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SID J. WHITE
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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 REPLY BRIEF

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SUMMARY OF ARGUMENT

Issue 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 so diminish the discretionary function and public duty principles of common law sovereign immunity.

Issue II:

Neither Respondent has demonstrated that a statutory or common law duty of care existed to protect House individually rather than the public generally. 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.

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), to urge this Court to preclude interlocutory review of sovereign immunity claims.

The facts in **Pullman** are as follows: When Pullman commenced a reorganization in bankruptcy, the United States filed claims in the bankruptcy proceeding to recover taxes due. In response, Pullman requested the bankruptcy court to recover from the United States monies it paid toward tax obligations during the period 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 had waived its immunity claim when it initiated claims against Pullman.

In analyzing the appealability of the order rejecting the immunity claim, the circuit court recognized that 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. The basis for the sovereign immunity claim is not set forth in the decision. However, it is clear that the court's conclusion that the claim was not subject to immediate review rested in large part upon an implicit finding of waiver and the separability of the immunity claim from the 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. FDLE did not initiate an action against House. Florida's common law sovereign immunity does not consist of an "elaborate system of statutory provisions" permitting some suits and disallowing others. Unlike FDLE, 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 review of its immunity claim. Unlike the government's claim in **Pullman**, which had no bearing upon the underlying bankruptcy proceeding, FDLE's sovereign immunity claim goes to the very heart of House's 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 relevance 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 submerged land 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 sovereign 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 the two 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 had available in each case an alternate vehicle by which to obtain appellate review of the immunity 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's doctrine of sovereign immunity, 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 separation of powers issues. Central to the doctrine 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**, 665 So. 2d 304 (Fla. 1st DCA 1995); **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**, 666 So. 2d 140 (Fla. 1996); **Burnett v. Department of Corrections**, 666 So. 2d 882 (Fla. 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 these grounds for 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). Under Florida law, these claims can **never** be waived. **Department of Health and Rehabilitative Services v. Lee**.

SBJM cites **Florida Med. Malpractice v. Indem. Ins.**, 652 So. 2d 1148 (Fla. 4th DCA), rev. granted 663 So. 2d 237 (Fla. 1995), 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 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, compliance with which is required in order to demonstrate a waiver of immunity, as well as exceptions to suit. **See** Section 768.28(7),(9)(a),(13),(14) Florida Statutes (1995). FDLE's immunity claim does not assert that House failed to comply with the statutory requirements for suit against the state, or that House's claims fall into a statutory exception to suit. Other substantive sovereign immunity claims based upon

common law discretionary function or public duty principles adopted by this court in **Commercial Carrier Corp.** and **Trianon** similarly do not involve statutory requirements or exceptions.

As to whether common law state 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.
>
> * * *
>
> 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 SBJM argues that **Griesel** is not persuasive because Georgia has not waived sovereign immunity,

Florida also 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 of the 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 SBJM's argument.

ISSUE II

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

Petitioner rests upon the arguments made in its initial brief as to this issue.

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 the instant case for lack of jurisdiction 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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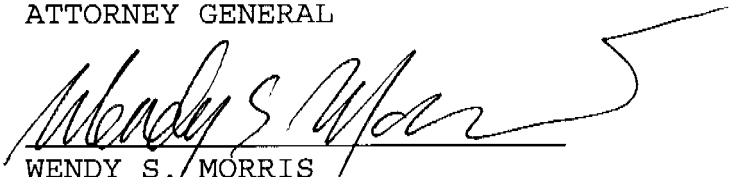

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief 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 6th day of June, 1996.

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