IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,346

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

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

Respondents.
_____/

PARIS RESPONDENTS' ANSWER BRIEF ON THE MERITS

THERESA A. DiPAOLA, ESQ.
Fla. Bar No. 441058
THERESA A. DiPAOLA, P.A.
1645 Palm Beach Lakes Blvd., Suite 280
West Palm Beach, Florida 33401
(561) 687-5014
-and-
EDWARD M. RICCI, ESQ.
Fla. Bar No. 185673
RICCI, HUBBARD, LEOPOLD & FRANKEL, P.A.
1645 Palm Beach Lakes Blvd., Suite 250
West Palm Beach, Florida 33401
(561)684-6500

Attorneys for Paris respondents

TABLE OF CONTENTS

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

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AUTHORITIES

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

INTRODUCTION

The petitioner State of Florida, Department of Transportation ("DOT") seeks review and reversal of the opinion of the Fourth District Court of Appeal which dismissed for lack of jurisdiction the DOT's appeal from a trial court order denying its motion to dismiss a negligence claim grounded on Florida sovereign immunity. The opinion certified conflict on this jurisdictional issue with the decision of the Fifth District in Department of Transportation v. Wallis, 659 So.2d 429 (Fla. 5th DCA 1995).

The petitioner State of Florida, Department of Transportation, is a defendant below and will be referred to in this Answer Brief as "DOT."

The respondents Alyse Cohen Paris, and her minor children, Michael Cohen Paris, Ethan Louis, Paris, Reuben Elan Paris and Samuel Asher Paris, are plaintiffs below and will be referred to as "Paris respondents" or plaintiffs.[1]

The respondent N.S. Marine Industrial Services Corp. is a defendant below and will be referred to by name.

References to the Appendix to this Answer Brief of the Paris respondents will be made by the designation "App." References to the Initial Brief filed by the DOT in this Court will be made by the designation "DOT IB."

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[1] At the time the DOT initiated its appeal, Mark Paris, husband to Alyse Cohen Paris, was also named as a party plaintiff in the proceedings below. However, the plaintiffs' complaint has since been amended, as more particularly discussed infra, resulting inter alia, in the deletion of Mark Paris as a party plaintiff. The case style has here been corrected accordingly, and Mr. Paris is not named as a respondent.

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

STATEMENT OF THE CASE AND FACTS

The DOT's statement of the case is somewhat incomplete. The following is offered to supplement and clarify the facts and procedural posture of this action.

This case involves a negligence claim asserted against the DOT premised on alleged negligence in its maintenance of an existing guardrail structure located in Jupiter Florida along the Florida Turnpike. The guardrail in question was repaired in September, 1992, by defendant N.S. Marine, Inc. under contract with the DOT. (App. 2). In December of 1992, the plaintiff Alyse Paris was driving south on the Turnpike when she struck the approach end of the guardrail. Upon impact, the rail pierced through the fire wall of her vehicle and traumatically amputated both of her legs. (App. 2-4)

Alleging negligence in its maintenance, inspection and repair of the guardrail, plaintiffs initiated suit against the DOT by way of the Third Amended Complaint filed in January, 1995. (App. 1-11). The plaintiffs alleged that the DOT negligently inspected and approved the repair work done by N.S. Marine in the preceding September, failing to determine its conformity with established department regulations and reasonably prudent engineering practices. It further failed to discover and correct the dangerous condition in the repaired rail, creating an unreasonable risk of injury in the event of a collision. (App. 5,7). In addition, the third amended complaint alternatively alleged that defects in the support structure and curvature of the repaired guardrail

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

constituted a perilous hidden trap of which DOT had knowledge and a duty to warn or guard against. (App. 6, paragraph 16).

The DOT responded to this initial pleading with a motion to dismiss, arguing that "the doctrine of sovereign immunity totally exempts the DOT from all claims asserted in this action" because "discretionary, judgmental or planning level decisions or actions are immune from suit," and further, because the hidden trap exception to this doctrine was inapplicable as a matter of law. (App. 16,18). The trial court denied this motion, and the DOT immediately appealed.

The Fourth District dismissed for lack of jurisdiction, holding that appeal of a non-final order denying a motion to dismiss a negligence claim against a state agency was not authorized by Tucker v. Resha, 648 So.2d 1187 (Fla. 1994). Department of Transportation v. Paris, 665 So.2d 381 (Fla. 4th DCA 1995) (App. 77-78). It certified conflict on this point with the decision of the Fifth District in Department of Transportation v. Wallis, 659 So.2d 429 (Fla. 5th DCA 1995), noting that the majority's opinion in Wallis would require a rule change within the exclusive jurisdiction of this Court.

The Fourth District issued its mandate accordingly, following which the DOT invoked the discretionary jurisdiction of this Court. Thereafter, by agreement of the parties, the plaintiffs amended their complaint, dropping the hidden trap allegations and deleting Mark Paris as a party plaintiff. (App. 58-59; Agreed Order dated March 22, 1996).

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

By the express terms of this Agreed Order, neither the DOT nor N.S. Marine was required serve any further Answer. (App. 58) Nonetheless, the DOT opted to file a new responsive pleading, this time raising its claim of sovereign immunity not by way of motion to dismiss, but rather simply by including it as one of the several affirmative defenses contained in its Answer. (App. 70; Affirmative Defense No. 15).

In its petition still pending before this Court, the DOT persists in its attempt to pursue interlocutory review of the trial court's ruling on its earlier motion to dismiss the third amended complaint, seeking resolution of the certified jurisdictional question as well as a review on the merits of its immunity claim.

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

SUMMARY OF ARGUMENT

It is apparent that the action over which DOT seeks interlocutory review has become entirely mooted by an agreed amendment to the pleadings, requiring dismissal of the DOT's petition before this Court. Since the DOT did not renew its sovereign immunity challenge by way of motion to dismiss in responding to the now operative Fourth Amended Complaint, the propriety of the trial court's ruling on the DOT's motion to dismiss the third amended complaint and the immediate appealability of such an order are reduced to academic questions. This being so, the instant appeal has been rendered entirely moot and should be dismissed.

If this court nonetheless does determine to address the jurisdictional question raised, it should affirm the opinion of the Fourth District Court of Appeal, which correctly discerned that this case is not governed by the holding of Tucker v. Resha, 648 So.2d 1187 (Fla. 1994), nor does it fall within the ambit of its rationale. Tucker involved review of a trial court order denying a summary judgment motion grounded on qualified immunity as to federal claims asserted against officials of state government acting in their discretionary capacities. This case, in contrast, involves review of a trial court order denying a motion to dismiss grounded on Florida's sovereign immunity doctrine as to an ordinary negligence claim asserted against a state agency.

Tucker thus does not apply, and there is no sound public

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

policy reason which would be served by a rule change further enlarging the class of non-final appeals permitted under Fla. R. App. 9.130 to include orders denying motions to dismiss sovereign immunity claims. To the contrary, the proposed amendment would serve only to foster development of piecemeal appeals, and deluge the appellate courts with multiple review proceedings in garden variety negligence claims over a single issue that could most efficiently be reviewed by plenary appeal at the conclusion of the litigation.

The instant case --where an agreed amendment of the pleadings has already mooted the challenged lower court order-- is a case in point demonstrating the waste of judicial resources which would attend opening the door to interlocutory appeal of this new class of orders. In other contexts, it is not difficult to envision that even where a meritorious immunity challenge is raised, an order of reversal might oftentimes be accompanied by an order of remand with leave to amend. The appellate court might again be asked to review the subsequent amendment by way of interlocutory appeal, and yet again to pass on the merits of the immunity claim upon plenary appeal after conclusion of the trial. The folly of appellate pretrial policing of the pleadings in this context is thus apparent, and the DOT's invitation to this Court to enlarge the categories of permissible non-final appeals under Rule 9.130 to include such an order should be declined.

If this Court dismisses this case as moot, or affirms the Fourth District Court of Appeal on the jurisdictional question certified,

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

it will not be necessary to reach the second issue presented for review. If, however, this Court disagrees with the district court below and decides to direct a rule change which would allow this appeal, it should nevertheless direct the district court upon remand to affirm the trial court order denying the sovereign immunity defense because the DOT has failed to preserve the error alleged here for appellate review. In any event, the trial court correctly denied the motion to dismiss the third amended complaint because the DOT's alleged negligence in maintenance and repair of an existing guardrail structure clearly implicated operational level non-immune conduct.

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

ARGUMENT

I. THIS APPEAL HAS BEEN RENDERED MOOT BY AN AGREED AMENDMENT TO THE PLEADINGS.

The DOT takes this appeal from a circuit court order which denied its motion to dismiss the plaintiffs' third amended complaint grounded on sovereign immunity. However, following the district court's dismissal of its appeal from that order, plaintiffs amended their complaint pursuant to agreement of the parties. (App. 58-59) In response to the now operative fourth amended complaint (App. 47-57), the DOT decided to simply assert its claim of sovereign immunity as an affirmative defense in its answer. (App. 70)

Plaintiffs anticipate that DOT will argue that this change in the procedural posture of the case is of no moment because the material allegations of the plaintiff's fourth amended complaint are virtually identical to those alleged in the third amended complaint, but for the deletion of the hidden trap allegations. This is a correct description of the pleadings, but it does not, however, provide a continuing basis for entertaining this appeal.

By opting <u>not</u> to renew its sovereign immunity challenge by way of motion to dismiss, the DOT has effectively abandoned its earlier efforts to obtain a preliminary disposition on this defense and no practical purpose would be served by proceeding further with this appeal. This action is now at issue, and there are no pending dispositive motions hinging on the sovereign immunity defense. This being so, the instant appeal -- calling into question the

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

immediate appealability of an order denying a motion to dismiss based on sovereign immunity -- has been rendered entirely moot. See e.g. Dept. of Health and Rehab. Services v. Skinner, 649 So.2d 280 (Fla. 2d DCA 1995)(dismissing as moot appeal from interlocutory order ruling that statute of limitations barred claims where trial court's final order ruled that claims were barred by estoppel and laches); Dept. of Highway Safety and Motor Vehicles v. Heredia, 520 So.2d 61 (Fla. 3d DCA 1988)(appeal from order temporarily enjoining department from imposing one year restricted suspension of driver license was rendered moot by department's rescission of suspension); In re T.A.A. v. Shoultz, 388 So.2d 41 (Fla. 5th DCA 1980)(appeal from dissolution of temporary injunction prohibiting county from separating prisoner from child mooted by probation of prisoner).

Moreover, there is no basis for further entertaining the DOT's petition in this case despite its mootness because the issue presented, respectfully, does not rise to the level of one having great public importance. Cf. In re Dubreuil, 629 So.2d 819 (Fla. 1993)(whether right to privacy may be asserted as basis for resisting involuntary blood transfusion held question of great public importance justifying resolution despite mootness). And, while the issue might be one capable of repetition, it is hardly one that evades review. See Times Publishing Co. v. State, 632 So.2d 1072 (Fla. 4th DCA 1994)(reaching merits of order restricting news media from publishing certain information obtained during jury selection); Nemeth v. R.B. Shore, 511 So.2d 1118 (Fla. 2d DCA

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

1981). Indeed, the identical jurisdictional issue here certified is currently the subject of review before this Court in Department of Education v. Roe, 656 So.2d 507 (Fla. 1st DCA 1995), rev. granted, No. 86, 061 (Fla. 1995), and presumably will be shortly resolved in that context. As there is no pertinent exception to the mootness doctrine here applicable, the DOT's petition should be dismissed.

A. IN ANY EVENT, APPELLATE COURTS DO NOT HAVE JURISDICTION UNDER TUCKER V. RESHA TO REVIEW A NON FINAL ORDER DENYING A MOTION TO DISMISS A NEGLIGENCE CLAIM AGAINST A STATE AGENCY GROUNDED ON SOVEREIGN IMMUNITY.

If this Court dismisses this appeal as moot, it will not be necessary to reach the jurisdictional question on which conflict has been certified. If this Court does reach this jurisdictional question, it should affirm the Fourth District Court of Appeal which correctly held that Tucker v. Resha, 648 So.2d 1187 (Fla. 1994), and the rule change initiated therein provide no jurisdictional premise for appeal in this case.

1. The rule of Tucker.

Tucker held that interlocutory review is permitted of an order denying a summary judgment motion grounded on qualified immunity to the extent the order turned on a question of law. It specifically involved a federal claim under 42 U.S.C. §1983) against an official of state government acting in his discretionary capacity.

In contrast, this case involves application of Florida's sovereign immunity doctrine for state agencies and involves review of an order denying a motion to dismiss based solely on the

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

allegations of the complaint in an ordinary negligence claim against a state agency. By its terms, Tucker does not apply here and an examination of its rationale demonstrates that it offers no logical support for yet another rule change to enlarge the classes of non-final appeals permitted in Florida appellate courts.

In Tucker, this Court adopted the standard announced in Mitchell v. Forsyth 472 U.S. 511, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985), for reviewing orders denying summary judgment based on qualified immunity of public officers. Mitchell, in turn, held that because the rights implicated by qualified immunity involve immunity from suit rather than a mere defense to liability, an individual denied protection of those rights in the summary judgment setting is entitled to immediate appeal, lest the entitlement be effectively lost by allowing a case to erroneously proceed to trial.

Recognizing there is no analogous Florida Rule of Appellate Procedure permitting appeal of such a non-final order, and seeking to achieve consistency on the appealability of such orders in the state and federal systems, this Court in Tucker directed a rule change to allow non-final appeals of orders denying summary judgment based on qualified immunity asserted by state officials. In reaching this result, this Court recognized, as did the Supreme Court in Mitchell, that such a procedure is consistent with the central purpose of affording public officers qualified immunity from suit, to wit, "to protect them from undue interference with their duties and from potentially disabling threats of liability." Tucker, citing Elder v. Holloway, 510 U.S. 510, 114 S. Ct. 1019,

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

1022, 127 L.Ed. 2d 344 (1994). In addition to the deleterious effect on the individual, the great societal costs implicated by the prospect of erroneously permitting suit against a state officer to proceed to trial, in terms of "the expense of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" were deemed to justify this result. Tucker at 1190.

In the instant case, the DOT argues that the societal costs of permitting a claim to go forward against a state agency are no different than those involved where a state official is individually named, theorizing that litigation is equally disruptive to the performance of government in either setting. This approach misses the mark, because it overlooks the central underlying goal of Tucker and Mitchell, i.e. promoting the exercise of independent judgment on the part of government officers whose actions might otherwise be stifled by fear of potentially disastrous personal financial consequences attendant to their decisions -- a realistic concern where the defendant is an individually named person. However, entirely different policy considerations are implicated here, where a state agency is the only government defendant. An agency is not a person, and is thus not susceptible at an unconscious or conscious level to the intimidating effects of personal exposure to judgment.

2. The rule of Mitchell.

Beyond this distinct variance, it is apparent that the doctrinal underpinnings of Mitchell do not logically support allowance of

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

immediate interlocutory appeal under the present circumstances, Mitchell is premised on application of the "collateral order" doctrine first espoused in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed 1528 (1949), where the United States Supreme Court held that a "small class" of so-called collateral orders amounted to "final decisions" immediately appealable under 28 U.S.C. §1291, even though entered before final disposition of the case. These special orders were those that fell within "that small class which finally determine claims of right separable from, and collateral to, the 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, 337 U.S. at 546, 69 S.Ct. at 1225-1226.

The Court recently restated the "collateral order doctrine," requiring that an appealable order of this class must:
(1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the actions, and (3) be effectively unreviewable on appeal from a final judgment. Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S.---,---, 113 S.Ct. 684, 688, 121 L.Ed.2d 605 (1993) [(quoting Coopers & Lybrand v. Liveay, 437 U.S. 463, 468, 98 S.Ct. 2454,2458, 57 L.Ed.2d 351 (1978)].

Most recently, the Court restricted its opinion in Mitchell, holding that only cases posing "neat abstract issues of law" should be allowed to be appealed prior to a final judgment, and

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

disallowing immediate appeal of an order denying summary judgment on a qualified immunity claim which raised a claim of "pretrial evidentiary insufficiency." See Johnson v. Jones, __U.S. __, 115 S. Ct. 2151 , 132 L.Ed. 238 (1995). In Johnson, the Court held that a district court order denying summary judgment in a qualified immunity case was not appealable where the ruling turned on the trial court's assessment of the sufficiency of the evidence supporting the cause of action. In such cases involving pretrial evidentiary insufficiency claims, the Court reasoned it will often prove difficult to find any "separate" question,i.e. one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits. Id., 115 S.Ct. at 2157. Hence, the second part of Cohen is not satisfied in such circumstances. In reaching this result, the Court acknowledged that, as in Mitchell, a similar interest in protecting government officials from the burdens of further pretrial proceedings and trial is implicated, but found this no justification for abandoning the separability requirement of Cohen:

> The upshot is that, compared with Mitchell, considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources, argue in favor of limiting interlocutory appeals of "qualified immunity" matters to cases presenting more abstract issues of law. Considering these "competing considerations," we are persuaded that "[i]mmunity appeals... interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law." (Citations omitted).

Johnson v. Jones, ___U.S.___, 115 S.Ct, at 2158.

3. Applying Mitchell to sovereign immunity claims

Notwithstanding this restrictive modern approach in defining the

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

parameters of the collateral order doctrine under Cohen, the DOT argues there is a "clear trend" in the federal cases toward expanding the categories of immediately appealable orders denying immunity claims. However, none of the cases to which it cites involved claims of federal sovereign immunity. Indeed, the only two federal cases addressing this specific and more germane issue -- applying a Mitchell analysis -- have concluded that denial of federal sovereign immunity is not immediately appealable under the collateral order doctrine. See State of Alaska v. United States, 64 F.3d 1352 (9th Cir. 1995); Pullman Construction Industries, Inc. v. United States, 23 F.3d 1166 (7th Cir. 1994), more particularly discussed below.

The critical question posed by Mitchell is whether "the essence" of the claimed immunity right is a right not to stand trial. Mitchell, 472 U.S. at 525, 105 S. Ct., at 2815. This question is difficult because in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial. Van Cauwenberghe v. Biard, 486 U.S. 517, 524, 108 S. Ct. 1945 100 L.Ed.2d 517 (1988).

This truism is not to defeat the force of the "final judgment rule", which requires in general that litigants abide by a trial court's orders and suffer the concomitant burden of trial until the end of the case before seeking appellate review. The philosophical underpinnings of this Rule are grounded in notions of judicial efficiency and economy, as this Court expressed in Travelers v. Bruns, 443 So.2d 959 (Fla. 1984):

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

> The thrust of rule 9.130 is to restrict the number of appealable non-final orders. The theory underlying the more restrictive rule is that appellate review of non-final judgments serves to waste court resources and needlessly delays final judgment.

443 So.2d at 961.

Because of the important interests furthered by the final judgment rule and the ease with which certain pretrial claims for dismissal may be alleged to entail the right not to stand trial, close scrutiny of the nature of the right asserted is required to determine whether an essential aspect of the claim is the right to be free of the burden of trial. See Van Cauwenberge v. Baird, 436 U.S. 517, 525, 108 S.Ct., at 1951. (1988).

The nuances between various types of immunities were the subject of such an examination in State of Alaska v. United States, 64 F.3d 1352 (9th Cir. 1995), where the Court made the following observations in concluding that immediate interlocutory appeal is not available over an order denying federal sovereign immunity:

> Federal sovereign immunity is readily distinguishable from the states' immunity under the Eleventh Amendment and foreign governments' immunity under the Foreign Sovereign Immunities Act. The latter two doctrines allow one sovereign entity the right to avoid, altogether, being subjected to litigation in another sovereign's courts.... Similar sovereignty concerns are not implicated by the maintenance of suit against the United States in federal court.... Federal sovereign immunity has had such broad exceptions carved out of it that, as Pullman Construction concluded, "Congress, on behalf of the Unites States, has surrendered any comparable right not to be a litigant in its own courts."

64 F.3d at 1355 (footnotes and citations omitted). On this basis, the State of Alaska court concluded that "federal sovereign immunity is a defense to liability rather than a right to be free from trial," and rejected an attempt at immediate appeal of an

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

order denying federal sovereign immunity. Id. at 1355.

By parity of reasoning, it is plain that Florida sovereign immunity is a defense to liability, not a right to be free from trial. Florida sovereign immunity no longer protects the State altogether from being subject to suit. There are so many statutory exceptions nicking into this armor[2] it may fairly be concluded that the Florida legislature, on behalf of the State of Florida, has surrendered any right not to be a litigant in its own courts. For this reason, the State cannot logically claim that the remaining vestiges of its original immunity from suit implicate a right to be free from trial in the courts of the State of Florida.[3] Thus, denial of this immunity cannot be said to trigger a right of immediate appellate review.

The DOT urges otherwise, contending that the benefits of this immunity will be irretrievably lost without the benefit of

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[2] Florida Statutes are replete with specific authorizations for suit against the State of Florida and its agencies. See e.g. Sec. 768.28, Fla. Statutes (general tort claims); Sec. 760.11, Fla. Statutes (civil rights violations); Sec. 213.015, Fla. Statutes (taxpayer actions); Sec. 556.106, Fla. Statutes (damage to underground utilities); Sec. 331.328, Fla. Statutes (suits against Spaceport Florida Authority); Sec. 403.706(17)(c), Fla. Statutes (suits against solid waste management facilities).

[3] Indeed, in the statutory waiver of tort immunity, the Florida legislature does not cast the immunity as a protection against suit, but rather expresses it as a limitation on liability:

> In accordance with s.3, Art. X, State Constitution the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act.

Section 768.28(1), Florida States (1995) (emphasis supplied).

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

immediate right of appeal. However, "the mere identification of some interest that would be "irretrievably lost" has never sufficed to meet the third Cohen requirement." Digital Equipment Corp. V. Desktop Direct, Inc., ___U.S. ___ 114 S.Ct. 1992, 1995, 128 L.Ed.2d 842 (1994). The interest that would be lost must also be "important," which in this context means "weightier than the societal interests advanced by the ordinary operation of final judgment principles." Id. at __, 114 S.Ct. at 2001, 2002.

In State of Alaska v. United States, supra, the Court found no such weighty interest present in orders denying sovereign immunity, reasoning:

> Claims of sovereign immunity contrast sharply with claims of double jeopardy or official immunity. In the latter type of cases, the judicial inquiry itself, rather than just a merits judgment, causes the disruption that the doctrine of immunity was designed to prevent.... The concept of qualified immunity is animated by concern about the burden of discovery and the need for government officials to act "with independence and without fear of consequences."... Immediate appeals are permitted because if officials were unable to obtain prompt review of denials of qualified immunity, the substance of the immunity would be lost. That concern is not the foundation of federal sovereign immunity.

64 F.3d at 1357 (citations omitted).

Likewise, there is no urgency entailed in protecting a state agency against the burden of trial in state court on an ordinary negligence claim. In this context, the doctrine of sovereign immunity limits the extent of the state's liability, but does not protect it against standing trial. As the Pullman Construction court determined in the analogous context of assessing the availability of an immediate appeal from an order denying a federal sovereign immunity claim:

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

> Federal sovereign immunity today is nothing but a condensed way to refer to the fact that monetary relief is permissible only to the extent Congress has authorized it....An elaborate system permitting some monetary claims and limiting or forbidding others does not imply that the United States retains a general "right not to be sued" in its own courts, for civil litigation in general or taxation in particular.

Pullman Construction Industries, Inc. V. United States, 23 F.3d 1166, 1168 (7th Cir. 1994). Similarly, the tapestry of laws in Florida permitting some monetary claims while limiting or forbidding others[4] does not imply that the State of Florida has retained a general "right not to be sued" in its own courts.

If the federal interpretation of the collateral order doctrine is to be followed here in defining the parameter of Tucker --as this Court implicitly found by its adoption of the rule of law in Mitchell as its premise for that decision --then the DOT plainly is not entitled to immediate interlocutory review of an order denying a motion to dismiss grounded on sovereign immunity.

Under Mitchell, as refined by the United States Supreme Court in Metcalf & Eddy, Jones and Digital Equipment Corp., supra, and as interpreted by the federal appeals courts in State of Alaska and Pullman Construction, it is apparent that allowing such an appeal to proceed here would be to do so in circumstances which the federal courts would deny, and would do violence to the competing considerations underlying the rule of finality by increasing the judicial costs of piecemeal review and enhancing the dangers of justice by delay.

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[4] See authorities cited at footnote 2 supra.

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

B. THERE IS NO COMPELLING REASON JUSTIFYING THE REQUESTED ENLARGEMENT OF CATEGORIES OF NON-FINAL APPEALS UNDER THE FLORIDA RULES OF APPELLATE PROCEDURE.

The DOT advances the additional argument that there is no reason to treat orders denying sovereign immunity any differently than workers compensation immunity, which following this Court's decision in Mandico v. Taos Construction, 605 So.2d 850 (Fla.1992) became a designated class of appealable non-final orders under Rule 9.130(a)(3). Under this logic, however, denial of any immunity at the pleadings stage would qualify for inclusion as a designated non-final appeal under Rule 9.130, opening the doors to a deluge of interlocutory appeals without regard for a balancing of the competing interests at stake under the rule of finality.

And, taken a step further, under this logic there would be no reason to deny an immediate right of appeal from orders denying motions to dismiss other dispositive affirmative defenses, such as the statute of limitations or res judicata. Such an approach would be entirely inconsistent with the strong policy disfavoring piecemeal review in place in this State --fully applicable to potentially dispositive pretrial claims for dismissal -- and should accordingly be rejected. See e.g. Elder v. Carter, 670 So.2d 1032 (Fla. 2d DCA 1996) (review of interlocutory order denying res judicata defense not appealable as non-final order under Rule 9.130 or by way of certiorari); Bondurant v. Geeker, 499 So.2d 909 (Fla. 1st DCA 1986) (denial of statute of limitations defense not

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

appealable by writ of prohibition); Mullin v. State Dept. of Administration, 354 So.2d 1216 (Fla. 1st DCA), cert. den. 359 So.2d 1217(Fla. 1978)(statute of limitations defense); State Road Department v. Brill, 171 So.2d 229 (Fla. 1st DCA 1964)(state agency not entitled to interlocutory appeal from order denying motion to dismiss based on sovereign immunity defense).

Plaintiffs therefore respectfully submit that in the event this Court addresses the certified jurisdictional issue, it should affirm the opinion of the Fourth District Court of Appeal holding that Tucker does not extend to these circumstances, and should decline to entertain any further rule amendment enlarging the classes of non-final appeals to permit such a result.

POINT II: THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED BECAUSE THE DOT FAILED TO PRESERVE THE ERROR ALLEGED FOR APPELLATE REVIEW, AND, IN ANY EVENT THE TRIAL COURT CORRECTLY DENIED THE DOT'S SOVEREIGN IMMUNITY CHALLENGE TO THE THIRD AMENDED COMPLAINT.

If this Court dismisses this appeal as moot, or if it resolves the conflict certified by agreeing with the Fourth District that jurisdiction does not properly lie here, it will not be necessary to reach this second issue. If, however, this Court crosses this threshold jurisdictional question and instead decides to enlarge the classes of non-final appeals under Rule 9.130, opening wide the doors of the appellate courts to a barrage of interlocutory appeals over pleading practices, it should nonetheless direct

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

affirmance of the result below.[5]

First, affirmance of the result below is required because the DOT failed to preserve the error here alleged for review. The DOT tacitly acknowledges in its Brief before this Court that the plaintiff's complaint alleges operational level conduct, but complains that plaintiff achieves this result only by using "buzz words" to evade the immunity issue, and that the complaint insufficiently details the underlying "operational function facts" showing "how, when, what and where" a non-immune duty was breached. [DOT IB at 25].

At the trial level, on the other hand, DOT made no remotely similar argument, urging in its motion to dismiss only that the third amended complaint in its entirety alleged discretionary planning level activity for which it enjoys absolute sovereign immunity. (App. 16,18).

It is axiomatic that counsel may not argue a matter in the lower tribunal on one ground, and then pursue an appeal based upon an entirely different ground. See e.g. W.R. Grace & Co.-Conn v. Dougherty, 636 So.2d So.2d 746 (Fla. 2d DCA 1994); Mt. Sinai Hospital of Greater Miami v. Steiner, 426 So.2d 1154 (Fla. 3d DCA

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[5] The issue on which this Court granted review and on which the district court of appeal passed is not whether the DOT's underlying claim of immunity is meritorious, but whether the denial of the DOT's motion to dismiss on ground of sovereign immunity is immediately appealable. The propriety of the lower court's ruling on the immunity question is, nonetheless, properly raised here, because once this Court acquires jurisdiction by way of the certified question, it has jurisdiction to decide all issues in the case. See e.g. Feller v. State, 637 So.2d 911 (Fla. 1994); State v. Gray, 654 So.2d 552 (Fla. 1995); Cleveland v. City of Miami, 263 So.2d 573 (Fla. 1972); Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961).

1983); Palm Beach Aviation, Inc. v. Kibildis, 423 So.2d 1011 (Fa. 4th DCA 1982). Additionally, an objection or challenge in the lower tribunal must be specific enough to appraise the court of the alleged error and to preserve the issue for intelligent review on appeal. Cook v. State, 548 So.2d 257 (Fla. 5th DCA 1989), rev. denied 558 So.2d 17 (Fla. 1990); Cornwell v. State, 425 So.2d 1189 (Fla. 1st DCA 1983).

The DOT's general challenge to the third amended complaint contained in its underlying motion to dismiss in no way resembles or preserves the "fact insufficiency" argument which it now presses before this Court. Hence, it has failed to preserve error alleged for appellate review, requiring affirmance of the ruling below. See Mansfield v. Rivero, 620 So.2d 987 (Fla. 1993); Farris v. Bramlette, 6 So.2d 374 (Fla. 1942).

Second, in an abundance of caution, even if review on the merits of the DOT's immunity claim is indulged, it is apparent that the trial court correctly denied the DOT's motion to dismiss because negligence in the maintenance and repair of an existing guardrail structure as alleged in plaintiffs' third and fourth amended complaints plainly implicates operational level non-immune conduct.

In the context of road design and construction cases, a line of authority has evolved distinguishing between governmental liability for failure to properly plan, design or upgrade roads or intersections, characterized as planning level activities as to

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

which immunity attaches,[6] and government liability for failure to properly maintain and repair existing facilities, as to which sovereign immunity does not attach.[7]

In this latter context involving capital improvements already in place, it is unequivocally established that a government agency has the same duty of care to maintain and inspect its property that as private person would have. Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So.2d 912, 921 (Fla. 1985). Here, discretionary conduct is treated as operational level activity for which there is no immunity, rather than planning level activity for which there is immunity. See Simmonds-Hewett v. Keaton, 626 So.2d 249, 250 (Fla. 4th DCA 1993), citing City of Jacksonville v. Mills, 544 So.2d 190 (Fla. 1989).

In Simmonds-Hewett, for example, the district court held that a

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[6] See e.g. Perez v. Department of Transportation, 435 S.2d 830(Fla. 1983)(failure to upgrade bridge design); Department of Transportation v. Neilson 419 So.2d 1071 (Fla. 1982)(failure to install traffic control devices, failure to upgrade existing road and decision to build road with particular alignment constitute planning level functions); Cygler v. Presjack, 667 So.2d 458 (Fla. 4th DCA 1996)(failure to erect median barrier); Freeman v. Taylor County, 643 So.2d 44 (Fla. 1st DCA 1994)(failure to erect guardrail); Department. of Transportation v. Stevens, 630 So.2d 1150 (Fla. 2d DCA 1992) (failure to upgrade guardrail design).

[7] See Neilson,419 So.2d 1071, 1078 (Fla. 1982); City of St. Petersburg v. Collum, 419 So.2d 1082 (Fla. 1982)(maintenance of existing improvement or proper construction or installation of improvement plan; Capo v. Department of Transportation, 642 So.2d 37 (Fla. 3d DCA 1994), rev. denied, 651 So.2d 1193 (Fla.1995) (failure to properly maintain exit ramp by allowing potholes to exist and foliage to grow); Hughes v. City of Fort Lauderdale, 519 So.2d 43, 33 (Fla. 4th DCA 1988)(failure to trim foliage obscuring traffic sign).

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

claim against the DOT alleging failure to maintain and inspect an existing light pole which fell on plaintiff's automobile involved operational conduct to which no immunity attached. In so holding, it rejected the contention of the DOT that the failure to maintain and inspect an existing facility results in a planning level function, as such a result would turn the unequivocal scheme established by Trianon Park on its head by allowing the government to shield itself from liability simply by refraining from inspection or maintenance of improvements. Id. at 251.

The case sub judice similarly involves allegations of negligence in inspection and maintenance of an existing facility, and similarly falls under the classification of operational level activity. The complaint alleges that in consequence of the DOT's negligent inspection of the repaired guardrail, it failed to discover and correct a dangerous condition created by the substandard repair work, thus creating an unreasonable risk of injury to highway motorists. (App.5-6, 51-52).

Because its endeavors created a foreseeable risk of harm to others, the DOT owed a duty of care toward persons who might be foreseeably harmed --such as and including Alyse Paris. See generally McCain v. Florida Power Corp., 593 So.2d 500, 503 (Fla. 1992)("[E]ach defendant who creates a risk is required to exercise prudent foresight wherever others may be injured as a result."). Clearly, then, the allegations of plaintiffs' complaint, under McCain and Simmonds-Hewett, supra, state a claim against the DOT premised on operational level conduct.

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

This Court has held that an assessment of whether planning level or operational level activities are implicated by the conduct of government must proceed on a case by case basis. Department of Health & Rehabilitative Services v. Yamuni, 529 So.2d 258 (Fla. 1988). This is so because the applicability of sovereign immunity to a given claim is a complex determination, requiring "minute examination of the alleged negligent actions of the governmental unit to determine if they are operation or planning level as each case comes to court". Id. at 260; see also Seguine v. City of Miami, 627 So.2d 14, 16 (Fla. 3d DCA 1993).

Given this analytical framework, the DOT's demand for greater specificity in the pleading of claims against government entities -- beyond being unsupported by a single case precedent -- is entirely illogical. In the first instance, the rules of civil procedure do not require prolix pleading, because the rules of discovery and other pretrial procedures provide ample opportunity for exploration of the precise bases of both claims and defenses. Moreover, imposition of such an onerous pleading requirement would be entirely unworkable in the context of this particular affirmative defense, the complexities of which do not lend to the "minute examination" required under Yamuni on an undeveloped record.

The DOT has not cited a single case suggesting that the allegations in the plaintiffs' complaint against it involve purely discretionary planning level activities as a matter of law. Thus, the DOT's unpreserved objection regarding the "fact insufficiency" of the plaintiffs' pleading must fail, as it in any event presents

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

no legal basis for dismissal of a complaint.[8]

Accordingly, in the unlikely event this Court reaches the merits of the immunity question posed, it must direct affirmance of the result below.

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[8] Florida precedent clearly holds that an affirmative defense is no basis for dismissal unless the complaint on its face affirmatively and clearly shows the conclusive applicability of the defense. See e.g. Mettler, Inc. v. Ellen Tracy, Inc., 648 So.2d 253, 255 (Fla. 2d DCA 1994); Hett v. Madison Mutual Insurance, 621 So.2d 764 (Fla. 2d DCA 1993); Alexander Hamilton Corp. v. Leeson, 508 So.2d 513 (Fla. 4th DCA 1987). The DOT in this case does not even pretend to have satisfied this burden.

THERESA A. DIPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this entire proceeding should be dismissed as moot. If, however, the jurisdictional question on which conflict is certified is reached, the decision of the District Court should be affirmed, and the DOT's invitation for a further enlargement of classes of non-final appeals under Rule 9.130 should be declined. Finally, even if interlocutory review is held appropriate in the circumstances presented, the District Court should be directed upon remand to affirm the trial court's order.

Respectfully submitted,

THERESA A. DiPAOLA, ESQ.
THERESA A. DiPAOLA, P.A.
1645 Palm Beach Lakes Blvd., Suite 280
West Palm Beach, FL 33401
(561) 687-5014
-and-
EDWARD M. RICCI, ESQ.
RICCI, HUBBARD, LEOPOLD & FRANKEL, P.A.
1645 Palm Beach Lakes Blvd., Suite 250
West Palm Beach, Florida 33401
(561)684-6500

By: 
THERESA A. DiPAOLA

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing has been delivered by U.S. Mail this 28th day of May, 1996 to: Wayne T. Gill, Esquire, Walton Lantaff Schroeder & Carsen, 1645 Palm Beach Lakes Boulevard, Suite 800, West Palm Beach, Florida 33401;

Edward M. Ricci, Esquire, Ricci, Hubbard & Leopold, P.A., 1645 Palm Beach Lakes Boulevard, Suite 250, West Palm Beach, Florida 33401; Geoffrey Marks, Walton Lantaff Schroeder & Carsen, Twenty-Fifth Floor, One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33131; W. Kirk Davenport, Esquire, Tucker, Davenport & Willingham, P.O. Box 360186, Birmingham, Alabama 35236; and Bruce Flower, Esquire, N.S. Marine, 511 N. Maitland Avenue, Maitland, Florida 32751.

By: _____
THERESA A. DiPAOLA

THERESA A. DiPAOLA, P.A.
1645 PALM BEACH LAKES BLVD. SUITE 280, WEST PALM BEACH, FLORIDA 33401
TELEPHONE (561) 687-5014 ♦ FACSIMILE (561) 687-5019