SUPREME COURT OF FLORIDA

CASE NO. 87,346

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

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

Respondents.
_____/

PETITIONER STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION'S INITIAL BRIEF
(With Incorporated Appendix)

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PRELIMINARY STATEMENT

The petitioner, State of Florida, Department of Transportation, seeks review and resolution of a certified conflict between the district courts of appeal. In this case, the Fourth District dismissed an appeal of a non-final order of The Honorable Harold J. Cohen, Circuit Court Judge of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. The order denies a motion to dismiss based on the doctrine of sovereign immunity. Department of Transportation v. Paris, 665 So.2d 381 (Fla. 4th DCA 1996). The opinion certified conflict with Department of Transportation v. Wallis, 659 So.2d 429 (Fla. 5th DCA 1995).

The petitioner, State of Florida, Department of Transportation is a defendant in the trial and will be referred to as the petitioner, defendant, or as the Department of Transportation.

The respondents, Alyse Cohen Paris, Mark Paris, Michael Cohen Paris, Ethan Louis Paris, Reuben Elan Paris, Samuel Asher Paris, are the plaintiffs in the trial court and will be referred to as the respondents or plaintiffs.

The respondent, N.S. Marine & Industrial Services Corp., is a defendant in the trial court and will be referred to by name.

References to the appendix filed by petitioner in the district court will be designated by the letter "A".

STATEMENT OF THE CASE AND THE FACTS

The plaintiffs sued the Department of Transportation for personal injuries sustained in a one car accident with a guardrail. The Department of Transportation moved to dismiss plaintiffs' third amended complaint on the basis of sovereign immunity.[1] The trial court denied the motion. The Department filed a non-final appeal from that order.

The Fourth District Court of Appeal dismissed the appeal, holding that an order denying a motion to dismiss based on sovereign immunity is a non-appealable non-final order. To allow an appeal would require a change in Fla.R.App.P. 9.130, which is not in the power of the district courts of appeal. Department of Trans. v. Paris, 665 So.2d 381 (Fla. 4th DCA 1996). The Fourth District certified conflict with Department of Trans. v. Wallis, 659 So.2d 429 (Fla. 5th DCA 1995).

On December 18, 1992, the plaintiff, Alyse Paris, was driving south on State Road 91 (the Florida Turnpike) around mile post 113.4 in Palm Beach County. The complaint does not explain how or why, but Paris' vehicle struck a guardrail on the west shoulder of the southbound lane of the Florida Turnpike, and she suffered injuries. (A. 2).

Paris, her husband, and their minor children, sued the Department of Transportation and N.S. Marine & Industrial Services

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[1] The plaintiffs have since amended their complaint a fourth time, and a copy is included in this brief's appendix. The fourth amended complaint drops plaintiffs' claim of a "hidden trap."

Corp. The third amended complaint alleges that "the FLA DOT was responsible for inspecting and maintaining the subject guardrail in a reasonably safe condition, and when said rails were repaired to discover and correct any unsafe conditions in said rails so as to protect the traveling public from potential injury." (A. 2). The complaint also alleged that N.S. Marine had a contract with DOT to "install, repair or replace guardrails on the Florida Turnpike on or about September 2, 1992." (A. 2).

The third amended complaint further alleges that:

> FLA DOT owed a duty to the traveling public, including the plaintiffs herein, to use reasonable care in the maintenance and inspection of guardrails along public highways in this State, including the subject guardrail, and had a duty to discover any repair any dangerous conditions of which it knew or should have known. Defendant FLA DOT breached that duty of care in any one or more of the following ways:
>
> > (a) By negligently failing to properly inspect the subject guardrail consistent with the requirements of department operational standards and procedures;
> >
> > (b) By negligently inspecting and approving the subject guardrail work performed by N.S. MARINE in September 1992, and in failing to determine its conformity with reasonably prudent engineering safety practices, and applicable operational department standards and specifications;
> >
> > (c) By negligently failing to discover the dangerous condition with existed in the guardrail support structure and curvature following completion of the repair work performed Defendant, N.S. MARINE in September 1992;
> >
> > (d) By negligently failing to correct the above-described dangerous condition in the subject guardrail which it knew or should have known existed;

(e) By otherwise failing to exercise operational level due care in maintaining and repairing the subject guardrail in a reasonably safe condition.

(A. 5-6).

Noticeably absent from the above quoted allegations are any facts.

The Department of Transportation moved to dismiss the complaint on three grounds. The plaintiffs failed to comply with the notice requirements of section 768.28(6)(a), and the plaintiffs filed their action prior to the expiration of the six month pre-suit notification period of section 768.28(6)(d).

Dismissal was also sought based on the sovereign immunity doctrine. Given the complete absence of facts as to how, when, and where the Department of Transportation violated any duty, the complaint failed to remove the cloak of immunity. Put differently, the complaint did not contain operational, as opposed to planning, facts to make the Department of Transportation answerable to the complaint. (A. 12).

The trial court heard and denied the motion. (A. 21). The Department of Transportation timely filed a non-final appeal seeking review of the order denying the motion to dismiss. The Fourth District, sua sponte, dismissed DOT's appeal holding, a) that the non-final order rule would have to be amended to allow this appeal, and b) that the rule should not be amended because permissible non-final appeals should be limited.

The Fourth District noted and certified conflict in its decision with the Fifth District's decision in Department of Trans. v. Wallis, 659 So.2d 429 (Fla. 5th DCA 1995). The court also noted

that this court is currently reviewing the appealability of an order denying a motion to dismiss based on sovereign immunity in Department of Education v. Roe, 656 So.2d 507 (Fla. 1st DCA), review granted, 663 So.2d 629 (Fla. 1995).

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ISSUES ON REVIEW

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

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

SUMMARY OF THE ARGUMENT

An non-final order rejecting a claim of sovereign immunity meets the interlocutory review requirements and rationale set forth by this court in Tucker v. Resha, 648 So.2d 1187 (Fla. 1994), as correctly recognized by the Fifth District in Department of Transportation v. Wallis, 659 So.2d 429 (Fla. 5th DCA 1995). Immunity from suit, if not subject to interlocutory review, will effectively be lost if a case is erroneously permitted to go to trial. An order determining sovereign immunity is conclusive as to that claim, is separable from, and not collateral to, the underlying merits of the tort action, and the claim is not effectively reviewable on direct appeal following final judgment because the immunity from suit, once lost, cannot be recaptured when litigation proceeds.

This court has recognized the need for interlocutory review based on "concerns for early resolution of controlling issues" in Mandico v. Taos Construction Co., 605 So.2d 850, 854 (Fla. 1992). This court amended the non-final order rule to permit review of orders determining workers' compensation immunity. Fla.R.App.P. 9.130(a)(3)(C)(vi). The court noted that other remedies were not available to immune defendants to obtain immediate review of their immunity claim. There is no basis for distinguishing workers compensation immunity from sovereign immunity.

Finally, the lack of facts alleged in the complaint support DOT's assertion of sovereign immunity. The complaint does not contain sufficient factual allegations to overcome the principle that sovereign immunity is the rule rather than the exception.

ARGUMENT

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

A clear trend in this state's courts is emerging. Orders determining sovereign immunity, vel non, are subject to pre-plenary review. The rationale supporting the trend is found in Tucker v. Resha, 648 So.2d 1187 (Fla. 1994). Entitlement to immunity from suit "is effectively lost if a case is erroneously permitted to go to trial." Tucker, 648 So.2d at 1189, quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct 2806, 86 L.Ed.2d 411 (1985).

The Fifth District Court of Appeal, relying in part on Goetz v. Noble, 652 So.2d 1203 (Fla. 4th DCA 1995), recently determined that an order denying a motion to dismiss based on sovereign immunity was an appealable non-final order. Department of Trans. v. Wallis, 659 So.2d 429 (Fla. 5th DCA 1995). In Wallis, the plaintiff sued the Department of Transportation on a negligence theory. The trial court denied DOT's motion to dismiss based on sovereign immunity. The DOT filed a petition for writ of certiorari. As stated by the Wallis court:

> DOT is entitled to relief, although not through a petition for writ of certiorari. In Tucker v. Resha, 648 So.2d 1187 (Fla. 1994), the Florida Supreme Court held that an order denying a motion for summary judgment that is based upon a qualified immunity claim is subject to interlocutory review as to issues of law. This petition involves a claim for

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> sovereign immunity made by DOT in its motion to dismiss, and as such, it falls within the ambit of Tucker and thus should be treated as a reviewable appeal of a non-final order. See also Goetz v. Noble, 652 So.2d 1203 (Fla. 4th DCA 1995). But see Department of Educ. v. Roe, [656 So. 2d 507 (Fla. 1st DCA 1995)].

In Tucker, this court directed a change in the non-final order rule, allowing interlocutory review of orders denying claims of qualified immunity in federal civil rights actions brought in Florida courts. Tucker relied on the holding and rationale of Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct 2806, 2815, 86 L.Ed.2d 411 (1985), which allowed review of pretrial orders rejecting qualified immunity claim. As stated in Tucker:

> Under the qualified immunity doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow [v. Fitzgerald, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982)]. "The central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties from potentially disabling threats of liability.'" Elder v. Holloway, ___ U.S. ___, 114 S.Ct. 1019, 1022, 127 L.Ed.2d 344 (1994) (quoting Harlow, 457 U.S. at 806, 102 S.Ct. at 2732).
>
> Consistent with this purpose, the qualified immunity of public officials involves "immunity from suit rather that a mere defense to liability." Mitchell v. Forsythe, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). The entitlement is "effectively lost if a case is erroneously permitted to go to trial." Id. Furthermore an order denying qualified immunity "is effectively unreviewable on appeal from a final judgment," id. at 527, 105 S.Ct. at 2816, as the public official cannot be "re-immunized" if

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> erroneously required to stand trial or face the other burdens of litigation.
>
> We also note that the defendant official is not the only party who suffers "consequences" from erroneously lost immunity. As the Supreme Court explained in Harlow, society as a whole also pays the "social costs" of "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is 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.'" 457 U.S. at 814, 102 S.Ct. at 2736 (quoting Gregorie 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). Thus, if orders denying summary judgment based upon claims of qualified immunity are not subject to interlocutory review, the qualified immunity of public officials is illusory and the very policy that animates the decision to afford such immunity is thwarted.

Tucker, 648 So.2d at 1189-90.

The trend is further demonstrated by this court's recent recognition of the need for interlocutory review based on "concerns for early resolution of controlling issues" in Mandico v. Taos Construction Co., 605 So.2d 850, 854 (Fla. 1992). This court amended the non-final order rule to permit review of orders determining workers' compensation immunity. Fla.R.App.P. 9.130(a)(3)(C)(vi). The court noted that other remedies were not available to immune defendants to obtain immediate review of their immunity claim. There is no basis for distinguishing workers compensation immunity from sovereign immunity.

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The federal system, unlike Florida, does not have a rule based non-final order. Mitchell, which this court adopted in Tucker, discusses immunity appeals based on the collateral order doctrine:

> Although 28 U.S.C. § 1291 vests the courts of appeals with jurisdiction over appeals only from "final decisions" of the district courts, "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." Gillespie v. United States Steel Corp., 379 U.S. 148, 152, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964). Thus, a decision of a district court is appealable if it falls 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 to independent of the cause itself to require that appellate consideration to be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Cor., 357 U.S. 541, 546, 93 L.Ed.2d 1528, 69 S.Ct. 1221 (1949)].
>
> A major characteristic of the denial or granting of a claim appealable under Cohen's "collateral order" doctrine is that "unless it can be reviewed before [the proceedings terminate], it never can be reviewed at all." Stack v. Boyle, 342 U.S. 1, 12, 72 S.Ct. 1, 96 L.Ed.3d, (1952) (opinion of Jackson, J.; see also United States v. Hollywood Motor Car Co., 458 U.S. 263, 266, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982). When a district court has denied a defendant's claim of right not to stand trial, on double jeopardy grounds, for example, we have consistently held that court's decision appealable, for such a right cannot be effectively vindicated after the trial has occurred. Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1978) [footnote omitted]. Thus, the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action. See Nixon v. Fitzgerald, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); cf.

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Helstoski v. Meanor, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979).

Mitchell, 472 U.S. at 524-525, 105 S.Ct. at 2806, 86 L.Ed. 2d at 424.[2]

Federal courts have permitted non-final review of a wide variety of immunity claims beyond absolute and qualified immunity. Most notably, the Supreme Court allowed non-final review of Eleventh Amendment state immunity in Puerto Rico Aqueduct and Sewer Authority v. Metcalf, 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)[3]; see also Schopler v. Bliss, 903 F.2d 1373 (11th Cir. 1990) (same); Harris v. Deveaus, 780 F.2d 911 (11th Cir. 1986) (prosecutorial and judicial immunity); Princz v. Federal Republic of Germany, 998 F.2d 1 (D.C. Cir. 1993) (foreign sovereign immunity); United States v. Rose, 28 F.3d 181 (D.C. Cir. 1994) (Speech and Debate Clause immunity); McSurely v. McClellan, 521 F.2d 1024 (D.C.Cir. 1975) (state action doctrine immunity in antitrust cases); Marx v. Government of Guam, 866 F.2d 294 (9th Cir. 1989) (interlocutory appeal from denial of motion to dismiss premised on Guam's sovereign immunity law); Napolitano v. Flynn,

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[2] The Supreme Court has also held that state-court decisions rejecting a party's federal law claim that the party is not subject to suit before a particular tribunal are "final" for purposes of certiorari jurisdiction under 28 U.S.C. § 1257. Mitchell, 472 U.S. at 525 n. 8, citing Mercantile Nat'l Bank at Dallas v. Langdeau, 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963).

[3] The Eleventh Amendment prohibits federal courts from exercising subject matter jurisdiction in suits brought against a state by a citizen of that state. Welch v. State Dep't of Highways and Public Transportation, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d (1985).

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949 F.2d 617 (2d Cir. 1991) (applying state sovereign immunity in diversity action).

Numerous federal decisions have permitted interlocutory review of orders determining immunity claims on motions to dismiss. See Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993) (qualified immunity raised on motion to dismiss); United States v. University of Texas M.D. Anderson Cancer Center, 961 F.2d 46 (4th Cir. 1992); Kaluczky v. City of White Plains, 57 F.3d 202 (2d Cir. 1995); Hathaway v. Coughlin, 37 F.3d 63 (2d Cir. 1994); Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for Galardi, 12 F.3d 317 (2d Cir. 1993) (foreign sovereign immunity).

In civil litigation, the law considers the state, or the sovereign, differently than other parties. Article X, Section 13, Florida Constitution, states that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." This provision has been interpreted to "provide absolute sovereign immunity for the state absent waiver by legislative enactment or constitutional amendment." Jackson v. Palm Beach County, 360 So.2d 1 (Fla. 4th DCA), cert. denied, 354 So.2d 886 (Fla. 1978). Section 768.28(1), Florida Statutes, provides that "[i]n accordance with s. 13, Art. X, State Constitution, the state, for itself and for all its agencies or subdivision, hereby waives sovereign immunity for liability for torts, but only to the extent specific in this act." The state is immune from suit except where legislative or constitutional waiver has been implemented. Sovereign immunity is

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the rule rather than the exception. Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984).

Consistent with the "rule" of immunity, there are pre-suit requirements that must be complied with before suing the state, and damage recovery limitations. See § 768.28, Fla. Stat. There are also civil and appellate rules of procedure that apply only to the state. See e.g. Fla.R.Civ.P. 1.170(d), Fla.R.App.P. 9.130(b) (automatic stay).

This court has held that Florida's limited waiver of sovereign immunity, pursuant to section 768.28, must be strictly construed to preclude suit unless a plaintiff can demonstrate entitlement to maintain a cause of action against the state. Levine v. Dade County School Board, 442 So.2d 210 (Fla. 1983); Arnold v. Shumpert, 217 So.2d 116 (Fla. 1968). To that end, Florida courts have recognized that sovereign immunity is not an affirmative defense, but rather a jurisdictional matter which can never be waived by the government defendant. Sebring Utilities Commission v. Sicher, 509 So.2d 968 (Fla. 2d DCA 1987).

Other jurisdictions permit interlocutory review of sovereign immunity claims. Col.Rev.Stat. § 24-10-108 (1994) ("[i]f a public entity raises the issue of sovereign immunity prior to or after the commencement of discovery, the court shall suspend discovery. . . . The court's decision on such motion shall be a final judgment and shall be subject to interlocutory appeal."); Blevins v. Denny, 114 N.C.App. 766, 443 S.E.2d 354 (N.C. App. 1994) (on Mitchell analysis, interlocutory review of sovereign immunity claims

permitted); City of Mission v. Ramirez, 865 S.W.2d 579 (Tex. App. 1993); Lee County Board of Supervisors v. Fortune, 611 So.2d 927 (Miss. 1992); Griesel v. Hamilin, 963 F.2d 338 (11th Cir. 1992) (applying Georgia law).

Under Tucker and Mitchell, the critical inquiry in determining the right to interlocutory appeal, is whether the immunity claim is soundly premised on a protection from trial, rather than a mere defense to liability. Sovereign immunity claims under Florida law unquestionably are premised upon a right not to stand trial. While the original doctrine of sovereign immunity was based on the notion that the sovereign could do no wrong, the modern concept is explained as a rule of social policy, of protecting the state from the burdensome interference with the performance of governmental functions that preserves its control over funds, property and instrumentalities. See States, Territories and Dependencies, 72 Am.Jur.2d § 99 (1974).

In Berek v. Metropolitan Dade County, 396 So.2d 756, 758 (Fla. 3d DCA 1981), approved 422 So.2d 838 (Fla. 1982) the Third District stated:

> The doctrine of sovereign immunity rests on two public policy considerations: the protection of the public against profligate encroachments on the public treasury, Spangler v. Florida State Turnpike Authority, 106 So.2d 421 (Fla. 1958), and the need for the orderly administration of government, which, in the absence of immunity, would be disrupted if the state could be sued at the instance of every citizen, State Road Department v. Tharp, 146 Fla. 745, 1 So.2d 868 (Fla. 1941). The enactment in 1973 of Section 768.28(5) was a legislative declaration that the countervailing public policy of allowing

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> citizens injured by the tortious action or inaction of the state to sue for the recovery of damages outweighed the state's interest in not being discommoded by litigation. But at the same time the Legislature permitted the state to be sued, it chose to continue to protect against profligate encroachments on the public treasury by limiting the waiver of sovereign immunity to a specified dollar amount . . . .

See Vargas v. Glades General Hospital, 566 So.2d 282, 284 (Fla. 4th DCA 1990); see also Trianon Park Condo. Ass'n v. City of Hialeah, 468 So.2d 912, 918 (Fla. 1985) (noting that separation of powers doctrine precludes judicial branch from interfering with discretionary functions of legislative or executive branches of government absent a violation of constitutional or statutory rights which give rise to private causes of action, and certain functions inherent in the act of governing are "immune from suit").

Thus, in Tucker, this court considered the social and personal consequences of erroneously lost public immunity in civil rights actions, noting the expenses of litigation, the diversion of official energy from pressing public issues, the deterrence of able citizens from accepting public office, and the danger that fear of being sued will deter officials from unflinching discharge of their official duties. The Supreme Court also considered these policy reasons in reaching its decision to allow non-final appeals in Mitchell.

When the state is sued in a tort action, the social and personal costs are no different. Society pays the litigation costs, suffers the same diversion of energy from public issues, the same deterrence of able citizens from accepting public employment,

and the same danger that fear of suit will deter performance of public duties. When the state, its agencies, subdivisions and employees are sued in tort, it is not the monolithic, nameless, faceless force of the state which is summoned in defense of the claim. Public employees and officials respond to and defend against the allegations of negligence. Performance of official duties comes to a halt when these individuals are required to provide testimony at depositions and trials and when they are required to gather documents in response to discovery requests. The burdens upon these officials and the state are equivalent in every respect to the burdens placed upon public officials named as defendants in civil rights actions.

The public policy supporting qualified immunity, as outlined in Mitchell and Tucker, supports sovereign immunity. Under Mitchell and Tucker, it is the nature of the right asserted that determines entitlement to interlocutory review. Thus, there is no rationale for permitting interlocutory review of qualified immunity claims in civil rights actions and precluding interlocutory review of sovereign immunity claims in state tort actions. The sovereign immunity claim meets the requirements for appealability under the Cohen collateral order doctrine because immunity cannot be recaptured after trial, it is separable from and collateral to the rights asserted in a tort claim, and the order determining immunity is conclusive as to that claim.

The only hiccup in the trend towards allowing non-final review of sovereign immunity issues comes from an easily distinguished

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decision by the First District Court of Appeal in Department of Education v. Roe, 656 So.2d 507 (Fla. 1st DCA 1995), review granted, 664 So.2d 629 (Fla. 1995). In Roe, the district court issued an opinion on rehearing which reversed an earlier opinion determining sovereign immunity dismissal orders are appealable. In the revised opinion, the Roe court refused to consider this court's decision in Tucker as deciding any issue beyond that which was specifically asked in the certified question in the case -- whether a Florida court should apply the same standard of review of a denial of summary judgment as the federal courts. The Roe court also restated the rule that denial of a motion to dismiss does not ordinarily qualify for certiorari review.

Roe and the Fourth District's decision in this case do not represent the appellate court trend of granting review. Roe contravenes the Mitchell and Tucker rationale -- that the immunity becomes worthless if the legal issue cannot be determined at a preliminary stage. The immunity means total protection from suit, including the burden of defending a suit that cannot be brought in the first instance. Without early appellate review of the immunity issue, the immune defendant is essentially no different than a garden variety tort feasor. In that sense, the technically immune defendant loses his statutory protection.

The better reasoned approach, and clearly the majority trend, is to grant non-final review of these types of orders. This court created the review exception in Tucker so that this type of order

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is subject to interlocutory review, and this appeal was improvidently dismissed by the Fourth District.

The Fourth District based its decision to dismiss the appeal on Judge Sharp's dissent in Department of Transportation v. Wallis, 659 So.2d 429 (Fla. 5th DCA 1995). In Wallis, the plaintiff alleged that DOT created a known dangerous condition when it failed to place a stoplight and sidewalk along a heavily travelled roadway. The plaintiff was injured when she attempted to cross the road in the middle of the block.

The majority, relying on Payne v. Broward County, 461 So.2d 63 (Fla. 1984), determined that the dangers of crossing a street are readily apparent. The state does not have an operational level duty to warn or protect the public from such dangers, and the state's decisions as to road design are discretionary acts protected from tort liability by the sovereign immunity.

Judge Sharp's dissent noted that under federal law, interlocutory appeals should not be allowed if the issue involves controversy about the facts, the sufficiency of the factual evidence, or issues which are inseparable from the merits of the case. Judge Sharp noted that Tucker involved a qualified immunity claim and an order on a motion for summary judgment, while Wallis was a "garden variety" state tort claim involving an order on a motion to dismiss.

Judge Sharp cited Johnson v. Jones, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). In Johnson, three of five police officer defendants sought summary judgment based on qualified

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immunity grounds. The police officers argued that they did not beat the plaintiff, and that they were not present when the plaintiff was beaten. The plaintiff had contrary evidence.

The Supreme Court determined that there could be no interlocutory appeal because the order denying summary judgment merely determined the existence or non-existence of fact issues. The appeal did not involve the central question to qualified immunity: whether the police officers' conduct violated constitutional or statutory standards. Thus, Judge Sharp's dissent does not refute the Tucker and Mitchell premise and rationale for allowing non-final review -- whether immunity constituted a legitimate entitlement not to stand trial, and whether an order denying a claim of such immunity effectively was unreviewable on appeal from a final judgment. Nor did Judge Sharp engage in the next layer of analysis to determine if such an order should be reviewable, based on the Cohen collateral order doctrine -- whether an order rejecting an immunity claim conclusively determined the disputed question, and whether such a claim involved a right completely separate from the merits of the action.

Immunity from suit, be it sovereign or otherwise, is a special right or privilege granted to a person or entity that provides protection from litigation. The rationale and purpose for sovereign immunity is well established in this state. Sovereign immunity claims, to having any continued meaning or import, and to support the immunity's rationale and purpose, must be accorded non-final review. This court has conducted a thorough and well

reasoned analysis in Tucker, pertaining to federal qualified immunity, and in Mandico, pertaining to workers' compensation immunity, that is equally applicable to sovereign immunity claims. There is no sound reason for deviating from the apparent trend of allowing non-final review of immunity claims. To do otherwise would render the immunity meaningless.

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

The trial court rejected the Department of Transportation's arguments concerning the applicability of the doctrine of sovereign immunity. The plaintiffs' complaint contains no factual allegations to remove the immunity cloak from the defendant. Rather, the plaintiffs' complaint merely recites conclusory non-factual statements that use buzz words designed to remove the immunity.

Recently, this court provided a cogent and succinctly stated brief historical overview of sovereign immunity in Florida. In Department of Health and Rehabilitative Servs. v. B.J.M., 656 So.2d 906, 911-12 (Fla. 1995), this court stated:

> Section 768.68, Florida Statutes (1993), waives governmental immunity from tort liability "under circumstances in which the state or [an] agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state." § 768.28(1), Fla. Stat. (1993). In Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1020 (Fla.

> 1979), we attempted to flesh out the effect of the statutory waiver of immunity and, in doing so, carved out an exception to the waiver of immunity of "policy-making, planning or judgmental government functions." In other words, despite the rather straightforward and broad scope of the waiver of sovereign immunity in section 768.28, we held that certain "discretionary"[footnote omitted] governmental functions remain immune from tort liability. Id. at 1022. Identifying these functions is done primarily by distinguishing, through a case-by-case analysis, "the 'planning' and 'operational' levels of decision-making by governmental agencies." [footnote omitted] Id.

The court went on to state the four categories of government action:

> We held in Commercial Carrier that this distinction should be made according to "the preliminary test iterated in Evangelical United Brethren Church v. State," 67 Wash.2d 246, 407 P.2d 440 (1965), as set out in our opinion.[footnote omitted] Id. Subsequently, in a further attempt to define the parameters of governmental tort liability, we modified this approach. In Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985), we explained that before applying the Evangelical Brethren test, the governmental function or activity at issue should be placed in one of four basic categories of government action. These fourcategories are: (I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and the protection of public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational, and general services for the health and welfare of the citizens. Id. at 919-21.

The court then went on to explain sovereign immunity as applied to the four categories:

> In considering governmental tort liability under these four categories, we stated:

> [T]here is no governmental tort liability [regarding] the discretionary governmental functions described in categories I and II because there has never been a common law duty of care with respect to these legislative, executive, and police power functions, and the statutory waiver of sovereign immunity did not create a new duty of care.

Id. at 921. On the other hand, we recognized:

> [T]here may be substantial governmental liability under categories III and IV. This result follows because there is a common law duty of care regarding how property is maintained and operated and how professional and general services are performed. It is in these latter two categories that the Evangelical Brethren test is most appropriately utilized to determine what conduct constitutes a discretionary planning or judgmental function and what conduct is operational for which the governmental entity may be liable.

Id. We have since emphasized that these four Trianon categories are "rough" guides rather than inflexible rules. See, e.g., Yamuni, 529 So.2d at 261.

Assuming that a governmental activity or function is not protected under category I or II, the court must determine what conduct within categories III and IV "constitutes a discretionary planning or judgmental function and what conduct is operational" under the Evangelical Brethren test. Trianon, 468 So.2d at 921. If the questions posed in Evangelical can be clearly and unequivocally answered yes, then the challenged act is probably policy-making, planning, or judgmental activity which is immune from tort liability. If the answer to any of these questions is no, then further inquiry is necessary to determine whether the conduct should be immune. Commercial Carrier, 371 So.2d at 1019; see also Yamuni, 529 So.2d

> at 260. The essential goal of this further analysis is the same, to distinguish those "policy-making, planning or judgmental government functions" entitled to immunity from those routine operational level actions that are subject to tort liability.

The third category applies to the claim in this case. See Simmonds-Hewett v. Keaton, 626 So.2d 249 (Fla. 4th DCA 1993).

In a series of cases, this court has distinguished between government liability for failure to properly plan, design, or upgrade roads or intersections, and government liability for failure to properly maintain existing facilities. See Department of Transportation v. Neilson, 419 So.2d 1071 (Fla. 1982); Ingham v. Department of Transportation, 419 So.2d 1081 (Fla. 1982); City of St. Petersburg v. Collum, 419 So.2d 1082 (Fla. 1982). As to the former, the court has held that such governmental decisions are policy-making, planing or judgmental functions to which absolute immunity attaches. Neilson, 419 So.2d at 1074-75. As to the latter, the court in Neilson reaffirmed its view expressed in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), that "the failure to properly maintain existing traffic control devices and existing roads may . . . be the basis of a suit against a governmental entity." Neilson, 419 So.2d at 1078. Because the duty to properly maintain roads arises at the operational level of government, sovereign immunity does not apply. Hughes v. City of Ft. Lauderdale, 519 So.2d 43, 44 (Fla. 4th DCA 1988) ("Maintenance is an operational, not a planning level function.").

As a general proposition, the decisions to build or change a road, and all the determinations inherent in such a decision, are planning level decisions immune from suit. See Department of Transportation v. Stevens, 630 So.2d 1160 (Fla. 2d DCA 1993), review denied, 640 So.2d 1108 (Fla. 1994). In Payne v. Palm Beach County, 395 So.2d 1267 (Fla. 4th DCA 1981), the court held that the failure to extend the road and the construction of a guardrail are classic examples of the type of judgmental, planning level decision within the protected sphere of sovereign immunity.

In this case, the plaintiffs' complaint uses only buzz words to evade the immunity issue. The complaint does not allege any "operational" function facts. The complaint is devoid of any facts as to how the Department of Transportation failed to maintain and inspect the guardrails. The immunity is not dissolved by alleging the general existence of an operational level type duty. There must be some factual allegations as to how, when, what and where the duty existed and was breached. This complaint contains nothing of the sort. See e.g. Capo v. Department of Transportation, 642 So.2d 37 (Fla. 3d DCA 1994), review denied, 651 So.2d 1193 (Fla. 1995) (complaint specifically alleged that DOT failed to properly maintain exit ramp by allowing potholes to exist and by allowing foliage to grow hindering motorist's view). In this case the complaint does not contain facts which indicate what non-immune duty was breached, and must be subject to dismissal.

Reversal is warranted.

CONCLUSION

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

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of April, 1996 to: Edward M. Ricci, Esquire, and Theresa Dipaola, Esquire, Ricci, Hubbard & Leopold, P.A., Counsel for Appellees, 1645 Palm Beach Lakes Boulevard, Suite 250, West Palm Beach, Florida 33401; W. Kirk Davenport, Esquire, Tucker, Davenport & Willingham, Counsel for Appellees, P.O. Box 360186, Birmingham, Alabama 35236; and Bruce Flower, Esquire, Counsel for Appellee N.S. Marine, 511 N. Maitland Avenue, Maitland, Florida 32751.

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GBM/bj
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