

FILED

SID J. WHITE

FEB 18 1993

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

KATIE D. TUCKER,

Petitioner/Defendant,

vs.

CASE NO. 80,991

DONALD GEORGE RESHA,

Respondent/Plaintiff.

BRIEF OF AMICUS CURIAE

ROBERT A. BUTTERWORTH
Attorney General

KATHLEEN E. MOORE
Assistant Attorney General
Florida Bar No. 0750174

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL - PL01
TALLAHASSEE, FL 32399-1050
(904) 488-9935

Attorneys for the State of
Florida

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| Table of Contents | i |
| Table of Citations | ii |
| Statement of the Case and Facts | 1 |
| Summary of the Argument | 3 |
| Argument | 4 |
| A PUBLIC OFFICIAL ASSERTING QUALIFIED IMMUNITY AS A DEFENSE TO A FEDERAL CIVIL RIGHTS CLAIM IS ENTITLED IN THE FLORIDA COURTS TO THE SAME STANDARD OF REVIEW OF DENIAL OF HER MOTION FOR SUMMARY JUDGMENT AS IS AVAILABLE IN THE FEDERAL COURTS. | |
| Conclusion | 18 |
| Certificate of Service | 19 |

TABLE OF CITATIONS

| <u>CASES</u> |PAGE(S) |
|---|--------------|
| <u>Abney v. United States,</u> 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) |9 |
| <u>Alford v. Osei-Kwasi,</u> 418 S.E.2d (Ga.App. 1992) |10 |
| <u>Anderson v. City of Hopkins,</u> 393 N.W.2d 363 (Minn. 1986) |10 |
| <u>Barnhill v. Board of Regents,</u> 479 N.W.2d 917 (Wis. 1992) |10 |
| <u>Boucher v. Pure Oil Co.,</u> 101 So. 2d 408 (Fla. 1st DCA 1957) |10 |
| <u>Brayshaw v. Gelber,</u> 556 A.2d 788 (N.J. Super. A.D. 1989) |10 |
| <u>Breault v. Chairman of Bd. of Fire Comm'ners of Springfield,</u> 401 Mass. 26, 513 N.E.2d 1277, cert. den., 485 U.S. 906, 108 S.Ct. 1078, 99 L.ED.2d 237 (1987) |10 |
| <u>Brooks v. Owens,</u> 97 So. 2d 693 (Fla. 1957) |13 |
| <u>Cohen v. Beneficial Loan Corp.,</u> 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed.2d 1528 (1949) |9 |
| <u>Corum v. University of North Carolina,</u> 389 S.E.2d 596, 97 N.C.App. 527 (Ct. App. 1990) |10 |
| <u>Fann v. Brailey,</u> 841 S.W. 833 (Tenn.App. 1992) |10 |
| <u>Felder v. Casey,</u> 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), quoting <u>Garrett v. Moore-McCormack, Co.,</u> 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed.2d 239 (1942) |10 |
| <u>Harlow v. Fitzgerald,</u> 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) |5 |

| | |
|---|----------|
| <u>Harte v. Palm Beach Biltmore Condominium Ass'n,</u> 436 So. 2d 444 (Fla 4th DCA 1983)..... | 13 |
| <u>Henke v. Superior Court,</u> 161 Ariz. 96, 775 P.2d 1160 (Ct. App. 1989)..... | 10 |
| <u>Howlett v. Rose,</u> 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) | 5-8 |
| <u>Lord v. Murphy,</u> 561 A.2d 1013 (Me. 1989) | 10 |
| <u>Mandico v. Taos Const., Inc.,</u> 605 So. 2d 850 (Fla. 1992) | 11,12 |
| <u>McKnett v. St. Louis & San Francisco R. Co.,</u> 292 U.S. 230, 54 S.Ct. 690 (1934)..... | 6 |
| <u>McLin v. Trimble,</u> 795 P.2d 1035 (Okla. 1990) | 10 |
| <u>Mitchell v. Forsyth,</u> 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) | 5,8,9,15 |
| <u>Murray v. White,</u> 587 A.2d 975 (Vt. 1991) | 10 |
| <u>National Camera, Inc. v. Sanchez,</u> 832 P.2d 960 (Col. Ct. App. 1991)..... | 10 |
| <u>Nixon v. Fitzgerald,</u> 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) | 9 |
| <u>Park County v. Cooney,</u> ___ P.2d ___, 1992 WL 350708 (Wyo.)..... | 10 |
| <u>Richardson v. Chevrefils,</u> 552 A.2d 89 (N.H. 1988) | 10 |
| <u>Tucker v. Resha,</u> 17 F.L.W. D2388 (Fla. 1st DCA, October 12, 1992).. | passim |
| <u>Tucker v. Resha,</u> 18 F.L.W. D189 (Fla. 1st DCA, December 30, 1992)..... | 2 |
| <u>Virden v. Roper,</u> 788 S.E.2d 470 (Ark. 1990) | 10 |

| | |
|--|----------|
| <u>Wyatt v. Cole</u> , U.S. _____, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) | 5,8 |
| <u>Yamaha International Corp. v. Ehrman</u> , 318 So. 2d 196 (Fla. 1st DCA 1975)..... | 15 |
| <u>United States Constitution</u> | |
| Fourteenth Amendment, Section 5..... | 8 |
| <u>United States Code</u> | |
| 28 U.S.C. §1291..... | 8,15 |
| 42 U.S.C. §1983 | 1,6,7 |
| <u>Florida Statutes</u> | |
| Section 120.68, Florida Statutes..... | 16 |
| <u>Other Authorites Cited</u> | |
| Fla.R.A.P. 9.030(b)(3) | 1 |
| Fla.R.A.P. 9.130(a)(3) | 11 |
| Fla.R.A.P. 9.130(a)(3)(C) | 11,12,16 |

STATEMENT OF THE CASE AND FACTS

In February of 1990, Respondent Resha filed a multi-count lawsuit, which included two civil rights claims pursuant to 42 U.S.C. §1983, against Petitioner Tucker in the Leon County Circuit Court. Tucker subsequently filed a motion for summary judgment on the 42 U.S.C. §1983 claims, based on the defense of qualified immunity. The circuit court denied Tucker's summary judgment motion and Tucker petitioned the First District Court of Appeal for review by certiorari pursuant to Fla.R.A.P. 9.030(b)(3).

On October 12, 1992, the First District Court of Appeal issued an order denying Tucker's petition for common law certiorari. The stated basis of the First District Court of Appeal's denial was that the trial court's order did not "violate a clearly established principal of law or otherwise depart from the essential requirements of law resulting in a miscarriage of justice." Tucker v. Resha, 17 F.L.W. D2388 (Fla. 1st DCA, October 12, 1992). While acknowledging that the immunity asserted by Petitioner Tucker could not be effectively or adequately restored by an appeal once it is lost by exposure to trial Id., the District Court held that the applicable state law governing certiorari jurisdiction over non-final orders "affords a much narrower scope of relief than does the established federal appellate mechanism for interlocutory review of

orders denying summary judgment on the issue of qualified immunity." Id.

Petitioner Tucker then moved for rehearing and for certification of the following question as one of great public importance:

IS A PUBLIC OFFICIAL ASSERTING QUALIFIED IMMUNITY AS A DEFENSE TO A FEDERAL CIVIL RIGHTS CLAIM ENTITLED IN THE FLORIDA COURTS TO THE SAME STANDARD OF REVIEW OF DENIAL OF HER MOTION FOR SUMMARY JUDGMENT AS IS AVAILABLE IN THE FEDERAL COURTS?

On December 30, 1992, the First District Court of Appeal denied Tucker's motion for rehearing but granted her motion to certify the question posed above. Tucker v. Resha, 18 F.L.W. D189 (Fla 1st DCA, December 30, 1992) On December 31, 1992, Tucker petitioned to invoke the discretionary jurisdiction of this Court. On January 4, 1993, this Court issued an order postponing decision on jurisdiction and set a briefing schedule.

On January 22, 1993, the Attorney General, on behalf of the State of Florida Department of Insurance, Division of Risk Management, moved for leave to file an amicus curiae brief in support of the State of Florida and all state officials and employees who will be affected by the Court's decision on the certified question. The Attorney General's motion to file an amicus curiae brief was granted on February 12, 1993.

SUMMARY OF THE ARGUMENT

Pursuant to the Supremacy Clause and the federal decisions establishing that public officials have a substantive right to obtain a final appellate determination on the defense of qualified immunity before proceeding to trial, public officials sued in state court must be afforded the same substantive rights and protections as are afforded to public officials sued in federal court. Qualified immunity is an immunity from suit that is irretrievably lost if an immediate appellate review is not provided when a public official's motion for summary judgment on qualified immunity grounds is denied. This Court should amend the Florida Rules of Appellate Procedure to allow an interlocutory appeal of denials of motions for summary judgment based qualified immunity. This rule should also be made applicable to all other governmental immunities, including judicial immunity, prosecutorial immunity and sovereign immunity. Alternatively, this Court should hold that the appropriate vehicle for appellate review of a denial of a governmental immunity defense on summary judgment is petition for common-law certiorari.

ARGUMENT

A PUBLIC OFFICIAL ASSERTING QUALIFIED IMMUNITY AS A DEFENSE TO A FEDERAL CIVIL RIGHTS CLAIM IS ENTITLED IN THE FLORIDA COURTS TO THE SAME STANDARD OF REVIEW OF DENIAL OF HER MOTION FOR SUMMARY JUDGMENT AS IS AVAILABLE IN THE FEDERAL COURTS.

As was previously stated in its motion to file an amicus brief, the State takes no position on whether the District Court's decision was proper under the particular facts of this case.¹ Instead, this brief addresses the broader issue of what standard of review should be applied when a public official's motion for summary judgment based on qualified immunity is denied in state court and the mechanisms available to enforce that standard.

Pursuant to the Supremacy Clause and the federal decisions establishing that public officials have a substantive right to obtain a final appellate determination on the defense of qualified immunity before proceeding to trial, public officials sued in state court must be afforded the same substantive rights and protections as are afforded to public officials sued in federal court. The defense of qualified immunity in the context of 42 U.S.C. §1983 is a creature of federal law. The United States Supreme Court

¹ Indeed, the Division of Risk Management is no longer paying for Tucker's defense and has not done so since June 2, 1992.

has repeatedly and unequivocally held that qualified immunity is an immunity from suit, rather than merely an immunity from liability. Wyatt v. Cole, ___ U.S. ___, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992); Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) Requiring state officials and employees to go to trial without providing them with a final appellate determination on the issue of qualified immunity renders the defense meaningless. Mitchell, supra, at 2815. One of the major purposes underlying the defense of qualified immunity is to protect public officials from being sued for every error in judgment, which would divert their attention from public duties, and thus prevent them from independently exercising their discretion because of fear of damages liability, as well as discouraging qualified persons from seeking public office. Harlow v. Fitzgerald, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982).

THE SUPREMACY CLAUSE

The Supremacy Clause makes the Constitution and the laws passed pursuant to it "the supreme Law of the Land", and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430, 2438, 110 L.Ed.2d 332 (1990). Thus, federal law is enforceable in state courts because it is as much the

law in the states as laws passed by the states' own legislatures. Id. The Supremacy Clause "imposes on state courts a constitutional duty 'to proceed in such a manner that all the substantial rights of the parties under controlling federal law [are] protected'" Felder v. Casey, 487 U.S. 131, 151, 108 S.Ct. 2302, 2314-2315, 101 L.Ed.2d 123, 146 (1988) (quoting Garrett v. Moore-McCormack, Co., 317 U.S. 239, 245, 63 S.Ct. 246, 251, 87 L.Ed.2d 239 (1942)). Further, "the power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the federal constitution." McKnett v. St. Louis & San Francisco R. Co., 292 U.S. 230, 233, 54 S.Ct. 690 (1934). A court of otherwise competent jurisdiction may not avoid its obligations under the Supremacy Clause "by invocation of the term 'jurisdiction.'" Howlett, supra, at 2446.

In Howlett, supra, the plaintiffs filed a 42 U.S.C. §1983 civil rights action in the Circuit Court for Pinellas County, Florida, which the circuit court dismissed on state sovereign immunity grounds. On appeal, the United States Supreme Court rejected the state court's holding that the availability of sovereign immunity in a §1983 suit is a matter of state law and held, pursuant to the Supremacy Clause, that the state court could not apply an immunity which was not provided by §1983. Id. at 2442. The Supreme

Court articulated three corollaries to the principle that "federal" law is part of the law of the land in a state: 1) In the absence of a "valid excuse", a state court "may not deny a federal right, when the parties and controversy are properly before it." 2) "An excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to dissociate themselves from federal law because of a disagreement with its content or a refusal to recognize the superiority of its source." 3) "When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts," the Supreme Court acts with utmost caution before deciding that the state court is obligated to entertain the claim. Id. at 2439-2441.

Because qualified immunity is a federal defense to a federal claim -- 42 U.S.C. §1983 -- the Supremacy Clause mandates that public officials and employees sued in Florida courts be provided immediate appellate review of denials of qualified immunity. In the instant case, the controversy and the parties were properly before the District Court. Further, no valid excuse existed for not applying the federal standard. A refusal to provide public officials with appellate review prior to trial would constitute a refusal to recognize the superiority of federal law on this point. "The fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid

the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." Howlett, supra, at 2445-2446. Finally, a state rule which has the effect of denying a public official the defense of qualified immunity is not neutral because the effect of the rule is the denial of a substantive right. Just as conduct which is wrongful under §1983 cannot be immunized by state rule or law, an immunity to a claim based on §1983 cannot be destroyed by a state rule or law that precludes or limits immediate appellate review.

Title 42 U.S.C. §1983 was enacted by the United States Congress pursuant to Section 5 of the Fourteenth Amendment to the United States Constitution. "The elements of, and the defenses to, a federal cause of action are defined by federal law." Howlett, supra, at 2442. Review of an interlocutory order denying a summary judgment motion based on qualified immunity defense is required as a matter of substantive federal law. Wyatt, supra; Mitchell, supra.

Title 28 U.S.C. §1291 vests the federal courts of appeals with jurisdiction over only those appeals that result from final decisions of the district courts. However, an exception has been carved out for that small class of decisions that "finally determine claims 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 Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed.2d 1528 (1949). Termed the "collateral order" doctrine, it provides a vehicle for appeal of those decisions that can never be reviewed at all if they are not reviewed before the proceedings terminate. Prior to Mitchell, the collateral order doctrine was applied to denial of claims of absolute immunity, Nixon v. Fitzgerald, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), and to denial of a defendant's right not to stand trial on double jeopardy grounds, Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). In both of these instances, the right asserted cannot be effectively vindicated after the trial has occurred. Mitchell, supra, at 2815.

In Mitchell, the United States Supreme Court held that a denial of summary judgment based on qualified immunity conclusively determines the defendant's claim of the right not to stand trial and is thus immediately appealable. Mitchell, supra, at 2816. In the context of a qualified immunity claim, the "collateral order" doctrine is not merely a federal procedural mechanism to obtain appellate review of interlocutory orders but is a necessary substantive protection of a public official's right not to stand trial under certain circumstances.

The majority of the foreign jurisdictions that have addressed this issue have determined for a variety of reasons that denial of a motion for summary judgment based on qualified immunity is immediately reviewable. Viriden v. Roper, 788 S.E.2d 470 (Ark. 1990); Henke v. Superior Court, 161 Ariz. 96, 775 P.2d 1160 (Ct. App. 1989); National Camera, Inc. v. Sanchez, 832 P.2d 960 (Col. Ct. App. 1991); Alford v. Osei-Kwasi, 418 S.E.2d (Ga.App. 1992); Breault v. Chairman of Bd. of Fire Comm'ns of Springfield, 401 Mass. 26, 513 N.E.2d 1277, cert. den., 485 U.S. 906, 108 S.Ct. 1078, 99 L.ED.2d 237 (1987); Lord v. Murphy, 561 A.2d 1013 (Me. 1989); McGovern v. City of Minneapolis, 475 N.W.2d 71 (Minn. 1991); Anderson v. City of Hopkins, 393 N.W.2d 363 (Minn. 1986); Richardson v. Chevrefils, 552 A.2d 89 (N.H. 1988); Corum v. University of North Carolina, 389 S.E.2d 596, 97 N.C.App. 527 (Ct. App. 1990); Brayshaw v. Gelber, 556 A.2d 788 (N.J. Super. A.D. 1989); McLin v. Trimble, 795 P.2d 1035 (Okl. 1990); Fann v. Brailey, 841 S.W. 833 (Tenn.App. 1992); Murray v. White, 587 A.2d 975 (Vt. 1991); Barnhill v. Board of Regents, 479 N.W.2d 917 (Wis. 1992); Park County v. Cooney, ___ P.2d ___, 1992 WL 350708 (Wyo.).

REVIEW OF DENIALS OF MOTIONS FOR SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY IN THE COURTS OF FLORIDA

As mentioned previously, the State of Florida is not before this Court to address the specifics of Tucker's

claimed qualified immunity defense. However, the State is vitally interested in ensuring that there exists a meaningful state court vehicle for review of denials of qualified immunity and that the federal standard of review applies to such reviews. While common-law certiorari may already provide such a vehicle, the State respectfully suggests that amendment of Florida Rule of Appellate Procedure 9.130(a)(3)(C) would provide a more effective and consistent means of review.

This Court recently fashioned such a vehicle regarding workers' compensation immunity in Mandico v. Taos Const., Inc., 605 So. 2d 850 (Fla. 1992). Although not involving a federal substantive right, Mandico raised the issue of the appealability of an interlocutory order denying a defendant's motion for summary judgment based on workers' compensation immunity. The question certified in Mandico inquired whether such a denial could be reviewed by a writ of prohibition. Id. at 851. This Court responded in the negative, but amended Fla. R.App.P. 9.130(a)(3) to allow appellate review of non-final orders determining that a party is not entitled to workers' compensation immunity as a matter of law. Id. at 854-855. The stated basis for the amendment to the appellate rules was this Court's sensitivity "to the concern for an early resolution of controlling issues." Id. at 854.

Just as the issue of workers' compensation immunity is controlling in lawsuits brought against employers, qualified immunity is a controlling issue in lawsuits brought against public officials. In fact, this is true not only for qualified immunity, but for all of the various governmental immunities that can be claimed by public officials and employees, including judicial immunity, prosecutorial immunity and sovereign immunity. A determination that any of these immunities apply obviates the need for trial and ensures an early resolution of the lawsuit. On the basis of Mandico, supra, this Court should fashion a similar amendment to Fla.R.A.P. 9.130(a)(3)(C), which would permit appeals of non-final orders determining that a party is not entitled to a governmental immunity. This amendment should apply to all of the governmental immunities; qualified immunity, judicial immunity, prosecutorial immunity and sovereign immunity. By addressing all of the immunities in the amended rule, this Court will avoid the piecemeal amendments to the rule that would be sure to occur otherwise and will ensure that the various public officials and employees of the State of Florida are treated equitably and consistently.²

² Alternatively, the Court could refer this matter to the Appellate Rules Committee of the Florida Bar for expedited consideration.

REVIEW UNDER COMMON-LAW CERTIORARI

The District Court determined that the appropriate vehicle for review of a denial of the defense of qualified immunity on summary judgment is by petition for common law certiorari. In order to obtain review by common-law certiorari, two prerequisites must be met. 1) The petitioner must establish that a full and adequate remedy by appeal after judgment is unavailable, and 2) that the challenged order departs from the essential requirements of law such that it will cause material injury to the petitioner throughout the subsequent proceedings below. Brooks v. Owens, 97 So. 2d 693, 695 (Fla. 1957); Harte v. Palm Beach Biltmore Condominium Ass'n, 436 So. 2d 444, 445 (Fla 4th DCA 1983); Boucher v. Pure Oil Co., 101 So. 2d 408, 410 (Fla. 1st DCA 1957). The District Court acknowledged that Tucker fulfilled the first requirement because "Tucker's claim of qualified immunity from suit involves a type of protection that cannot be effectively or adequately restored by appeal, once it is lost by exposure to trial." Tucker, supra, at 2388. Nonetheless, the District Court found that Tucker did not meet the second prerequisite, in large part because of the District Court's holding that common-law certiorari affords a much narrower scope of relief than does the standard of review applied by federal courts. Id.

The language of the District Court's decision denying certiorari and the wording of the certified question indicate that the district court perceived that there exists both a federal standard of review and a state standard of review and that these two standards are distinguishable. The District Court contrasted the federal entitlement to interlocutory review of non-final orders denying summary judgment based on qualified immunity with the "much narrower scope of relief" afforded by the applicable Florida laws governing certiorari jurisdiction over non-final orders. The District Court declined to exercise its jurisdiction over Tucker's petition for writ of certiorari because under this "much narrower scope of relief", the challenged order did not violate a clearly established principal of law or otherwise depart from the essential requirements of law resulting in a miscarriage of justice. Id.

The District Court stated that it declined the opportunity, in the absence of an analogous Florida rule of appellate procedure, "to apply the federal procedure affording interlocutory review of the non-final order merely because a qualified immunity claim is involved". Id. at 2389. The District Court further stated that the governing appellate rules "do not afford the type of relief provided in the federal courts pursuant to federal procedural rules." Id. Specifically regarding Petitioner Tucker's petition for writ of certiorari, the District Court stated:

Although the common-law writ of certiorari is 'essentially a writ of review,' see Haddad at 207, we emphasize that the scope of our review here is discretionary and very limited, compared to that of appellate review. See Combs, 436 So. 2d 95-96. Because common-law certiorari is in no sense a substitute for an appeal, we note that the present denial of the petition is not necessarily indicative of how we would dispose of the matter were it to be appealed from judgment. (Citation omitted).

Id., at 2391.

As mentioned previously, the United States Supreme Court's holding that the denial of qualified immunity is an appealable final decision is not merely based on an expanded construction of what constitutes a "final" order under 28 U.S.C. §1291, but also stems from the Supreme Court's determination that the defense of qualified immunity is a substantive right "not to stand trial" that is irretrievably lost if appellate review is not allowed prior to trial. Mitchell, supra, at 2815. The District Court incorrectly characterized the right to a final determination of qualified immunity before trial as a mere federal procedural mechanism or entitlement rather than a substantive right.

The First District Court's determination in Yamaha International Corp. v. Ehrman, 318 So. 2d 196 (Fla. 1st DCA 1975) is applicable to this situation. In 1974, the Legislature instituted major revisions to the Administrative Procedures Act. While the 1974 amendments clearly provided for administrative orders to be reviewed by the

district courts, there were no applicable appellate rules in place to effectuate the right of appeal. The First District determined that in the absence of appellate rules governing petitions for review of administrative orders, the appropriate rules for review of administrative orders were those rules governing certiorari, "as amplified" by the requirements of Section 120.68, Florida Statutes. Id. at 197. Similarly, review of denials of qualified immunity on summary judgment should be governed by the rules applicable to common law certiorari, amplified by the applicable federal law, should this Court reject the suggestion to amend Fla.R.A.P. 9.130(a)(3)(C). As an alternative to amending the appellate rules to allow an interlocutory appeal, requiring that the applicable federal law on qualified immunity be applied to petitions for certiorari would ensure that a public official sued in state court would have the opportunity to obtain a final appellate determination of his or her qualified immunity defense prior to trial.

The District Court's opinion included a discussion of some of the applicable federal law on qualified immunity in holding that the circuit court's denial of Tucker's motion for summary judgment did not depart from the essential requirements of law. It appears that the "essential requirements of law" analyzed by the District Court were gleaned from the body of federal case law

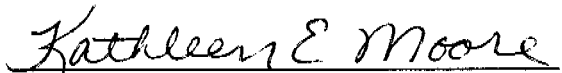
addressing qualified immunity. However, it is not clear whether the standard of review applied by the District Court on that issue rose to the level of the standard of review that would be applied by a federal appellate court. This Court may determine, upon review of the District Court's analysis, that the District Court applied a standard of review equivalent to the standard that would be applied by a federal court or it may remand to the District Court for application of the federal standard.

CONCLUSION

The Supremacy Clause and federal case authority construing qualified immunity establish that officials and employees of the State of Florida have a federal right to obtain a final appellate determination on the defense of qualified immunity prior to trial and thus should be afforded the same standard of appellate review in state court as is afforded by the federal courts. This Court should answer the certified question in the affirmative and amend the Rules of Appellate Procedure to allow an immediate appeal of a denial of a motion for summary judgment based on any governmental immunity, including qualified immunity. Alternatively, the Court should hold that petition for writ of common law certiorari is the appropriate appellate vehicle for public officials to obtain appellate review of a denial of the defense of qualified immunity as long as a federal standard of review is applied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL


KATHLEEN E. MOORE
Assistant Attorney General
Fla. Bar No. 0750174
DEPARTMENT OF LEGAL AFFAIRS
The Capitol, PL01
Tallahassee, FL 32399-1050
(904) 488-9935