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IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF EDUCATION,

Petitioner,

vs. Case No. 86,061

SALLY ROE, et al.,

Respondents.
_____/

ANSWER BRIEF OF RESPONDENTS ROE

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PRELIMINARY STATEMENT

The parties to this proceeding shall be referred to as follows:

1. Respondents ROE are Plaintiffs in the lower court. They shall be referred to as "Roe," "Respondents" or "Plaintiffs."

2. Petitioner DEPARTMENT OF EDUCATION is a defendant in the lower court. Petitioner shall be referred to as "Department of Education, " "DOE" or "Petitioner."

Certain matters of record are filed and served with this brief as an Appendix. They are referenced by "A" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Plaintiffs (presently Respondents) ROE brought suit against the School Board, Superintendent (at that time Bill Woolley, currently Richard Merrick), 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 the minor plaintiff was, 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 several allegations against that agency, as set out in the Amended Complaint (A 9-18). [1],[2]

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[1]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 of the Second Judicial Circuit, in and for Leon County. Roe and Doe arise out of the same or

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") (A 19-20). Plaintiffs refiled their Amended Complaint (A 21-30). DOE then moved to dismiss on grounds of sovereign immunity (A 31-32). This Motion was denied by Order of August 22, 1994 (A 33).

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. That Court rendered an opinion treating 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, 648 So. 2d 1187 (Fla. 1994). The First District

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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 counseling Roe have agreed to utilize discovery depositions accomplished in Doe.

[2]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.

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 (A 34-35)

However, upon Petitioners' Motion for Rehearing, Motion for Rehearing En Banc and Motion for Certification of Conflict, the First District Court of Appeal receded from its initial 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. 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) (A 36-37)

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.

SUMMARY OF ARGUMENT

ISSUE I

Sovereign immunity is not absolute immunity from suit, but simply immunity from liability, depending on the facts of the particular case. Accordingly, denial of a motion to dismiss based on sovereign immunity does not qualify for interlocutory review under the collateral order doctrine.

ISSUE II

Motions to dismiss on grounds of sovereign immunity are fact specific. Because facts are not fully developed at the dismissal stage, permitting interlocutory review encourages piecemeal litigation and wastes judicial resources.

ISSUE III

Respondents have sufficiently alleged breach of a common law duty by Petitioner, and the trial court's denial of Petitioner's Motion to Dismiss was legally correct.

ISSUE IV

If interlocutory review of this case is permitted, and the trial court's denial of the motion to dismiss is reversed, Respondents should be granted leave to amend their Complaint.

ARGUMENT

ISSUE I

THE COLLATERAL ORDER DOCTRINE DOES NOT APPLY TO THE ISSUE OF SOVEREIGN IMMUNITY.

The Florida Rules of Appellate Procedure do not allow for interlocutory appeal from the denial of a motion for summary judgment. Florida Rule of Appellate Procedure 9.130. This Court created an exception to that rule in Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994) by allowing interlocutory appeal from the denial of a motion for summary judgment on the issue of qualified immunity. In creating this exception, this Court relied on Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), saying,

> ". . . We find the standard announced by the Supreme Court in Mitchell to be the proper one for reviewing such orders." Tucker, supra, at 1190.

Mitchell, in turn, relied on Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). Cohen created what has come to be known as the "collateral order doctrine," which allows interlocutory appeals from

> a small class [of orders] which finally determine claims of rights 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 at 337 U.S. 546.

The doctrine applies only to:

> those district Court decisions [1] that are conclusive, [2] that resolve important questions completely separate from the merits, and [3] that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. Digital Equipment Corp. v. Desktop Direct, Inc., _____ U.S._____,_____,114

S. Ct. 1992, 1995-96, 128 L. Ed. 2d 842 (1994). (Enumeration added and internal quotations and citations omitted.)

Both Tucker and Mitchell relied heavily on the principle that qualified immunity of public officials involves "*immunity from suit* rather than a mere defense to liability." Mitchell at 472 U.S. 526; Tucker at 648 So. 2d 1189. Obviously, the right not to be sued would be effectively unreviewable on appeal so that the third prong of the Cohen analysis is met.

Whether the exception created by this Court in Tucker should be expanded to include interlocutory appeals from the denial of motions to dismiss based on sovereign immunity depends first on whether sovereign immunity involves "immunity from suit" or "a mere defense to liability."

Curiously, although the Department of Education relies heavily on federal cases such as Mitchell and Cohen to support its request that the Tucker exception be expanded, the Department completely ignores the two federal cases which are directly on point and which unequivocally hold that "sovereign immunity" is not and should not be subject to interlocutory review.

In a case of first impression, the United States Court of Appeals considered this issue in Pullman Construction Industries, Inc. v. United States, 23 F.3d 1166 (7th Cir. 1994). In that case the government argued that

> 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." Id. at 1167.

In analyzing whether the collateral order doctrine applied to federal sovereign immunity, the Court noted "the newfangled nature of the doctrine permitting appeals based on claims of rights to be free from litigation." Id. at 1168. (Emphasis added.)

The Court then rhetorically asked, "does the word 'immunity' in 'sovereign immunity' itself support interlocutory appeal?" (Id. 1169.) And the Court's answer to its own question was, "Surely not. . . ." (Id. 1169). Explaining, the Court said,

> 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. (Id. at 1169; emphasis in original.)

The Court noted that, "Only an 'explicit statutory or constitutional guarantee that trial will not occur' creates the sort of right that supports immediate review." Id. at 1169 quoting from Midland Asphalt Corp. v. United States, 489 U.S. 794, 801, 109 S. Ct. 1494, 1499, 102 L. Ed. 2d 879 (1989). The Court observed that, "Congress has consented to litigation in federal court seeking equitable relief from the United States," and "in limited circumstances to litigation seeking money." Id. at 1168. The Court went on to point out that

> 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. Id. at 1168.

In analyzing the difference between the "right not to be sued" and "the right to prevail," the Court compared federal sovereign immunity with other immunities such as that granted by the Eleventh Amendment, saying, "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive power of judicial tribunals at the instance of private parties." Id. at 1169 quoting from Ex Parte Ayers, 123 U.S. 443, 505, 8 S. Ct. 164, 182, 31 L. Ed. 216 (1887). Contrasting federal sovereign immunity, the Court said, "We have demonstrated that the Congress, on behalf of the United States, has surrendered any comparable right not to be a litigant in its own courts." Id. at 1169

Accordingly, the Court dismissed the government's attempted interlocutory appeal "for want of jurisdiction." Id. at 11970.

The analysis of federal sovereign immunity by the Court of Appeals applies equally to the sovereign immunity of the State of Florida. At the risk of stating the obvious, Florida has "surrendered any ... right not to be a litigant in its own courts."

Like Congress, the legislature of the State of Florida "has consented to litigation" in its own courts seeking equitable relief and, in limited circumstances, to litigation seeking money.

Like the United States Code, the Florida Statutes are "riddled with statutes authorizing relief against" the State of Florida and its agencies. Such statutes include general tort claims (F.S. 768.28); civil rights violations (F.S. 760.11); taxpayer actions (F.S. 213.015); damage to underground utilities (F.S. 556.106);

suits against Spaceport Florida Authority (F.S. 331.328); pollution of waters (F.S. 387.10); and suits against solid waste management facilities (F.S. 403.706).

In State of Alaska v. United States, 64 F.3d 1352 (9th Cir. 1995) a different federal appeals court considered whether federal sovereign immunity is subject to the collateral order doctrine. The Court began its analysis by observing that,

> At first glance, federal sovereign immunity seems to fit comfortably among the types of immunities for which immediate appeal is appropriate. In *Digital Equipment* the Supreme Court observed that "orders denying certain immunities are strong candidates for prompt appeal under §1291." -- U.S. --, 114 S. Ct. at 1998. This is because certain immunities are more likely to meet the third prong of the *Cohen* analysis: where the immunity guarantees a "right not to stand trial," that right may be "irretrievably lost" if immediate review is not available. The Supreme Court in *Digital Equipment* hastened to add, however, that "a party's ability to characterize a district court's decision as denying an irreparable "right not to stand trial" altogether is [not] sufficient ...for a collateral order appeal," because virtually every right or procedural step that can be enforced by pretrial dismissal could be characterized as a right not to stand trial. Id. at 1355.

The appeals court then went on to hold that "despite the label 'immunity' federal sovereign immunity is not best characterized as a 'right not to stand trial altogether.'" Id. Explaining this conclusion, the Court said,

> 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. Id.

As did the Pullman Court, the Court of Appeals for the Ninth Circuit found that,

> "Federal sovereign immunity is readily distinguishable from the states' immunity under the Eleventh Amendment and foreign governments' under the Foreign Sovereign Immunities Act. The latter two doctrines allow one sovereign entity the right to avoid, altogether, being subjected to litigation in another sovereign's courts. (Citation omitted.) Similar sovereignty concerns are not implicated by the maintenance of suit against the United States in federal court." Id. at 1355, 1356.

The Alaska Court rejected the government's argument that its claim of sovereign immunity would be "effectively unreviewable" at a later point, saying

> 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 . . . . Id. at 1356, 1357.

As the Supreme Court pointed out in Van Cauwenberghe v. Biard, 486 U.S. 517, 524, 108 S. Ct. 1945, 100 L. Ed.2d 517 (1988):

> 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.

The Seventh Circuit concluded that the substance of the rights entailed

> ...is not urgent in the context of claims of federal sovereign immunity. In this respect, claims of sovereign immunity contrast sharply with claims of double jeopardy or official immunity. In the latter type of cases, the judicial inquiry itself, rather than just a merits judgment, causes the disruption that the doctrine of immunity was designed to prevent. (Citations omitted.) The concept of qualified immunity is animated by concern about the burden of discovery and the need for government officials to act "with independence and without fear of

> consequences." (Citation omitted.) Immediate appeals are permitted because if officials were unable to obtain prompt review of denials of qualified immunity, the substance of the immunity would be lost. That concern is not the foundation of federal sovereign immunity. Suits that, for a technical reason, do not satisfy the strict requirements of statutes waiving sovereign immunity are no more fundamentally burdensome or disruptive than suits that do not satisfy those requirements.
>
> The denial of federal sovereign immunity, we conclude, imposes no hardship on the United States than 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. Alaska v. U.S., supra, at 1357. (Emphasis added.)

The analysis of federal sovereign immunity by two federal Circuit Courts of Appeal applies equally to the analysis of Florida's state sovereign immunity. First, an order denying sovereign immunity does not meet the three-part Cohen test for the "collateral order doctrine" because state sovereign immunity, having been broadly waived, does not constitute absolute freedom from suit, but merely a limitation on suit based on the factual circumstances of the case. Second, the "hardship" inflicted on the State by postponing review of sovereign immunity issues is not significant. As the Supreme Court said, "the mere identification of some interest that would be 'irretrievably lost' has never sufficed to meet the third Cohen requirement. Digital Equipment, -- U.S. at --, 114 S. Ct. at 1998. The interest that would be lost must also be "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." Alaska v. U. S., supra, at 1356.

ISSUE II

DENIAL OF A MOTION TO DISMISS ON GROUNDS OF SOVEREIGN IMMUNITY IS NOT FACTUALLY RIPE FOR INTERLOCUTORY REVIEW.

Appellate courts may not review orders denying motions to dismiss by certiorari. Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987).

Interlocutory review is governed by Florida Rule of Appellate Procedure 9.130 which provides, in pertinent part:

> (3) Review of non-final orders of lower tribunals is limited to those that
> (A) Concern venue;
> (B) Grant, continue, modify, deny, or dissolve injunctions, or refuse to modify or dissolve injunctions;
> (C) Determine
> (i) the jurisdiction of the person;
> (ii) the right to immediate possession of property;
> (iii) the right to immediate monetary relief or child custody in domestic relations matters;
> (iv) the issue of liability in favor of a party seeking affirmative relief;
> (v) the entitlement of a party to arbitration;
> (vi) that a party is not entitled to workers' compensation immunity as a matter of law; or
> (vii) that a class should be certified.

Accordingly, a motion to dismiss based on sovereign immunity is not presently subject to interlocutory appeal. There are solid practical reasons why this should remain the case.

As the Court of Appeals for the Ninth Circuit said:

> Not only may the denial of federal sovereign immunity be effectively reviewed after trial, but it may also be reviewed more efficiently at that time. * * * In most situations where the defense of sovereign immunity is denied, the issue will be whether the facts are such that the plaintiff's claim fits under the relevant statute waiving immunity. * * * A motion for dismissal based on federal sovereign immunity is, therefore, strikingly similar to a motion for dismissal for failure to state a claim (citation omitted) or a motion for summary judgment

> (citation omitted), neither of which is immediately appealable under the collateral order doctrine. All three types of orders give rise to similar efficiency concerns: Because the legal inquiry (whether the plaintiff's claim falls within the language of a statute or common law cause of action) is highly fact specific, appellate resources would be squandered if appeals were heard before the relevant facts have been fully developed. Alaska v. U.S., 64 F. 3d 1352, 1357 (9th Cir. 1995).

An interlocutory appeal from the denial of a motion for summary judgment presupposes that the facts have been fully developed and are not in dispute. The opinion of the appellate court on the legal sufficiency or insufficiency of the undisputed facts can then be dispositive of the legal issues involved.

However, by allowing interlocutory appeal of the denial of a motion to dismiss based on sovereign immunity, where the facts have not been developed and are still in dispute, at most the appellate court can reverse the denial of the motion to dismiss and remand the case to the trial court for amendment of the Complaint, unless the appellate court finds that no possible amendment could allege a cause of action, an exercise which is speculative at best. It is not at all far-fetched to anticipate that by allowing interlocutory appeal of the denial of motions to dismiss, the appellate courts will be besieged by such interim appeals, will reverse a certain number of these denials with leave to amend, only to be asked to review the subsequent amendment by way of interlocutory appeal, repetitively, until either the trial court or the appellate court determines that no further amendments are possible. Or, as the Court of Appeals for the Ninth Circuit observed:

> Appellate courts might routinely be asked to review the same basic claim at two different times with reference to two different sets of facts: once on immediate appeal, assuming the facts on the face of the complaint, and (if dismissal is unwarranted on those facts) again after trial on appeal of the denial of a motion for judgment as a matter of law. Alaska v. U.S., supra, at 1357, 1358.

In Johnson v. Jones, -- U.S. -- , 115 S. Ct. 2151, 132 L. Ed.2d 238 (1995), the United States Supreme Court said

> . . . [R]ules that permit too many interlocutory appeals can cause harm. An interlocutory appeal can make it more difficult for trial judges to do their basic job -- supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

In her dissenting opinion in Department of Transportation v. Wallis, 659 So.2d 429 (Fla. 5th DCA 1995), Judge Sharpe opined that

> If anything, the Court in *Tyson* restricted its opinion in *Mitchell* and stepped back from its broad justification for appealability in that case, which was based on "the need to protect officials against the burdens of further pre-trial proceedings and trial" ... . It held in *Tyson* that only cases posing "neat abstract issues of law" should be allowed to be appealed prior to a final judgment. Appeal should not be allowed if the issue involves controversy about facts, sufficiency of factual evidence, and issues which are inseparable from those that underly the basic case. Id. at 432.

This Court has long recognized the danger of squandering judicial resources inherent in an overly permissive rule allowing interlocutory appeals. As the Court said in Travelers Insurance Company v. Bruns, 443 So.2d 959 (Fla. 1984):

> The thrust of Rule 9.130 is to restrict the number of appealable non-final orders. The theory underlying the more restrictive rule is that appellate review of non-

final judgments serves to waste court resources and needlessly delays final judgment.

Allowing interlocutory appeals from the denial of motions to dismiss based on summary judgment would inevitably clog the appellate courts with interim appeals and interminably delay resolution of cases on the merits. In tort suits against the State, the trial court time standards imposed by this Court would become meaningless.

ISSUE III

PETITIONER, DEPARTMENT OF EDUCATION, IS NOT IMMUNE FROM TORT LIABILITY IN THIS CASE BECAUSE PLAINTIFFS ALLEGED BREACH OF A COMMON LAW DUTY.

In their Second Amended Complaint, Plaintiffs alleged that the Department of Education acted jointly with the Leon County School Board in the decision to hire teacher, Billy Campbell.

> 25. The DEPARTMENT and the COUNTY acted jointly in determining the qualifications and moral fitness of applicants for teaching positions. The DEPARTMENT undertook to investigate the moral fitness of applicants for issuance or renewal of licenses, and when considering hiring an applicant for a teaching position the COUNTY relied in part upon the most recent determination of moral fitness by the DEPARTMENT.
>
> 26. The COUNTY relied in part upon the DEPARTMENT to check the criminal record of applicants, to investigate reports of misconduct, and to determine whether applicants were morally fit to serve as teachers. The DEPARTMENT undertook to perform these tasks knowing that county school boards, including the LEON COUNTY SCHOOL BOARD, would rely in part upon the DEPARTMENT in these respects (A 26).

In addition, Plaintiffs alleged that DOE violated statutory duties to them:

> 24. At all material times, the DEPARTMENT was the agency of the State of Florida that issued and renewed certificates of school teachers. The DEPARTMENT was required to determine whether an applicant for issuance or renewal of a teacher's certificate was of good moral character.
>
> 27. The DEPARTMENT learned, at least by 1985, of misconduct by defendant CAMPBELL. The DEPARTMENT determined that CAMPBELL should not be allowed to teach and that his teaching certificate should not be renewed at least pending further investigation.
>
> 28. Nonetheless, in 1986 the DEPARTMENT negligently renewed CAMPBELL'S teaching certificate. The DEPARTMENT did so in violation of its own determination that this should not occur absent further investigation. The

> DEPARTMENT negligently failed properly to investigate, learn or consider the fact that CAMPBELL had a criminal record, had engaged in acts of sexual abuse of minor children during prior employment, and was otherwise morally unfit to hold a teaching certificate or to be employed at any school (A 25, 26).

The common law duty and the statutory duties alleged by Plaintiffs are not identical or even coextensive. Before reversing itself on rehearing, the Court of Appeals, First District, held that the statutory obligations of DOE do not create a duty owed specifically to Plaintiffs, violation of which would give rise to a cause of action. However, regardless of whether DOE has any statutory obligation whatsoever, much less whether those obligations create a specific duty of care, Plaintiffs have alleged that DOE voluntarily incurred a common law duty to Plaintiffs by assuming the responsibility of investigating the background of teacher applicants on behalf of school boards, including specifically the Leon County School Board.

There is no question that "[t]he school board has a common law duty to protect others from the result of negligent hiring, supervision, or retention ...." School Board of Orange County v. Coffey, 524 So.2d 1052, 1053 (Fla. 5th DCA 1988), rev. den., 534 So.2d 401 (Fla. 1988).

There is no question "that persons who combine to commit a wrong are joint tortfeasors and are responsible for the acts of each other" and that this maxim applies to public employers to the same extent as private employers. Hollis v. School Board of Leon County, 384 So.2d 661, 663 (Fla. 1st DCA 1980).

There is no question "that the law imposes an obligation on everyone who attempts to do anything, even gratuitously, for another to exercise some degree of care and skill in the performance of what he has undertaken" and that this rule applies to public agencies as well as private individuals. Padgett v. School Board of Escambia County, 395 So.2d 584, 585 (1st DCA 1981). (Emphasis added.)

The only question is whether the Department of Education did, in fact, voluntarily act jointly with the Leon County School Board in the investigation and hiring of Billy Campbell, and that is not a question that can be answered on a motion to dismiss.

"For purposes of a motion to dismiss the allegations of a Complaint are taken to be true." Padgett, supra, at 585. Accordingly, if Plaintiffs have adequately alleged that DOE voluntarily participated in the investigation and hiring of Billy Campbell, those allegations must be accepted as true, and the motion to dismiss denied.

ISSUE IV

IF INTERLOCUTORY REVIEW IS GRANTED AND THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO DISMISS IS REVERSED, PLAINTIFFS ARE ENTITLED TO AMEND THEIR COMPLAINT.

On the other hand, if this Court should feel that Plaintiffs have not adequately alleged joint undertaking by Petitioner, DOE and the Leon County School Board, then Plaintiffs are entitled to amend and their Second Amended Complaint should not be dismissed with prejudice.

The Court of Appeals, First District, announced the standard for dismissal with prejudice in Hamide v. Department of Corrections, 548 So.2d 877 (Fla. 1st DCA 1989) as follows:

> Unless it appears that the privilege to amend has been abused or that the Complaint is clearly unamendable, it is an abuse of discretion to dismiss a complaint with prejudice. Id. at 548.

This standard applies as much to Courts reviewing the decision of a trial Court on a motion to dismiss as it does to the trial court in making its decision.

Plaintiffs have not abused their privilege to amend.

The only remaining issue, then, is whether Plaintiffs' Complaint is "clearly unamendable." The answer is no.

Consider these hypothetical facts:

Alice Administrator, the hiring coordinator for the Leon County School Board, calls Betty Bureaucrat, chief of the certification bureau of the Department of Education and the following conversation takes place:

ALICE: Hi, Betty, I need a favor.

BETTY: What can I do for you, Alice?

ALICE: Sam Snoop, my chief investigator for teacher fitness, is taking a 6-month leave of absence. Sam is responsible for doing background checks on all of our teacher applicants to make sure they have no criminal record, no history of child molesting and no other known problems which would make them dangerous to our children. I have been unable to find a temporary replacement for Sam.

Would your bureau agree to perform these background investigations for us to use in making our hiring decisions?

BETTY: Well, Alice, I realize how important it is for you to know whether a prospective teacher is dangerous to your school children. Although we are primarily concerned with academic credentials, I could ask our people to investigate criminal history and such. Until Sam comes back to work, we will do the background checks for you.

ALICE: I really appreciate your willingness to help us out, Betty. In that regard, we have a teacher applicant named Billy Campbell. I need to find out whether he has ever been arrested for or convicted of a criminal offense, and whether he has ever been fired by another school district because of allegations that he molested a child.

BETTY: I'll be happy to furnish that information to you, Alice.

Betty later notifies Alice that based on her investigation there is no reason to believe that Billy Campbell has a criminal record, a history of child molestation, or is in any way inappropriate to be hired as a teacher. In fact, Billy Campbell did have a criminal history, and the Department of Education knew that Billy Campbell had been fired from a previous teaching job for sexually molesting a student.

The Leon County School Board hires Billy Campbell as a teacher, and he proceeds to sexually molest a number of his students.

In Hartley v. Floyd, 512 So. 2d 1022 (Fla. 1st DCA 1987) the Court held that a Deputy Sheriff's voluntary agreement to check a boat ramp for signs of a missing fisherman's truck and trailer and to call the Coast Guard created a duty to perform those acts with reasonable care. Following is a series of quotes from the opinion in Hartley. Each quote is followed by an italicized quote which

differs only in that the facts of the preceding hypothetical have been substituted for the equivalent facts from Hartley.

Hartley

"Deputy Legler promised to have someone check the Cedar Key Boat Ramp." Id. at 1023.

Hypothetical

Betty Bureaucrat promised to have someone check the information on Billy Campbell.

Hartley

"When Mrs. Floyd called back approximately 40 minutes later, the Deputy told her that the boat ramp had been checked and her husband's truck was not there." Id.

Hypothetical

When Alice Administrator called back Betty Bureaucrat told her that the investigative information had been checked and there was no indication Billy Campbell had a criminal record or had been fired for child molesting.

Hartley

"Based on Deputy Legler's representation that her husband's truck and trailer were no longer at the boat ramp, Mrs. Floyd assumed that the fishermen had returned safely to Cedar Key, trailered their boat, and were on the way home." Id.

Hypothetical

Based upon Betty Bureaucrat's representation that there was no information in the Department of Education's files that Billy Campbell had a criminal record or had been fired for molesting children, Alice Administrator assumed that there was nothing in Billy Campbell's background that would indicate he was dangerous to children.

Hartley

"In reliance on the erroneous information, Mrs. Floyd made no additional effort to locate her husband for approximately five hours." Id. at 1024.

Hypothetical

In reliance on the erroneous information, Alice Administrator made no additional effort to check into the background of Billy Campbell.

Hartley

"The Sheriff's primary contentions are that the trial court should have sustained his sovereign immunity defense because, first, the alleged negligence on the part of the Sheriff's Deputy involved an exercise of discretion and not a merely ministerial or

operational activity and, second, because he owed no special duty to Mrs. Floyd different from his general duty to the public at large." Id.

Hypothetical

The Department of Education's primary contentions are that the trial court should have sustained its sovereign immunity defense because, first, the alleged negligence on the part of Betty Bureaucrat involved an exercise of discretion and not a merely ministerial or operational activity and, second, because it owed no special duty to Sally Roe different from its general duty to the public at large.

Hartley

"The decision whether to comply with Mrs. Floyd's request that the Sheriff's office determine if her husband's truck and trailer were still at the Cedar Key boat ramp was initially a discretionary judgmental decision for which there would be no liability if Deputy Legler had decided not to comply with the request and had so advised Mrs. Floyd." Id.

Hypothetical

The decision whether to comply with Alice Administrator's request that the Department of Education determine whether Billy Campbell had a criminal history and had ever been fired for molesting school children was initially a discretionary judgmental decision for which there would be no liability if the Department of Education had decided not to comply with the request and had so advised Alice Administrator.

Hartley

"However, once he advised her that he would comply with her request to inspect the boat ramp and told her he would contact the Coast Guard, he had a duty to perform these tasks with reasonable care." Id.

Hypothetical

However, once the Department of Education advised Alice Administrator that it would comply with her request to investigate the background of Billy Campbell and told her they would notify her if there were problems, it had a duty to perform these tasks with reasonable care.

Hartley

"Once Deputy Legler agreed to perform the tasks his actions thereafter ceased to be discretionary actions and became merely operational level activities which must be performed with reasonable care and for which there is no sovereign immunity." Id.

Hypothetical

Once the Department of Education agreed to perform the tasks its actions thereafter ceased to be discretionary actions and

became merely operational level activities which must be performed with reasonable care and for which there is no sovereign immunity.

The side-by-side application of the reasoning of the Court in Hartley to the facts in the hypothetical graphically demonstrates how easily Plaintiffs may state a cause of action by amending their complaint.

A similar application of the same Court's reasoning in another case, Padgett v. School board of Escambia County, 395 So.2d 584 (Fla. 1st DCA 1981) again results in the inescapable conclusion that the hypothetical facts above (and virtually endless hypothetical theories) state viable causes of action against the Department of Education.

In Padgett a mother sued for injuries her minor son received while crossing the street at or near a school crossing. The mother alleged that the school principal negligently operated or failed to operate the warning signals at the school crossing.

Compare:

Padgett

"The third amended complaint alleged that the School Board, through the acts of its principal, had voluntarily undertaken to operate flashing operating lights at the school crossing." Id. at 585.

Hypothetical

The second amended complaint alleged that the Department of Education, through the acts of its bureau chief, had voluntarily undertaken to investigate the background of Billy Campbell and communicate the results of that investigation to the Leon County School Board.

Padgett

"For purposes of a motion to dismiss the allegations of a complaint are taken to be true." Id.

Hypothetical

For purposes of a motion to dismiss the allegations of a complaint are taken to be true.

Padgett

"It is also axiomatic that the law imposes an obligation on everyone who attempts to do anything, even gratuitously, for another to exercise some degree of care and skill in the performance of what has been undertaken." Id.

Hypothetical

It is also axiomatic that the law imposes an obligation on everyone who attempts to do anything, even gratuitously, for another to exercise some degree of care and skill in the performance of what has been undertaken.

Padgett

"It cannot be determined from the face of the complaint, or as a matter of law, that the principal was not acting within the scope of his employment by his decision to operate the warning lights." Id.

Hypothetical

It cannot be determined from the face of the complaint, or as a matter of law, that the bureau chief was not acting within the scope of her employment by her decision to investigate the background of Billy Campbell and communicate the results of that investigation to the School Board.

Padgett

"There does not appear to be any legal authority precluding agents of the school board from operating traffic control lights." Id.

Hypothetical

There does not appear to be any legal authority precluding agents of the Department of Education from agreeing to do background investigations of teacher applicants on behalf of school boards.

As the First District Court of Appeal said only two years ago in Thompson v. Publix Supermarkets, Inc., 615 So.2d 796 (Fla. 1st DCA 1993):

> Our rules of civil procedure evidence a clear policy that, absent exceptional circumstances, requests for leave to amend pleadings be granted. Fla.R.Civ.P. 1.190(a). "Although granting leave to amend rests within the sound discretion of the trial court, *all doubts should be resolved in favor of allowing amendment.* It is public policy of this state to freely allow amendments to pleadings so that cases may be resolved upon their merits." Adams v. Knabb Turpentine Co., 435 So.2d 944,946 (Fla. 1st DCA 1983). "As a general rule, refusal to allow amendment of a pleading constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile." Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Cooperative Bank, 592 So.2d 302,305 Fla. 1st DCA 1991) review dismissed, 598 So.2d 76 (Fla. 1992). Id. at 797. (Italics added.)

The foregoing hypotheticals graphically illustrate the point that motions to dismiss on grounds of sovereign immunity are fact-sensitive and will rarely, if ever, pose "neat abstract issues of law." However, should this Court decide to allow interlocutory appeal of the denial of Petitioner's Motion to Dismiss and remand this case to the Court of Appeals, First District, for further proceedings, this Court should instruct the court of Appeals that a reversal of the trial court should not include directions to dismiss with prejudice, but to allow Respondents/Plaintiffs, an opportunity to amend.

CONCLUSION

The weight of authority compels the conclusion that sovereign immunity is not absolute immunity from suit, but simply immunity from liability under certain factual circumstances. Therefore, DOE is not entitled to interlocutory review of an order denying a motion to dismiss based upon the defense of sovereign immunity.

The mischief from allowing piecemeal review of trial court rulings, the burden on judicial resources of repetitive interim appellate review and the denial of justice by inordinate delay all militate against allowing interlocutory review of orders denying motions to dismiss on the defense of sovereign immunity.

Plaintiffs/Respondents have sufficiently alleged the breach of a common law duty by Respondent DOE so that it cannot be concluded that DOE is sovereignly immune as a matter of law.

If this Court should determine to allow interlocutory appeal of motions to dismiss based on sovereign immunity, and remand this case to the District Court for further proceedings, this Court should instruct the appellate court that a reversal of the trial court should be without prejudice to Respondents/Plaintiffs to further amend their Complaint.

Respectfully submitted,

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By 
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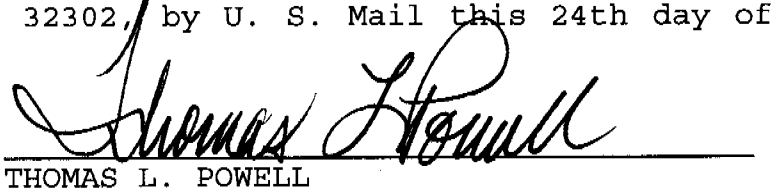
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Billy R. Campbell, Liberty Correctional Institution, P. O. Box 999, Bristol, FL 32321; Laura R. Rush, Office of the Attorney General, PL-01, Capitol, Tallahassee, FL 32399; Jeannette M. Andrews, P. O. Box 1739, Tallahassee, FL 32302; John C. Cooper, P. O. Drawer 14447, Tallahassee, FL 32317; Gordon D. Cherr, P. O. Drawer 229, Tallahassee, FL 32302; and C. Graham Carothers, P. O. Box 391, Tallahassee, FL 32302, by U. S. Mail this 24th day of January, 1996.



THOMAS L. POWELL