IN THE SUPREME COURT OF FLORIDA

KATIE D. TUCKER,

Petitioner/Defendant,

vs. CASE NO. 80,991

DONALD GEORGE RESHA,

Respondent/Plaintiff.

_____/

REVIEW OF A CERTIFIED QUESTION OF THE FIRST DISTRICT COURT OF APPEAL

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER BY FLORIDA SHERIFFS' SELF-INSURANCE FUND

BARBARA C. FROMM
Florida Bar Number 894273
LEONARD J. DIETZEN, III
Florida Bar Number 840912
JENNIFER PARKER LaVIA
Florida Bar Number 699608
PARKER, SKELDING, LABASKY & CORRY
Post Office Box 669
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Florida Sheriffs' Self-Insurance Fund

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PRELIMINARY STATEMENT

The Florida Sheriffs' Self-Insurance Fund (The Fund) has petitioned this Court to file a brief of amicus curiae in support of the Petitioner. The Fund will not argue the specific facts and merits of the decision by the trial court and the district court of appeal in the case at bar, because The Fund will be solely dealing with the certified question and its legal and public policy ramifications.

STATEMENT OF THE CASE

The Fund adopts the statement of the case as set forth in Petitioner's brief on the merits.

STATEMENT OF THE FACTS

The Fund adopts the statement of the facts as set forth in Petitioner's brief on the merits.

SUMMARY OF THE ARGUMENT

When a 42 U.S.C. § 1983 defendant raises the defense of qualified immunity in state court, that person should be entitled to the same rights and the same standards of appellate review as they would be entitled to if the plaintiff had brought the action in federal court. A public official may raise the defense of qualified immunity to a claimed civil rights violation. When the official raises the defense, they are raising a substantive right; the right to be free from the burden and expense of exposing

themselves to trial. Moreover, federal courts have recognized a defendant's right to take an immediate appeal from a trial court's denial of their motion for summary judgment based on a claim of qualified immunity since the claim of qualified immunity is effectively lost if the case is allowed to proceed to trial.

Florida courts, if the opinion below is allowed to stand, will take precisely the opposite position. Immediate appeals as of right will not be allowed, the defendant's substantive right to be immune from trial will be lost, and the defendant will be forced to use the only remaining procedural mechanism available, the common law writ of certiorari. When placed in this position, defendants will find themselves at a procedural disadvantage; forced on them by the plaintiff's choice of forums. Such outcome determinative state policies and procedures are not allowed under the basic principles of federalism and the supremacy clause of the United States Constitution.

The decision of the lower court is one of far-reaching great public importance. State officials at all levels will be forced to remove §1983 causes to federal court to protect their right to an immediate appeal following a denial of summary judgment. If defendants remove the case to protect their substantive rights, plaintiffs will suffer an extraordinary delay in obtaining an adjudication of their claims.

The lower court overlooked Florida case law granting an immediate appeal avenue when distinct claims, severable from the remaining issues in the case, are decided. Additionally, the

potential additional appeal avenue as an appeal from a partial final judgment was apparently not considered. These Florida immediate appeal methods are entirely consistent with the federal case law governing immediate appeals. For these reasons, the decision of the lower court should be quashed.

ARGUMENT

THE DEFENSE OF QUALIFIED IMMUNITY IS A SUBSTANTIVE RIGHT GRANTED UNDER FEDERAL LAW; A PUBLIC OFFICER SHOULD BE ENTITLED TO THE SAME STANDARD OF REVIEW IN BOTH STATE AND FEDERAL COURT WHEN A MOTION FOR SUMMARY JUDGMENT CLAIMING QUALIFIED IMMUNITY IS DENIED.

The certified question is of tremendous importance to The Fund, its member Sheriffs and their deputies. The Florida Sheriffs and their deputies are repeatedly subjected to federal civil rights claims in both state and federal courts.

Before addressing the specifics of the standard of review of denial of petitioner's motion for summary judgment, a review of the applicable federal case law granting the federal substantive right of immediate appeal when a defense of qualified immunity is denied is in order.

A. History of Qualified Immunity

Each year hundreds of cases are filed in state and federal courts under 42 U.S.C. § 1983 alleging violations of citizens constitutional rights.[1] State courts have concurrent jurisdiction

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[1]These suits are authorized by federal law which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory

to hear suits under this section. Howlett v. Rose, ____ U.S. _____, 110 S. Ct. 2430, 2444, 110 L. Ed. 2d 332, ____ (1990). Although the statute does not include any immunities, the general approach of the United States Supreme Court regarding the question of immunities under §1983 has been to read the statute "in harmony with general principles of tort immunities and defenses rather than in derogation of them." Imbler v. Pactman, 424 U.S. 409, 418 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976). Thus, the "initial inquiry is whether an official claiming immunity under §1983 can point to a common law counterpart to the privilege he asserts. Malley v. Briggs, 475 U.S. 335, 339-340, 106 S. Ct. 1092, 1093, 89 L. Ed. 2d 271, 277 (1986) (citing Tower v. Glover, 467 U.S. 914, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984)). If an official was entitled to immunity from tort liability at the time that §1983 was enacted, then the court's next step is to determine whether the immunity is consistent with the purpose and history of §1983.

Accordingly, the Supreme Court allowing for qualified immunity against liability has held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly

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> or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suite in equity, or other proper proceedings for redress.

42 U.S.C. § 1983.

established law of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, _____, 73 L. Ed. 2d 396, 410 (1982).[2] Of particular interest to amicus curiae Florida Sheriffs' Self-Insurance Fund are decisions of the United States Supreme Court holding that police officers sued under §1983 are entitled to qualified immunity, Pierson v. Ray, 386 U.S. 547, 557, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967), that an officer whose request for a warrant allegedly causes an unconstitutional arrest is entitled to qualified immunity unless "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable," Malley, 475 U.S. at 345, and that officers conducting allegedly unconstitutional warrantless searches are entitled to qualified immunity if "a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." Anderson v. Creighton, 483 U.S.

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[2]The Supreme Court noted that Harlow did not involve a claim under § 1983 but stated that the Court had "found previously, however, that it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.'" 457 U.S. at 818 n. 30 (quoting Butz v. Economou, 438 U.S. 478, 504, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)).

635, 641, 107 S. Ct. 3034, ____, 97 L. Ed. 2d 523, 532 (1987).[3] Qualified immunity "is intended to balance society's interest in providing a remedy for injured victims and discouraging unlawful conduct against the interest in enabling public officials to act independently and without fear of consequences." Waldrop v. Evans, 871 F.2d 1030, 1033 (11th Cir. 1989). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. at 341, 106 S. Ct. at 1093, 89 L. Ed. 2d at 278 (1986). "Eligibility for this immunity is determined on an objective basis and not on the basis of the officer's subjective beliefs. The immunity standard is designed to encourage summary disposition of immunity issues and to prevent public officials from having to defend against insubstantial claims." Acoff v. Abston, 762 F.2d 1543, 1549 (11th Cir. 1985).

The defense of qualified immunity is an interesting one because it provides that even if government officials did in fact violate a plaintiff's constitutional rights, they are not liable unless their actions violated clearly established law of which a reasonable officer would have been aware. Thus, even if a court determines after the fact that the officers' actions were unconstitutional, the officers may be entitled to qualified

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[3]The Eleventh Circuit has applied Anderson to hold that an officer who makes an allegedly unconstitutional arrest is protected by qualified immunity if a reasonable officer in the same circumstances and possessing the same knowledge could have believed that probable cause existed. Von Stein v. Brescher, 904 F.2d 572, 579 (11th Cir. 1990).

immunity nevertheless so long as the law was not clearly established at the time they acted.

The burden of proof is on the plaintiff to prove the existence of clearly established law. To defeat a defendant's claim of qualified immunity a plaintiff "must prove the existence of a clear, factually-defined, well-recognized right of which a reasonable police officer should have known." Barts v. Joyner, 865 F.2d 1187, 1190 (11th Cir. 1989). When the plaintiff cannot meet this burden, summary judgment for the defendants is appropriate.

The issue of qualified immunity is properly decided on a motion for summary judgment where the facts upon which the claim is made are not in dispute. Qualified immunity is a question of law generally resolved by the court upon the appropriate motion offered prior to trial. The mere fact that the parties may make factual showings which create factual issues does not preclude summary judgment "if the legal norms allegedly violated were not clearly established at the time of the challenged action." Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir. 1988). The pertinent question is not whether factual issues are presented but whether there exists "a triable conflict on facts material to defendant's defense." DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 719 (10th Cir. 1988).

Being a question of law, qualified immunity will rarely present a question for resolution by a jury. Rich, 841 F.2d at 1561. The status of the law on the particular date and whether

that law was clearly established simply is not a question appropriately resolved by a jury. Alvardo v. Picur, 859 F.2d 448, 451 (7th Cir. 1988). Instead, the court must determine whether the actions of the Defendants were reasonable when assessed in light of legal rules that were clearly established on the dates in question. Id.

The United States Supreme Court in Harlow, in fact, abolished the previously required subjective portion of the qualified immunity test in order to facilitate the resolution of qualified immunity defenses on motions for summary judgment. The Court recognized the need for early disposition of unmerited claims for civil rights violations, noting that "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty." Harlow, 457 U.S. at 814, 102 S. Ct. at _____, 73 L. Ed. 2d at 408. The Court then discussed the social costs of allowing meritless claims to proceed, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" as well as "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.'" Id. (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950)). In abolishing the subjective component of the qualified immunity test, the Court noted, "The subjective element of the good-faith defense frequently has proved incompatible with

our admonition in Butz that insubstantial claims should not proceed to trial" because "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." Id. at 815-16.

Immunity from trial is necessary because of the costs of subjecting officials to the risk of trial: "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." Id. "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." Id. at 818. So important is the immunity claim that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." Id.

This immunity from trial is of no small consequence. A graphic illustration of the importance of the availability of qualified immunity as an immunity from trial occurred in federal court in Bailey v. Board of County Commissioners, 956 F.2d 1112 (11th Cir. 1990). In Bailey, Alachua County Deputy Sheriff Farnell Cole was among the defendants sued under §1983 for allegedly violating the plaintiff's constitutional rights by arresting him without probable cause. Id. at 1115-18. Before trial the deputy was granted summary judgment on the basis of qualified immunity. Id. at 1118. The remaining Defendants, including Alachua County Sheriff L. J. "Lu" Hindery, who were not granted summary judgment,

then proceeded to trial. The jury trial lasted five weeks. At the end of the trial the court determined that probable cause existed for the arrest and granted directed verdict for many of the defendants, including Sheriff Hindery. The Eleventh Circuit Court of Appeals agreed with the trial court's finding of probable cause and affirmed the summary judgment for Cole and the directed verdict for Hindery. Id. at 1121.

The Bailey case is just one example of the monumental waste of governmental resources that can result from the denial of a motion for summary judgment based on qualified immunity. Although in that particular case Deputy Cole was granted qualified immunity and spared the ordeal of a five week jury trial, if the trial court had incorrectly denied the motion for summary judgment and that ruling could not be immediately appealed, the deputy would have spent five weeks in a federal courtroom instead of doing the job for which he was hired, protecting the citizens of Alachua County. Law enforcement officers are needed on the streets, not in the courtrooms. Fortunately for Cole and for the citizens, the case was in federal court, so even if the trial court had mistakenly denied the motion for summary judgment, Cole could have filed an immediate appeal. If such an error had occurred in a Florida state court under the ruling of the lower court herein, Cole would have had no other option but to endure the entire five week trial and

wait until the conclusion to have the error remedied on appeal.[4] And, of course, the error could never be fully remedied once the trial had occurred because the right not to stand trial is lost forever once a defendant has erroneously been made to stand trial. Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, _____, 86 L. Ed. 2d 411, 425 (1985). On the other hand, if the decision of the lower court in this case is allowed to stand, both plaintiffs and defendants will see their rights infringed. Section 1983 defendants facing a claim in state court will be forced to remove the case to federal court to protect their right to an immediate appeal if their motion for summary judgment is denied. See 28 U.S.C. § 1441(a); Routh v. City of Parkville, Mo., 580 F. Supp. 876, 877 (W.D. Mo. 1984); (citing cases); Spencer v. So. Florida Water Management District, 657 F. Supp. 66, 67 (S.D. Fla. 1987). Given the current heavy burden placed on federal courts by drug cases, plaintiffs will suffer an extraordinary delay in obtaining an adjudication of their claims. Such a result is unnecessary under a close reading of current Florida appellate procedures and case law.

Another example where this issue recently arose was in Matthews v. Baden, No. 92-02755 (Fla. 2d DCA December 16, 1992). Sheriff Charles B. Wells of Manatee County and many of his deputies were sued in state court. Plaintiff Matthews brought his civil

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[4]Filing a writ of common law certiorari offers such a limited scope of review, it in effect is no relief at all. See Tucker v. Resha, 17 FLW 2388, 2389-2390 (Fla. 1st DCA, October 12, 1992).

rights complaint pursuant to 42 U.S.C. § 1983 plus state pendant claims alleging false arrest and trespass. The trial court denied the defendant deputies' motion for summary judgment based upon qualified immunity, thus prompting the defendants to seek an immediate appeal in the Second District Court of Appeal.[5] On jurisdictional grounds, the Second District Court of Appeal, relying on this recently decided case in Tucker dismissed appellants appeal. The Second District Court of Appeal declined to certify a very similar question to the one in the case at bar

[5]In Matthews, because the defendants recognized the narrow scope of review available in appealing a denial of summary judgment motion via a common law writ of certiorari, Tucker v. Resha, 17 FLW 2388, 2389 (Fla. 1st DCA October 12, 1992), the defendants chose not to appeal via certiorari. Instead, the defendants framed their appeal as an appeal from a "final decision" since the denial of summary judgment "finally determines" a substantive right, the right not to stand trial on the plaintiff's allegations. The defendants offered two separate bases for taking an immediate appeal under existing Florida appellate procedure: (1) as an appeal from a partial final judgment under Rule 9.110(k), Fla. R. App. P.; or (2) as an appeal from a final order of a trial court under Rule 9.030(b)(1)(A), Fla. R. App. P. The Second District Court of Appeal dismissed the appeal in Matthews without opinion on December 16, 1992.

as one of great public importance.[6] Thus, the net result of Tucker is that the defendant law enforcement officers in Matthews will be compelled to attend a five day jury trial instead of having a legal issue determined prior to trial which could completely eliminate the necessity of appearing for and attending the trial. Amicus Florida Sheriffs' Self-Insurance Fund respectfully suggests that the First District Court of Appeal erred in stating "Florida appellate rules . . . do not afford the type of relief provided in the federal courts pursuant to federal procedural rules." Tucker, 17 FLW at 2389. As shown above, the present Florida appellate rules already provide two different potential immediate appeal mechanisms to civil rights defendants. The availability of these potential appeals as a matter of right is not, however, readily apparent. Moreover, these alternative procedural appeal mechanisms were apparently not briefed or considered by the First District because the Appellant chose to file a common law writ of certiorari. Tucker, therefore, should not be considered as binding

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[6]After the Matthews appeal was dismissed, the defendants filed a motion to certify the following question as being one of great public importance:

> Whether a trial court's order on a federal civil right claim denying a motion for summary judgment based upon a claim of qualified immunity may be immediately appealed [as of right] to the District Courts of Appeal either as: (1) an appeal from a partial final judgment under Rule 9.110(k); or (2) as an interlocutory appeal of a controlling issue under Rule 9.130(a)(3)?

precedent on these unmentioned points of law. 13 Fla. Jur 2d Courts and Judges § 146 (1979).

The immunity from suit provisions offered by the relevant federal case law is not just a "procedural mechanism." Immediate appeal of a denial of a defendant's summary judgment motion claiming qualified immunity is a substantive due process right, the right to appeal a trial court's decision denying qualified immunity before being exposed to a trial on the merits. See, Mitchell.

It is important to note that allowing interlocutory appeals will not harm a plaintiff's rights, their rights will be fully protected if they have a meritorious claim. If a plaintiff is in fact entitled to recover damages for a civil rights violation and the official is not entitled to qualified immunity, then the trial court's decision denying qualified immunity will be affirmed on appeal, and the case may proceed to trial, having made just a brief detour to the appellate court. Thus, the rights of both plaintiffs and defendants will have been protected.

Of course, denial of summary judgment on qualified immunity grounds does not necessarily mean that the official will not be entitled to qualified immunity on a motion for directed verdict. Summary judgment may be denied because of disputed issues of material fact. At trial if those issues are resolved in favor of the defendant, qualified immunity may be appropriate.

However, in the Eleventh Circuit, the rule may be that if the issue is not resolved at pretrial, it is lost forever. The Court has erroneously held that if the qualified immunity issue is not

decided before trial, it cannot even be raised at trial. Ansley v. Heinrich, 925 F.2d 1339 (11th Cir. 1990). This erroneous holding is based on an unfortunate misreading of Mitchell v. Forsyth.

In Ansley, the Eleventh Circuit stated: "Qualified immunity is an affirmative defense from trial and not a defense to liability issues raised during trial. Id. at _____ (citing Mitchell, 472 U.S. at 526). The referenced page from Mitchell, however, contains the following statement: "The entitlement is an immunity from suit rather than a mere defense to liability." Mitchell, 472 U.S. at 526. The Eleventh Circuit apparently overlooked the work "mere" and concluded that qualified immunity is not a defense to liability but just a defense to the burden of trial. A correct reading of Mitchell reveals that qualified immunity is an immunity from suit as well as, not instead of, an immunity from liability.

Nevertheless, if the rule in Ansley is in fact adhered to, then the need for interlocutory review is even more critical because not only will immunity from trial be lost, immunity from liability will also be lost where the issue is not decided before trial.

What will be the effect of a ruling that in Florida state courts a defendant may not file an interlocutory appeal of a denial of a motion for summary judgment based on qualified immunity? One possible result would be that the state courts will be flooded by lawsuits because plaintiffs will know that they can exert additional pressure against a defendant who will be faced with the

threat of a possibly lengthy and almost certainly expensive trial, even if entitled to the defense of qualified immunity. Some plaintiffs acting with improper motives will file in state court to harass or intimidate defendants. This is not to say by any means that all or even most plaintiffs have improper motives when filing §1983 lawsuits. However, government officials need protection from those who do.

As noted previously, defendants in a §1983 action will be forced to remove their case to federal court to protect their rights to an immediate appeal. Thus, even more judicial resources will be wasted because more plaintiffs will file in state court and then all those cases will be removed to federal court. In addition to the inherent delays because of removal, the result is simply an additional step in every civil rights case filed.

Additionally, the failure to treat similarly situated defendants in state court equally with defendants in federal court would frequently and predictably produce different outcomes in §1983 litigation based solely on whether that litigation took place in state or federal courts. The United States Supreme Court has prohibited state courts from applying outcome-determinative state policies in 42 U.S.C. § 1983 actions. Felder v. Casey, 487 U.S. 131 (1988).

To allow an immediate appeal of a denial of qualified immunity would not be as novel as the lower court portrays. Moreover, this Court has shown a willingness to amend the Appellate Rules of Procedure in similar situations. In Mandico v. Taos Construction,

Inc., 605 So. 2d 850 (Fla. 1992), this Court recently recognized another exception to the general rule that appeals do not lie until after a final judgment disposing of an entire case. Mandico was procedurally identical to the instant case in that the defendant claimed a complete immunity from suit as a matter of law and no apparent procedural path existed to take an immediate appeal. In deciding the certified question presented, this Court restated its "concern for an early resolution of controlling issues" and crafted an additional procedural entitlement to allow defendants a procedural mechanism to present an immediate appeal when their claim of complete immunity from suit in a workers' compensation case is denied. Mandico, 605 So. 2d at 854-855. Qualified immunity is just such a controlling issue because if the case is allowed to proceed to trial without the special controlling question of qualified immunity being finally decided, the right of immunity is effectively lost. Mitchell, 472 U.S. at 526. If this Court, in the case at bar, should answer the certified question in the affirmative, an additional procedural entitlement to allow defendants to appeal could be created as this Court did in Mandico without significantly disrupting current litigation.

B. Standard of Review

The Petitioner below petitioned for writ of common law certiorari for review of the trial court's order denying her motion for summary judgment. Because of a perceived lack of appellate avenues under the Florida Rules of Appellate Procedure, the petitioner sought to impose the "limited and discretionary

jurisdiction" of the district court to review what was characterized as a "non-final order," Tucker, 17 FLW at 2388. In so doing the petitioner was not exercising an appeal privilege as of right. And as the First District recognized, "the applicable Florida laws governing certiorari jurisdiction over non-final orders afford a much narrower scope of relief." Id. In fact, the Tucker court itself recognized that proceeding under common law writ of certiorari provides little, if any, relief when compared to an appeal of right from a final judgment. In concluding its opinion, the 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 at 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 a matter were it to be appealed from judgment.

(Citations omitted; emphasis added). Thus, the court in Tucker hinted at what in fact is The Fund's position; that restricting the standard of review from that which a public official is entitled to in federal court will lead to a different outcome by the plaintiff's simple choice of forum. Such forum shopping will be a necessary result if this certified question is answered in the negative.

A plaintiff's choice of forums should not be allowed to decide the outcome of a case. Outcome determinative state statutes and rules of procedure are prohibited under the principles of

federalism and the supremacy clause of the United States Constitution if they "frequently and predictably produce different outcomes in §1983 litigation based solely on whether the claim is asserted in state or federal court." Felder v. Casey, 487 U.S. 131, 138, 108 S. Ct. 2302, ____, 101 L. Ed. 2d 123, 138 (1988); U.S. Const. art. VI, cl. 2. In Felder, the Wisconsin Supreme Court's attempt to uphold a state statute imposing conditions on bringing a §1983 action in state court was reversed. "Where state courts entertain a federally created cause of action, the federal right cannot be defeated by the forms of local practice." Id. at 487 U.S. 138, 108 S. Ct. ____, 101 L. Ed. 2d at 137 (quoting Brown v. Western R. Co. of Alabama, 338 U.S. 294, 296, 70 S. Ct. 105, 94 L. Ed. 100 (1949)). And, even though a state may establish its own rules of procedure for its courts, "that authority does not extend so far as to permit courts to place conditions on the vindication of a federal right." Id. 487 U.S. at 147, 108 S. Ct. at ____, 101 L. Ed. at 143. The federal right sought to be protected here is a substantive right; the defendant's right to be free from the burden of trial. It is not merely a "federal procedural rule" as the First District would characterize it. Tucker, 17 FLW at 2389. Thus, the Florida Rules of Appellate Procedure should be interpreted so that defendants will have the same rights and the same standard of review regardless of whether the action is brought in federal or state courts.

One important distinction between the limited standard of review provided by Florida courts under common law certiorari and

that which is available in federal courts is that the review by common law certiorari is discretionary. See Scholastic Systems, Inc. v. Lee Loup, 307 So. 2d 166 (Fla. 1974). In fact, a district court may refuse to grant a petition for common law certiorari even though there may have been a departure from the essential requirements of law. Combs v. State, 463 So. 2d 93, 96 (Fla. 1983).

It is The Fund's position here that the trial court's decision denying the Petitioner's motion for summary judgment is a final order, at least, and to the particular extent of the substantive right recognized under federal law to be completely immune from suit when a public official asserts qualified immunity. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). As a final order disposing of a separate distinct right, it should be immediately appealable under Rule 9.030(b)(1)(A).

It is true, in most instances, that an order denying summary judgment is usually only an interlocutory or a non-final order and, thus, is not subject to appellate review. Fla. R. App. P. 9.130(a) and 9.030(b)(1)(B); Vanco Construction, Inc. v. Nucor Corp., 378 So. 2d 116 (Fla. 5th DCA 1980); Tucker, 17 FLW at 2389. The collateral order exception to the final judgment rule, however, recognizes some decisions are final and appealable as a "final decision," and those final decisions and orders do not necessarily mean the "last order possible to be made in a case." Mitchell, 472 U.S. at 524 (quoting Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152 (1964)). These decisions, appealable prior to final judgment

in a case, must "fall 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 jurisdiction be deferred until the whole case is adjudicated." Mitchell, 472 U.S. at 524-525, 105 S. Ct. at _____, 86 L. Ed. 2d at 424 (quoting Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949)). It is the federal substantive case law of Mitchell, Gillespie, and Cohen which makes an appeal of a denial of summary judgment immediately appealable because it is a final decision governing a claimed substantive right, the right to be immune from trial. Describing such an appeal as an interlocutory appeal or an appeal from a "non-final order" as the Court below did in Tucker, mischaracterizes the nature of the right claimed. The order appealed from finally determines the defendant's rights because the defendants will lose their right to be immune from suit if the case proceeds to trial. Mitchell, Tucker. A denial of a defendant's motion for summary judgment should not be considered an interlocutory decision or order at all because it "finally determines" a substantive right. S. Steinglass, Section 1983 Litigation in State Courts § 8.11(6)(1) at 8-25 n.94.1 (1992). Since it "finally determines" the right to be free from trial, it is actually a "final decision." Id.

Florida case law is in agreement with federal law that appellate courts may review certain final decisions of lower courts and such review power should be invoked, on certain limited bases,

prior to final judgment being rendered which finally disposes of the entire case. Cohen, 337 U.S. at 546; 28 U.S.C. § 1291. See Mendez v. West Flager Family Ass'n, Inc., 303 So. 2d 1, 5 (Fla. 1974).

Thus, Florida courts are not as restrictive as a first reading of Tucker would indicate. The courts do not completely bar immediate appeals from some final orders or decisions even though a final judgment has not yet been entered in the case. Mendez, 303 So. 2d at 5. Furthermore, "partial final judgments are reviewable either on appeal from the partial final judgment or on an appeal from the final judgment in the entire case." Fla. R. App. P. 9.110(k) (emphasis added). Case law designates other exceptions to the general rule in Florida courts. "Generally, to be appealable as final, an order or decree must dispose of all the issues or causes in the case, but this general rule is relaxed where the judgment, order or decree adjudicates a distinct and severable cause of action [claim], not interrelated with remaining claims pending in the trial court." S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97, 99 (Fla. 1974). Other examples of immediately appealable final orders include orders granting summary final judgment, Moates v. Register, 556 So. 2d 503 (Fla. 3d DCA 1990), and orders denying a parent's right to serve as a personal representative in a probate proceeding, In re Estate of Zimbrick, 453 So. 2d 1155, 1156 (Fla. 4th DCA 1984) (denying an appellee's motion to dismiss claiming premature filing of appeal). The appellate rules themselves allow appeals of "final orders of trial

courts." Fla. R. App. P. 9.030(b)(1)(A). Under the Steinglass analysis, therefore, defendants should already have an appeal procedure as of right in Florida courts.

The Fund contends the collateral order exception articulated in Cohen and Mitchell is precisely the type of exception articulated by Florida courts in S.L.T. Warehouse, Estate of Zimbrick, and Mendez. The claim of qualified immunity is clearly severable under Cohen and Mitchell. It is a claim made by the public officials asserting their substantive right to be immune from trial and is severable because even if the public officials should lose on the question of qualified immunity as a question of law, Mitchell, 472 U.S. at 528, the Plaintiff must still prove the underlying cause of action by meeting their burden of proof through a preponderance of the evidence.

Because the order denying summary judgment based on qualified immunity denies the Petitioner a substantive right, not just a procedural right, the order is a recognized exception to the "final decision" rule of federal case law and is a recognized exception to the "final judgment" or "final order" doctrine in Florida law. Fla. R. App. P. 9.110(k); S.L.T. Warehouse, 304 So. 2d at 99; Estate of Zimbrick, 453 So. 2d at 1156.

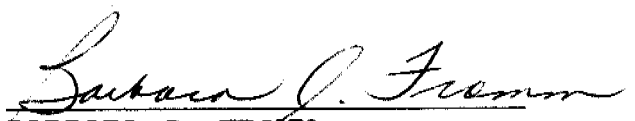
For each of the foregoing reasons, The Fund as amicus respectfully submits that the standard of review in immediate appeals from a denial of a defendant's motion for summary judgment in §1983 litigation in state courts is not limited to the narrow standard of review mandated when a writ of certiorari is used as the method of appeal. Instead, the full scope of appellate review

available to appellants when making an appeal as of right is appropriate under either Rule 9.030(b)(1)(A) or Rule 9.110(k). Alternatively, a new procedural mechanism should be crafted similar to that adopted in Mandico so that a §1983 defendant's procedural entitlement to an immediate appeal of a denial of qualified immunity under Rule 9.130(a)(3) is clearly articulated.

CONCLUSION

The judgment of the First District Court of Appeal in Tucker v. Resha, 17 FLW 2388 should be quashed.

Respectfully submitted,



BARBARA C. FRØMM
LEONARD J. DIETZEN, III
JENNIFER PARKER LaVIA
PARKER, SKELDING, LABASKY
& CORRY
Post Office Box 669
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Florida Sheriffs'
Self-Insurance Fund

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following by United States Mail, this 18th day of February, 1993:

Richard Johnson
Spriggs & Johnson
324 W. College Avenue
Tallahassee, Florida 32301

William A. Friedlander
Lake Jackson Office Park
3045 Tower Court
Tallahassee, Florida 32303

Kathleen E. Moore
Assistant Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050

Brian S. Duffy
McConnaughhay, Roland, Maida,
Cherry & McCranie, P.A.
Post Office Drawer 229
Tallahassee, Florida 32302

Barbara C. Fromm

BARBARA C. FROMM