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FILED
SID J. WHITE
FEB 26 1996
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF LAW ENFORCEMENT,

Petitioner,

v. CASE NO. 87,172

SHARON HOUSE,

Respondent.

_____/

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF THE STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

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PETITIONER'S BRIEF ON THE MERITS
PRELIMINARY STATEMENT

Petitioner, the Florida Department of Law Enforcement, shall be referred to herein as "FDLE." Respondents, Ms. Sharon House, et al., will be referred to herein as "House" or "Respondents." References to the record on appeal, will be by the use of the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE

House filed a complaint against the Florida Department of Law Enforcement ("FDLE"), in the Second Judicial Circuit, in and for Leon County, Florida (R 1-7). Therein, House alleged that FDLE and the Quincy Gun & Pawnshop negligently participated in the sale of a firearm to House's husband, a convicted felon (R 1-7). Mr. House subsequently shot and seriously injured Ms. House with the firearm (R 1-7). FDLE moved to dismiss the complaint for failure to state a cause of action because there was no duty of care owed to Appellant under Section 790.065, Florida Statutes, or the common law (R 9-10). House filed a memorandum of law in opposition to the motion to dismiss (R 11). House alleged that the legislature by enacting Section 790.065 intended to protect anyone who might come into contact with an armed convicted felon and that FDLE had a common law duty to protect them (R 13, 15). House further alleged that the cause of action was not barred by sovereign immunity because the act of conducting background checks was operational, not discretionary (R 18).

FDLE filed a memorandum of law in support of its motion to dismiss, arguing that House failed to show a duty of care under the common law or the statute (R 22). FDLE argued that the duty to approve firearm transactions was a public safety or licensing function, i.e., the clearance provided to the dealer was a license or permit to sell the firearm (R 24). FDLE stated that the licensing and police power

functions of government are covered by the doctrine of sovereign immunity at common law (R 24-25). FDLE further argued that the statute does not create a duty of care to individual plaintiffs (R 26). Rather, it protects the public generally (R 26-27). Section 790.065(11), Florida Statutes, expressly provides immunity to FDLE and its personnel (R 28).

The trial court denied FDLE's motion to dismiss (R 30). FDLE filed its notice of appeal to the First District pursuant to Dept. of Education v. Roe, 20 Fla. Law Weekly D686, D686-87 (Fla. 1st DCA Mar. 14, 1995) ("Roe I"). In that case, the First District held that it had jurisdiction under Fla.R.App.P. 9.130(a) over an appeal from a non-final order denying a motion to dismiss based on a claim of sovereign immunity. After FDLE filed its initial brief, the First District ordered FDLE to show cause why the appeal should not be dismissed for lack of jurisdiction. The First District then withdrew its decision in Roe I, and held that it did not have jurisdiction over an appeal from the denial of a motion to dismiss based on a claim of sovereign immunity. Dept. of Education v. Roe, 656 So. 2d 507 (Fla. 1st DCA 1995) ("Roe II").

The First District dismissed the instant appeal for lack of jurisdiction, noting that its decision was "in contradiction" with Dept. of Transportation v. Wallis, 659 So. 2d 429 (Fla. 5th DCA 1995). FDLE moved for certification of conflict with Wallis, which the court

granted. On January 12, 1996, FDLE filed a notice to invoke the discretionary jurisdiction of this Court, pursuant to Fla.R.App.P. 9.030(a)(2)(A)(vi).

STATEMENT OF THE FACTS

In her complaint, Sharon House alleged that she was at home with her husband, Gregory House, Sr., on June 19, 1993 (R 4). Mr. House retrieved a handgun from the rear of the home and shot her three times (R 4). The shooting was unprovoked and permanently injured Ms. House (R 4). Mr. House was a convicted felon and therefore he was prohibited from receipt or possession of a firearm pursuant to Section 790.23, Florida Statutes (R 3, 5).

Ms. House further alleged that the Quincy Gun & Pawn Shop sold the firearm to Mr. House shortly before the shooting (R 4). As a part of the transaction, Mr. House gave the shop his name, date of birth and social security number (R 4). Pursuant to Section 790.065, Florida Statutes, the shop provided the information to FDLE for purposes of a criminal history records check of Mr. House (R 4-5). FDLE approved Mr. House as a firearm purchaser (R 4-5).

Ms. House alleged that FDLE was negligent in approving the sale of the firearm to Mr. House (R 5). Ms. House stated that Section 790.065, Florida Statutes, imposed a duty on FDLE to the citizens of the State generally and to the plaintiffs individually "to prevent the sale of firearms to those who might use them to injure others" (R 5). House alleged that plaintiffs are members of the class of persons contemplated by the Florida Legislature to be protected by enactment of Section 790.065, Florida Statutes (R 5).

SUMMARY OF ARGUMENT

ISSUE I:

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 not a defense to liability, rather it is an immunity from suit 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, and is separable from and collateral to the underlying merits of the tort action. 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. After direct appeal, only immunity from judgment may be protected.

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 FDLE's claim of sovereign immunity and the absence of any actionable duty of care owed to House turns strictly on issues of law which can be determined solely on the undisputed allegations of the Complaint.

ISSUE II:

The 1989 Legislature enacted Section 790.065, Florida Statutes, to require licensed firearm dealers to obtain a criminal history records check of a potential buyer from FDLE. In her complaint, Ms. House contended that FDLE negligently informed the Quincy Gun and Pawn Shop that Mr. House was eligible to purchase a firearm. The trial court denied FDLE's motion to dismiss, erroneously finding that the suit was not barred by the doctrine of sovereign immunity.

No statutory or common law duty of care existed to protect House individually rather than the public generally. House's complaint showed that the legislature in enacting Section 790.065 did not intend to create a new cause of action or to waive sovereign immunity. House also has not shown a common law duty of care to themselves. FDLE's act of screening prospective firearm purchasers is a discretionary licensing and police power function which is immune from suit.

ARGUMENT

ISSUE I

THE FIRST DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT IT DID NOT HAVE JURISDICTION TO REVIEW AN ORDER DENYING A MOTION TO DISMISS BASED ON A CLAIM OF SOVEREIGN IMMUNITY.

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, and the rule is currently published for comment from the Bar. 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. FDLE urges this court to authorize interlocutory review of orders rejecting sovereign immunity claims for the reasons set forth below. The issue presented in the instant case also is before this Court in DOE v. Roe, Case No. 86,061.

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 and 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 also met these requirements.

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 not to 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 Florida Rule of Appellate Procedure 9.130(a)(3)(A), 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). There is no evidence that appellate courts have suffered a deluge of interlocutory appeals from orders erroneously determining venue. In the absence of a quantifiable "opening of the floodgate," it can be presumed that the right to interlocutory appeal in this context has served to clarify venue law and encourage 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 are premised 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) (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; 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 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.

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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.

When the state is sued in tort, the social and personal costs are the same. 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 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 respond 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 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

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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 public officials in federal civil rights actions and the state in tort actions.

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 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 because suit cannot be maintained against Georgia without its consent and sovereign immunity is an immunity from suit).

This Court expressed sensitivity to "concerns for early resolution of controlling issues," in Mandico v. Taos Construction Co.,, 605 So. 2d 850 (Fla. 1992), amended Florida

Rule of Appellate Procedure 9.130(a)(3) 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 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 non-involvement. 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.

Relying on Tucker, the Fifth District in Department of Transportation v. Wallis, 659 So. 2d 429 (Fla. 5th DCA 1995), permitted interlocutory review of an order denying the state's motion to dismiss based on a claim of sovereign immunity. 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. DOT decisions with respect to the design of roadways are discretionary acts which are immune from tort liability.

The Wallis 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 did not owe an operational-level duty to warn or protect the public from such dangers. 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 are 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, 20 Fla. Law Weekly S552 (Fla. Nov. 2, 1995)(no duty of care to protect individuals from the 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 the instant case or Wallis, on the basis of the vehicle by which the immunity claim was asserted is illusory. FDLE urges this Court to adopt the reasoning of the Mitchell Court and 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]

> C. The order in this case qualifies for interlocutory review because whether FDLE is immune from tort liability under the doctrine of sovereign immunity is strictly a legal issue.

The First District in Roe I initially interpreted Tucker v. Resha as authorizing interlocutory review of an order rejecting a sovereign immunity claim. On rehearing, the district court withdrew its earlier decision and stated that it would not construe Tucker as deciding any issue beyond that which was specifically asked in the certified question in that case. Roe II. This Court accepted review of Roe II on the basis of direct and express conflict with Tucker.

Roe II and the instant case fall into the category of cases cited above in which factual development of the allegations of the complaint have no bearing upon the viability of the sovereign immunity claim. FDLE's immunity claim turns strictly on the question of whether, in the performance of its Trianon Category I

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[3] The United States Supreme Court in **Behrens v. Pelletier**, Case No. 94-1244 (Feb. 21, 1996), rejected the "one interlocutory appeal" rule in the context 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.

and II police power and licensing functions, Petitioner owes any duty of care other than to the public at large.

While the duty of care question is threshold in any tort action against the State, 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 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 threshold 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 stated 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. As discussed under Issue II of this brief, FDLE's approval of Mr. House's firearm transaction was immune from suit under the police power and licensing functions of the sovereign.

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

A CAUSE OF ACTION UNDER FLORIDA'S CRIMINAL HISTORY CHECK LAW IS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY.

The 1989 Legislature enacted Section 790.065, Florida Statutes, to require licensed firearm dealers to obtain a criminal history records check of a potential buyer from FDLE. See Ch. 89-191, § 1, Laws of Fla. The statute prohibits a dealer from selling or delivering a firearm to a purchaser until he has: (1) ascertained the identity of the buyer, (2) collected a fee for processing the records check, (3) telephoned FDLE and requested the check, and (4) received an approval number for the inquiry. §790.065(1)(a)-(d), Fla. Stat. Upon receipt of an inquiry from a dealer, the statute requires FDLE to review criminal history records

> to determine if the potential buyer or transferee has been convicted of a felony and is prohibited from receipt or possession of a firearm pursuant to s. 790.23 or has had adjudication of guilt withheld or imposition of sentence suspended on any felony unless 3 years have elapsed since probation or any other conditions set by the court have been fulfilled or expunction has occurred.

§790.065(2)(a), Fla. Stat. FDLE must either approve or disapprove the firearms transaction based on the information uncovered and so inform the dealer. §790.065(2)(b), Fla. Stat.

In her complaint, Ms. House contended that FDLE negligently informed the Quincy Gun and Pawn Shop that Mr. House was eligible to purchase a firearm (R 4-5). Ms. House contended that Mr. House is a convicted felon who is prohibited from possessing a firearm pursuant to Section 790.23, Florida Statutes (R 5). FDLE moved to dismiss the complaint on the grounds that the suit was barred by the doctrine of sovereign immunity (R 9-10, 22-29). The trial court denied the motion to dismiss, and this appeal ensues (R 30).

The State of Florida's liability for the acts of its employees is limited as follows:

> Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful at or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act . . . . [Emphasis added].

§768.28(1), Fla. Stat. This statutory waiver of sovereign immunity created no new causes of action against a governmental entity which did not previously exist. Trianon Park Condominium v. City of Hialeah, 468 So. 2d 912, 921

(Fla. 1985). Rather, the sole purpose of the law was to waive that immunity which prevented recovery for breaches of existing common law duties. Id. at 917.

In determining whether FDLE could be held liable in the instant case, this Court must consider the following two questions:

> (1) Whether there exists a common law or statutory duty of care which inures to the benefit of the plaintiffs as a result of the alleged negligence, and (2) whether the alleged action is one for which sovereign immunity has been waived. Trianon Park, supra. In Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989), the supreme court stated as to governmental liability "that a court must find no liability as a matter of law if either (a) no duty of care existed or (b) the doctrine of governmental immunity bars the claim." Id. at 734. [Emphasis in original].

Vann, supra, adopting, 20 Fla. Law Weekly D381, D381 (Fla. 1st DCA Feb. 9, 1995). Identical duties exist for private persons and governmental entities, Trianon, supra, at 921, and "the duty analysis is the same whether the defendant is a governmental entity or a private individual." Parrotino v. City of Jacksonville, 612 So. 2d 586, 590 (Fla. 1st DCA 1992). In the present case, no statutory or common law duty of care existed as to the instant plaintiffs.

To establish a legally cognizable statutory duty of care, a claimant must demonstrate that the legislature intended to create a private cause of action under the

statute. This Court recently addressed this issue in Murthy v. N. Sinha Corp., 644 So. 2d 983 (Fla. 1994). In that case, the plaintiffs contended that Chapter 489, Florida Statutes, created a private cause of action against a qualifying agent on corporate construction projects. Id. at 984. The statute made the agent responsible for supervising, directing, managing, and controlling the corporation's contracting and construction activities. Id. at 984 n.1 (citing §§ 489.105(4) & 489.1195, Fla. Stat. (1991)).

This Court held that no private cause of action existed, stating:

> In the past, some courts dealing with this issue have looked to whether the statute at issue imposed a duty to benefit a class of individuals . . . These courts simply concluded that a cause of action arose when a class member was injured by a breach of that duty . . . Today, however, most courts generally look to the legislative intent of a statute to determine whether a private cause of action should be judicially inferred . . . [W]e agree that legislative intent, rather than the duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one. [Citations omitted].

Id. at 985. While the Court elevated legislative intent above the class benefit analysis, it still considered whether the statute benefitted individual citizens or the

public as a whole. Id. at 986. Therefore, the determination of who benefits under a statute remains as one factor in determining legislative intent.

The violation of a statutory duty still does not give rise to a cause of action unless it appears that the statute was meant to protect the claimant and her right or interest allegedly invaded. Griffith v. Dept. Health & Rehab. Services, 624 So. 2d 813, 815 (Fla 4th DCA 1993). "[L]egislative enactments for the benefit of the general public do not automatically create an independent duty to either individual citizens or a specific class of citizens." Trianon, supra, at 917 (citing Restatement (Second) of Torts, § 288 comment b (1964)). "Statutes and regulations enacted under the police power to protect the public and enhance the public safety do not create duties owed by the government to citizens as individuals without the specific legislative intent to do so." Id. at 922.

The Third District discussed this public duty doctrine in Seguine v. City of Miami, 627 So. 2d 14, 17 (Fla. 3d DCA 1993), stating:

> [A]s to the public duty doctrine exception, it has been held that a governmental entity is not liable in tort for breaching a duty which the government owes to the public generally, as opposed to a special tort duty owed to a particular individual. A plaintiff suing a governmental entity in tort must allege and prove that the defendant breached a common law or statutory tort duty owed to the

> plaintiff individually and not a tort duty owed to the public generally.

The exception is based on the need to curb the chilling of law enforcement. Id.

This Court further explained the policy reasons behind the public duty doctrine as follows:

> Governments must be able to enact and enforce laws without creating new duties of care and corresponding tort liabilities that would, in effect make the governments and their taxpayers virtual insurers of the activities regulated. To hold otherwise would result in a substantial fiscal impact on governmental entities which was never intended by the legislature. Such a holding would inevitably restrict the development of new programs, projects, and policies and would decrease governmental regulation intended to protect the public and enhance the public welfare.

Trianon, supra, at 922-23.

In the present case, House has not demonstrated that the legislature intended to create a private cause of action under Section 790.065. First, FDLE does not owe a duty to plaintiff individually rather than to the public generally. The statute directs dealers to obtain clearance of potential firearm purchasers from FDLE. Clearly, the statute was enacted under the police power to protect the public at large from the transfer of firearms to felons. The statute increases compliance with Section 790.23, Florida Statutes, a provision of the Criminal Code which prohibits convicted

felons from possessing a firearm. Second, before a court may recognize a new cause of action, the legislature must enunciate the specific intent to create one. The language in the instant statute evinces no intent to create a cause of action for individual citizens.

In George v. Hitek Community Control Corp., 639 So. 2d 661, 663 (Fla. 4th DCA 1994), the Fourth District Court of Appeal held that the legislature did not create a duty of care to individual citizens in enacting the community control statute. Hitek centered on a criminal who was court ordered to participate in the community control program. He wore an electronic monitoring device as a condition of participation. Id. at 662. The individual removed the device, entered the plaintiff's residence and raped her. Id. The court rejected the plaintiff's argument that the State owed a duty of care to her, stating:

> [W]e believe that community control programs were borne out of a frustration with the rehabilitative benefits of incarceration for some offenders and a desire to minimize the cost of criminal punishment while at the same time providing a sufficient measure of safety to the public at large. Unlike the statute in Yamuni, the community control statute in no way evinces a specific legislative intent to create a duty of care and impart a sphere of protection over certain individual citizens who may be injured by a releasee who manages to evade surveillance.

Id. at 664. In the present case, Section 790.065 was borne out of a frustration with the recidivism rate among armed criminals despite the existence of Section 790.23, Florida Statutes. Section 790.065 seeks to minimize the number of felons carrying firearms during subsequent crimes by preventing their possession of such weapons in the first instance.

In Freehauf v. School Board of Seminole County, 623 So. 2d 761 (Fla. 5th DCA 1993), the court addressed the question whether the statutory duty to report child abuse set forth in Section 415.504, Florida Statutes, gave rise to a duty of care owed individually to the plaintiff abused child. Applying the factors enumerated in §§ 286 and 288 of the Restatement (Second) of Torts (1978), the court concluded that no private cause of action existed for violation of the statutory duty, stating:

> The rationale for not reading into the child abuse reporting statute a private cause of action for its breach is that it would create a large and new field of tort liability beyond what existed at common law without clear legislative direction to do so.

Id. at 764. In the present statute, the legislature also evinced no intent to create a cause of action.

Even if Plaintiff could demonstrate a statutory duty to her individually, she fails the second prong of sovereign immunity analysis, i.e., whether the alleged action is one

for which sovereign immunity has been waived. Vann, supra, at D381. Section 790.065(11) provides in pertinent part as follows:

> The Department of Law Enforcement, its agents and employees shall not be liable for any claim or cause of action under the laws of any state for liability for damages arising from its actions in lawful compliance with this section. (Emphasis added).

Clearly, this language constitutes an express disclaimer of liability, thereby protecting FDLE from liability even if FDLE owed a duty to plaintiffs individually.

Recently, in Dept. of Health & Rehab. Svcs. v. B.J.M., 656 So. 2d 906 (Fla. 1995), this Court held that a similar provision in Chapter 39, Florida Statutes, barred a negligence claim against the state. In that case, a dependent child sued the state for negligent vocational and educational training and for failure to provide proper counseling and psychiatric services. Id. at 2. Section 39.455 provided that neither the state nor its employees shall be liable under the statute when acting in good faith. Id. at 22-23. As the plaintiff had not alleged that the agency acted with wanton or willful disregard of human rights, safety or property, he failed to allege a statutory duty of care. Id. at 23-24. Therefore, the cause of action was barred by sovereign immunity. Likewise, in the present case, Section 790.065(11), Florida Statutes, bars the instant cause of action.

House also cannot establish a common law duty to protect her individually from the transfer of weapons to felons. To aid in determining whether a common law duty of care exists on the part of a governmental entity, this Court placed governmental functions and activities into four categories: "(I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational, and general services for the health and welfare of the citizens." Trianon Park, supra, at 919. Activities I and II do not trigger governmental tort liability because such conduct is inherent in the act of governing. Id. at 919-920. Government officials and employees responsible for the "enforcement of laws and protection of the public safety" usually owe no duty of care to an individual member of the general public. Id. at 919-20. There is no common law duty to prevent the misconduct of third persons. Id. at 918. In B.J.M., the Court reaffirmed the vitality of this common law duty of care analysis.

In the present case, FDLE's act of screening prospective firearm purchasers falls within categories I and II, and therefore no common law duty of care existed to plaintiffs. The act falls into category I because FDLE's clearance to dealers prior to the sale of a firearm is in the nature of a licensing or permitting function. The

clearance in effect is a license to sell the firearm. In Trianon, supra, at 919, this Court stated the judicial branch has no authority to interfere with the conduct of licensing and permitting. The discretionary power given to regulatory officials such as building inspectors, etc., id., applies to the FDLE officials determining whether to approve a firearms transaction. The act of approving a firearm transaction also falls into category II because the public safety is protected by keeping firearms out of the hands of convicted felons.

In Vann, supra, this Court considered the question whether the State may be held liable under the common law for the criminal acts of an escaped prisoner. This Court held that the only duty which existed was a general duty owed to the public not to allow a prisoner to escape. Id. The Court stated:

> In a number of cases, the courts of this state have determined that the state is not liable for injuries resulting from the criminal acts of escapees. This principle is clearly stated by the Florida Supreme Court in Department of Health and Rehabilitative Servs. v. Whaley, 574 So. 2d 100 (Fla. 1991). Addressing a case where the Department of Corrections was sued for negligence, the Whaley Court held that "the Department of Corrections has no specific duty to protect individual members of the public from escaped inmates." Id. n.1. (citing Reddish v. Smith, 468 So. 2d 929 (Fla. 1985)).

Id. See also Parker v. Murphy, 510 So. 2d 990, 991 (Fla. 1st DCA 1987) (the protection of citizens from criminal offenses is a general duty owed to the public as a whole and therefore is generally beyond the limited waiver of sovereign immunity); George, supra, at 663 (no common law duty of care existed to an individual member of the public for protection from a participant in a community control program); Bradford v. Metropolitan Dade County, 522 So. 2d 96 (Fla. 3d DCA 1988) (no common law duty of care owed to individual citizen as to escaped mentally disturbed patient). Similarly, in the present case, FDLE owed no specific duty of care to members of the public who may be injured by a convicted felon carrying a handgun.

Public policy weighs against imposing on FDLE a duty to protect individual citizens from the intentional torts of third parties. The creation of such a duty would have a substantial fiscal impact on governmental entities. It would make FDLE the insurer of firearms transactions and subsequent criminal activities utilizing those firearms. Law enforcement will be chilled if the legislature cannot enact a public safety statute like Section 790.065 without opening up the public treasury to lawsuits.

In sum, the trial court erred in denying FDLE's motion to dismiss the complaint because House failed to allege a cause of action. House has not shown the existence of a statutory or common law duty which inures to their benefit

as a result of the alleged negligence. Rather, the statute expressly states that the legislature intended not to create a new cause of action. House also has not shown a common law duty to themselves individually. The act of conducting a background check on a potential firearm purchaser falls within Trianon categories one and two because it constitutes a licensing and police power function. Therefore, no duty of care exists under the common law.

CONCLUSION

Based on the foregoing legal authorities and arguments, Petitioner respectfully requests that this Honorable Court reverse the First District Court of Appeal's order dismissing this case and hold that orders rejecting sovereign immunity claims are appealable non-final orders. Petitioner also requests that this Court find that Respondent's cause of action is barred by sovereign immunity and reverse the trial court's order denying Petitioner's motion to dismiss the complaint.

Respectfully submitted,

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ATTORNEY GENERAL

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ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0890537

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to L. William Porter, II, P.A., Post Office Box 648, Havana, FL 32333-0648; and, Gordon D. Cherr, Esq., McConnaughhay, Roland, Maida & Cherr, P.A., Post Office Drawer 229, Tallahassee, FL 32302-0229, this 26th day of February, 1996.

Wendy S. Morris
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF LAW ENFORCEMENT,

Petitioner,

v. CASE NO. 87,172

SHARON HOUSE,

Respondent.

_____/

APPENDIX

(A) First District of Appeal's order dismissing the case for lack of jurisdiction, dated October 13, 1995.

(B) First District Court of Appeal's order certifying conflict with the Fifth District Court of Appeal, dated December 15, 1995.

Appendix A

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Fl. 32399

Telephone (904) 488-6151

DATE December 15, 1995

CASE NO. 95-965

FLORIDA DEPARTMENT OF LAW ENFORCEMENT
appellant/petitioner

v.

SHARON HOUSE
appellee/respondent

BY ORDER OF THE COURT:

Appellant's motion for certification of conflict is granted. We hereby certify that our decision in this case conflicts with Department of Transportation v. Wallis, 20 Fla. L. Weekly D1823 (Fla. 5th DCA Aug. 11, 1995).

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler

Jon S. Wheeler, Clerk

By: _____
Deputy Clerk

DISTRICT COURT OF APPEAL 1ST DISTRICT STATE OF FLORIDA

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Craig B. Willis
L. William Porter

Wendy S. Morris
Gordon S. Cherr

Appendix B

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Fl. 32399

Telephone (904) 488-6151

DATE October 13, 1995

CASE NO. 95-965

LT# 94-528-CAB

FLORIDA DEPARTMENT OF LAW ENFORCEMENT v. SHARON HOUSE
appellant/petitioner appellee/respondent

BY ORDER OF THE COURT:

Having considered appellant's response to this court's order to show cause why the appeal should not be dismissed for lack of jurisdiction, the appeal is hereby dismissed. Department of Education v. Roe, 656 So. 2d 507 (Fla. 1st DCA 1995). See Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994); Johnson v. Jones, 115 S. Ct. 2151 (1995). Contra Department of Transportation v. Wallis, 20 Fla. L. Weekly D1823 (Fla. 5th DCA Aug. 11, 1995).

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler, Clerk

By: Deputy Clerk

DISTRICT COURT OF APPEAL OF FLORIDA

Wendy S. Morris
Gordon D. Cherr

Copies:

Craig B. Willis
L. William Porter, II
Nicholas Thomas