IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC18-468
L.T. CASE NO. 1D16-3940

FLORIDA HIGHWAY PATROL,

Petitioner,

v.

LASHONTA RENEA JACKSON,

Respondent.

BRIEF OF FLORIDA LEAGUE OF CITIES AND CITY OF BOCA RATON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
FIRST DISTRICT COURT OF APPEAL

EDWARD G. GUEDES, ESQ.
Florida Bar No. 768103
ERIC S. KAY, ESQ.
Florida Bar No. 1011803
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
2525 Ponce de Leon Blvd., Ste. 700
Coral Gables, Florida 33134
Telephone: (305) 854-0800
Facsimile: (305) 854-2323
eguedes@wsh-law.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

Cases

TABLE OF CITATIONS
(Continued)

Page

Statutes

Rules

TABLE OF CITATIONS
(Continued)

Page

INTRODUCTION

The Florida League of Cities ("League") and the City of Boca Raton ("City") hereby submit this brief as *amici curiae* in support of petitioner, the Florida Highway Patrol, to alert the Court to the potential consequences of its decision with respect to invocations and denials of other types of immunity governed by Florida Rule of Appellate Procedure 9.130(a)(3)(C).[1]

STATEMENT OF IDENTITY AND INTEREST OF *AMICI*

The League is the united voice for Florida's municipal governments. Its goals are to serve the needs of Florida's municipalities and promote local self-government. The League was founded on the belief that local self-governance is the keystone of American democracy and consists of hundreds of municipal members throughout Florida. Those municipalities are frequently entitled to invoke the protections of sovereign immunity in connection with the performance of discretionary planning functions that might ostensibly give rise to litigation. Their tens of thousands of employees in administrative, law enforcement, fire fighting and various other capacities are frequently entitled to invoke the immunity from suit conferred on them by section 768.28(9)(a), Florida Statutes.

The City is a municipality located in Palm Beach County. Through its elected officials and/or administrative personnel, the City frequently makes discretionary planning decisions, which under Florida law are sovereignly immune

[1] This brief contains hyperlinks to reported cases when they first appear.

from judicial review and potential liability. Additionally, the City employs individuals in administrative, law enforcement, fire fighting and varied other capacities who are frequently entitled to invoke the immunity from suit conferred on them by section 768.28(9)(a), Florida Statutes.

Since the relevant language in the rules governing interlocutory review of immunity denial decisions is identical as to invocations of (i) sovereign immunity, (ii) qualified immunity, (iii) workers' compensation immunity, and (iv) section 768.28(9) immunity, and because the district courts of appeal sometimes analogize the provisions, how the Court resolves the jurisdictional inquiry in this case may have broader implications. As such, *amici* seek to focus the Court's attention on the consequences of denying interlocutory review of denials of immunity from suit under section 768.28(9)(a). When a trial court rejects the invocation of section 768.28(9)(a) immunity, whether at the motion to dismiss or summary judgment stage, and fails (or refuses) to provide an explanation for its reasoning, it effectively strips the municipal employee of the immunity conferred on him or her by the Florida Legislature. Unless immediate appellate review is available to examine such an order, the immunity from suit in section 768.28(9)(a) is potentially rendered illusory.

SUMMARY OF ARGUMENT

In waiving the immunity of government for tort claims under specific circumstances, the Florida Legislature has also expressly *mandated* in section 768.28(9)(a) that a governmental employee shall not be named as a defendant in a

tort lawsuit unless the employee has "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." This constitutes immunity from suit in all but exceptional situations. While the various subsections of Rule 9.130(a)(3)(C) relating to interlocutory review of orders rejecting the invocation of different types of immunity all contain key identical language, they need not – and should not – be interpreted the same way. The immunity from liability illustrated in many workers' compensation immunity cases is distinct and serves a different purpose than the immunities from suit arising from invocations of sovereign immunity for discretionary planning functions, qualified immunity and immunity pursuant to section 768.28(9)(a). Failure to recognize this distinction in practice and allow immediate appellate review fundamentally defeats the purpose of section 768.28(9)(a) and the interlocutory appeals allowed cities under Rule 9.130(a)(3)(C)(x).

For that reason, there are sound policy reasons for allowing – and, in fact, *requiring* – an appellate court to look beyond the face of a trial court order to examine the record and determine whether the rejection of the immunity from suit defense turns on a question of law, as this Court held in *Keck v. Eminisor*, 104 So. 3d 359 (Fla. 2012). This Court's holdings in *Hastings v. Demming*, 694 So. 2d 718 (Fla. 1997), and *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812 (Fla. 2004), which reflect that immediate appellate review is available only when the trial court's order *expressly* determines that the defendant is not entitled to

immunity as a matter of law, should either be receded from or limited in their application to workers' compensation cases.

ARGUMENT

I. THE IMMUNITY FROM SUIT LEGISLATIVELY CONFERRED IN SECTION 768.28(9)(a) SHOULD NOT BE VITIATED SIMPLY BECAUSE A TRIAL COURT FAILS OR REFUSES TO PROVIDE AN EXPLANATION FOR ITS REJECTION OF THE IMMUNITY.

A. Review of immunity denials generally.

Section 768.28(9)(a) reads, in pertinent part, as follows:

> No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort *or named as a party defendant in any action* for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

§ 768.28(9)(a), Fla. Stat. (emphasis added). This immunity is not merely immunity from liability, but rather immunity from being forced to participate as a defendant in the litigation. *Keck*, 104 So. 3d at 366-67.

To safeguard such immunity, this Court has adopted a rule of appellate procedure that allows for immediate review of non-final orders determining, "that, as a matter of law, a party is not entitled to immunity under section 768.28(9), Florida Statutes." Fla. R. App. P. 9.130(a)(3)(C)(x). The rule contains jurisdictional language identical to that found in other subsections of the rule relating to appeals of non-final orders relating to invocations of workers'

compensation immunity, absolute or qualified immunity, and sovereign immunity.[2] *See* Fla. R. App. P. 9.130(a)(3)(C)(v), (vi), (xi).

Notwithstanding this rule and its origins (discussed in greater detail below), multiple district courts of appeal (including the First District in this case) have declined to exercise jurisdiction over interlocutory appeals of non-final orders rejecting an invocation of immunity where the trial court's order fails to provide an *express* determination that the defendant is not entitled to immunity as a matter of law. *See, e.g.*, *Citizens Prop. Ins. Corp. v. Calonge*, 246 So. 3d 447, 450-51 (Fla. 3d DCA 2018); *Jackson*, 238 So. 3d at 431; *Miami-Dade County v. Pozos*, 242 So. 3d 1152, 1156 (Fla. 3d DCA 2017); *Footstar Corp. v. Doe*, 932 So. 3d 1272, 1274 (Fla. 2d DCA 2006); *Rinker Materials Corp. v. Holmes*, 697 So. 2d 558, 559-60 (Fla. 4th DCA 1997). *Cf. Miami-Dade County v. Pozos*, 242 So. 3d 540, 1167-68 (Fla. 3d DCA 2018) (Rothenberg, C.J., dissenting from denial of rehearing and rehearing en banc) (relying primarily on *Keck* and concluding it was appropriate for an appellate court to examine the record to determine whether the invocation of immunity could be decided as a "legal" rather than factual question).

Invariably, the district courts, in declining jurisdiction, have cited this Court's decisions in *Hastings v. Demming*, 694 So. 2d 718 (Fla. 1997), and *Reeves*

---

[2] In the case below, the immunity at issue was sovereign immunity and the pertinent rule was 9.130(a)(3)(C)(xi). *Florida Hwy. Patrol v. Jackson*, 238 So. 3d 430, 431 (Fla. 1st DCA 2018). The First District also noted the similarities between the various immunity subsections of Rule 9.130(a)(3)(C). *Id.* at 435.

v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812 (Fla. 2004). As such, a preliminary examination of each decision is warranted.

In *Hastings*, the defendants in a workers' compensation appeal sought interlocutory review of a decision denying summary judgment in their favor on the grounds of immunity. 694 So. 2d at 718. The certified question before the Court asked:

> Does an appellate court have jurisdiction under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi) to review a nonfinal order denying a motion for summary judgment asserting workers' compensation immunity when the order does not conclusively and finally determine a party's entitlement to such immunity, as a matter of law, because of the existence of disputed material facts, so that the effect of the order is to leave for a jury's determination the issue of whether the plaintiff's exclusive remedy is workers' compensation benefits?

Id. (upper-case lettering eliminated). The *Hastings* opinion further reveals that the defendants' motions for summary judgment "were denied without elaboration." *Id.* at 719.

Despite the lack of "elaboration" in the denial of the immunity motions, it appears that the Second District *examined the record* to ascertain whether the appeal "presented with a record with facts so manifest it can readily conclude that a plaintiff's exclusive remedy is in fact workers' compensation, thereby promoting an early resolution of the case at the appellate level." *Id.* (quoting *Hastings v. Demmings*, 682 So. 2d 1107, 1109 (Fla. 2d DCA 1996)). The Second District further explained: "We conclude, therefore, that in amending the rule the supreme court's clear intent was to confer jurisdiction to review only that type of nonfinal

order in which a lower tribunal, based on undisputed material facts, has determined clearly and conclusively, *beyond doubt*, that a party is not entitled to workers' compensation immunity as a matter of law." *Id.* (emphasis in original; quoting *Hastings*, 682 So. 2d at 1109).

Ultimately, the Second District dismissed the appeal for lack of jurisdiction based on the following analysis:

> In this case, *we cannot discern either from the record or the order* under review that the facts presented to the trial court in connection with the motions for summary judgment were so fixed and definite that the court was in a position to determine clearly and conclusively, beyond doubt, that Hastings and ASC were not entitled to workers' compensation immunity as a matter of law. Thus, we are unable to determine whether the trial court's denial of the motions for summary judgment effectively precluded Hastings and ASC from ever presenting to the jury the issue of whether workers' compensation is the appellees' exclusive remedy.

Id. (emphasis added; quoting *Hastings*, 682 So. 2d at 1110). Clearly, the Second District did not merely rely upon the contents of the order to ascertain its jurisdiction, but actually examined the record. And yet, notwithstanding the Second District's examination of the record and this Court's own examination of the record, *see id.* at 718 ("The record in this case reflects the following."), this Court concluded:

> Nonfinal orders denying summary judgment on a claim of workers' compensation immunity are not appealable *unless the trial court order specifically states that, as a matter of law, such a defense is not available to a party*. In those limited cases, the party is precluded from having a jury decide whether a plaintiff's remedy is limited to workers' compensation benefits and, therefore, an appeal is proper. Otherwise, the denial of the summary judgment may be based on a

> factual dispute and *the party is still likely able to present an immunity defense to the jury*. In those cases, the new rule makes clear that the district courts have no jurisdiction to hear an appeal of the nonfinal order.

Id. at 720 (emphasis added). The Court's conclusion seems to emphasize the opportunity the defendant retained in the ordinary course of litigation to present its workers' compensation immunity defense to the jury.

Seven years later, in *Reeves*, this Court in another workers' compensation immunity case reaffirmed its holding in *Hastings*. Before turning to the jurisdictional question, the Court noted the Second District's detailed examination of the record facts surrounding the accident. *Reeves*, 889 So. 2d at 814-15 (citing *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d 857, 859-61 (Fla. 2d DCA 2002)). The trial court had explained in its written order that "[t]he facts of this case and the allegations of the plaintiff, viewed in the light most favorable to the plaintiff, create a factual basis for a composite of circumstances which, together, constituted an imminent or clear and present danger amounting to more than normal and usual peril, show a chargeable knowledge or awareness of the imminent danger, and evince a conscious disregard of consequences." *Id.* at 816. The record reflected that the denial of the immunity turned on the *factual* determination of whether the employer engaged in an intentional tort or gross negligence, thus precluding application of the immunity. *Id.* at 817.

The Second District, though, concluded it had jurisdiction to decide the appeal:

> [B]ecause the standards of care applicable to gross negligence, culpable negligence, and intentional tort are very limited, the disputed

> facts in this case do not actually create disputes concerning the material issues. In other words, the facts in the light most favorable to the plaintiff are so "crystallized" that a court can determine, as a matter of law, that these facts do not rise to the heights of gross negligence, culpable negligence, or intentional tort. *See Hastings*, 694 So. 2d at 719. Thus, rule 9.130(a)(3)(C)(v) should restrict us from examining cases where the record is not factually well-developed on the issue of workers' compensation immunity, but it should not prevent us from enforcing the legislative policy of immunity when we can review a well-developed record to conclude that the plaintiff cannot present prima facie evidence to establish the exceptional case of gross negligence, culpable negligence, or intentional tort in this context.

889 So. 2d at 818 (quoting *Reeves*, 833 So. 2d at 865). This Court quashed the decision and explained:

> In 1996, the section [of the rule] was amended by moving the phrase "as a matter of law" from the end of the provision to the beginning. As explained in the committee notes, this amendment was made to clarify "that this subdivision was not intended to grant a right of nonfinal review if the lower tribunal denies a motion for summary judgment based on the existence of a material fact dispute." Fla. R. App. P. 9.130 (Committee Notes, 1996 Amendment).

889 So. 2d at 819 (footnote omitted).

Importantly, the Court in *Reeves* cited to its earlier decision in *Florida Dep't of Corrections v. Culver*, 716 So. 2d 768 (Fla. 1998), where it answered the following certified question: "In determining the appealability of a nonfinal order denying a motion for summary judgment based on workers' compensation immunity, are we restricted to looking only at the order on appeal or may we review the record in the manner described in *Hastings v. Demming*, 682 So. 2d 1107 (Fla. 2d DCA 1996)[?]" *Reeves*, 889 So. 2d at 820 (quoting *Culver*, 716

So. 2d at 768)). The Court's answer was to refer to the language from *Hastings* that "'[n]onfinal orders denying summary judgment on a claim of workers' compensation immunity are not appealable unless the trial court order specifically states that, as a matter of law, such a defense is not available to a party.'" *Id.* (quoting *Culver*, 716 So. 2d at 768-69, in turn quoting *Hastings*, 694 So. 2d at 720).

As it did in *Hastings*, the Court in *Reeves* again focus on the defendant's ability or inability to present a workers' compensation immunity defense at trial. *Reeves*, 889 So. 2d at 821. It was only where a defendant would be precluded by the trial court from mounting such a defense that immediate appellate review would be available. *Id.* ("In the instant case, the circuit court's order denying summary judgment did not explicitly state that the respondents would not be entitled to rely upon a workers' compensation immunity defense at trial. … There is no determination, on the face of the order, that the respondents are precluded and prohibited, as a matter of law, from asserting the application of workers' compensation immunity from liability at the time of trial."). Plainly, in both *Hastings* and *Reeves*, the Court was concerned about a defendant's retained ability to present a workers' compensation immunity defense to a jury *at trial*, a concern that (as explained below) finds no place in the application of the immunity *from suit* inherent in section 768.28(9)(a) (or with the invocation of sovereign immunity based on discretionary governmental planning functions).

Interestingly, Justice Wells, joined by Justices Cantero and Bell, specially concurred in *Reeves* and explained:

> I write to state that I find the logic of Judge Altenbernd's opinion for the Second District to raise important issues which need to be confronted. In order to give effect to the legislatively mandated workers' compensation immunity, the legal existence and applicability of that immunity in individual cases should be able to be tested pretrial in appellate review. Such a procedure is necessary to prevent workers' compensation immunity from being seriously depreciated and this integral part of the workers' compensation system rendered worthless by reason of the expense and exposure of a jury trial.

Reeves, 889 So. 2d at 823 (Wells, J., specially concurring).[3] There is an even more compelling need to treat interlocutory appeals of denials of section 768.28(9)(a) immunity differently from workers' compensation immunity questions: whereas the immunity afforded by workers' compensation law is immunity from *liability*, *see infra* at 18-20, the immunity legislatively conferred by section 768.28(9)(a) is also *immunity from being named as a defendant*.

B. This Court's decision in *Keck v. Eminisor* calls into question the extension of prior precedents relating to workers' compensation immunity to other invocations of immunity.

In *Keck*, this Court addressed the following certified question of great public importance:

---

[3] Ultimately, Justices Wells, Cantero and Bell advocated for a return to the prior version of Rule 9.130 to allow for interlocutory review of non-elaborated orders. *Reeves*, 889 So. 2d at 823 (Wells, J., specially concurring).

> Should review of the denial of a motion for summary judgment based on a claim of individual immunity under section 768.28(9)(a), Florida Statutes, await the entry of a final judgment in the trial court to the extent that *the order turns on an issue of law*?

104 So. 3d at 360-61 (emphasis added). The Court answered the question in the negative and directed the Florida Bar Appellate Court Rules Committee to submit a proposed rule change that addressed the Court's concerns regarding preservation of an individual employee's immunity. *Id.* at 366, 369. The result was Rule 9.130(a)(3)(C)(x).

In examining the language of section 768.28(9)(a), this Court in *Keck* held:

> Because section 768.28(9)(a) specifies that an employee of the State shall not be "named as a party defendant" in a lawsuit unless the employee acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard, *we conclude that Keck should be entitled to interlocutory review in this case, as the resolution of that issue turns on a question of law*. In accordance with our approach to the issue of individual immunity in *Tucker v. Resha*, 648 So. 2d 1187, 1189-90 (Fla. 1994), we conclude that *a claim of individual immunity from suit under section 768.28(9)(a) should be appealable as a non-final order* under Florida Rule of Appellate Procedure 9.130, obviating the necessity of determining whether common law certiorari would alternatively be available.

104 So. 3d at 361 (emphasis added). Consequently, the Court made it clear that the presumption should be *in favor of* the exercise of interlocutory appellate jurisdiction whenever the issue of immunity "turns on a question of law." The Court's analysis did not focus on what the trial court's order might say, but rather on whether proper invocation of immunity "turned" on a legal determination.

It seems highly implausible – given the Legislature's express mandate that an individual governmental employee is immune from *suit* absent evidence of bad

faith or malicious purpose – that such immunity can be summarily stripped away by a trial court's unelaborated denial of a motion invoking immunity. It is ultimately irrelevant whether the trial court fails or refuses to provide an explanation for its rejection of the immunity defense, though there are troubling instances of a trial court's refusal to provide an explanation for its rejection of an immunity defense. *See, e.g.*, *Dep't of Children & Families v. Feliciano*, --- So. 3d ---, 2018 WL 6186521, at *3 (Fla. 3d DCA Nov. 28, 2018) (Rothenberg, C.J., concurring in result) (noting the trial court's *refusal* to provide in its order a reason for its rejection of immunity: "No, I don't need to give you a basis. I'm just letting [the plaintiff] proceed and it's denied, period."). No trial court should be able to insulate its ruling from appellate review in this manner.

The invocation of immunity invariably arises at two particular points in litigation. Either it is invoked in a motion to dismiss or, upon further development of the record, at summary judgment. In either instance, immediate appellate review should be available.

In the case of a motion to dismiss, the moving defendant accepts as true the well-pled allegations of the complaint. *See, e.g.*, *Chakra 5, Inc. v. City of Miami Beach*, 254 So. 3d 1056, 1061 (Fla. 3d DCA 2018); *Florida Carry, Inc. v. Univ. of Fla.*, 180 So. 3d 137, 148 (Fla. 1st DCA 2015). As a result, there can be no issue of disputed fact that would preclude the trial court (or the appellate court) from determining whether statutory immunity precludes the lawsuit from continuing against the named municipal employee. Either the alleged facts are sufficient to

overcome the legislatively mandated immunity from suit or they are not – and the appellate court is equally well positioned to determine, as this Court held in *Keck*, whether that decision "turns on a question of law." If the alleged facts do not, as a matter of law, permit the conclusion that the employee "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property," § 768.28(9)(a), Fla. Stat., then the employee is entitled to immunity, the lawsuit should be dismissed, and the appellate court should be able to make that determination immediately.

At the summary judgment stage, the analysis is only slightly different. A defendant municipal employee who seeks appellate review and contends that *under any set of facts established by the record* he or she is entitled to immunity as a matter of law should be entitled to have the trial court's determination to the contrary reviewed promptly. If, under a plaintiff's "best" set of record facts one cannot legally conclude that the municipal employee "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property," then the statutory immunity precludes the case from proceeding to trial.

For that matter, even an order cursorily noting the existence of "disputed issues of material fact" should be insufficient to defeat interlocutory review, particularly where an independent examination of the record reveals that there are, in fact, no disputed issues of fact *material* to the immunity question. Adopting an unyielding interpretation of Rule 9.130(a)(3)(C)(x) would (i) contradict the

Legislature's express intent that a municipal employee not be named as a defendant, and (ii) vitiate the employee's statutory immunity, thus subjecting him or her to the inconvenience and expense of prolonged litigation simply because of a drafting decision on the part of the trial court. This consequence cannot be remedied on final appeal and defeats the purpose of the rule. As the First District Court of Appeal observed in *Florida Fish & Wildlife Conservation Comm'n v. Jeffrey*, 178 So. 3d 460 (Fla. 1st DCA 2015), in considering the invocation of qualified immunity:

> The mistaken denial of a motion for summary judgment asserting qualified immunity – whether based on a determination of law *or an erroneous belief that material issues of fact preclude summary judgment on the issue* – results in irreparable harm because qualified immunity is an immunity from suit that is effectively lost if a case is erroneously permitted to go to trial. ….
>
> By contrast, any harm resulting from the erroneous denial of FWCC's motion for summary judgment is not irreparable because, by virtue of the waiver of sovereign immunity in section 768.28, Florida Statutes, FWCC has only limited *immunity from the liability* that may result from Respondent's suit, not immunity from the suit itself.

Id. at 464-65 (emphasis added; citing, *inter alia*, *Tucker v. Resha*, 648 So. 2d 1187, 1189 (Fla. 1994), and *Dep't of Educ. v. Roe*, 679 So. 2d 756, 759 (Fla. 1996)).[4]

[4] Unfortunately, and perhaps because it struggled with the apparent limitations on the interpretation of the interlocutory appeal rule, the First District opted to convert the appeal into a certiorari proceeding, *Jeffrey*, 178 So. 3d at 464, something which this Court in *Keck* had sought to avoid by inviting the adoption of Rule 9.130(a)(3)(C)(x). *Keck*, 104 So. 3d at 365 (noting that the Court had previously refused to expand the scope of certiorari review to allow for immediate review of denials of qualified immunity and instead requested an amendment to Rule 9.130(a)(3)(C) to allow for immediate review and vindication of the policy (continued . . .)

This Court's more recent decision in *Beach Community Bank v. City of Freeport*, 150 So. 3d 1111 (Fla. 2014), lends further credence to the conclusion that an appellate court *should* examine the record before it, rather than merely rely on the order entered by the trial court, to determine whether the application of immunity turns on a question of law. The First District decision reviewed by this Court in *Beach Community Bank* suggests that the trial court's order denying the motion to dismiss was unelaborated. *See* *City of Freeport v. Beach Cmty. Bank*, 108 So. 3d 684, 686-87 (Fla. 1st DCA 2013) ("The City moved to dismiss the complaint [because] … the decisions at issue were policy-making, planning-level functions for which the City is immune from suit. The circuit court denied the motion to dismiss and directed the City to file a responsive pleading."). The First District did not discuss the trial court's reasoning for its denial. An independent examination of the record before the First District confirms that the trial court's order simply denied the immunity request (after accepting as true the allegations of the complaint). *See* Appendix A.

(. . . continued)
underlying immunity from suit). *See also* *Seminole Tribe of Fla. v. Schinneller*, 197 So. 3d 1216, 1219 (Fla. 4th DCA 2016) (declining to exercise jurisdiction under Rule 9.130(a)(3)(C)(xi) and treating an appeal as a petition for certiorari on the ground that tribal sovereign immunity "involves complete immunity from suit" "because the sovereign immunity provided to the tribe is illusory if the tribe is required to defend an action barred by the doctrine." (internal quotation marks omitted)).

Citing *Keck*, this Court quashed the First District's decision to grant certiorari review of a denial of sovereign immunity, but went ahead and concluded that immunity from suit nonetheless applied because "immunity rested on a pure question of law." *Beach Cmty. Bank*, 150 So. 3d at 1113. *Notwithstanding the lack of elaboration* in the trial court's order, the Court concluded that review fell "squarely within the new rule amendment" and that "the procedure is similar to the procedure that we followed in *Keck*." *Id.* (citing *In re Amendments to Florida Rule of Appellate Procedure 9.130*, 151 So. 3d 1217 (Fla. 2014)).

II. THE COURT SHOULD EITHER RECEDE FROM *HASTINGS* AND ITS PROGENY OR LIMIT THEIR EFFECT TO WORKERS' COMPENSATION CASES.

Since *Keck* and *Beach Community Bank* – and apparently despite those decisions – the district courts of appeal have continued to decline to exercise jurisdiction in situations where the trial court's order rejecting the invocation of immunity is unelaborated. As previously noted, in each instance, the courts have relied predominantly on *Hastings* and *Reeves*, while struggling to understand the interplay of those decisions with *Keck* and *Beach Community Bank*. This Court should clarify that, where immunity from suit is implicated, rather than merely immunity from liability, the lack of elaboration in a trial court order should not preclude a district court from exercising jurisdiction and examining the record to determine whether the rejection of the immunity defense turns on a question of law. To that end, the Court should either recede in part from *Hastings* and its progeny, or limit their application to workers' compensation cases.

Analogizing the invocation of other types of immunity to workers' compensation cases is inappropriate because the immunity afforded under the workers' compensation scheme is immunity from liability, rather than immunity from suit. This is the trap the Third District fell into when deciding *Pozos*, a case where sovereign immunity was invoked with respect to a discretionary planning function. 242 So. 3d at 1152-53. The *Pozos* Court observed:

> Given the recency of these amendments [to rules 9.130(a)(3)(C)(x) and 9.130(a)(3)(C)(xi)], there is virtually no case law construing or applying these provisions. However, there is relevant case law construing *identical* language from an existing provision of rule 9.130, authorizing an appeal from a nonfinal order "that determines ... that, as a matter of law, a party is not entitled to workers' compensation immunity." Fla. R. App. P. 9.130(a)(3)(C)(v). Case law interpreting this provision holds uniformly that an order denying summary judgment on the basis of workers' compensation immunity is not appealable under rule 9.130 unless the trial court's order *expressly* provides that it is making a determination that, as a matter of law, the party is not entitled to immunity.

242 So. 3d at 1154-55 (ellipsis in original). The Third District noted the similarity in the language of both of Rule 9.130's subsections, and after citing *Hastings* and *Reeves*, concluded that the workers' compensation cases controlled the interpretation of Miami-Dade County's invocation of immunity governed by Rule 9.130(a)(3)(C)(xi). *Id.* at 1156-57.

As previously noted, both *Hastings* and *Reeves* point out that the employer retained the ability to present the workers' compensation immunity defense at trial. *Hastings*, 694 So. 2d at 720; *Reeves*, 889 So. 2d at 821. In short, because the party invoking workers' compensation immunity retained the ability (and was expected)

to present the immunity defense to the jury, an immediate appeal was not necessary. This conclusion makes sense when one considers that the immunity afforded by the workers' compensation statute is *not* immunity from *suit*, as is the case with section 768.28(9)(a), but rather simply immunity from *liability*. Section 440.11, Florida Statutes, states in pertinent part:

> (1) The *liability* of an employer prescribed in s. 440.10 shall be exclusive and in place of all other *liability*, including vicarious liability, of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death …. The same *immunities from liability* enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter. …
>
> (2) The *immunity from liability* described in subsection (1) shall extend to an employer and to each employee of the employer which uses the services of the employees of a help supply services company….

§ 440.11(1), (2), Fla. Stat. (emphasis added).

Unfortunately, and in the absence of case law directly on point, the Third District failed to draw the distinction between Miami-Dade County's claimed immunity from suit for planning decisions, which is based on the separation of powers doctrine, *see, e.g.*, *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1017-22 (Fla. 1979), and the immunity from liability conferred by workers' compensation laws. In the former scenario, as in cases involving section 768.28(9)(a) – which this Court recognized was the case in *Keck* – there is simply

no expectation that an immune party should present the immunity question to a jury and endure prolonged litigation if the relevant facts are not disputed. *Keck*, 104 So. 3d at 361. While workers' compensation immunity provides immunity from liability and such immunity can be proven through trial and appeal without vitiating that immunity, section 768.28(9)(a) confers immunity from suit, which is wholly abrogated by the obligation to proceed through trial and appeal.

CONCLUSION

The Legislature has mandated that government employees not be named as defendants in tort lawsuits unless the evidence establishes that they "acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." § 768.28(9)(a), Fla. Stat. The protection of this immunity from suit, comparable in many ways to the immunity from suit at issue when governments engage in discretionary, planning or governmental functions, should not be subject to the whims of a trial court that, for whatever reason, fails or refuses to elaborate on its rationale for rejecting the immunity. Even when the trial court provides an explanation, however elaborated, the appellate courts in Florida should engage in an assessment of the record to confirm whether the rejection of immunity turns on a question of law. If it does, then jurisdiction exists to review the trial court's immunity determination and protect against inadvertent vitiation of what the Legislature (or the separation of powers doctrine) has guaranteed.

Respectfully submitted,

EDWARD G. GUEDES, ESQ.
Florida Bar No. 768103
eguedes@wsh-law.com (primary)
szavala@wsh-law.com (secondary)
ERIC S. KAY, ESQ.
Florida Bar No. 1011803
ekay@wsh-law.com (primary)
jmessa@wsh-law.com (secondary)
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
2525 Ponce de Leon Blvd., Ste. 700
Coral Gables, Florida 33134
Telephone: (305) 854-0800
Facsimile: (305) 854-2323

Counsel for Amici Curiae

By: /s/ *Edward G. Guedes*
Edward G. Guedes

CERTIFICATE OF SERVICE

I certify that a copy of this amicus curiae brief was served via E-Portal this 19th day of February, 2019, on:

Ashley Moody, Attorney General Amit Agarwal, Solicitor General Edward M. Wenger, Chief Deputy Solicitor General Christopher J. Baum, Deputy Solicitor General, Britt Thomas, Chief Assistant Attorney General, Office of the Attorney General The Capitol, PL-01 Tallahassee, Florida 32399 Christopher.baum@myfloridalegal.com *Counsel for Petitioner*	Jack J. Fine, Esq. Melissa S. Morris, Esq. Fine, Farkash & Parlapiano, P.A. 622 N.E. 1st Street Gainesville, Florida 32601 jfine@ffplaw.com mmorris@ffplaw.com jduchaj@ffplaw.com Daniel Glassman, Esq. Glassman & Zissimopulous 804 NW 16th Avenue Suite B Gainesville, Florida 32601 dan@putmyclientsfirst.com *Co-Counsel for Respondent*
Frances G. De La Guardia, Esq. Holland & Knight LLP 701 Brickell Avenue Suite 3300 Miami, Florida 33131 Frances.guasch@hklaw.com *Counsel for Amicus City of Coral Gables*	Miriam Soler Ramos, Esq. City Attorney City of Coral Gables 405 Biltmore Way Coral Gables, Florida 33134 mramos@coralgables.com *Counsel for Amicus City of Coral Gables*

/s/ *Edward G. Guedes*
Edward G. Guedes

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ *Edward G. Guedes*
Edward G. Guedes