IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF EDUCATION,

Petitioner,

v. Case No. 86,961

SALLY ROE, et al.,

Respondents.

_____/

Accepted As Is

PETITIONER'S REPLY BRIEF

Respectfully submitted,

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TABLE OF AUTHORITIES

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STATEMENT OF THE CASE AND FACTS

Respondents have included assertions pertaining to Leon County School Board's Crossclaim for Contribution against DOE and DOE's Motion to Dismiss the Crossclaim in their Statements of the Case and Facts. While DOE has not moved to strike these portions of Respondents' briefs, it is DOE's position that references to the Crossclaim for Contribution and Motion to Dismiss, which were filed in the trial court long after the order rejecting DOE's sovereign immunity claim issued and which are not part of the record in this proceeding, are not properly before this court.

SUMMARY OF ARGUMENT

I. While federal sovereign immunity has been diminished through congressional enactment to no more than a set of statutory requirements for and exceptions to suit against the government, the Florida Legislature has chosen not to reduce the discretionary function and public duty prongs of common-law sovereign immunity to mere statutory exceptions to suit.

II. DOE's performance of statutory licensing and investigatory duties it owes to public at large cannot be viewed as a "voluntary" undertaking for the specific benefit of Leon County School Board or Roes. No common-law duty of care can be established under a theory of voluntary undertaking because the sole duty which may arise is a duty to protect persons or things from physical harmm. Even if a theory of voluntary undertaking could apply, DOE is not alleged to have made an express promise to Leon County School Board and DOE's alleged negligent conduct, whether construed as a failure to properly recertify, investigate or provide information from its file to the Board, constituted no more than the withholding of a benefit. The Board's alleged reliance was not justifiable as a matter of law in that the information DOE allegedly failed to provide the Board is statutorily confidential, and Chapters 230 and 231 do not indicate any legislative intent to permit school boards, superintendents or principals to forego their common-law and statutory duties to investigate applicants for teaching positions in reliance upon DOE's duties to investigate and recertify teachers, or the contents of its licensing files.

ARGUMENT

ISSUE I

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

Respondents rely upon **Pullman Construction Industries, Inc. v. United States**, 23 F.3d 1166 (7th Cir. 1994) and **State of Alaska v. United States**, 64 F.3d 1352 (9th Cir. 1995), holding that federal sovereign immunity claims are not subject to interlocutory review under the collateral order doctrine.

In **Pullman**, the United States filed claims against Pullman to recover taxes due after Pullman commenced a reorganization in bankruptcy. In response, Pullman requested the bankruptcy court to recover from the United States monies it paid toward tax obligations prior to filing the bankruptcy petition. The United States moved to dismiss Pullman's claim for recovery of the taxes paid, asserting sovereign immunity. The district court held that the United States waived its immunity claim when it initiated claims against Pullman.

The basis for the immunity claim in **Pullman** cannot be ascertained from the decision. However, it is clear that the circuit court, in analyzing the appealability of the order rejecting the immunity claim, recognized that (1) the United States Code includes "dozens if not hundreds of **sue and be sued** clauses," particularly within the realm of tax litigation, Id., 23 F.3d at 1168; and (2) the immunity claim was entirely separable from Pullman's underlying bankruptcy proceeding. The court stated:

> The United States exposed itself to the prospect of recovery under §106 by filing a claim against Pullman's estate in bankruptcy. If it prevails on this appeal, the litigation will not come to an end; it will continue with the same parties, exploring the same general question: what are Pullman's tax obligations for 1987? The bankruptcy court, the district court, and then this court will consider this subject no matter what happens on the United States' current appeal. Far from asserting a right not to be a litigant, the United States is asserting a defense to the payment of money. It wants a court to determine the correct amount of Pullman's obligations, but it also wants to ensure that dollars flow in only one direction: from Pullman to the Treasury. This is far removed from the kinds of immunities from the judicial process involved in **Metcalf & Eddy**, **Segni** and similar cases.

Id., 23 F.3d at 1169.

If **Pullman** has any applicability or persuasive force with respect to this case, it is to elucidate the distinctions between the two cases and the two immunities at stake. DOE did not initiate an action against the Roes. Florida's common law sovereign immunity does not consist of an "elaborate system of statutory provisions" permitting some suits and disallowing others. Unlike DOE, the United States in **Pullman** had available under 28 U.S.C. §1292(b)(2) a vehicle other than the collateral order doctrine by which to obtain immediate review of its immunity claim. Unlike the government's claim in **Pullman**, which had no bearing upon the underlying bankruptcy proceeding, DOE's immunity claim goes to the very heart of Roes' negligence claim against the agency. Whatever an assertion of federal sovereign immunity may mean in the context of a taxpayer's request for recovery of preferential transfers, that claim has no relevancy

to an assertion that the state cannot be sued for an alleged breach of discretionary and inherently governmental duties which are owed solely to the public at large.

The same conclusion must be drawn about **Alaska v. United States**. In that case, Alaska brought an action to quiet title to submerged lands, naming the United States as a defendant under a statutory provision which permitted the federal government to be deemed to have an interest in any river bed which was not navigable. The United States moved to dismiss the action, asserting that sovereign immunity had not been waived because it had never actively claimed an interest in the beds and did not want to take a position as to navigability. In concluding that the immunity claim was not subject to immediate review under the collateral order doctrine, the court noted that the United States could have obtained review under 28 U.S.C. §1292(b) and that the claim involved no more than a technical interpretation of statutory exceptions to suit which did not embody a right not to stand trial. The court stated:

> In the present day, federal sovereign immunity serves merely to channel litigation into the appropriate avenue for redress, ensuring that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." **Pullman Constr.** at 1168 (quoting Art. I, § 9, cl. 7). "Congress requires litigation to follow certain forms and restricts available remedies, but implementing these restrictions is an ordinary task of statutory interpretation, for which interlocutory appeals are no more necessary (or appropriate) than they are in the bulk of federal litigation." **Pullman Constr.**, 23 F.3d at 1169.

Id., 64 F.3d at 1356.

What is clear from **Pullman** and **Alaska v. United States** is that the immunity claims in those cases rested upon an assertion that the suits failed to satisfy technical statutory requirements, a claim akin, the court in **Alaska v. United States** noted, to an assertion of failure to state a cause of action under Fed.R.Civ.P. 12(b)(6). Such claims clearly cannot meet the collateral order doctrine requirement that the immunity claim assert a right not to stand trial so significant that review cannot be deferred until after final judgment. The immunity claims in these cases also could not satisfy the collateral order doctrine requirement of separability. The government's claim in **Pullman** had no impact upon the bankruptcy proceeding and in **Alaska v. United States**, the government claimed only that it did not want to decide whether to claim the lands. Finally, the government in each case had available an alternate vehicle by which to obtain immediate review of the claim.

Florida's sovereign immunity law can hardly be characterized as a set of technical statutory exceptions which do nothing more than "channel litigation into the appropriate avenue for redress." 64 F.3d at 1356. Florida sovereign immunity law, in the aftermath of the partial waiver of immunity set forth in §768.28, Florida Statutes, consists of a large body of complex, steadily-evolving decisional law which has flowed from and directly implicated the separation of powers doctrine. Central to this common-law sovereign immunity is an unwillingness to permit judicial interference, by way of tort actions, with discretionary legislative or executive functions, See e.g.

Department of Health and Rehabilitative Services v. Lee, Case Nos. 93-1350 and 93-1411, (Fla. 1st DCA Dec. 13, 1995), review pending, Lee v. Department of Health and Rehabilitative Services, Case No. 87,071; Department of Health and Rehabilitative Services v. B.J.M., 656 So.2d 906 (Fla. 1988), and concerns for protecting the government from excessive fiscal impact by restrictions on the scope of liability for the exercise of strictly governmental functions. McGhee v. Department of Corrections, 21 Fla.L.Weekly S22(b)(Fla. Jan. 11, 1996); Burnett v. Department of Corrections, 21 Fla.L.Weekly S22 (Fla. Jan. 11, 1996); Vann v. Department of Corrections, 662 So.2d 339 (Fla. 1995); Trianon Park Condominium Assoc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985). Most importantly, the Florida legislature, in enacting §768.28, Florida Statutes, chose not to diminish the discretionary function and public duty prongs of sovereign immunity to technical statutory exceptions to suit or to simple defenses to payment of damages.

Substantive sovereign immunity claims constitute a challenge to subject-matter jurisdiction. Seguine v. City of Miami, 627 So.2d 14 (Fla. 3d DCA 1993); Department of Highway Safety and Motor Vehicles v. Kropff, 491 So.2d 1252,1254 n.1 (Fla. 3d DCA 1986). These claims can never be waived. Department of Health and Rehabilitative Services v. Lee.

Leon County School Board cites Florida Med. Malpractice v. Indem. Ins., 652 So.2d 1148 (Fla. 4th DCA 1995), involving statutory notice requirements, for the proposition that sovereign immunity is not a matter of subject-matter jurisdiction. City of

Pembroke Pines v. Atlas, 474 So.2d 237 (Fla. 4th DCA 1985), upon which that case relies, pertains to the §768.28(6)(a) notice requirement. Unlike a substantive claim of sovereign immunity, a defense based upon failure to comply with the statutory notice requirement can be waived. **Menendez v. North Broward Hospital District**, 537 So.2d 89 (Fla. 1988). The notice requirement is a condition precedent to maintaining suit against the state, compliance with which is required to state a cause of action. **Commercial Carrier Corp. v. Indian River County**, 371 So.2d 1010 (Fla. 1979). Section 768.28 contains other requirements for suit, compliance with which is required to demonstrate a waiver of immunity, as well as statutory exceptions to suit. See Section 768.28(7),(9)(a),(13),(14) Florida Statutes (1995). DOE's immunity claim does not assert that Roes failed to comply with statutory requirements for suit against the state, or that Roes' claims fall into a statutory exception to suit. Substantive sovereign immunity claims based upon common-law discretionary function or public duty principles adopted by this court in **Commercial Carrier Corp.** and **Trianon** do not involve statutory requirements or exceptions.

As to whether common-law sovereign immunity constitutes an immunity from suit, language from **Griesel v. Hamlin**, 963 F.2d 338 (11th Cir. 1992) is instructive. The court stated:

> The immunity under Georgia law, which is at issue in this case, satisfies all of the **Cohen** factors for the same reasons that the Supreme Court in **Mitchell v. Forsyth** found that the **Cohen** factors were satisfied when summary judgment was denied to a government official asserting qualified immunity for alleged constitutional deprivations.

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> The crucial issue in our determination ... is whether the state sovereign immunity under Georgia law is an immunity from suit rather than simply a defense to substantive liability. [footnote omitted] Under Georgia law, "a **suit cannot be maintained against the State without its consent.**" **Crowder v. Department of State Parks**, 228 Ga. 436, 185 S.E.2d 908,910 (1971) (emphasis added). **See also Sikes v. Candler County**, 247 Ga. 115, 274 S.E.2d 464,466 (1981)(stating that immunity from suit is a basic attribute of sovereignty and that the State cannot be made amenable to suit without its consent). Therefore, it is clear that sovereign immunity under Georgia law is an immunity from suit.

Id., 963 F.2d at 340. While Leon County School Board argues that **Griesel** is not persuasive because Georgia has not waived sovereign immunity, Florida has not waived sovereign immunity, either by legislative enactment or by constitutional amendment, for discretionary functions or where a discretionary or inherently governmental duty is owed solely to the public at large. Section 768.28 waives immunity, "but only to the extent specified in this act." Art. I, Sec. 13, Florida Constitution continues to provide absolute immunity where waiver has not occurred by legislative enactment or constitutional amendment. **Jackson v. Palm Beach County**, 360 So.2d 1 (Fla. 4th DCA 1978).

Finally, **Blevins v. Denny**, 443 S.E. 2d 354 (North Carolina App. 1994) and **City of Mission v. Ramirez**, 865 S.W. 2d 579 (Tex. App. 1993), both affirmed the right of the state to obtain interlocutory review of sovereign immunity claims, contrary to the Board's argument. Board's Answer Brief at 20.

ISSUE II

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

Roes strive to construct a common-law duty of care owed to them by alleging that DOE voluntarily performed, for the specific benefit of Leon County School Board, the very same duties the agency is obligated to perform for the benefit of the public at large.[1]

Under a theory of voluntary undertaking, a governmental entity can create a special relationship by voluntarily acting on behalf of a particular citizen who then relies to his detriment on the promise given. This theory has been explained as follows:

> In such circumstances the municipality's liability is not that of an insurer for failing to protect from harm a member of the general public, but rather liability is based upon the municipality's own affirmative conduct, which, having induced the citizen's reasonable reliance, must be considered to have progressed to a point after which the failure to provide the promised protection will result not "merely in withholding a benefit, but positively or actively in working an injury."

Kircher v. City of Jamestown, 543 N.E. 2d 443,446 (N.Y. 1989).

The Restatement (Second) of Torts §323 (1965 ed.), upon which the theory of voluntary undertaking is based, states as follows:

> One who undertakes, gratuitously or for consideration, to render services to another

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[1] Contrary to Roes' argument, the district court found that the Amended Complaint failed to allege either a common-law or statutory duty of care owed to them.

> which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking . . . .

Under the Restatement provision, the duty which may arise by a voluntary undertaking is a duty to protect persons or things from "physical harm." Florida courts have found a common-law duty based upon voluntary undertaking in this context. See e.g. White v. City of Waldo, 659 So.2d 767 (Fla. 1st DCA 1995); Parrotino v. City of Jacksonville, 612 So.2d 586 (Fla. 1st DCA 1992), quashed by Office of the State Attorney v. Parrotino, 628 So.2d 1097 (Fla. 1993); Slemp v. City of North Miami, 545 So.2d 256 (Fla. 1989)(flooding damage to property); Hartley v. Floyd, 512 So.2d 1022 (Fla. 1st DCA 1987); Department of Highway Safety and Motor Vehicles v. Kropff, 491 So.2d 1252 (Fla. 3d DCA 1986); Padgett v. School Board of Escambia County, 395 So.2d 584 (Fla. 1st DCA 1981); St. George v. City of Deerfield Beach, 568 So.2d 931 (Fla. 4th DCA 1990); Everton v. Willard, 468 So.2d 936 (Fla. 1985); Department of Health and Rehabilitative Services v. Yamuni, 529 So.2d 258 (Fla. 1988); Sheridon v. Greenberg, 391 So.2d 234 (Fla. 3d DCA 1981)(insurance agent's failure to provide promised insurance protection). See also Indian Towing Co. v. United States, 350 U.S. 61 (1955).

The allegations of the Amended Complaint and the Board's Crossclaim do not presently assert and no subsequently amended pleadings could assert that DOE failed to protect Leon County School Board's persons or things from physical harm by negligent performance of licensing and investigatory duties, or by an

alleged failure to provide information to the Board. The allegations, in addition, do not allege that DOE made any express promise to Leon County School Board. DOE did not exercise any "discretion" in undertaking to perform functions it was obligated by law to perform for the benefit of the public at large.[2]

Moreover, with respect to the allegations of the Board's Crossclaim, the alleged failure of DOE to provide information from its files to Leon County School Board did not constitute more than the withholding of a benefit. **Kircher**.

Even if an implied promise could be derived from the allegations of the Amended Complaint, the provisions of Chapter 231 conclusively refute the propriety of the Board's alleged reliance for the following reasons: (1) the legislature has not imposed upon DOE any duty to investigate moral fitness of applicants for renewal (section 231.24); DOE's investigations of teachers are statutorily confidential, as to school boards and as to DOE's certification office, until a finding of probable cause (section 231.262(4); and (3) DOE does not have the right to deny recertification of an applicant merely because of an ongoing investigation (section 231.262(5) & (6). Moreover, there is no indication of any legislative intent under Chapters 230 and 231

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[2] Leon County School Board Appendix Tab 6 contains a select portion of deposition testimony of DOE representative Audrey Huggins which states that DOE provided public record information from its files to "principals **or anyone else**. Appendix at 69. Under Florida law, a claim for failure to provide accurate public information is barred by the public duty doctrine prong of sovereign immunity. **See Friedberg v. Town of Longboat Key**, 504 So.2d 52 (Fla. 2d DCA 1987); **City of Tarpon Springs v. Garrigan**, 510 SAo.2d 1198 (Fla. 1987); **Chester v. Metro Dade County**, 493 So.2d 1119 (Fla. 3d DCA 1986). **cf. Rodriquez v. Commerical Union Ins. Co.**, 449 So.2d 375 (Fla. 3d DCA 1984)(a pre-**Trianon** case).

to allow school boards, principals or superintendents to forgo their own common-law and statutory duties to investigate applicants for employment in reliance upon DOE's investigations or recertifications.

If Roes attempt to allege that an implied contract existed between DOE and Leon County School Board, the claim is barred by sovereign immunity. **Pan-Am Tobacco Corp. v. Department of Corrections**, 471 So.2d 4 (Fla. 1984).

Roes argue that "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." Roes' Answer Brief at 20. When the sole voluntary conduct DOE is alleged to have engaged in is the performance of duties it owes to the public at large, no legislative intent exists to make DOE a joint employer of teachers by performance of those duties, and no legal or factual basis can exist to give rise to a common-law duty of care owed by DOE to Leon County School Board, the question **can** be answered on a motion to dismiss. Futility is one basis for precluding amendment of a complaint. **Hamide v. State Department of Corrections**, 548 So.2d 877 (Fla. 1st DCA 1989).

DOE urges this court to find that Roes did not and cannot allege any common-law or statutory duty of care owed by DOE to them, or to Leon County School Board.

CONCLUSION

Based on the foregoing argument and citations of authority, DOE requests this court to find that orders rejecting claims of sovereign immunity are subject to interlocutory review as a matter of right, and that Roes' claims against DOE are barred.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief 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; **Alan S. Zimmet, Esquire**, and **Mark A. Connolly, Esquire**, P.O. Box 5124, Clearwater, FL 34619; and **Billy R. Campbell**, DOC#578085, Liberty Correctional Institution, P.O. Box 999, Bristol, FL 32321 this 16th day of February, 1996.

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