cases which Tucker relies upon, most notably Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1986) and (implicitly) Cohen v. Beneficial Industrial Loan Cor., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed.2d 1258 (1949) fails to support DOE's argument. In fact, analysis of these cases require the conclusion that DOE's arguments are entirely misplaced.

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[7]But see Department of Transportation v. Wallis, 659 So. 2d 429 (Fla. 5th DCA 1995).

The certified question reached and answered by this court in Tucker v. Resha was the following:

> "Is a public official asserting qualified immunity as a defense to a federal civil rights claim entitled in the Florida Courts to the same standard of review of denial of her motion for summary judgment as is available in federal court?"

648 So. 2d at 1187. That question was answered in the affirmative.

In the present case, DOE is not seeking interlocutory review of a denial of a motion for summary judgment. DOE is not seeking interlocutory review of a denial of a motion for summary judgment based upon the defense of qualified immunity. DOE does assert that under the "collateral order doctrine" of Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528, it should have the right to obtain interlocutory appeal of an order denying a motion to dismiss based upon the defense of sovereign immunity. According to Cohen, the collateral order doctrine allows appeals from "a small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949).

The specific issue raised by DOE in this matter has been reached by other courts. Their consensus is that the nature of orders denying motions to dismiss on the basis of sovereign immunity are so far theoretically removed from orders denying

summary judgment on the basis of qualified immunity (or any other "absolute immunity"), and that interlocutory review of the former is wholly inappropriate.

In Pullman Construction Industries v. United States of America, 23 F.3d 1166 (7th Cir. 1994), the United States raised the identical issue, seeking interlocutory review of a lower court order denying a motion to dismiss based upon the defense of sovereign immunity. The Seventh Circuit recognized that certain "immunities" carry with them the right to interlocutory appeal. These included, for example, the right of a state to not be sued in the courts of another sovereign pursuant to the 11th Amendment or the right of a foreign nation or foreign national to not be sued in courts of the United States under the Foreign Sovereign Immunities Act (FSIA), 28 USC §§1602-05. The notion that sovereign immunity was a right to be free from suit (as asserted by DOE) was soundly rejected, especially where the sovereign had previously consented to suit in its own court.[8] Instead, sovereign immunity is to be regarded as a right to be free from payment of damages based upon a liability:[9]

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[8]See Section 768.28, Florida Statutes. The State of Florida has consented to be sued in its own courts, under the circumstances set out in that statute.

[9]Respondent is aware that extensive citation from opinions is often cumbersome. However, the Pullman court performed an indepth analysis of the issue presently pending before this court and Respondent cannot analyze the issue with any more insight or clarity than the 7th Circuit. The opinion is quoted only sparingly and the opinion should be read in its entirety.

The United States candidly admits that its appeal cannot be sustained under 28 U.S.C. §158(d) as one from a "final decision." Instead, it argues, an opinion denying a motion asserting the sovereign immunity of the United States may be appealed as a collateral order under a series of cases permitting interlocutory appeal when the defendant asserts a "right not to be sued." Descriptions of the United States' sovereign immunity often refer to freedom from suit as well as freedom from an obligation to pay damages. E.g., FDIC v. Meyer, --- U.S. ---, ---- - ---, 114 S.Ct. 996, 1000-02, 127 L.Ed.2d 308 (1994); Minnesota v. United States, 305 U.S. 382, 387, 59 S.Ct. 292, 294, 83 L.Ed. 235 (1939). We know from Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., --- U.S. ---, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993), that states may take interlocutory appeals to vindicate their immunity from suit under the eleventh amendment, and from Segni v. Commercial Office of Spain, 816 F.2d 344, 346-47 (7th Cir. 1987), that foreign nations likewise may obtain interlocutory review of decisions denying their claims of immunity from suit. See also Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic, 877 F.2d 574, 576 n. 2 (7th Cir. 1989); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C.Cir. 1990). The United States insists that it deserves no lesser protection.

If this is all so clear, one wonders why, in the entire existence of the United States, the federal government has never before taken an interlocutory appeal to assert sovereign immunity. Our case appears to be the first. Before today the United States has occasionally sought and received permission to take an interlocutory appeal on this question under 28 U.S.C. §1292(b)(2), a puzzling step if the federal government could appeal of right. E.g., South Delta Water Agency v. Department of the Interior, 767 F.2d 531, 535 (9th Cir. 1985). Perhaps the explanation lies in the newfangled nature of the doctrine permitting appeals based on claims of rights to be free from litigation, a doctrine that

acquires its first purchase in Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). Metcalf & Eddy extends Abney to a governmental body's right to avoid litigation in another sovereign's courts -- an important qualifier, because the United States is no stranger to litigation in its own courts. Congress has consented to litigation in federal courts seeking equitable relief from the United States, see 5 U.S.C. §702; Bowen v. Massachusetts, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988); and 11 U.S.C. §106 gives consent in limited circumstances to litigation seeking money. Indeed, the United States Code is riddled with statutes authorizing relief against the United States and its agencies -- the Federal Tort Claims Act, 28 U.S.C. §§2671-80; the Tucker Act, 28 U.S.C. §§1346(a), 1491(a); the whole jurisdiction of the Court of Federal Claims, 28 U.S.C. §§1491-1509; dozens if not hundreds of sue-and-be-sued clauses; the list can be extended without much effort.

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Federal sovereign immunity today is nothing but a condensed way to refer to the fact that monetary relief is permissible only to the extent Congress has authorized it, in line with Art. I, §9, cl. 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law".[10] Instead of exposing the United States to suit under the general federal-question jurisdiction of 28 U.S.C. §1331, Congress has elected to be more specific. An elaborate system permitting some monetary claims and limiting or forbidding others does not imply that the United States retains a general "right not to be sued" in

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[10]Article VII, Section 1(c), Constitution of the State of Florida, is literally identical:

> "No money shall be drawn from the treasury except in pursuance of appropriation made by law."

its own courts, for civil litigation in general or taxation in particular.

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Does the word "immunity" in "sovereign immunity" itself support interlocutory appeal? Surely not, as the Court held in Van Cauwenberghe v. Biard, 486 U.S. 517, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988). Defendant in that case insisted that a treaty immunized him from service of process, and when the district court rejected that argument he immediately appealed. The Court held that the collateral order doctrine did not authorize such an appeal, distinguishing among kinds of immunities. Sometimes the word connotes a right not to be tried, which must be vindicated promptly. Sometimes the word means only a right to prevail at trial -- a right to win, indistinguishable from all the other reasons why a party may not have to pay damages. Confusing the two would undermine the final decision requirement.

Since Abney it has been necessary to distinguish between a right not to be sued and a right the vindication of which ends the litigation. United States v. Hollywood Motor Car Co., 458 U.S. 263, 269, 102 S.Ct. 3081, 3084, 73 L.Ed.2d 754 (1982); United States v. MacDonald, 435 U.S. 850, 860 n. 7, 98 S.Ct. 1547, 1552 n. 7, 56 L.Ed.2d 18 (1978). Only an "explicit statutory or constitutional guarantee that trial will not occur" creates the sort of right that supports immediate review. Midland Asphalt Corp. v. United States, 489 U.S. 794, 801, 109 S.Ct. 1494, 1499, 103 L.Ed.2d 879 (1989). See also, e.g., Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989). The eleventh amendment and the FSIA create genuine rights not to be sued in federal court. "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive power of judicial tribunals at the instance of private parties." In re Ayers, 123 U.S. 443, 505, 8 S.Ct. 164, 182, 31 L.Ed. 216 (1887). So too with the FSIA, which is designed to promote harmonious

> international relations by respecting governmental immunities recognized in international law while permitting claims arising out of ordinary commercial activities. See Saudi Arabia v. Nelson, --- U.S. ---, 113 S.Ct. (emphasis added)

Pullman is directly analogous to the present case. The State of Florida has consented to a limited waiver of sovereign immunity by enacting §768.28, Fla.Stat. Surely the state is no stranger to litigation in its own courts. There is nothing in the clear and unambiguous language of §768.28, Fla.Stat., which remotely suggests that sovereign immunity is a right to be free from suit[11] as opposed to a right to prevail at trial. Instead, the sovereign immunity law specifies that such immunity is a right to be free from liability as opposed to a freedom from suit. Section 768.28 states the following:

> "(1) In accordance with s. 13, Art X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to be the extent specified in this act." (emphasis added).

The present issue was again raised and squarely faced in State of Alaska v. United States of America, 64 F.3d 1352 (9th Cir. 1995). In relying upon Pullman and extending its analysis further, the 9th Circuit held that sovereign immunity is not freedom from suit, and the fact that an order denying federal sovereign immunity

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[11]DOE asserts that sovereign immunity claims under Florida law "unquestionably are premised upon a right not to stand trial." (Petitioner's Brief, p. 14) DOE cannot follow this assertion with a single reference to even one Florida appellate decision on point.

imposed a hardship on the federal government of having to prepare for trial did not justify immediate appeal of the order under the collateral order doctrine.

Instead, the Ninth Circuit held that:[12]

> We hold that, despite the label "immunity," federal sovereign immunity is not best characterized as a "right not to stand trial altogether." The only other case to consider the issue, Pullman Construction, concluded that federal sovereign immunity was more accurately considered a right to prevail at trial, i.e., a defense to payment of damages. 23 F.3d at 1169. Like immunity from service of process (leading to lack of personal jurisdiction), federal sovereign immunity is better viewed as a right not to be subject to a binding judgment. Such a right may be vindicated effectively after trial. See Van Cauwenberghe v. Biard, 486 U.S. 517, 524, 108 S.Ct. 1945, 1950, 100 L.Ed.2d 517 (1988).
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> Federal sovereign immunity does not implicate the sovereignty concerns that motivate immediate appeal of orders denying Eleventh Amendment immunity or foreign sovereign immunity. Likewise, denial of federal sovereign immunity need not be reviewed with the same urgency as the denial of official immunity or double jeopardy claims. The interest served by federal sovereign immunity (the United States' freedom from paying damages without Congressional consent) may be served equally well if review follows a final judgment on the merits. Because there is no sufficiently important interest in immediate review, the third prong of the Cohen test is not satisfied, and the order denying federal sovereign immunity is not an immediately appealable collateral order. This result is

[12]Please see footnote 9 which applies with equal force to the opinion rendered in State of Alaska by the 9th Circuit.

confirmed when one considers the relative inefficiency of applying the collateral order doctrine to federal sovereign immunity cases.

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Because federal sovereign immunity is a defense to liability rather than a right to be free from trial, the benefits of immunity are not lost if review is postponed. The United States argues that this is not the case and that its claim would, in fact, be "effectively unreviewable" at a later point: If this case goes to trial, the United States will have to decide whether to claim or disclaim the lands in question. According to the United States, doing so will moot the argument that the courts lack jurisdiction because the United States has never claimed or disclaimed the lands. The United States claims that the essence of its sovereign immunity is freedom from having to appear in court and take a position, and hence the benefits of immunity will be irretrievably lost if immediate appeal is denied.

This argument fails to two reasons. First, the argument is too particularized to affect our inquiry. "[T]he issue of appealability under §1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision." Digital Equipment, --- U.S. at ---, 114 S.Ct. at 1996 (internal quotation omitted). The issue, therefore, is whether denial of federal sovereign immunity in general is immediately appealable, not whether immediate appeal is appropriate when construing the waiver embodied in the Quiet Title Act.

Second, "the mere identification of some interest that would be 'irretrievably lost' has never sufficed to meet the third Cohen requirement." Id. at ---, 114 S.Ct. at 1998. The interest that would be lost must also be "important," which in this context means "weightier than the societal interests

advanced by the ordinary operation of final judgment principles." Id. at ---, ---, 114 S.Ct. at 2001, 2002. No such weighty interest is present in orders denying sovereign immunity.

The only foreseeable hardship inflicted on the United States by postponing review of sovereign immunity issues is the need to prepare for trials. That hardship alone is generally not sufficient to justify immediate appeal, as the Supreme Court has pointed out:

"Admittedly, there is value...in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial."

Van Cauwenberghe, 486 U.S. at 524, 108 S.Ct. at 1951 (quoting United States v. MacDonald, 435 U.S. 850, 860 n. 7, 98 S.Ct. 1547, 1552 n. 7, 56 L.Ed.2d 18 (1978)).

* * * *

The denial of federal sovereign immunity, we conclude, imposes no hardship on the United States that is qualitatively different from, or weightier than, the hardship imposed by the denial of such defenses as the statute of limitations or res judicata, both of which have been held to be effectively reviewable following trial. See United States v. Weiss, 7 F.3d 1088 (2d Cir. 1993) (statute of limitations); In re Corrugated Container Antitrust Litigation, 694 F.2d 1041 (5th Cir. 1983) (res judicata).

* * * *

For the reasons above, we hold that the district court's order denying the United States' motion to dismiss based on sovereign immunity is not immediately appealable under

> the collateral order doctrine. (emphasis added)

There is no legal or logical reason to agree with DOE's conclusion that any "absolute immunity" including qualified immunity of an individual can somehow be equated with the sovereign immunity of the state. That view has never been adopted by any court and, in fact, that the two are separate and apart from each other is a view apparently adopted by this court. Office of State Attorney v. Parrotino, 628 So. 2d 1097 (Fla. 1993).[13]. Qualified immunity of public officials involves immunity from suit rather than a mere defense to liability. Tucker v. Resha, citing Mitchell v. Forsyth, 648 So. 2d 1187. Sovereign immunity is a defense to liability rather than a right to be free from suit. State of Alaska; Pullman Construction Industries. In qualified immunity matters, officials are sued in their individual capacities, this is not so in tort actions against the state. DOE's assertion that social and personal costs in either instance are no different, is presumptive and speculative at best, and irrelevant at worst.

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[13] "It may be true that in its earliest manifestation judicial immunity emanated from the English sovereign's absolute immunity, because early English judges sat at the pleasure and as legal appendages of the Crown. However, in time even England began recognizing that judges held an office that was to an increasing degree distinct from and beyond the Crown's reach. Floyd. Continuing this same trend, judicial immunity and sovereign immunity completely ceased to be coextensive as conceived in most American states, and in Florida in particular." 628 So. 2d at 1099 (emphasis added).

DOE asserts that "on the basis of Cohen collateral order doctrine requirements, federal courts permit interlocutory review of orders determining a wide variety of immunity claims" (Petitioner's Brief, p. 11), and "federal jurisprudence contains innumerable cases in which interlocutory review has been permitted of orders determining immunity claims on motions to dismiss" (Petitioner's Brief, p. 19). This may be so but it is also true that none of the opinions cited by DOE involve interlocutory appeal of claims of sovereign immunity. Instead, those cases cited above (Pullman, State of Alaska) hold that interlocutory review of sovereign immunity claims under the present circumstances is contrary to law and that no such interlocutory review is allowable. There are no decisions to the contrary on this issue.

DOE asserts that "[o]ther jurisdictions permit interlocutory review of sovereign immunity claims" (Petitioner's Brief, p. 18). This is a misleading statement. Several of the cases cited by DOE for this proposition are actually interlocutory appeals of orders denying motions for summary judgment on the defense of qualified immunity (Blevins v. Denny, 443 S.E.2d 354 (North Carolina App 1994); City of Mission v. Ramirez, 865 S.W.2d 579 (Tex. App. 1993).

Further, Griesel v. Hamlin, 963 F.2d 338 (11th Cir. 1992), also cited by DOE, certainly does not stand for that proposition either. In Griesel it was apparent that the State of Georgia did not have any applicable waiver of sovereign immunity in place at that time. See Gilbert v. Richardson, 452 S.E.2d 476 (Ga. 1994).

When a state has not consented to suit and has no applicable waiver of sovereign immunity, it is in the same position as a state which has an 11th Amendment right to not stand trial in the federal court, or a foreign government which may not stand trial in federal court under the FSIA. Tamiami Partners v. Miccosukee Tribe of Indians, 63 F.3d 1030 (11th Cir. 1995) and Seminole Tribe of Florida v. State of Florida, 11 F.3d 1016 (11th Cir. 1994), both note that there is an immediate right of interlocutory appeal on sovereign immunity claims for Indian tribes under the Indian Gaming Regulatory Act ("IGRA") because the Indian tribe has not consented to suit and Congress has not consented to suit for the tribe, either. In the absence of any waiver of sovereign immunity, that sovereign immunity is a right to be free from trial. In the presence of an applicable waiver of sovereign immunity, that sovereign immunity is not construed as freedom from suit but rather freedom from liability. The distinction is significant in the present case.

DOE also asserts that Colorado and Mississippi permit interlocutory review of sovereign immunity claims (Petitioner's Brief, p. 18). However, Colorado has done so by legislative enactment and not by concluding that the "collateral order doctrine" of Cohen applies to claims of sovereign immunity. See Richland Dev. Co. v. East Cherry Creek Valley Water and San. Dist., 899 P.2d 371 (Colorado App. 1992). Colorado courts also recognize, significantly, that if the issue of sovereign immunity depends upon

a factual dispute (which could be applicable in the present case), then the trial court cannot resolve that issue on a pretrial basis, Richland Dev. Co. Presumably there would then be no right of interlocutory appeal on the existence of the sovereign immunity defense under that circumstance.

DOE's reference to Mississippi allowing interlocutory review of sovereign immunity claims is also misleading. There is no such rule of court or statute. Instead, Rule 5, Mississippi Rules of Appellate Procedure, permits interlocutory review on questions of law which may:

> (1) Materially advance the termination of litigation and avoid exceptional expense to the parties; or,
>
> (2) Protect a party from substantial and irreparable injury; or,
>
> (3) Resolve an issue of general importance in the administration of justice.

It was under one of these appellate provisions that interlocutory review was granted in Lee County Board of Supervisors v. Fortune, 611 So. 2d 927 (Miss. 1992), and not because Mississippi equated sovereign immunity with immunity from suit or accepted review under the "collateral order doctrine" of Cohen.

Curiously while DOE argues vigorously that this matter should fall under the doctrinal law espoused by the federal court in Mitchell v. Forsyth and Cohen v. Beneficial Industrial Loan Co., the only federal cases construing this specific question both conclude that DOE is not entitled to interlocutory appeal of an

order denying a motion to dismiss based upon the defense of sovereign immunity.

Insofar as this issue is concerned, the application of sound legal reasoning requires rejection of the position taken by DOE. Sovereign immunity cannot be equated under the present circumstances with any other absolute immunity to not stand trial -- 11th Amendment immunity, immunity under the FSIA or IGRA, prosecutorial immunity, judicial immunity or any other form of "absolute immunity" including qualified immunity as spoken to in Tucker v. Resha. This is true of many other forms of immunity under Florida law, as well, as noted below.

Point II

No public policy justifies modification of the Final Judgment Rule to allow for interlocutory appeal of orders denying motions to dismiss based upon sovereign immunity.

The application of sound legal reasoning as set forth by Pullman and State of Alaska suggests that granting interlocutory review of orders denying motions to dismiss based upon sovereign immunity is not appropriate, as noted in Point I above. If sovereign immunity is separate and distinct from those "absolute" immunities such as judicial immunity, prosecutorial immunity or even qualified immunity, a view apparently adopted by this court in Parrotino, this confirms that allowing for interlocutory review of such orders lacks justification under the law.

DOE has argued that two (2) jurisdictions actually allow for such interlocutory review, Colorado and Mississippi (Petitioner's Brief, p. 18). It has also been pointed out, above, that such review in Mississippi is really premised upon particular rules of appellate procedure which are not directly related to interlocutory review of sovereign immunity denials, per se (p. 20, above). Additional research indicates that Pennsylvania has a similar appellate provision, which also allows for interlocutory appeals by permission on controlling questions of law (and not relating to interlocutory review of orders denying motions to dismiss based upon sovereign immunity or any other specific defense). See 42 Pa. C.S. §702(b) and Pennsylvania Turnpike Commission v. Jellig, 563 A.2d 202 (Comm. Ct. Pa. 1989). These types of court rules appear to

be in a distinct minority. Respondents would respectfully suggest that application of such rules lead to review of various questions on an ad-hoc basis, something not preferable and better avoided.

A related procedure exists in Texas but is unrelated to a motion to dismiss. Instead, under Tex.Civ.Prac. & Rem. Code §51.014, a person may appeal from an interlocutory order that denies a motion for summary judgment based upon an assertion of "immunity" by an individual who is an officer or employee of the state or a political subdivision of the state. However, §51.014(5) makes it clear that the "immunity" must be an assertion of "qualified immunity". See also City of Houston v. Kilburn, 849 S.W.2d 810 (Texas 1993) which indicates, consistent with Tucker v. Resha, that qualified immunity is an affirmative defense available for governmental employees sued in their individual capacities. 849 S.W.2d 811, fn. 4.

The Colorado statute (§24-10-108) indicates that sovereign immunity is to be equated with subject matter jurisdiction, a view not yet universally adopted in Florida. Compare Florida Med. Malpractice v. Indem. Ins., 652 So. 2d 1148 (Fla. 4th DCA 1995) with Sebring Utilities Commission v. Sicher, 509 So. 2d 968 (Fla. 2d DCA 1987). Regardless, nonfinal orders which concern the presence or absence of subject matter jurisdiction are not within the list of those enumerated nonfinal orders subject to interlocutory review under Rule 9.130, Fla.R.App.P.

Both DOE and amicus Pinellas Sun Coast Transit Authority argue long and loud that there is policy justification for interlocutory review of orders denying motions to dismiss based upon sovereign immunity, and that that policy is one related to the expense of litigation imposed upon the state and its subdivisions. State of Alaska rejects expense as a basis sufficient to allow for interlocutory review of orders denying motions to dismiss based upon the sovereign immunity. 64 F.3d at 1356.

Regarding review by writ of certiorari, this court has likewise stated that the expense and other hardships of litigation is not a sufficient basis to grant certiorari review. Martin-Johnson v. Savage, 509 So. 2d 1097 (Fla. 1987). If that is so (and it is) then there is no reasonable justification for the position that expense and the other hardships of litigation on the State of Florida should allow it to obtain interlocutory review.

There clearly is expense involved to all public and private persons involved in meritorious as well as nonmeritorious litigation. Substantial expense is also incurred by the judiciary at the trial court and appellate levels.

DOE goes so far as to argue that the right to interlocutory appeal in this context "rationally should have the effect of decreasing the work of both trial and appellate courts." (Petitioner's Brief, p. 14) This is not only a cavalier statement, it is one not justified by any available data and it certainly does not appear to have any logical appeal, either.

In reality, what DOE asks for is more an attempt to shift expense from the executive branch of government to the judiciary. It is neither wise nor a savings of judicial resources to review orders denying motions to dismiss, including those based upon the grounds of sovereign immunity. Unquestionably, the State of Florida, its agencies and subdivisions are involved at all times in an enormous volume of tort litigation. As a matter of course, sovereign immunity is raised as an affirmative defense, and just as invariably the state (or whomever) moves for dismissal on the very same grounds. Review of orders denying motions to dismiss based upon sovereign immunity will simply flood all of the appellate districts at an early stage in litigation where the underlying facts have yet to be fully developed. The "final judgment rule" is specifically adhered to, to avoid just such an expenditure of judicial resources and to avoid the wasteful pitfalls of piecemeal litigation and piecemeal appellate review. See S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97 (Fla. 1974); Employers Overload of Dade County v. Robinson, 642 So. 2d 72 (Fla. 1st DCA 1994); BE&K, Inc. v. Seminole Kraft Corp., 583 So. 2d 361 (Fla. 1st DCA 1991).

If interlocutory review is allowed for sovereign immunity claims, not an absolute immunity, then there is little to recommend against similar review of other immunity claims under Florida law, which are also not regarded as absolute. A short list might include the following:

1. Interspousal immunity.

2. Interfamily immunity.

3. Merchants/Retailers immunity under §812.015, Fla.Stat.

4. Good Samaritan immunity under §768.13, Fla.Stat.

5. Immunity granted to retailers of firearms under §790.065(11), Fla.Stat.

6. Immunity granted under the "condominium" statute, §718.116(8)(a) and (b), Fla.Stat.

7. Limited tort immunity under §627.737, Fla.Stat.

8. Insurance company reporting immunity under §626.989(6), Fla. Stat.

9. Immunity granted to review committee members under §766.101, Fla.Stat.

This list is hardly exhaustive. Review of the term "immunity" in the General Index to the Florida Statutes (1993) lists no less than seven (7) full columns of specific statutory entries relative to immunities provided for by statute under Florida law. There are literally hundreds of different immunities provided for in the Florida Statutes relative to civil liability. This list is attached to the School Board's Appendix, pp. 92-95.

This court has the absolute, unfettered right to do what DOE requests, by court rule. However, there is no overriding policy justifying the present request for interlocutory review. There is no reason to vary from the present "final judgment rule."

Point III

Given the present status of this case including previous factual development and the School Board's Crossclaim against DOE, it is not possible to conclude, at this juncture, that DOE is immune from suit.

In its Issue II, DOE vigorously asserts that it is sovereignly immune from suit as a matter of law for the acts alleged to have been negligently performed. So much cannot be gleaned from the present record in this case, either on the facts or on the law.

In this case, the facts alleged in Count II of Roe's Amended Complaint to support the claim do not relate to the department's decision to renew or not renew Campbell's teaching certificate or to investigate or not investigate the charges of misconduct against Dr. Campbell. Rather, the claim is based on the allegations that, once the department decided not to renew Dr. Campbell's teaching certificate pending investigation, it was negligent when it renewed the certificate without conducting a proper investigation. Parrotino v. City of Jacksonville, 612 So. 2d 586 (Fla. 1st DCA 1992), recognized an agency's decision to act is "a fundamental policy determination" so that the agency is shielded from tort liability by the doctrine of sovereign immunity." 612 So. 2d at 591. On the other hand, once the decision to act has been made, the

agency's activities become operational, and the agency is not immune from liability. Id.[14]

A similar analysis has been included in decisions of this court. As noted in Department of Health & Rehabilitative Services v. Yamuni, 529 So. 2d 258, 260 (Fla. 1988), "discretion in the Commercial Carrier sense refers to the policymaking or planning level." (referring to Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979)). In Kaiser v. Kolb, 543 So. 2d 732, 737 (Fla. 1989), the court defined "discretionary" in the context of sovereign immunity to mean "that the governmental act in question involved an exercise of executive or legislative power such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning." The court also stated that "[a]n 'operational' function . . . is one not necessary or inherent in policy or planning, that merely reflects a secondary decision as to how those policy or plans will be implemented." Id.

The evaluation of the activities of government to determine whether they are planning level, discretionary activities or operational activities must proceed on a case by case basis. Yamuni

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[14]The decision of this court, quashing the First District's decision in Parrotino was based on the absolute immunity from liability enjoyed by the judiciary and prosecutor when engaged in judicial and quasi-judicial functions. Office of the State Attorney v. Parrotino, 628 So. 2d 1097 (Fla. 1993). The First District's general statement of the distinction between discretionary and operational activities remained undisturbed.

at 259. DOE has not cited a single case which is on point with the facts alleged in Roes' Amended Complaint, the School Board's crossclaim, or which compels the conclusion that the activities alleged were exclusively discretionary. The determination of whether sovereign immunity is applicable as a defense to a particular claim is complex and requires "minute examination of the alleged negligent actions of the governmental unit to determine if they are operational or planning level as each case comes to court." Yamuni, at 260. See also Seguine v. City of Miami, 627 So. 2d 14, 16 (Fla. 3d DCA 1993) ("Florida law on sovereign immunity is immensely complex, has lent itself to multifaceted formulations and rules over the years, and has generally been developed by the courts on a case-by-case basis depending on the particular fact pattern and policy concerns presented.")

DOE cannot, based on nothing more than the allegations stated in Roes' Amended Complaint, and the School Board's Crossclaim, establish that it is shielded from liability under the doctrine of sovereign immunity because its activities were discretionary as a matter of law. Consequently, DOE has not shown that, in this respect, the trial court's order violated "a clearly established principle of law resulting in a miscarriage of justice." Combs v. State, 436 So. 2d 93, 96 (Fla. 1983).

DOE has also failed to show that, under a "clearly established principle of law," it had no duty to investigate the reports of Campbell's misconduct or to revoke or refuse to renew his teaching

certificate when an investigation revealed that Dr. Campbell had a criminal record and had possibly sexually abused an elementary school child under his care in South Carolina. It is well established that a governmental agency is not liable in tort if "no duty of care existed," Kaisner, 543 So. 2d at 734. However, the allegations of the Amended Complaint and the School Board's crossclaim and the record facts disclosed to date, taken as true, are sufficient to establish the "minimal threshold legal requirement for opening the courthouse doors" with respect to the duty element of a negligence cause of action. McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992) (footnote omitted). In McCain, the court cited Kaisner when it held that a duty exists when "the defendant's conduct foreseeably create[s] a broader 'zone of risk' that poses a general threat of harm to others." Id. This applies as well to the failure to act reasonably to protect others from harm. Id.

DOE cannot cite any statute or judicial decision to support its assertion that it has no duty to protect children attending Florida's public schools by the reasonable exercise of its statutory responsibility to investigate complaints and revoke or nonrenew teacher's certificates. See §231.262(1), Fla.Stat. (1985) ("The department shall cause to be investigated expeditiously any complaint which is filed before it or which is otherwise called to its attention.") Nor has DOE cited a single case which is on point with the facts alleged in Roes' Amended Complaint or in the

School Board's crossclaim, and which compels the conclusion that the activities complained of do not, as a matter of law, give rise to a duty to care to the Roes or the School Board, or both.

The duties which can be derived form the facts alleged in the Amended Complaint and the School Board's crossclaim are different from the duty owed to the general public to enforce the laws and protect the public welfare, identified by the court in Trianon as Category II discretionary governmental acts. 468 So. 2d at 919. These activities do involve the discretionary acts of deciding, for example, whether and how to make an arrest, see e.g. Seguine; whether and how to investigate a crime, see e.g. City of Orlando v. Kazarian, 481 So. 2d 506 (Fla. 5th DCA 1985), rev. denied, 491 So. 2d 279 (Fla. 1986); and whether and under what terms to issue a license. See e.g. Huff v. Goldcoast Jet Ski Rentals, Inc., 515 So. 2d 1349 (Fla. 4th DCA 1987). Such activities do not give rise to a duty of care to any individual or specific, identifiable group.

In this case, however, the duty alleged in the Amended Complaint is the department's duty to carry out the decision not to renew Campbell's license pending investigation of reports of wrongdoing, which is more like the type of duty recognized in Yamuni and Department of Health & Rehabilitative Services v. Whaley, 574 So. 2d 100 (Fla. 1991). The decision to take action is discretionary, but, once taken, the governmental agency owes a common law duty of care to a member of the specific group the governmental agency is responsible for protecting.

This issue actually brings into closer focus a portion of the well reasoned dissent of Judge Sharp in Department of Transportation v. Wallis, 20 FLW D1823 (Fla. 5th DCA August 11, 1995):

> Finally, it is not clear at this stage in the proceeding (motion to dismiss addressed to the complaint) whether the issue is purely and simply a question of law. Indeed, most of these cases involve the resolution of factual issues. See Ralph v. City of Daytona Beach, 471 So. 2d 1 (Fla. 1983).

20 FLW D1824 (emphasis in original).

Regardless of whether it is appropriate in the judgment of this court to allow interlocutory review of orders denying motions to dismiss based upon sovereign immunity, it is appropriate on the present state of this record, to affirm the trial court order of August 22, 1994 (A 25).

CONCLUSION

Application of accepted legal reasoning leads to the conclusion that under the present circumstances sovereign immunity is not an absolute immunity from suit. Instead, sovereign immunity in the present context is an immunity from liability. As a result, DOE is not entitled to interlocutory review of an order denying a motion to dismiss based upon the defense of sovereign immunity.

There is no overriding public policy which justifies circumvention of the "final judgment rule" and the application of a new court rule allowing interlocutory review of orders denying motions to dismiss on the defense of sovereign immunity or any other immunity (except for immunities regarded as "absolute"). Allowing interlocutory appeals under the present circumstances shifts substantial expense from the executive branch of government to the judiciary.

It cannot be concluded in this case that DOE is sovereignly immune as a matter of law, especially in view of ongoing factual development of this particular lawsuit.

Respectfully submitted,

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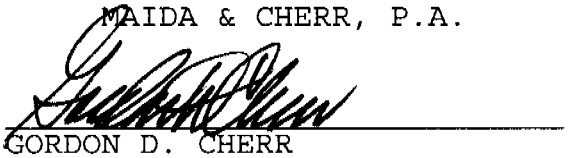

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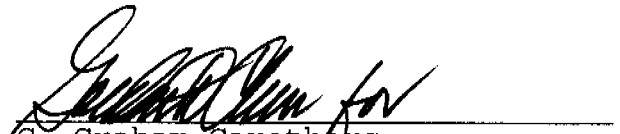

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail to:

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