IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF EDUCATION,

Petitioner,

v. Case No. 86,061

SALLY ROE, et al.,

Respondents.

_____/

PETITIONER'S BRIEF ON THE MERITS

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner Department of Education (DOE) is a defendant in the civil action before the trial court and was petitioner in the certiorari proceeding before the District Court of Appeal, First District of Florida. Respondents Roes are the plaintiffs in the civil action before the trial court and were Respondents in the certiorari proceeding before the District Court of Appeal, First District of Florida. Respondents Leon County School Board, Superintendent Merrick, Unknown Employees of the Leon County School Board, former principal Sam Alderman, principal Nancy E. Russell, and inmate Billy Randolph Campbell are defendants in the civil action before the trial court, and were respondents in the certiorari proceeding before the District Court of Appeal, First District of Florida. Roes' Amended Complaint is included in the Appendix to Petitioner's Brief on the Merits, and is denominated as (Ex. A-).

STATEMENT OF THE CASE AND FACTS

Respondents Sally and Ann Roe sued the Department of Education (DOE), Leon County School Board and Superintendent Richard Merrick, elementary school principals Nancy E. Russell and Sam Alderman, and former teacher Billy R. Campbell, alleging that Campbell was a teacher at Ruediger Elementary School who sexually molested Sally Roe during 1988-89 and 1989-90, when she was in fourth and fifth grades, causing permanent physical and psychological injuries. (Ex. A, pp. 1-10) The Roes sued the Leon County School Board in Count I under §768.28, Florida Statutes, for alleged negligent hiring and retention of Campbell. (Ex. A, pp. 4-5) The Roes sued the school board, the unknown defendants, Superintendent Merrick, Alderman and Russell in Count III under 42 U.S.C §1983 for alleged violations of the Roes' federal civil rights. (Ex. A, pp. 7-10) The Roes sued Campbell in Count IV for battery. (Ex. A, p. 10).

As to DOE, Count II of the Amended Complaint alleged as follows:

> 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.
>
> 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.
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> 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.
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> 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.
>
> 29. In 1986, the COUNTY, acting cooperatively with the DEPARTMENT, hired CAMPBELL based in part on the negligent renewal of CAMPBELL's teaching certificate earlier that same year by the DEPARTMENT. The COUNTY continued CAMPBELL's employment through the occurrences of sexual abuse at issue in this case based in part upon the negligence of the DEPARTMENT in renewing CAMPBELL's certificate.

DOE moved to dismiss the Amended Complaint on grounds that Roes' claims were barred by sovereign immunity and DOE did not owe a common-law or statutory duty of care to the Roes as to the acts alleged to have been negligently performed. The trial court denied the motion.

DOE filed a petition for writ of common-law certiorari in the District Court of Appeal. The district court treated DOE's petition as an interlocutory appeal on authority of **Tucker v. Resha**, 648 So.2d 1187 (Fla. 1995), stating that "[w]e consider this holding applicable to any denial of a claim of absolute or qualified immunity, and not simply those raised in the context of a motion for summary judgment, so long as the issue is a matter of law, as in the case at bar." **Department of Education v. Roe, et al.**, 20 Fla.L.Weekly D686b,D687 (Fla. 1st DCA March 14, 1995).

The district court concluded that the Roes' Amended Complaint failed to allege any duty of care owed to them by DOE with respect to the alleged negligently performed licensing and investigatory acts, noting that DOE under Florida law was not be an employer of teachers, and therefore could not owe a duty of care, along with Leon County School Board, to use reasonable care in the hiring of Campbell. The district court reversed the trial court's order, directing it to dismiss the Amended Complaint against DOE with prejudice.

On rehearing, the district court withdrew its earlier decision and in a brief substituted decision held that the order denying DOE's immunity claim was not subject to interlocutory review because "[w]e are now of the view that we should not construe **Tucker** as deciding any issue beyond that which was specifically asked in the certified question in that case." **Department of Education v. Roe, et al.**, 656 So.2d 507 (Fla. 1st DCA 1995)

DOE filed motions for rehearing, rehearing en banc and for certification. The trial court on June 16, 1995 denied the motions.

DOE on July 14, 1995 timely filed a Notice to Invoke this court's discretionary jurisdiction on grounds that the district court's May 12, 1995 decision expressly and directly conflicts with this court's decision in **Tucker v. Resha**, 648 So.2d 1187 (Fla. 1994). This court on November 7, 1995 accepted jurisdiction and dispensed with oral argument.

SUMMARY OF ARGUMENT

1. Orders rejecting claims of sovereign immunity meet the requirements for interlocutory review under the rationale set forth by this court in **Tucker v. Resha**. Under Florida law, sovereign immunity is an immunity from suit, not a defense to liability, which is effectively lost if a case is erroneously permitted to go to trial. An order determining sovereign immunity is conclusive as to that claim, the claim is separable from, and collateral to, the underlying merits of the tort action, and the claim is not effectively reviewable on direct appeal following final judgment because the immunity from suit, once lost, cannot be recaptured when litigation erroneously proceeds.

The societal and personal costs of erroneously lost immunity in state tort actions are indistinguishable from those in federal civil rights actions. The diversion of official energy from public issues, the deterrence of able citizens from acceptance of public office, and the danger that fear of lawsuit will deter proper performance of public duties are consequences which impact the state in tort actions to no less degree than they impact public officials in federal civil rights actions. When the state is sued in tort, public employees and officials respond to and defend against allegations of negligence. Under Florida law, public officials in federal civil rights actions are no more personally liable than is the state or its employees or officials in state tort actions.

No rationale exists for precluding review of orders determining immunity on a motion to dismiss, when the order turns strictly on an issue of law. The order at issue in this case qualifies for interlocutory review because DOE's claims of sovereign immunity and the absence of any actionable duty of care owed to Roes turn strictly on issues of law which can be determined solely on the undisputed allegations of the Amended Complaint.

II. DOE does not owe a duty of care to other than the public at large in the performance of its statutory licensing and investigatory duties, and its decisions with respect to licensing and investigating teachers are immune from tort liability under the doctrine of sovereign immunity. Leon County School Board's alleged reliance upon DOE to properly perform its licensing and investigatory duties when the Board hired former teacher Campbell does not create any duty of care owed by DOE to Roes because DOE, as a matter of law, cannot be an employer of teachers. If DOE cannot be an employer of teachers, it cannot, as a matter of law, owe any duty of care to Roes for the hiring and retention of former teacher Campbell.

ARGUMENT

ISSUE I

WHETHER AN ORDER REJECTING A CLAIM OF SOVEREIGN IMMUNITY IS SUBJECT TO INTERLOCUTORY REVIEW, WHERE THE ORDER TURNS STRICTLY ON AN ISSUE OF LAW.

In **Tucker v. Resha**, 648 So.2d 1187 (Fla. 1994) this court authorized interlocutory review of orders denying claims of qualified immunity in federal civil rights actions brought in state courts, where the order under review turns strictly on an issue of law. The court directed a change in the Florida Rules of Appellate Procedure to accommodate such review. DOE has requested the court to consider whether claims of sovereign immunity in state tort actions should be subject to interlocutory review on the same reasoning set forth in **Tucker**. DOE urges this court to authorize interlocutory review of orders rejecting sovereign immunity claims for the reasons set forth below.

A. The rationale expressed in **Tucker v. Resha**, 648 So.2d 1187 (Fla. 1994) for permitting interlocutory review of orders rejecting public official qualified immunity claims applies equally to orders rejecting state sovereign immunity claims.

Under existing Florida law, orders rejecting claims of sovereign immunity are not among the non-final orders reviewable pursuant to Rule 9.130(a)(3)(C), Florida Rules of Appellate Procedure. **Page v. Ezell**, 452 So.2d 582 (Fla. 3d DCA 1984); **State Road Department v. Brill**, 171 So.2d 229 (Fla. 1st DCA 1964); **Florida Department of Highway Safety v. Desmond**, 568 So.2d 1354 (Fla. 2d DCA 1990). Certiorari review of orders rejecting sovereign immunity claims is precluded where the order rules on a

motion to dismiss. See Martin-Johnson, Inc. v. Savage, 509 So.2d 1097 (Fla. 1987). Certiorari review may be obtained to review an order rejecting a sovereign immunity claim asserted by motion for summary judgment, but the standard of review under these circumstances permits the court to consider only whether the order constitutes a clear departure from the essential requirements of the law which causes irreparable harm. Martin-Johnson v. Savage; Caribbean Treasure Salvage v. Sheriff, 474 So.2d 883 (Fla. 4th DCA 1985). Certiorari relief is seldom granted to quash an interlocutory order. Crocker Construction Co. v. Hornsby, 562 So.2d 842 (Fla. 4th DCA 1990).

In Tucker, this court adopted as state law the standard of review applicable in federal courts under Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985) for review of public official qualified immunity claims. In concluding that qualified immunity claims should be appealable prior to final judgment under a standard of review less stringent than that afforded by certiorari review, this court considered the "nature of the rights involved", stating as follows:

> Under the qualified immunity doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [cite omitted] "The central purpose of affording public official qualified immunity from suit is to protect them "from undue interference with their duties and from potentially disabling threats of liability." [cites omitted]
>
> Consistent with this purpose, the qualified immunity of public officials involves

> "*immunity from suit* rather than a mere defense to liability." [cite omitted] The entitlement "is effectively lost if a case is erroneously permitted to go to trial." [cite omitted] Furthermore, an order denying qualified immunity "is effectively unreviewable on appeal from a final judgment" [cite omitted] as the public official cannot be "re-immunized" if erroneously required to stand trial or face the other burdens of litigation.
>
> We also note that the defendant official is not the only party who suffers "consequences" from erroneously lost immunity. As the Supreme Court explained in **Harlow**, society as a whole also pays the "social costs" of "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" [cite omitted] Thus, if orders denying summary judgment based upon claims of qualified immunity are not subject to interlocutory review, the qualified immunity of public officials is illusory and the very policy that animates the decision to afford such immunity is thwarted.

Id., 648 So.2d at 1189-90.

The court in **Mitchell v. Forsyth** analyzed the appealability of pretrial orders rejecting qualified immunity claims by reference to the requirements of the collateral order doctrine, stating as follows:

> Although 28 U.S.C §1291 [28 USCS §1291] vests the courts of appeals with jurisdiction over appeals only from "final decisions" of the district courts, "a decision 'final' within the meaning of §1291 does not necessarily mean the last order possible to be made in a case." [cite omitted] Thus, a decision of a district court is appealable if it falls within "that small class 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 v. Beneficial Industrial Loan Cor.**, 357 U.S. [541,546, 93 L.Ed.2d 1528, 69 S.Ct. 1221 (1949)].
>
> A major characteristic of the denial or granting of a claim appealable under Cohen's "collateral order" doctrine is that "unless it can be reviewed before [the proceedings terminate], it never can be reviewed at all." [cites omitted] When a district court has denied a defendant's claim of right not to stand trial, on double jeopardy grounds, for example, we have consistently held that court's decision appealable, for such a right cannot be effectively vindicated after the trial has occurred. [cite omitted] Thus, the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action. [cite omitted].

Id., 472 U.S. at 524-525, 86 L.Ed. 2d at 424.

In determining that a claim of qualified immunity, like absolute governmental immunity, should be subject to interlocutory appeal, the **Mitchell** court first considered whether qualified immunity constituted a legitimate entitlement not to stand trial, and whether an order denying a claim of such immunity effectively was unreviewable on appeal from a final judgment. Concluding that qualified immunity met these requirements, the court proceeded to consider whether an order rejecting a qualified immunity claim was conclusive, and whether such a claim involved a right separable from, and collateral to, rights asserted in the underlying action. The court concluded that a claim of qualified immunity met these requirements, as well.

On the basis of the **Cohen** collateral order doctrine requirements, federal courts permit interlocutory review of orders determining a wide variety of immunity claims. Thus, immediate review is permitted not only of orders determining absolute and qualified immunity, **Mitchell v. Forsyth**, but also Eleventh Amendment state immunity, **Puerto Rico Aqueduct and Sewer Authority v. Metcalf** 506 U.S. ___, 121 L.Ed.2d 605, 113 S.Ct. 684 (1993); **Schopler v. Bliss**, 903 F.2d. 1373 (11th Cir. 1990), prosecutorial and judicial immunity, **Harris v. Deveaus**, 780 F.2d 911 (11th Cir. 1986); **Schrob v. Catterson**, 948 F.2d 1402 (3d DCA 1991); foreign sovereign immunity, **Segni v. Commercial Office of Spain**, 816 F.2d 344 (7th Cir. 1987); **Princz v. Federal Republic of Germany**, 998 F.2d 1 (C.A.D.C. 1993); Speech and Debate Clause immunity, **U.S. v. Rose**, 28 F.3d 181 (C.A.D.C. 1994); **McSurely v. McClellan**, 521 F.2d 1024 (C.A.D.C. 1975), state action doctrine immunity in antitrust cases, **Commuter Transp. Systems, Inc. v. Hillsborough Cty. Av. Auth.**, 801 F.2d 1286 (11th Cir. 1986)(purpose of state action doctrine is to avoid needless waste of public time and money), and immunity claims under state and territorial sovereign immunity laws, **Marx v. Guam**, 866 F.2d 294 (9th Cir. 1989)(interlocutory appeal from denial of motion to dismiss premised on Guam's sovereign immunity law); **Napolitano v. Flynn**, 949 F.2d 617 (2nd Cir. 1991)(applying state sovereign immunity law in diversity action).

Federal courts have precluded interlocutory review of orders determining immunity when the claim did not entail an entitlement to not stand trial. **See Van Cauwenberghe v. Biard**, 486 U.S. 517,

100 L.Ed. 2d 517, 108 S.Ct. 1945 (1988)(rules pertaining to service and personal jurisdiction are designed to protect against entry of a binding judgment, not to protect against the burdens of trial); **Manion v. Evans**, 986 F.2d 1036 (6th Cir. 1993)(immunity claim of peer review committee members not subject to interlocutory review because the Health Care Quality Improvement Act does not provide immunity from suit); **Lauro Lines S.R.L. v. Chasser**, 109 S.Ct. 1976 (1989)(forum selection clause in a cruise line ticket asserted entitlement to be sued in a particular forum, not an entitlement to avoid suit).

Interlocutory review of immunity claims has played an important role in federal courts. A survey of 134 published opinions involving civil rights immunity claims in the federal circuit courts in 1987, 1988 and 1989 revealed that only 31 district court orders rejecting immunity claims were affirmed in the appeals courts. The 70 percent reversal rate, five times the ordinary reversal rate for all appeals of final decisions on the merits, has been thought to reflect the uncertainty and continuing evolution of civil rights immunity law, and to underscore the appropriateness of affording interlocutory appeal. Solimine, "**Revitalizing Interlocutory Appeals in the Federal Courts**, 58 Geo.Wash.L.Rev. 1165,1189-91.

While there have been concerns in the federal courts regarding increased caseloads as a result of interlocutory appeals of orders determining immunity claims, there is evidence to suggest that an increase in interlocutory appeals may decrease the overall federal appellate caseload by expediting and

shortening the resolution of trial court cases, encouraging settlement of more cases, and therefore reducing the number of appeals from final judgment. Solimine, 58 Geo.Wash.L.Rev. at 1178.

Under Rule 9.130(a)(3)(A), Florida Rules of Appellate Procedure, the state is entitled to immediate review of orders determining venue in tort and other actions. See e.g. Department of Transportation v. Lopez, 415 So.2d 116 (Fla. 3d DCA 1982); Department of Labor and Employment Security v. Summit Consulting, Inc., 594 So.2d 862 (Fla. 2d DCA 1992); School Board of Osceola County v. James E. Rose Mechanical Contractors, Inc., 604 So.2d 521 (Fla. 5th DCA 1992), but there is no evidence that appellate courts have suffered a deluge of interlocutory appeals from orders erroneously determining venue. In the absence of an ascertainable deluge, it can be presumed that the right to interlocutory appeal in this context has served to clarify venue law, and has encouraged trial courts to adhere to that law. The right to immediate appeal of orders determining sovereign immunity claims rationally would have the same salutory effect upon both the evolution of the law toward greater certainty, and intensified scrutiny and consideration by the trial courts of state sovereign immunity claims. Finally, it should be noted that when the state possesses a viable sovereign immunity claim, it will with certainty appeal from an adverse final judgment to seek review of that claim. Thus, affording the right to interlocutory appeal of pretrial orders determining immunity, where the orders turns on an issue of law, cannot be viewed as

increasing the overall caseload of the state's appellate courts. Rather, as noted above, the right to interlocutory appeal of orders determining immunity claims rationally should have the effect of decreasing the work of both trial and appellate courts.

Under **Tucker**, and **Mitchell**, the critical inquiry in determining the right to interlocutory appeal, is whether the immunity claim is soundly premised on a protection from trial, rather than a mere defense to liability. Sovereign immunity claims under Florida law unquestionably are premised upon a right not to stand trial. While the original doctrine of sovereign immunity was rooted in the feudal system and a notion that the King could do no wrong, modern conceptions premise the doctrine on a social policy of protecting the state from burdensome judicial and other interference with the performance of its governmental functions and control over its funds and property. 72 Am.Jur.2d, **States, Territories and Dependencies**, §99 (1974 ed.) **See also Department of Health and Rehabilitative Services v. B.J.M.**, 656 So.2d 906 (Fla. 1995)(DHRS' decisions pertaining to the placement and allocation of services to children in state custody involve an exercise of discretionary executive power and fundamental questions of legislative and executive policy and planning which are immune from tort liability); **Trianon Park Condominium Association v. City of Hialeah**, 468 So.2d 912,918 (Fla. 1985)(noting that the separation of powers doctrine precludes the judicial branch from interfering with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory

rights which gives rise to a private cause of action, and that certain functions inherent in the act of governing are "**immune from suit**").

Article X, Sec. 13, Florida Constitution, states that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." This provision has been interpreted to "provide absolute sovereign immunity for the state absent waiver by legislative enactment or constitutional amendment." **Jackson v. Palm Beach County**, 360 So.2d 1 (Fla. 4th DCA 1978), **cert. denied**, 364 So. 2d 886 (Fla. 1979). Section 768.28(1), Florida Statutes, provides that "[i]n 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 the extent specified in this act**." The language of Art. X, Sec. 13, Florida Constitution, and §768.28(1), Florida Statutes, evince a clear intent to provide immunity from suit except where legislative or constitutional waiver has been effected. Florida courts have held that the basic principle in this state is that "sovereign immunity is the rule, rather than the exception." **Windham v. Florida Department of Transportation**, 476 So.2d 735,739 (Fla. 1st DCA 1985), quoting **Pan-Am Tobacco Corporation, d/b/a Pan-Am Vend-Tronics v. Department of Corrections**, 471 So.2d 4 (Fla. 1984).

This court has held that Florida's limited waiver of sovereign immunity, pursuant to §768.28, Florida Statutes, must be strictly construed to **preclude** suit unless a plaintiff can

demonstrate entitlement to maintain a cause of action against the state. **Levine v. Dade County School Board**, 442 So.2d 213 (Fla. 1983); **Arnold v. Shumpert**, 217 So.2d 116 (Fla. 1968). To that end, Florida courts have recognized that sovereign immunity is not an affirmative defense, but rather is a jurisdictional matter which can never be waived by the government defendant. **Sebring Utilities Commission v. Sicher**, 509 So.2d 968 (Fla. 2d DCA 1987).[1]

This court in **Tucker** considered the social and personal consequences of erroneously lost public official immunity in civil rights actions, noting the expenses of litigation, the diversion of official energy from pressing public issues, the deterrence of able citizens from accepting public office, and the danger that fear of being sued will deter officials from unflinching discharge of their official duties.

When the state is sued in tort, the social and personal costs are no different. Society as a whole pays the same costs of litigation, suffers the same diversion of energy from public issues, the same deterrence of able citizens from accepting public employment, and the same danger that fear of suit will

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[1] The Federal Tort Claims Act includes statutory exceptions to liability. 28 U.S.C. §2680. Federal courts have characterized these exceptions variously as jurisdictional matters or as affirmative defenses to be plead and proven by the government. 8 Am.Jur.Trials p. 664 (1965 ed.) Failure to plead an exception has been held to constitute a waiver. **Stewart v. U.S.**, 199 F.2d 517 (7th Cir. 1952). In addition, under federal tort law, state law governs substantive questions such as the scope and existence of duty, status in premises liability cases, and negligence. 8 Am.Jur.Trials p. 667. This court in **District School Board v. Talmadge**, 381 So.2d 698 (Fla. 1980) noted that the Federal Tort Claims Act and this state's limited waiver of sovereign immunity under §768.28, Florida Statutes, contain dissimilar provisions.

deter performance of public duties. When the state, its agencies, subdivisions and employees are sued in tort, it is not the monolithic, nameless, faceless force of the state which is summoned in defense of the claim. Public employees and officials repond to and defend against the allegations of negligence. Performance of official duties comes to a halt when these individuals are required to provide testimony at depositions and trials and when they are required to gather documents in response to discovery requests. The burdens upon these officials are equivalent in in every respect to the burdens placed upon public officials named as defendants in civil rights actions.[2]

Under these circumstances, the public policy that animates sovereign immunity is indistinguishable from the public policy that animates qualified immunity. If it is the nature of the right asserted that determines entitlement to interlocutory review, then there is no rationale for permitting interlocutory review of qualified immunity claims in civil rights actions and precluding immediate review of sovereign immunity claims in state tort actions. A sovereign immunity claim meets all the requirements for appealability under the **Cohen** collateral order doctrine in that the immunity cannot be recaptured after trial, it is separable from and collateral to the underlying merits of a

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[2] Under §284.31, Florida Statutes, the Florida Casualty Insurance Risk Management Trust Fund covers both civil rights actions against public officials and tort claims against the state. Under Florida law, a public official defendant in a federal civil rights action is no more personally liable than is the state, or a state employee or official, in a state tort action. The Office of the Attorney General defends both public officials in federal civil rights actions and the state in tort actions.

tort claim, and the order determining immunity is conclusive as to that claim.

Other jurisdictions permit interlocutory review of sovereign immunity claims. **See** Title 24, Art. 10, Sec. 8, Colorado Revised Statutes Annotated (1994), providing that "[i]f a public entity raises the issue of sovereign immunity prior to or after the commencement of discovery, the court shall suspend discovery.... The court's decision on such motion shall be a final judgment and shall be subject to interlocutory appeal."); **Blevins v. Denny**, 114 N.C.App. 766, 443 S.E. 2d 354 (N.C. App. 1994)(affording interlocutory review of sovereign immunity claims on authority of **Mitchell v. Forsyth**); **City of Mission v. Ramirez**, 865 S.W.2d 579 (Tex. App. - Corpus Christi - 1993)(affording interlocutory review of sovereign immunity claims); **Lee County Board of Supervisors v. Fortune**, 611 So.2d 927 (Miss. 1992)(affording interlocutory review of sovereign immunity claims); **Griesel v. Hamlin**, 963 F.2d 338 (11th Cir. 1992)(permitting interlocutory review under state law, recognizing that under Georgia law, suit cannot be maintained against the state without its consent, and that sovereign immunity is an immunity from suit).

Finally, DOE notes that this court, expressing sensitivity to "concerns for early resolution of controlling issues," in **Mandico v. Taos Construction Co.,**, 605 So.2d 850 (Fla. 1992), amended Rule 9.130(a)(3), Florida Rules of Appellate Procedure, to permit interlocutory review of orders rejecting claims of employer immunity in workers' compensation cases. The court noted that other remedies were not available to employers to

obtain immediate review of their immunity claims. Unquestionably, the same concern for early resolution of controlling issues should be present when a state defendant seeks review of orders rejecting sovereign immunity claims.

B. Interlocutory review should be permitted for orders determining immunity claims on motions to dismiss, where the order under review turns strictly on an issue of law.

This court in **Tucker**, relying in part upon the reasoning set forth in **Mitchell v. Forsyth**, limited interlocutory review of orders rejecting qualified immunity claims to those cases in which the order turned strictly on an issue of law. The **Mitchell** court expressly recognized that interlocutory review is permitted of orders determining immunity claims on a motion to dismiss, stating that unless a plaintiff's allegations assert a violation of a clearly established law, a defendant pleading qualified immunity is entitled to dismissal of the action before commencement of discovery. **Id.**, 472 U.S. at 526, 86 L.Ed. 2d at 425.

Federal jurisprudence contains innumerable cases in which interlocutory review has been permitted of orders determining immunity claims on motions to dismiss. **See Malina v. Gonzaliez**, 994 F.2d 1121 (5th Cir. 1993)(interlocutory review of order on motion to dismiss asserting qualified immunity); **Milam v. University of Texas M.D. Anderson Cancer Center**, 961 F.2d 46 (4th Cir. 1992); **Kaluczky v. City of White Plains**, 57 F.3d 202 (2nd Cir. 1995); **Hill v. City of New York**, 45 F.3d 653 (2nd Cir. 1995); **Hathaway v. Coughlin**, 37 F.3d 63 (2nd Cir. 1994); **Drexel**

Burnham Lambert Group, Inc. v. Committee of Receivers for Galadari, 12 F.3d 317 (2nd Cir. 1993)(review of order on motion to dismiss asserting foreign sovereign immunity).

The United States Supreme Court in Johnson v. Jones, 63 U.S.L.W. 4552 (June 12, 1995) recently clarified one aspect of the right to interlocutory appeal in qualified immunity cases. In Johnson, three of five police officer defendants moved for summary judgment on qualified immunity grounds, but their argument did not entail the central question with which qualified immunity is concerned, that is, whether the officers' conduct violated constitutional or statutory standards of which they reasonably should have known. Rather, the officers asserted only that they did not beat Jones, and that they were not present when others beat him. Jones produced evidence to dispute the officers' assertions of noninvolvement. The district court denied the motion on grounds that there was sufficient circumstantial evidence to support Jones' theory of the case. The officers appealed on grounds that the evidence in the record was not sufficient to demonstrate a "genuine" issue of fact for trial. The Seventh Circuit Court of Appeals held that it lacked appellate jurisdiction over the issue raised. The United States Supreme Court agreed, holding that Mitchell does not support appealability of orders which merely determine the existence or nonexistence of genuine issues of fact, noting that the appeal in Mitchell involved the purely legal issue of application of "clearly established" law to a given set of facts.

In **Department of Transportation v. Wallis**, Case No. 95-492 (Fla. 5th DCA August 11, 1995), the district court, relying upon this court's decision in **Tucker**, permitted interlocutory review of an order denying the state's motion to dismiss, wherein it asserted a claim of sovereign immunity based upon the undisputed allegations of the complaint. **Wallis** involved the question of whether the state owed an operational-level duty to correct or warn of a known, hidden trap. The plaintiff alleged that DOT created a known dangerous condition when it failed to place a nearby stoplight and sidewalk along a heavily-travelled roadway. The plaintiff was injured when she attempted to cross the road mid-block. Under Florida law, an operational-level duty can arise only if the alleged danger is not readily apparent. Otherwise, DOT decisions with respect to the design of roadways are discretionary acts which are immune from tort liability.

The majority found that under well-settled law, **Payne v. Broward County**, 461 So.2d 63 (Fla. 1984), the dangers of crossing a street are readily apparent, the state therefore does not owe an operational-level duty to warn or protect the public from such dangers, and the state's decisions as to road design are discretionary acts protected from tort liability by sovereign immunity.

In a dissenting opinion, Judge Sharp, citing **Johnson v. Jones**, expressed disagreement with the majority's conclusion that the state was entitled to interlocutory review of the order rejecting its immunity claim. Judge Sharp noted that under federal law, interlocutory appeals should not be allowed if the

issue involves controversy about the facts, the sufficiency of factual evidence, or issues which are inseparable from the merits of the case. She noted that **Tucker** involved a qualified immunity claim and an order on a motion for summary judgment, while **Wallis** was a "garden variety" state tort claim involving an order on a motion to dismiss. Despite the well-settled law cited by the majority, Judge Sharp opined that DOT's immunity claim did nor involve a question of law. While dissenting on these grounds, however, Judge Sharp pointed to no factual allegations or disputes which would have placed **Wallis** outside the parameters of Payne so as to preclude entry of an order granting the motion to dismiss.

Wallis clearly did not involve a **Johnson v. Jones** issue. The state's sovereign immunity claim was not predicated on an assertion that it did not harm the plaintiff, but rather on the purely legal issue that it did not owe any operational-level duty to the plaintiff because, under Florida law, the danger complained of was readily apparent. No factual disputes were involved in **Wallis**, and no factual development was needed to determine the viability of the state's sovereign immunity claim.

It is clear that under federal decisions and this court's decision in **Tucker**, interlocutory appeal of orders rejecting immunity claims is appropriate only when the order turns on an issue of law. As made clear in **Mitchell**, this limitation on appealability does not provide any rationale for drawing a distinction between orders on motions to dismiss and motions for summary judgment, or for precluding interlocutory appeal from an order on a motion to dismiss.

Florida jurisprudence is replete with cases in which a claim of sovereign immunity either was or could have been determined on the allegations of the complaint. The sovereign immunity determination in **Department of Health and Rehabilitative Services v. B.J.M.** was made on direct appeal after final judgment. Yet, it is clear that the immunity claim involved no factual dispute and required no development of factual matters. **See also Vann v. Department of Corrections**, Case No. 85,415 (Fla. Nov. 2, 1995)(no duty of care owed, as a matter of law, to other than the general public to protect individuals from criminal acts of an escaped inmate); **Department of Corrections v. McGhee** 653 So.2d 1091 (Fla. 1st DCA 1995), **rev. pending**, **McGhee v. Department of Corrections**, Case No. 85,636 (no duty of care owed to victims of criminal attack of escaped inmate); **Department of Corrections v. Burnett**, 653 So.2d 1102 (Fla. 1st DCA 1995), **rev. pending**, **Burnett v. Department of Corrections**, Case No. 85,635 (no duty of care owed to victims of criminal attack by escaped inmate); **George v. Hitek Community Control Corp.**, 639 So.2d 661 (Fla. 4th DCA 1994)(no duty of care owed to plaintiffs on allegations of complaint); **Department of Health and Rehabilitative Services v. Yamuni**, 529 So.2d 258 (Fla. 1988)(statutory duty of care owed to child in DHRS custody to protect from further abuse); **City of Pinellas Park v. Brown**, 604 So.2d 1222 (Fla. 1992)(determining on the basis of the allegations of the pleadings that the conduct at issue, negligent operation of a police motor vehicle, was not protected by sovereign immunity, and that a common-law duty of care was owed to the victims); **Parker v. Murphy**, 510 So.2d 990

(Fla. 1st DCA 1987)(sovereign immunity determined on the basis of the allegations of the pleadings); **Bradford v. Metropolitan Dade County**, 522 So.2d 96 (Fla. 3d DCA 1988)(police owe duty to protect public as a whole); **Trianon Park Condominium Association v. City of Hialeah**, 468 So.2d 912 (Fla. 1985)(no duty of care owed to particular individual with respect to city's negligent performance of its inspection duties); **Reddish v. Smith**, 468 So.2d 929 (Fla. 1985)(sovereign immunity determined on the allegations of the complaint). **See also** Florida decisions on prosecutorial immunity, e.g., **Office of the State Attorney v. Parrotino**, 628 So.2d 1097 (Fla. 1983)(state attorney absolutely immune for performance of official duties); **Berry v. State**, 400 So.2d 80 (Fla. 4th DCA 1981), **rev. denied**, 411 So.2d 380 (Fla. 1981)(state attorney's exercise of prosecutorial duties is absolutely immune). In none of the above cases was factual development germane to the viability of the immunity claim. Rather, in each case, immunity turned on the "nature of the conduct" asserted to have been negligently performed.

Thus, any distinction made between **Tucker** and this case, or **Wallis**, on the basis of the vehicle by which the immunity claim was asserted is illusory. DOE urges this court to adopt the reasoning of the **Mitchell** court to find that immunity claims are subject to interlocutory review whenever the order determining the claim turns on an issue of law, regardless of whether the claim is asserted by motion to dismiss or motion for summary judgment.[3]

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[3] The United States Supreme Court in **Behrens v. Pelletier**, Case

C. The order in this case qualifies for interlocutory review because the issues of whether DOE is immune from tort liability under the doctrine of sovereign immunity and whether DOE owes an actionable duty of care to Roes for the acts alleged to have been negligently performed are strictly issues of law.

The district court in this case initially interpreted **Tucker v. Resha** as authorizing interlocutory review of the order rejecting Petitioner's sovereign immunity claim and directed the trial court to dismiss Roes' Amended Complaint against DOE with prejudice because the complaint failed to allege any common-law or statutory duty of care owed by DOE to Roes. **Department of Education v. Roes**, 20 Fla.L.Weekly D686 (Fla. March 154 1995) On rehearing, the district court withdrew its earlier decision and stated that it should not construe **Tucker** as deciding any issue beyond that which was specifically asked in the certified question in that case. This court accepted review of this case on the basis of direct and express conflict with **Tucker**.

This case falls into the category of cases cited above in which factual development of the allegations of the complaint has no bearing upon the viability of the sovereign immunity claim.

No. 94-1244, argued Nov. 7, 1995, is considering the issue of a "one appeal" rule in the context of interlocutory review of orders determining qualified immunity. Florida cases have precluded review of orders on repetitive motions. **Bensonhurst Drywall, Inc. v. Ledesma**, 583 So.2d 1094 (Fla. 4th DCA 1991); **Fibreboard Corporation v. Ward**, 455 So.2d 1151 (Fla. 1st DCA 1984). **But See Tucker v. Resha**, 610 So.2d 460 (Fla. 1st DCA 1992), **quashed**, 648 So.2d 1187 (Fla. 1994)(review permitted of order on repetitive motion for summary judgment). No Florida law appears to exist on the issue of whether an immunity claim may be asserted by motion to dismiss and motion for summary judgment. No repetitive motion is involved in this case.

Petitioner's immunity claim turns strictly on the question of whether, in the performance of its **Trianon** Category I and II licensing and investigatory conduct, Petitioner owes any duty of care to other than the public at large. DOE, in addition, has asserted that its decisions with respect to the investigation and licensing of teachers are absolutely immune from tort liability as **Trianon** Category I and II acts.

While the question of duty of care is a threshold question in any tort action, when a government defendant is sued in tort, the existence of a common-law or statutory duty of care owed to the plaintiff is intertwined with considerations of the governmental conduct alleged to have been negligently performed. In **Seguine v. City of Miami**, 627 So.2d 14,17 (Fla. 3d DCA 1993), the court noted that a plaintiff suing a governmental entity in tort must allege and prove that the defendant breached a common law or statutory duty owed to that plaintiff individually and not a tort duty owed to the public generally. The rationale for this requirement, the **Seguine** court noted, is "primarily based on the need to protect the government from excessive fiscal impact due to overburdensome tort liability; it also rests on the need to prevent the chilling of the law enforcement processes, as well as the availability of other remedies against private parties who initially created the danger which caused the damage." **Id.**, 627 So.2d at 17. Duty is the threshhold issue, and a court must find no liability on the part of a governmental defendant, as a matter of law, if either (1) no duty of care existed or (b) the doctrine of governmental immunity bars the claim. **Kaisner v. Kolb**, 543 So.2d 732 (Fla. 1989).

In **Trianon**, this court examined duty in the context of what type of governmental conduct was alleged to have been negligently performed. The court noted that with respect to strictly governmental conduct, such as licensing, permitting and legislation, a common-law duty of care has never existed, and this conduct is therefore absolutely immune in the absence of an alleged violation of a statutory or constitutional duty of care which gives rise to a private cause of action. The court, in addition, noted that when the state's conduct involves an exercise of police power, the duty of care is one which is owed solely to the public as a whole, absent the existence of a special relationship which gives rise to a private cause of action.

Roes alleged in Count II of their Amended Complaint that DOE negligently performed its statutory investigatory and licensing duties with respect to former Leon County School District teacher Billy R. Campbell. The Amended Complaint, in addition, alleged that Leon County School Board relied upon DOE to properly perform its investigatory and licensing duties and acted cooperatively with DOE when it hired Campbell.

The question of to whom DOE owes a duty of care turns solely on the nature of the conduct alleged to have been negligently performed, and examination of the statutory language which sets forth DOE's investigatory and licensing duties. Factual development of the circumstances of the acts of investigation and licensing are irrelevant to DOE's immunity claim. DOE argued in the courts below, and will argue further under Issue II of this

brief, that the alleged reliance of Leon County School Board upon DOE to properly perform its licensing and investigatory duties did not and could not as a matter of law create any duty of care owed to Plaintiffs.

For the foregoing reasons, Petitioner requests this court to find that orders rejecting claims of sovereign immunity, including the order at issue in this case, are subject to interlocutory review.

ISSUE II

WHETHER DOE IS IMMUNE FROM TORT LIABILITY UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY FOR THE ACTS ALLEGED TO HAVE BEEN NEGLIGENTLY PERFORMED.

The district court in **Department of Education v. Roes**, 20 Fla.L.Weekly D686 (Fla. 1st DCA March 14, 1995) concluded that Roes' Amended Complaint failed to allege any common-law or statutory duty of care owed to them by DOE. The court found that under Florida law, including §230.23(5), Florida Statutes (1985), DOE was not an employer of school district teaching personnel, and therefore did not owe any duty of care to Roes to use reasonable care in the hiring and retaining of former teacher Campbell. The court further concluded that DOE's investigatory duties under §231.262, Florida Statutes (1985) and its licensing duties under §231.17, Florida Statutes (1985) are owed solely to the public at large. The court reversed the trial court's order denying DOE's motion to dismiss, and directed the trial court to dismiss the Amended Complaint against DOE with prejudice. On rehearing, the court in **Department of Education v. Roe**, 656 So.2d 507 (Fla. 1st DCA 1995) withdrew its earlier decision, and held that DOE was not entitled to either interlocutory or certiorari review of the order denying its motion to dismiss. The court on rehearing did not address the merits of DOE's immunity claim.

A. DOE does not owe a duty of care to other than the public at large in the performance of its statutory licensing and investigatory duties under Chapter 231, Florida Statutes, and Leon County School Board's alleged reliance upon DOE to properly perform its licensing and investigatory duties when the Board hired Campbell did not create any duty of care owed by DOE to Roes.

The Amended Complaint alleged that DOE had duties to issue and renew teaching certificates, and to determine and investigate whether an applicant for issuance or renewal was of good moral character. Roes alleged that DOE determined through its investigation that Campbell should not be allowed to teach and that his certificate should not be renewed, but nonetheless renewed the certificate. Roes alleged that DOE negligently performed its investigation and failed to learn or consider the fact that Campbell had a criminal record and had engaged in acts of sexual abuse of children. Finally, Roes alleged that Leon County School Board relied, in part, upon DOE to investigate complaints of misconduct, and to determine whether applicants for recertification were morally fit, and that Leon County School Board acted cooperatively with DOE in hiring Campbell based upon the negligent renewal of Campbell's teaching certificate.

DOE's acts of issuing and renewing teaching certificates fall into **Trianon** Category I conduct which is absolutely immune from tort liability in the absence of an alleged violation of a statutory or constitutional duty of care owed to the plaintiff. As the district court correctly concluded, DOE's performance of its licensing duties pursuant to §231.17 did not give rise to any duty of care owed to other than the general public. Reference to the language of §231.17, pertaining to initial issuance of licenses, to §231.24, pertaining to extension or renewal of certificates, and to any other provision contained in Chapter 231 reveals the absence of any indication of legislative intent to permit a private cause of action based upon an alleged violation

of the statutory duties contained therein.[4] Compare DHRS v. Yamuni, legislative intent contained in then Chapter 827 to permit a private cause of action for failure to protect a child in state custody. Legislative intent is the primary factor to be considered in determining whether a cause of action exists when a statute does not expressly provide for one. Murthy v. N. Sinha Corp., 644 So.2d 983 (Fla. 1994).

Similarly, reference to the language of §231.262, pertaining to DOE's duty to investigate complaints against teachers, demonstrates that this provision is for the benefit of the general public, and violation of the statutory investigatory duty does not give rise to a private cause of action. Moreover, DOE's investigatory acts fall under Trianon's Category II conduct entailing the exercise of the state's police powers. DOE's duty to investigate complaints is owed solely to the public at large absent the existence of a special relationship which would give rise to a private cause of action. See George v. Hitek Community Control Corp.. The Amended Complaint did not allege the existence of any special relationship. Even if the Amended Complaint were interpreted to allege a special relationship between DOE and Leon County School Board, that relationship would not, as a matter of law, give rise to a duty of care owed by DOE to Roes. See e.g. Everton v. Willard, 468 So.2d 936,938 (Fla.

[4] DOE merely notes that under §231.24 and §231.262, DOE has no duty to investigate the moral fitness of applicants for renewal of teaching certificates as part of the renewal process, absent an admission of criminal conduct on the application for renewal. The Amended Complaint does not allege that Campbell admitted to criminal conduct on his application for renewal.

1985)("[i]f a special relationship exists between an individual and a governmental entity, there could be a duty of care owed to the individual.").

Reference to §§230.23, 230.35, 231.09, Florida Statutes (1985) establishes that school boards and superintendents are the sole employers of teaching personnel under Florida law. The existence of an employer-employee relationship is required in order to find that a duty of care is owed with respect to the hiring or retaining of an employee. See e.g. School Board of Orange County v. Coffey, 524 So.2d 1052 (Fla. 5th DCA 1988); Brantley v. Dade County School Board, 493 So.2d 471 (Fla. 3d DCA 1986); Willis v. Dade County School Board, 411 So.2d 245,246 n.1 (Fla. 3d DCA 1982); Hollis v. School Board of Leon County, 384 So.2d 661 (Fla. 1st DCA 1980); Mallory v. O'Neil, 69 So.2d 313 (Fla. 1954). DOE as a matter of law cannot be an employer of teaching personnel, and therefore, as a matter of law, cannot owe a duty of care to use reasonable care in the hiring and retaining of a teacher. The Amended Complaint contains no allegation that DOE's conduct at any time exceeded the parameters of its statutory duties with respect to licensing and investigation of Campbell.

Leon County School Board's alleged reliance upon DOE to investigate Campbell's fitness at the time it renewed his certificate and to investigate complaints made against Campbell, and the conclusory allegation that the board acted cooperatively with DOE when it hired Campbell do not, as a matter of law, create any duty of care owed by DOE to Roes. The alleged

reliance of the board upon DOE to properly perform its licensing and investigatory duties, under Florida law, did not and could not make DOE a joint employer, with the board, of Campbell.

DOE requests this court to find, in agreement with the district court, that the Amended Complaint did not allege any common-law or statutory duty of care owed by DOE to Roes.

B. DOE is immune from tort liability under the doctrine of sovereign immunity for all acts alleged in the Amended Complaint.

As this court noted in **DHRS v. B.J.M.**, section 768.28, Florida Statutes, waives governmental immunity from tort liability "under circumstances in which the state or [an] agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state," and, despite the broad scope of the statutory waiver, certain "discretionary" governmental functions remain immune from tort liability. Discretionary, in this context, means 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 would inappropriately entangle it in fundamental questions of policy and planning." **Id.**, 656 So.2d at 911, n.3, quoting **Kaisner v. Kolb**, 543 So.2d 732,737 (Fla. 1989), which cited **Department of Health and Rehabilitative Services v. Yamuni**, 529 So.2d 258,260 (Fla. 1988).

In **Trianon**, the court stated that, before applying the **Evangelical United Brethren Church v. State**, 67 Wash.2d 246, 407 P.2d 440 (1965) test set forth in **Commercial Carrier Corp. v. Indian River County**, 371 So.2d 1010 (Fla. 1979), government

conduct should be placed in one of four categories. Category I conduct, involving licensing, permitting and legislative acts, and Category II conduct, involving the exercise of the state's police powers, are immune from tort liability "because there has never been a common law duty of care with respect to these legislative, executive, and police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care." **Id.** at 921. Thus **United Brethren** and **Commercial Carrier** operational-discretionary analysis is not pertinent to **Trianon** Category I or II conduct.

DOE's licensing acts entail **Trianon** Category I conduct which is absolutely immune from tort liability in the absence of a constitutional or statutory violation which gives rise to a duty of care owed to Roes. As previously noted, the Amended Complaint did not allege violation of any constitutional or statutory duty of care owed by DOE to the Roes.

DOE's investigatory conduct entails **Trianon** Category II conduct which is absolutely immune from tort liability in the absence of a special relationship which would give rise to a duty of care owed by DOE to Roes. The Amended Complaint does not allege the existence of any special relationship.

DOE requests this court to find that DOE is immune from tort liability under the doctrine of sovereign immunity for all acts alleged in the Amended Complaint.

CONCLUSION

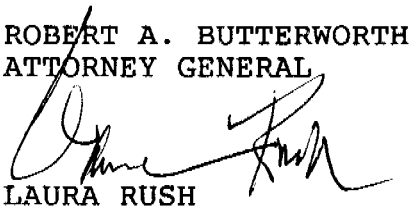
Because the sovereign immunity of the state is a protection from trial, rather than a defense to liability, Petitioner requests this court to find that orders rejecting claims of sovereign immunity are subject to interlocutory review when the order turns on an issue of law. DOE, in addition, requests this court to find that the Roes' Amended Complaint failed to allege any common-law or statutory duty of care owed to them by DOE.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on the Merits has been furnished by U.S. Mail to **Thomas L. Powell**, Esquire, P.O. Box 1674, Tallahassee, FL 32302-1674; **Gordon D. Cherr**, Esquire, P.O. Drawer 229, Tallahassee, FL 32302; **C. Graham Carothers**, Esquire, P.O. Box 391, Tallahassee, FL 32303, **Jeannette Andrews**, Esquire, 111 North Calhoun Street, P.O. Box 1739, Tallahassee, FL 32302; **John C. Cooper**, Esquire, 3303 Thomasville Road, Suite 301, P.O. Box 14447, Tallahassee, FL 32317; **Billy R. Campbell**, DOC#578085, Liberty Correctional Institution, P.O. Box 999, Bristol, FL 32321 this 14th day of December, 1995.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF EDUCATION,

Petitioner,

v. Case No. 86,061

SALLY ROE, et al.,

Respondents.

_____/

APPENDIX

A. Roes v. Leon County School Board, et al., Case No. 92-3635, Amended Complaint.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

CASE NO. 92-3635
FL BAR NO. 0233511

SALLY ROE, a minor child, by and through her mother and next friend, ANN ROE, and ANN ROE, individually,

Plaintiffs,

v.

LEON COUNTY SCHOOL BOARD; BILLY R. CAMPBELL; SAM ALDERMAN; RICHARD L. MERRICK; NANCY E. RUSSELL; UNKNOWN EMPLOYEES OF THE LEON COUNTY SCHOOL BOARD and STATE OF FLORIDA DEPARTMENT OF EDUCATION,

Defendants.

AMENDED COMPLAINT

Jurisdiction

1. This is an action for damages in excess of $15,000.00. Venue and jurisdiction are proper. Plaintiffs demand a trial by jury.

Parties

2. Plaintiff SALLY ROE is a minor child and a citizen of Florida. She brings this action in a fictitious name because she is a victim of sexual abuse and the allegations of this complaint require the disclosure of information of the utmost intimacy. Her identity is well known to the named defendants. She brings this action by and through her mother and next friend, also identified by a fictitious name, ANN ROE.

3. Plaintiff ANN ROE is SALLY ROE's mother. She is a citizen of Florida and brings this action both as the mother and next friend of SALLY ROE and individually on her own behalf. She brings this action in a fictitious name in order to protect the identity of SALLY ROE, a victim of sexual abuse.

4. Defendant LEON COUNTY SCHOOL BOARD (hereinafter "COUNTY") is a local governmental entity established under the laws of the State of Florida.

5. Defendant BILLY R. CAMPBELL is a citizen of Florida. At all times material, he was a teacher employed by the COUNTY and Ruediger Elementary School, Leon County, Florida.

6. Defendant SAM ALDERMAN is a citizen of Florida. At all material times he was the principal of Ruediger Elementary School acting within the course and scope of his employment.

7. Defendant RICHARD L. MERRICK is a citizen of Florida. He is Superintendent of Leon County Schools acting within the course and scope of his employment. He has been automatically substituted as a party to this action under Florida Rule of Civil Procedure 1.260(d)(1).

8. Defendant NANCY E. RUSSELL is a citizen of Florida. At all material times she was the principal of Leonard Wesson Elementary School, Leon County, Florida, acting within the course and scope of her employment.

9. The unknown defendants are the employees of the Leon County School Board, including those employed at Ruediger Elementary School, who knew or should have known that CAMPBELL was unfit to be hired or retained as a teacher, who failed properly to

supervise CAMPBELL, and who knew or should have known that CAMPBELL was engaging in inappropriate conduct toward students at Ruediger Elementary School, including sexual molestation. They will be identified by name when their identities are learned through discovery in this action.

10. Defendant STATE OF FLORIDA DEPARTMENT OF EDUCATION (the Department) is an agency of the State of Florida.

Allegations Applicable to All Counts

11. During the 1988-89 school year, plaintiff SALLY ROE was a 4th grade student at Ruediger Elementary School. During the 1989-90 school year, plaintiff SALLY ROE was a 5th grade student at Ruediger Elementary School.

12. During the 1988-89 and 1989-90 school years, defendant CAMPBELL was a teacher at Ruediger Elementary School.

13. During the 1988-89 and 1989-90 school years, defendant CAMBPELL molested and sexually battered plaintiff SALLY ROE on the school grounds at Ruediger Elementary School.

14. As a result of the molestation and sexual battery, plaintiff SALLY ROE has suffered continuing and permanent emotional distress and bodily injury and has incurred the cost of professional counseling. Her progress in school has been adversely affected and she has suffered a loss of earning capacity. The damages she sustained are continuing and are permanent and will be sustained in the future.

15. The mother of SALLY ROE, plaintiff ANN ROE, has incurred costs associated with her daughter's counseling. She has lost her daughter's support and services as a result of her daughter's

distress and psychological injuries.

16. Plaintiffs have given notice of this claim to defendants LEON COUNTY SCHOOL BOARD, ALDERMAN, MERRICK (through his predecessor in interest Bill Woolley) and the DEPARTMENT OF EDUCATION and FLORIDA DEPARTMENT OF INSURANCE. A copy of the notice is attached hereto as Exhibit A.

17. The plaintiffs have retained the undersigned attorneys and are obligated for the payment of a reasonable fee.

Count 1 - Negligence of Leon County School Board

Plaintiffs reallege Paragraphs 1 through 17.

18. This is a count against defendant LEON COUNTY SCHOOL BOARD for negligence pursuant to Florida Statutes §768.28.

19. The Leon County School Board was negligent in hiring and retaining BILLY R. CAMPBELL as a teacher in that:

a. He had a history of sexual molestation of children and other inappropriate conduct;

b. His references from prior teaching engagements were unfavorable and close inquiry would have revealed a history of misconduct;

c. His travel and employment patterns were consistent with child molestation;

d. While an employee of the Leon County School Board teaching at Leonard Wesson Elementary School, CAMPBELL engaged in inappropriate conduct with his students, including child molestation, as a result of which his contract was not renewed, but he was nonetheless thereafter hired as a teacher at Ruediger Elementary School.

20. Although the Leon County School Board knew or should have known of this conduct and knew or should have known that CAMPBELL had been reported as a child molester at prior schools, it nevertheless hired and retained him as an elementary school instructor in the Leon County School System.

21. The Leon County School Board negligently failed to supervise the conduct of CAMPBELL to assure that he did not have an opportunity to molest school children and failed to supervise the conduct of the principal and other employees of Ruediger Elementary School to assure that they prevented CAMPBELL from having an opportunity to molest school children.

22. As a direct and proximate result of the negligent hiring and retention of CAMPBELL and negligent failure to supervise CAMPBELL and the principal and other employees of Ruediger Elementary School, plaintiffs have sustained the damages set forth above.

WHEREFORE, plaintiffs demand trial by jury and judgment for damages and costs against defendant LEON COUNTY SCHOOL BOARD, together with such other relief as may be appropriate.

Count 2 - Negligence of Department of Education

Plaintiffs reallege Paragraphs 1 through 17.

23. This is a count against defendant DEPARTMENT OF EDUCATION for negligence pursuant to Florida Statutes §768.28.

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.

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.

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.

29. In 1986, the COUNTY, acting cooperatively with the DEPARTMENT, hired CAMPBELL based in part on the negligent renewal of CAMPBELL'S teaching certificate earlier that same year by the DEPARTMENT. The COUNTY continued CAMPBELL'S employment through the occurrences of sexual abuse at issue in this case based in part upon the negligence of the DEPARTMENT in renewing CAMPBELL'S certificate.

30. As a direct and proximate result of the negligence of the DEPARTMENT plaintiffs have sustained the damages set forth above.

WHEREFORE, plaintiffs demand trial by jury and judgment for damages and costs against defendant the DEPARTMENT OF EDUCATION, together with such other relief as may be appropriate.

Count 3 - 42 U.S.C. §1983

Plaintiffs reallege Paragraphs 1 through 17.

31. This is a count against defendant LEON COUNTY SCHOOL BOARD, ALDERMAN (in his official and individual capacities), RUSSELL (in her official and individual capacities), MERRICK (in his official capacity), CAMPBELL and the unknown defendants. This count arises under 42 U.S.C. §1983.

32. These defendants, and each of them, acting under color of law, deprived plaintiff SALLY ROE of her rights secured by the Constitution and laws of the United States, including the right not to be deprived of liberty without due process of law.

33. The policies and practices of defendants COUNTY, MERRICK (through his predecessor Bill Woolley), ALDERMAN, RUSSELL and the unknown defendants demonstrated reckless or deliberate indifference to plaintiffs' rights, constituted constitutional violations and

caused the deprivation of plaintiff SALLY ROE's liberty and property interests without due process of law in that:

a. The custom and practice of these defendants not to investigate teaching applicants placed at risk children including plaintiff SALLY ROE.

b. The custom and practice of these defendants not to discharge teachers accused and guilty of molesting children, but to retain them within the school system placed at risk children including plaintiff SALLY ROE.

c. The custom and the practice of these defendants not to check teacher references and to allow teachers to request that references not be checked placed at risk children including plaintiff SALLY ROE.

d. The custom and practice of these defendants in not encouraging and requiring teachers to report unusual or bizarre conduct on the part of another teacher and in not acting upon such information when obtained placed at risk children including plaintiff SALLY ROE.

e. The custom and practice of these defendants in not requiring and encouraging teachers and administrative personnel to follow the mandatory reporting requirements of §415.504, Florida Statutes, placed at risk children including plaintiff SALLY ROE.

f. As a result of the foregoing customs and practices, CAMPBELL was hired and retained as a teacher at Ruediger Elementary School and such conduct was the proximate cause of the damages sustained by the plaintiffs in this case.

34. In 1988, while CAMPBELL was a teacher at Leonard Wesson Elementary School, he sexually molested a young girl on the school's premises. The victim's parent reported the incident to RUSSELL. RUSSELL failed to report the incident to the Florida Department of Health and Rehabilitative Services or to make a formal report to the district office of the COUNTY. RUSSELL elected not to renew CAMPBELL'S contract but took no steps to prevent his hiring by another school within the Leon County school system or elsewhere. ALDERMAN hired CAMPBELL for the 1988-89 school year at Ruediger without checking with RUSSELL on his performance at Leonard Wesson or with any other prior employers, including prior employers who would have told ALDERMAN, if asked, that CAMPBELL was morally unfit to be a teacher.

35. After CAMPBELL was hired to teach at Ruediger Elementary School for the 1988-89 and 1989-90 school years, ALDERMAN and the unknown defendants knew or should have known that CAMPBELL was engaged in inappropriate conduct toward Ruediger Elementary School students, including taking plaintiff SALLY ROE into his classroom alone, locking the door, and failing to answer the door when another teacher knocked on the door, and also including having very young female students sit on his lap, giving very young female students candy, and otherwise exhibiting signs of sexual molestation of students. These defendants took no action to prevent this conduct by CAMPBELL until additional acts of sexual abuse by CAMPBELL occurred.

36. As a direct and proximate result of these defendants' constitutional violations, plaintiffs have sustained the damages

set forth above.

WHEREFORE, plaintiffs demand trial by jury and judgment for damages, costs and attorney's fees against defendants LEON COUNTY SCHOOL BOARD, ALDERMAN, MERRICK, RUSSELL, CAMPBELL and the unknown defendants, together with such other relief as may be appropriate.

Count 4 - Battery

Plaintiffs reallege Paragraphs 1 through 17.

37. This is a count for damages against defendant CAMPBELL for battery.

38. Defendant CAMPBELL offensively touched the minor child, plaintiff SALLY ROE, who was by virtue of her age incapable of consent to such touching.

39. As a direct and proximate result, plaintiffs have sustained the damages set forth above.

WHEREFORE, plaintiffs demand trial by jury and judgment for damages and costs against defendant CAMPBELL, together with such other relief as may be appropriate.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Gordon Cherr, P. O. Drawer 229, Tallahassee, FL 32302; C. Graham Carothers, P. O. Box 391, Tallahassee, FL 32302 and to Billy R. Campbell (D.C. 578085), Okaloosa Correctional Institution, P. O. Box 578, Crestview, FL 32536, by mail this 24th day of June, 1993.

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100 L.Ed. 2d 517, 108 S.Ct. 1945 (1988)(rules pertaining to service and personal jurisdiction are designed to protect against entry of a binding judgment, not to protect against the burdens of trial); **Manion v. Evans**, 986 F.2d 1036 (6th Cir. 1993)(immunity claim of peer review committee members not subject to interlocutory review because the Health Care Quality Improvement Act does not provide immunity from suit); **Lauro Lines S.R.L. v. Chasser**, 109 S.Ct. 1976 (1989)(forum selection clause in a cruise line ticket asserted entitlement to be sued in a particular forum, not an entitlement to avoid suit).

Interlocutory review of immunity claims has played an important role in federal courts. A survey of 134 published opinions involving civil rights immunity claims in the federal circuit courts in 1987, 1988 and 1989 revealed that only 31 district court orders rejecting immunity claims were affirmed in the appeals courts. The 70 percent reversal rate, five times the ordinary reversal rate for all appeals of final decisions on the merits, has been thought to reflect the uncertainty and continuing evolution of civil rights immunity law, and to underscore the appropriateness of affording interlocutory appeal. Solimine, "**Revitalizing Interlocutory Appeals in the Federal Courts**, 58 Geo.Wash.L.Rev. 1165,1189-91.

While there have been concerns in the federal courts regarding increased caseloads as a result of interlocutory appeals of orders determining immunity claims, there is evidence to suggest that an increase in interlocutory appeals may decrease the overall federal appellate caseload by expediting and