SUPREME COURT OF FLORIDA

CASE NO. 87,346

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

ALYSE COHEN PARIS and MARK PARIS, husband and wife and MICHAEL COHEN PARIS, ETHAN LOUIS PARIS, REUBEN ELAN PARIS and SAMUEL ASHER PARIS, minor children of ALYSE COHEN PARIS and MARK PARIS, and N.S. MARINE & INDUSTRIAL SERVICES CORP.,

Respondents.
_____/

PETITIONER STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION'S REPLY BRIEF

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ARGUMENT

I. AN APPELLATE COURT SHOULD HAVE JURISDICTION TO REVIEW A NON-FINAL ORDER DENYING A MOTION TO DISMISS BASED ON THE DOCTRINE OF SOVEREIGN IMMUNITY.

Contrary to the misguided belief of the respondents, this state's government still values its right not to be sued and still places significant stock in the doctrine of sovereign immunity. The long standing right of the state not to be sued, unless it so consents, is not a dead doctrine as respondent implies. Non-final review of decisions denying the state's right not to be sued supports the doctrine of sovereign immunity and reinforces its vitality. Sovereign immunity exists, and the courts of this state have an obligation to preserve the right, where only the legislature can remove it.

The respondent suggests that this entire review proceeding is now moot because the respondent has recast her pleadings in the lower court. The respondents also argue that there is no significant or public importance to the issue before the court on whether non-final review should be allowed based on sovereign immunity decisions.

The pleadings in this case have changed since the Fourth District issued its opinion denying non-final review of an order denying a motion to dismiss based on sovereign immunity. The respondent's husband has been dropped as a party plaintiff, and the respondent has abandoned her "hidden trap" theory of negligence.

In the trial court, the respondents obtained permission to amend their pleadings, knowing full well that petitioner was attempting to secure a stay of proceedings in this court -- which was ultimately granted on April 3, 1996. While the trial court did not require DOT to file a new answer, in an abundance of caution, DOT did file a new answer, and asserted sovereign immunity in its list of affirmative defenses.

The respondents now argue that DOT has abandoned its dismissal challenge, or alternatively that the issue of non-final review is moot. The argument has no merit.

The respondents would have DOT put on a dog and pony show in the trial court. The respondents would require the parties to reargue an issue which has already been decided by the trial court, and Fourth District Court of Appeal for that matter, and waste valuable court time and resources. The very first argument that respondents would make at a renewed motion to dismiss hearing would be that the trial court has already decided the issue and it is currently pending before this court. There would be no reason to reargue a self contained legal issue. The absurdity of respondents' argument is self-evident.

DOT has not abandoned or waived its challenge to seek non-final review of the sovereign immunity issue. DOT simply recognized that litigation should be conducted with a modicum of common sense and logic. DOT is hopeful that respondents are not seriously advocating that form counts more than substance, because that is precisely what respondents' argument suggests.

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Respondents argue that the issue before this court has no public importance. On the contrary, if this court permits non-final review of sovereign immunity decisions, there are significant public ramifications. First, Florida citizens will benefit because taxpayer dollars, which pay for defense of claims against the state, will not be wasted on defending against immune claims. This important argument may be lost on the respondents here because they are not Florida citizens!

Second, the respondents essentially suggest that sovereign immunity is a dead doctrine. The state strongly disagrees, and one need only read the numerous cases in which the doctrine is discussed and debated. See e.g. Department of Health and Rehabilitative Servs. v. B.J.M., 666 So.2d 906 (Fla. 1995) review pending, Case No. 87,071. Only the legislature has the authority to eliminate sovereign immunity, and certainly not the respondents. There is significant public importance to resolving the issue of whether the state must defend suits or can have appellate review of its immunity.

Respondents rely upon Pullman Construction Industries, Inc. v. United States, 23 F.3d 1166 (7th Cir. 1994), and 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. The reliance is misplaced.

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

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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 Pullman immunity claim cannot be determined from the decision. In analyzing the appealability of the order rejecting the immunity claim, the court 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. Pullman, 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 fax removed from the kinds of immunities from the judicial process involved in Metcalf & Eddy, Segni and similar cases.
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> Pullman, 23 F.3d at 1169

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Pullman elucidates the distinctions between the two cases and the two immunities at stake. DOT did not initiate an action against the respondents. Florida's common law sovereign immunity does not consist of an "elaborate system of statutory provisions" permitting some suits and disallowing others. Unlike DOT, the United States has alternatives to the collateral order doctrine to obtain immediate review of its immunity claim. Unlike the government's claim in Pullman, which had no bearing upon the underlying bankruptcy proceeding, DOT's immunity claim goes to the very heart of respondents' 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

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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.
>
> Alaska, 64 F.3d at 1356.

The Pullman and Alaska immunity claims rested upon an assertion that the suits failed to satisfy technical statutory requirements, 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 Pullman and Alaska 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, the government claimed only that it did not want to decide whether to claim the lands. Finally the

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government in each case had an alternate vehicle 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." Alaska, 64 F.3d at 1356. Florida sovereign immunity law in the aftermath of the partial waiver of immunity set forth in section 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, Department of Health and Rehabilitative Services v. Lee, 665 So.2d 304 (Fla. 1st DCA 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. 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 section 768.28, 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.

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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, 1252 n.1 (Fla. 3d DCA 1986). These claims can never be waived.

As to whether common-law sovereign immunity constitutes an immunity from suit, Griesel v. Hamlin, 963 F.2d 338 (11th Cir. 1992), is instructive. In that case the court held that Georgia sovereign immunity law, satisfied 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.

Griesel, 963 F.2d at 340. Contrary to respondents' perception, Florida has not wholesale waived sovereign immunity. Florida has waived sovereign immunity, only to the extent specified in section 768.28. The Florida Constitution continues to provide

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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).

The respondents argue that a state agency should have a "lesser degree" of immunity than an individual. The policy rationale supporting immunity applies to one or many, and the respondents' distinction ignores the very basis of the immunity. Furthermore, whether the sovereign is one or many still requires that someone's attention be diverted from government operation. The burden of responding to the claim still exists and still taxes an overburdened resource.

The respondents raise the time worn "deluge" of appeals argument. Respondents put forth no data or evidence to suggest that the appellate courts would suddenly be inundated with non-final sovereign immunity appeals. To the contrary, the defendant in these claims is a constant -- the state. The deluge argument does not hold water in the absence of any empirical data. Furthermore, the state is obligated to protect its immunity, and should seek non-final review in situations where the immunity would effectively be lost by erroneously allowing a case to go trial. Tucker v. Resha, 648 So.2d 1187, 1189 (Fla. 1994).

Numerous federal and state decisions have permitted interlocutory review of orders determining immunity claims on motions to dismiss. Protection of the immunity is critical because in civil litigation, the law considers the state, or the sovereign, differently than other parties. This court has held

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that Florida's limited waiver of sovereign immunity, pursuant to section 768.28 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 210 (Fla. 1983); Arnold v. Shumpert, 217 So.2d 116 (Fla. 1968). Sovereign immunity claims under Florida unquestionably are premised upon a right not to stand trial. This court should permit non-final review of sovereign immunity order.

II. THE TRIAL COURT ERRED IN DENYING THE DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS BASED ON THE DOCTRINE OF SOVEREIGN IMMUNITY.

The respondents argue that the sovereign immunity argument was not addressed below and is not preserved for review here. First, respondents made no such argument in the Fourth District. Any waiver has been done by the respondents.

Second, the argument has no merit because DOT has raised its immunity, which is the ultimate issue before the court. DOT challenged the amended complaint based on sovereign immunity and continues to make that challenge. The preservation "argument" is a paper tiger.

The trial court denied DOT's sovereign immunity based motion to dismiss even where plaintiffs' complaint contains no factual allegations to remove the immunity cloak from the defendant. The immunity should prevail, where the complaint cannot stand.

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The respondents now attempt to explain what their complaint means in an effort to evade the immunity issue. However, the complaint does not validly allege any operational function facts to explain that this is a maintenance and inspection of guardrail claim. The immunity is not dissolved by alleging the general existence of an operational level type duty and the complaint does not contain facts which indicate what non-immune duty was breached, and must be dismissed.

Reversal is warranted.

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CONCLUSION

Based on the foregoing rationale and authority, the petitioner, State of Florida, Department of Transportation, respectfully requests that this Court overrule the decision of the district court with instructions to reinstate the non-final appeal.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8th day of July, 1996 to: Edward M. Ricci, Esquire, and Theresa Dipaola, Esquire, Ricci, Hubbard & Leopold, P.A., Counsel for Appellees, 1645 Palm Beach Lakes Boulevard, Suite 250, West Palm Beach, Florida 33401; W. Kirk Davenport, Esquire, Tucker, Davenport & Willingham, Counsel for Appellees, P.O. Box 360186, Birmingham, Alabama 35236; and Bruce Flower, Esquire, Counsel for Appellee N.S. Marine, 511 N. Maitland Avenue, Maitland, Florida 32751.

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