

**IN THE SUPREME COURT OF FLORIDA**

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FLORIDA HIGHWAY PATROL, A DIVISION OF FLORIDA  
DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Petitioner,

-vs-

LASHONTA RENEA JACKSON, AS PERSONAL REPRESENTATIVE  
OF THE ESTATE OF VONTAVIA KIARA ROBINSON, DECEASED, ON  
BEHALF OF MULTIPLE BENEFICIARIES,

Respondent.

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**RESPONDENT'S AMENDED ANSWER BRIEF**

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**CASE NUMBER: SC18-468**

ON DISCRETIONARY REVIEW FROM THE  
FIRST DISTRICT COURT OF APPEAL  
L.T. CASE NO.: 1D16-3940

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FLORIDA SUPREME COURT

03/28/2019

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## **PREFACE**

In this Brief, Petitioner FLORIDA HIGHWAY PATROL will be referred to as Petitioner or FHP. Respondent LASHONTA RENEA JACKSON will be referred to as Respondent or JACKSON. References to the Record on Appeal will be designated by the abbreviation “(R. at \_\_\_\_)” followed by PDF page number.

## STATEMENT OF CASE AND FACTS

This is an appeal of a non-final order which denied a motion for summary judgment filed by the Florida Highway Patrol (“FHP”). (R. at 4-5). FHP’s Motion argued, among other things, that they owed Jackson no duty of care, but if the court found there was a duty owed, that i) sovereign immunity would protect “any decision made by FHP,” ii) reopening the roadway was a protected discretionary decision, and iii) that the “Police Emergency Exception” applied. (R. at 25-46). After considering the memorandums filed by both parties, reviewing extensive record evidence, and hearing argument by counsel, the trial court order stated that disputed issues of facts remained, without determining whether FHP was entitled to sovereign immunity as a matter of law. (R. at 322-23). FHP appealed the trial court’s non-final order and the First District Court of Appeal dismissed the appeal for lack of jurisdiction. (R. at 6) (R. at 1670-1683).

On appeal before this Court is the issue certified by the First District as a question of great public importance, which asks the following:

DOES RULE 9.130 PERMIT AN APPEAL OF A NON-FINAL ORDER DENYING IMMUNITY IF THE RECORD SHOWS THAT THE DEFENDANT IS ENTITLED TO IMMUNITY AS A MATTER OF LAW BUT THE TRIAL COURT DID NOT EXPLICITLY PRECLUDE IT AS A DEFENSE?

## FACTUAL BACKGROUND

### *a. FHP's Prior Knowledge of the Risks and Extreme Danger Smoke, Fog, and Weather Conditions Create for Motorists*

During the early morning hours of January 9, 2008, smoke and fog descended upon Interstate 4 in Polk County, draping it like a blanket and creating a perfect storm for a deadly 70-car pileup. (R. at 349-50, 1303-04, 1600). Drivers described hitting a white wall of smoke, within the 2-mile stretch of highway, where 10 separate crashes occurred, leaving 5 people dead and 37 injured. (R. at 349-50, 1303-04, 1600). At that time, I-4 was blanketed with a mixture of fog and smoke from a controlled burn, which lingered due to the weather conditions present on that January night. (R. at 1303).<sup>1</sup> FHP investigated, researched, and concluded<sup>2</sup> that the extreme reduction in visibility was predictable, and the crash could have been prevented by monitoring the weather conditions and closing the roadway. *Id.*

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<sup>1</sup>Although some of the Florida Department of Law Enforcement (FDLE) findings (regarding the subsequent 2012 response at issue here) criticized policy and planning, only the operational shortcomings are discussed herein. Despite the FDLE January 2012 Interstate 75 Incident Review (FDLE Report) being ruled inadmissible as hearsay, the facts discussed in the FDLE Report were substantiated by multiple witnesses and were argued to the Trial Court on multiple occasions.

<sup>2</sup> Experts explained that when the right combination of temperatures, humidity and smoke particles is reached, high pressure can cause the air to sink, forming an inversion layer near the surface, trapping atmospheric particulates beneath it – for, smoke and dust, creating a serious restriction to visibility. (R. at 1303, 1315, 1316, 1341).

During their review, FHP acknowledged that to *predict* this extremely dangerous condition in the future and avoid a duplicate deadly event, one could simply contact the National Weather Service for the current or overnight LVORI — Low Visibility Occurrence Risk Index — levels.<sup>3</sup> An “After Action Report,” summarized FHP’s review of the I-4 crashes and identified two action items to *predict* and *prevent* these fatal accidents from occurring: 1) the need to create a standard operating procedure for smoke/fog incidents; and 2) the standard operating procedure for smoke/fog incidents should incorporate the use of the Low Visibility Occurrence Risk Index (LVORI) system. (R. at 1303).

FHP presented to the Florida Senate Transportation Committee a summary regarding the I-4 crashes and their intended future use of the LVORI system. (R. at 1304). FHP stated they were taking certain steps to prevent future incidents by training command staff on the LVORI System and developing the standard protocol for smoke and fog incidents. (R. at 1304). The standard operating procedure<sup>4</sup> FHP created was then added as an addendum to their Policy Manual on Shift Commander

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<sup>3</sup> The LVORI gauges the probability of visibility restrictions from fog or smoke based on weather conditions on a scale of one to 10, with 10 the highest probability. (R. at 1301, 1303, 1349).

<sup>4</sup> Several FHP employees have testified that the addendum in the Policy Manual for Shift Commander Protocols was not a requirement and could be used as a “guideline.” (R. at 1296, 1321).

Protocols, titled **17.14-19 Checklist-Smoke/Fog Incidents**. (R. at 1301).

Specifically relevant to the instant case, were the following:

- **Notify Division of Forestry**
- **Obtain a spot weather forecast for the affected area from the National Weather Services**
- **Identify current or overnight LVORI levels to determine risk of high LVORI  $\geq 7$**
- **Confirm staffing plan is in place to monitor location and close roadway if needed**

*Id.*

*b. FHP's Knowledge of the "Boardwalk Fire"*

On Saturday afternoon of January 28, 2012 (2:35 pm), Alachua County Combined Communications Center ("ACCCC") received the first report of the "Boardwalk Fire," which burned for several weeks<sup>5</sup>. (R. at 1305). Within an hour of the first report, FHP Duty Officer Rickey Skinner, FHP Sergeant Mark Weber, and FHP Lieutenant John Gourley,<sup>6</sup> were all aware that the large brush fire on Paynes

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<sup>5</sup> Petitioner continued to misstate the facts regarding the circumstances leading up to the fatal crashes at issue here, stating "[t]here is no dispute but that by approximately 8 p.m. on January 28, 2012, the fire had been *extinguished*, and all first responders had left the scene. (R. at 185) (emphasis added). In fact, the 60-acre fire was merely "contained" by 8:00 pm, and FHP was continuously notified of "The Boardwalk Fire's" status as FFS continued to work for weeks. (R. at 1063, 1068, 1344, 1368).

<sup>6</sup>At 1451 hours, FHP Duty Officer Rickey Skinner notified FHP Sergeant Mark Weber of the Paynes prairie fire. Weber requested that FHP Lieutenant John Gourley be notified of the fire. At 1527 hours, FHP Duty Officer Skinner notified FHP Lieutenant Gourley that there was a large brush fire on Paynes Prairie that was *causing visibility problems* across US 441 and that FDOT was en route with signs. (R. at 1306) (emphasis added).

Prairie was causing visibility problems on US 441, and that FHP was assisting with the Florida Forestry Service's request "that traffic control and smoke signs were needed for the Paynes Prairie fire." (R. at 1306).

FHP personnel had been on site of the "Boardwalk Fire," but at 8:03 pm, the Florida Forestry Service ("FFS") contacted FHP Duty Officer Supervisor Ronald Cooper to notify FHP of the status of "The Boardwalk Fire":

8:03 pm - Florida Forestry Service contacted FHP to notify FHP of the status of the incident:

FFS (McCarty) Just wanted to let you know that we are leaving the site. Currently there is no smoke on 441 or 75 that we can determine, but *during the night that is still going to put out a lot of smoke* and the incident commander just wanted to *make sure y'all are going to patrol it 'cause you might have to close toward morning time.*

FHP (Cooper): Ok, I'll make a note and pass it off to the midnight people when they come in at ten.

FFS (McCarty): I really appreciate it. We don't know what it's gonna do, weather wise, so *that thing is pretty close to 441 and 75 and we don't want any major accidents.*

FHP (Cooper): That's a fact. Ok, sir, *we'll take care of it.*

(R. at 1306) (emphasis added).

c. *FHP's Knowledge of Smoke + Fog Causing Extreme Danger to Motorists on I-75 and nearby US 441, Prior to Reopening Roadway*

Prior to reopening the roadway, FHP was not only aware of a "risk of harm" the smoke, fog, and weather posed, to anyone driving on I-75 but knew the

conditions had already caused fatal accidents and the danger was ongoing. The timing of the critical events of that evening and early morning are as follows:

- 11:31 pm - ACCCC received reports of a multiple vehicle traffic crash with road blockage and low visibility due to smoke on US 441. FHP was notified and responded to investigate the crash, which involved six vehicles.
- 11:50 pm - FHP received a phone call from a citizen reporting “*zero visibility due to smoke and fog,*” on northbound I-75 at Paynes Prairie.
- 11:54 pm - ACCCC received reports of a traffic crash with road blockage and dense smoke on northbound I-75 at Paynes Prairie. FHP was notified of the crash and smoke and responded to investigate the crash, which involved two vehicles and a semi-truck.
- 12:10 am - Alachua County Sheriff’s Office notified FHP that they were shutting down I-75 in both directions due to “zero visibility.”**
- 1:15 am - FHP advised that the I-75 traffic crash was clear, but the road remained closed in both directions due to *poor visibility from smoke.*
- 1:15 am - FHP contacted FDOT regarding expected arrival time with road closure and detour materials. FDOT advised they had a personnel shortage but were loading trucks and would be en route.
- 2:06 am - FHP authorized FHP and ACSO responders to prepare to clear vehicles trapped in the smoke on I-75, by slowly leading the vehicles through the closed area of the interstate. This process continued for approximately 75 minutes.
- 2:52 am - FHP (Lt. Gourley) advised ACSO (Lt. Moran) that he was evaluating conditions on I-75 and may reopen the road soon, that he would then travel to US 441 (where ACSO (Lt. Moran) was located) to evaluate those conditions. ACSO (Lt. Moran) advised FHP (Lt. Gourley) to keep US 441 closed.

2:55 am - FHP Lieutenant Gourley advised FHP Sergeant Simmons that he was considering opening the road. Simmons advised he had a concern:

FHP (Gourley): ...Just driving through this we are better than quarter of a mile to half a mile visibility. I can see the lights to the rest area half a mile to a mile and a half away. *This gives us a little reprieve.* We need to go ahead and get our road closure assets in place but the fog has lifted somewhat. It's moved a little more to the north from where it was earlier because from Micanopy to here I see nothing to keep this road closed.

FHP (Simmons): Yeah, I seen that too, *but I'm concerned that another cloud might roll through and then we got to go through all this again*

FHP (Gourley): That's why we need to go ahead get DOT to get signs and assets in place *if we need to shut down where we did, we can do it.* Keep monitoring it but right at this point, I see no reason to keep it closed. I'll get with you here. Just let me get that traffic. I'll meet you back here at 382.

FHP (Simmons): OK.

3:04 am - FHP (Gourley) advised he would drive I-75 a couple of more times but **acknowledged a reoccurrence of low visibility may be possible.**

3:13 am - FHP (Sgt. Simmons) requested a report on visibility on US 441. FHP (Tpr. Downing) reported at the north end of Paynes Prairie, visibility was 100 to 200 feet. At the south end of Paynes Prairie the visibility was ¼ to ½ mile.

- 3:18 am - FHP (Lt. Gourley) drove I-75 again and reported ¼ mile to ½ mile visibility "at the worst area" and greater than 2 miles in some areas. Gourley advised FHP Trooper Taylor that the roadway could be reopened southbound, but to keep units in place to monitor the roadway. Gourley reiterated his request to keep FDOT assets in place in case the road needed to be closed again. Gourley also requested that FDOT place message boards both northbound and southbound Interstate 75, just past exit 374, saying "reduced visibility – be prepared to slow down."  
*(Note - these signs were not in place before the subsequent fatal crashes at 0400 hours)*
- 3:24 am - FHP (Lt. Gourley) advised ACSO (Sgt. Powers) northbound interstate would be reopened in a few minutes. During interviews, Gourley stated he asked Powers to keep an extra unit monitoring the interstate. According to Powers, Gourley advised that Powers could release everybody. After reviewing Powers' in-car video recording of their conversation, Powers states to Gourley "I'll keep our guys rotating up here." Subsequent interviews of ACSO personnel revealed that all ACSO personnel left I-75 at the time of reopening and returned to normal duties.
- 3:26 am - **FHP (Sgt. Simmons) advised FHP troop personnel that were assigned to I-75 road closures that per FHP (Lt. Gourley), open I-75 to traffic, allowing all personnel to leave I-75 at the time of reopening.**
- 3:30 am - **FHP (Lt. Gourley) advised the FHP Communications Center that I-75 was open in both directions. He advised that cones and signs were on standby so that there would not be a delay if the interstate needed to be closed again.**
- 3:40 am - FHP (Tpr. Downing) advised he encountered *another* cloud of smoke on US 441 causing very poor visibility in Paynes Prairie.
- 3:47 am - **FHP (Lt. Gourley) had also left I-75 and advised he was on US 441 in Paynes Prairie stating he observed less than 40 feet visibility and smoke drifting to the east. FHP (Lt. Gourley) did not request any immediate action be taken to evaluate conditions in the Paynes Prairie area of I-75.**

- 4:01 am - Alachua County Communications Center notified an FHP of a traffic crash on southbound I-75 in Paynes Prairie. A vehicle hit a guardrail, all lanes were blocked, and a vehicle was on fire.
- 4:03 am - FHP (Lt. Gourley) heard over ACSO radio call of traffic crash on southbound I-75. FHP (Lt. Gouley) immediately left US 441 and proceeded to I-75. FHP (Lt. Gourley) did not request any immediate action be taken to evaluate conditions in the Paynes Prairie area of I-75.
- 4:09 am - FHP (Tpr. Todd) reported heavy smoke and less than three feet visibility on southbound I-75 as he responded from the northbound rest area to the traffic crash.
- 4:09 am - FHP (Lt. Gourley) authorized a permanent shutdown of I-75 and requested FDOT be notified.

(R. at 1307-11) (emphasis added).

The reopening of the interstate led to 11 deaths in what was believed at that time to be the deadliest traffic incident in state history. This matter arises from a wrongful death claim filed by Respondent Lashonta Renea Jackson (“Jackson”) as personal representative of the estate of Vontavia Robinson (“Decedent”) against the Petitioner, Florida Highway Patrol (“FHP”), alleging negligence in their handling of reopening Interstate 75 (I-75).

## SUMMARY OF ARGUMENT

Rule 9.130, Florida Rules of Appellate Procedure, limits an appeal of a non-final order denying sovereign immunity. The plain language of the rule requires an express determination that “as a matter of law, a party is not entitled to sovereign immunity.” Additionally, this Court has expressly held that an order denying summary judgment is not appealable under the rule “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.” *Hastings v. Demming*, 694 So. 2d 718 (Fla. 1997).

Although the First District Court of Appeal correctly determined they did not have jurisdiction to review the trial court’s non-final order, the court impliedly and incorrectly, went on to determine that the record clearly shows entitlement to sovereign immunity as a matter of law. Their review stemmed from their reliance on an incorrect assertion that this Court’s recent holding in *Beach Community Bank v. City of Freeport*, is in conflict with precedent regarding the application of rule 9.130. *Beach Community Bank v. City of Freeport*, 150 So.3d 1111, 1113 (Fla. 2014).

Additionally, the trial court’s order clearly demonstrates that there were factual disputes related to the entitlement to sovereign immunity, which is a principle woven throughout sovereign immunity jurisprudence denying interlocutory review. The question certified to this Court and the First District’s opinion supplants the province of the trial judge and assumes that FHP is entitled to sovereign immunity

as a matter of law, even though that determination is inextricable from underlying facts that would be developed at trial.

In fact, the trial court was only able to assess FHP's claim on the basis of an extensive record, filed motions, and oral argument. Respondent demonstrated that Petitioner was not entitled to sovereign immunity because it deviated from mandatory operational policies during the process of reopening I-75. The sovereign immunity waiver statute is clear that actions which are operational, rather than discretionary, are subject to suit. FHP was not able to demonstrate an absence of disputed material facts on the applicability of sovereign immunity, so the trial court's ruling was correct.

Promulgating a new interpretation of rule 9.130, after more than two decades of reliance on its practical application would result in significant conflicts and confusion interpreting the rule's language. Additionally, the suggested interpretation by Petitioner would result in a flood of appeals to higher courts, harming the economy and efficiency of the Florida court system. It would take away the trial court's discretion to determine if there are disputed issues of fact and any governmental entity defending a claim, to have unfettered access to the District Courts, creating an automatic *de novo* review of all facts on all their cases. For the foregoing reasons, this Honorable Court should refrain from answering the certified

question as phrased, affirm the First District's dismissal and remand to the trial court for proceedings in compliance with this decision.

## ARGUMENT

**Standard of Review.** The question before this Court is a pure question of law, and thus the standard of review is *de novo*. *Aills v. Boemi*, 29 So.3d 1105, 1108 (Fla. 2010).

**Jurisdiction.** This Court has jurisdiction through its power to “review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.” Art. V, § 3(b)(5), Fla. Const.

### **I. THE FLORIDA SUPREME COURT’S ADOPTION OF RULE 9.130(a)(3)(C)(xi) ALLOWS AN INTERLOCUTORY APPEAL OF A TRIAL COURT’S NON-FINAL ORDER, WHEN THAT ORDER HAS EXPRESSLY STATED, AS A MATTER OF LAW, THAT A PARTY IS NOT ENTITLED TO SOVEREIGN IMMUNITY.**

Petitioner first argues Rule 9.130(a)(3)(C)(xi) permits an appeal of a non-final order if the *record* shows that the defendant is entitled to immunity as a matter of law, but the trial court did not explicitly preclude it as a defense. As demonstrated by Petitioner’s own recapitulation of the legal history on the issue, and as discussed *infra*, interpreting rule 9.130 to apply to non-final orders without an “express statement,” would be inconsistent with the plain and unambiguous text found within the rule, and would reverse this Court’s well-established precedent.

**a. Interpreting Rule 9.130(a)(3)(C)(xi) to apply to non-final orders without an express statement would be inconsistent with the plain and unambiguous text of the rule.**

FHP's argument that the plain text of rule 9.130(a)(3)(C)(xi) establishes that an express statement is *not* required, contrary to this Court's explicit pronouncement in *Hastings II* (discussed below), is based on textual analysis which lacks context and is incomplete. By simply defining the word "determine" without discussing the word's context within the phrase or addressing its relation to any of the other words in the rule, FHP adduces, incorrectly, this Court's use of the word "determine" as merely authorizing a district court to surmise what the trial court decided. As FHP restated "the jurisdictional question is whether a denial is of a certain character, not whether it announces itself as such." (Petitioner's Initial Brief 25).

Context is critical to providing an accurate understanding. Arguably, the presence of the word "determine" in the rule is highly material, when one considers the "non-final order" is *where* one must look. As noted within Justice Luck's concurring opinion in *Department of Children and Families v. Feliciano*, while "determine" means "deciding something officially," rule 9.130(a)(3)(C)(xi) also tells us where the official decision must be made and what the official decision must decide in order to invoke the court's interlocutory jurisdiction. *Department of Children and Families v. Feliciano*, 259 So.3d 957, 970 (Fla. 3d DCA 2018). In discussing where, Justice Luck uses context to explain,

[t]he word “those” in the rule refers to the “non-final orders.” An interlocutory appeal is allowed only for those non-final orders that determine as a matter of law, a party is not entitled to sovereign immunity.

*Id.*

While this Court adopted rule 9.130(a)(3)(C)(xi), to allow for interlocutory appeals of those cases where a pure legal question of whether the defendant is entitled to sovereign immunity, “[t]he rule says nothing about the record or transcript as being part of the trial court’s determination. The rule tells us we must look for the determination in the non-final order, and nowhere else.” *Id. See also Citizens Prop. Ins. Corp. Calonge*, 246 So. 3d 447, 450 (Fla. 3d DCA 2018) (“[n]othing in the text of the rule suggests that a court can search for or surmise such a determination by reviewing documents in the record apart from the trial court’s written order”).

**b. The requirement in Rule 9.130(a)(3)(C)(xi) limiting non-final orders subject to appellate review, to those that determine “as a matter of law, a party is not entitled to sovereign immunity” was clarified and resolved in *Hastings v. Demming*, to settle an inconsistency between the district courts.**

FHP relies on *Beach Community Bank v. City of Freeport*, as precedent for this Court’s interpretation and application of rule 9.130(a)(3)(C)(xi). *Beach Community Bank v. City of Freeport*, 150 So.3d 1111 (Fla. 2014). However, the argument is inherently flawed, as it interprets the rule’s application to an order which was not in existence when entered by the trial court in *Beach*. *Id.* FHP attempts to retroactively supplant *Beach*’s non-final order (never addressed within this Court’s

opinion in *Beach*), as the only basis for expanding this Court's rule. (Petitioner's Initial Brief 18-23).

*Hastings v. Demming*, 694 So. 2d 718 (Fla. 1997), an opinion by the Florida Supreme Court addressing the jurisdictional requirements of rule 9.130(a)(3)(C)(vi), serves as a clear rebuttal to FHP's argument. As the jurisdictional language appears identically in all of the subdivisions in rule 9.130(a)(3)(C) involving orders denying immunity,<sup>7</sup> the rule's subdivisions should be construed identically. As provided below, this Court should continue to interpret and apply its rules in a manner that comports with the repeated decisions of Florida courts, which were guided by the holding that "non-final orders are appealable if they expressly determine "as a matter of law" that the defendant is not entitled to immunity. Fla. R. App. P. 9.130(a)(3)(C)(xi). *Hastings II* at 720.

When initially adopted by this Court, rule 9.130(a)(3)(C)(vi) provided for an appeal of a non-final order that determined "that a party is not entitled to workers' compensation immunity as a matter of law." *Mandico v. Taos Construction, Inc.*, 605 So.2d 850 (Fla. 1992), *opinion corrected on denial of reconsideration* (Oct. 8, 1992). However, inconsistent application of the rule resulted in conflicts among the district courts, as certain courts interpreted the rule broadly and generally to

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<sup>7</sup> Fla. R. App. P. 9.130(a)(3)(C)(v), (vii), (x), & (xi),

allow appeals<sup>8</sup> and others, like the Second District in *Hastings I*, interpreted the language more narrowly. *Hastings v. Demming*, 682 So. 2d 1107, 1108 (Fla. 2d Dist. App. 1996), approved, 694 So. 2d 718 (Fla. 1997).

In *Hastings I*, an injured worker (Charles Demming) brought an action against his employer (American Sign Company) and its officer (Herbert Hastings), for failing to properly maintain equipment and alleging that the employer failed to exercise reasonable care in its supervision of its officer. *Id.* The defendants filed motions for summary judgment asserting immunity under the Workers' Compensation Act, which the trial court denied, without explanation. *Id.* The defendants filed a notice of appeal invoking rule 9.130(1)(3)(C)(vi) as the basis for the court's jurisdiction to review the non-final order denying Defendants' motions for summary judgment on the grounds of workers' compensation immunity. *Id.*

The Second District's analysis is highly relevant to this case, which involves a denial of a motion for summary judgment and addresses the potential for misuse:

a denial of a motion for summary judgment involving "unresolved factual questions" does not establish the law of the case. *See Steinhardt v. Steinhardt*, 445 So.2d 352, 356-357 (Fla. 3d DCA), review denied, 456 So.2d 1181 (Fla.1984). It merely defers the matter until a final hearing, even when an appellate court has affirmed the denial. *Id.* Thus, under the Fourth District's "broad" test announced in *Gloger*, which was adopted by the Fifth District in *Franklin*, a denial of a motion for summary judgment alleging

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<sup>8</sup> In both *Breakers Palm Beach, Inc. v. Gloger*, 646 So. 2d 237 (Fla. 4<sup>th</sup> DCA 1994) and *City of Lake Mary v. Franklin*, 668 So. 2d 712 (Fla. 5<sup>th</sup> DCA 1996), the district courts interpreted Rule 9.130 as allowing review of an order denying summary judgment even when the denial was the result of disputed issues of fact.

entitlement to workers' compensation immunity because of the existence of disputed material facts, followed by an appellate court's affirmance of the order, would not prevent a party from reasserting this defense in a later motion for summary judgment and, in the event of a trial court's denial of the second motion for the same reason, from appealing again. Such a scenario would obviously result in a waste of judicial resources at the trial and appellate levels and, because of the jurisdictional strictures of rule 9.130(f), would cause a needless delay in the trial court's ability to conclude the case by entry of a final judgment.

*Hastings I* at 1114–15.

The Second District dismissed the appeal, but certified conflict with its sister districts, after an extended analysis on the jurisdictional issue, holding that the Florida 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.* at 1109. Equally important to the Second District’s analysis (and relevant to the present case), was their review of this Court’s case law applying the principles of summary judgment law, noting,

a very clear theme permeating the supreme court’s pronouncements regarding the law of summary judgment: unless and until the material facts at issue presented to the trial court are so crystallized, conclusive, and compelling as to leave nothing for the court’s determination but a question of law, those facts, as well as any defenses, must be submitted to the jury for its resolution.

*Id.*

The Florida Supreme Court, in *Hastings II*, affirmed the Second District’s analysis and the holding in *Hastings I*; but also recognized, as valid, the district

court's arguments<sup>9</sup> stating, "[a]dmittedly, the rule as presented to the various district courts was susceptible to both interpretations." *Hastings II* at 720. This Court amended the rule, proclaiming resolution of the conflict, "our recent amendments to the appellate rules should eliminate the confusion" and then defined the new rule's jurisdictional limitations, stating,

[w]e changed the phrasing of the subject rule in order to settle the inconsistency between the district courts. 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.

*Id.*

Although *Hastings* is distinguishable from the present case in that it involves workers' compensation immunity rather than sovereign immunity, the holding as directed above, must apply. Rule 9.130(a)(3)(C) codifies all methods for interlocutory appeals of non-final orders, and their corresponding subsections are identical in their wording, and therefore must be considered analogous. *Citizens Prop. Ins. Corp. v. Calonge*, 246 So. 3d 447, 450 (Fla. 3d Dist. App. 2018), *reh'g*

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<sup>9</sup>"If the words "as a matter of law" had been placed at the beginning of the amendment, rather than at the end, appellees' argument would be persuasive. Under that scenario the rule would permit review of non-final orders which determine "as a matter of law that a party is not entitled to workers' compensation immunity." The key words, when placed at the beginning, modify "determine[.]" By putting the key words at the end, however, the court gave the amendment a broader meaning. They modify "entitled[.]" The denial of the defendant's motion for summary judgment, because there were issues of fact, is an order determining that the defendant is "not entitled to workers' compensation immunity as a matter of law." We therefore deny the motion to dismiss." *Breakers*, 646 So. 2d at 237-38.

*denied* (June 8, 2018) (citing *State v. Hearn*, 961 So. 2d 211, 217 (Fla. 2007) (“We have held that where the Legislature uses the exact same words or phrases in two different statutes, we may assume it intended the same meaning to apply.”)).

**c. The “purpose” of Rule 9.130(a)(3)(C)(xi) was not to create a substantive right allowing the government unfettered District Court review of denials of motions, but to provide a procedural method, limiting the number of appealable non-final orders to those which specifically state that the immunity defense is not available.**

FHP alleges that an “express statement” frustrates the “purpose” of rule 9.130. (Petitioner’s Initial Brief 29). FHP reaches this illogical conclusion by conflating this Court’s reasoning in *Keck v. Eminisor*, for amending rule 9.130 with the rule’s “purpose.” *Id.* (citing *Keck v. Eminisor*, 104 So. 3d 359, 360 (Fla. 2012)). Adding to their erroneous application of the holding in *Keck*, FHP seemingly argues *post hoc ergo propter hoc*, because this Court amended rule 9.130, adopting rule 9.130(a)(3)(C)(xi), the Court’s determination regarding the defendant’s entitlement to the individual immunity protections bestowed by Florida Statute 768.28(9)(a), must be true under rule 9.130(a)(3)(C)(xi) when a governmental entity invokes sovereign immunity. (Petitioner’s Initial Brief 30).

However, this Court’s rules are procedural in nature, establishing methods for conducting litigation involving rights and defenses, rather than the substantive law-making power of the legislature. Therefore, as stated by this Court,

[t]he thrust of rule 9.130 is to restrict the number of appealable nonfinal orders. The theory underlying the more restrictive rule is that appellate review

of nonfinal judgments serves to waste court resources and needlessly delays final judgment.

*Miami-Dade Cty. v. Pozos*, 242 So. 3d 1152, 1154 (Fla. 3DCA 2017) (quoting *Travelers Insurance Co. v. Bruns*, 443 So.2d 959, 961 (Fla. 1984)).

*Pozos* was a personal injury case against a county for negligent operation of a park that resulted in the shooting of a teen citizen. *Id.* In that case, the county asserted sovereign immunity as basis for summary judgment, but the trial court denied the county's motion. *Id.* The Third District affirmed the denial of summary judgment in a well-reasoned decision outlining the policies and construction of the rule at issue. *Id.* The court gave a detailed analysis of Rule 9.130(a)(3)(C), including the instant provision, subpart (xi). *Id.* In addressing the appellant's position, the Third District cited this Court's proposition in *Bruns* that "the categories of non-final orders subject to interlocutory review are narrowly construed." *Id.*

The *Pozos* court examined the trial court's order and found that there was no indication whether summary judgment as to sovereign immunity had been denied as a matter of law, or because of some other reason. *Id.* Accordingly, the court was constrained, as the First District was in this case, to find that it did not have jurisdiction. *Id.* Recognizing that testing the scope of Rule 9.130(a)(3)(C)(xi) was essentially an issue of first impression, the jurists in *Pozos* analogized to other cases from this Court for applicable statutory construction principles, and reasoned:

. . . [T]he Florida Supreme Court, in adding subdivisions (x) and (xi) to the list of appealable nonfinal orders, adopted the identical language it approved in its 1996 amendment to nonfinal orders regarding entitlement

to workers' compensation immunity (subdivision (v)). The Florida Supreme Court's adoption of this identical language cannot be regarded as accidental. When the Supreme Court added subdivisions (x) and (xi) to the list of nonappealable orders, it was obviously aware of the language it had previously utilized in authorizing appeals from workers' compensation immunity orders. The only logical conclusion is that, by using the identical language of the existing rule, and knowing how that language had been construed by Florida courts, the Florida Supreme Court intended that these two new provisions would be construed and applied in like fashion.

*Id.* at 1156. (citations omitted).

The same reasoning should have been adopted by the First District and should be again, affirmed in this Court.

**II. DOES RULE 9.130 PERMIT AN APPEAL OF A NON-FINAL ORDER DENYING IMMUNITY IF THE RECORD SHOWS THAT THE DEFENDANT IS ENTITLED TO IMMUNITY AS A MATTER OF LAW BUT THE TRIAL COURT DID NOT EXPLICITLY PRECLUDE IT AS A DEFENSE?**

**a. This Court should refrain from answering this certified question as phrased because the First District Court correctly dismissed the appeal for lack of jurisdiction.**

*(i) As phrased, the certified question would create inconsistencies regarding the jurisdictional limitations this Court has established pursuant to Rule 9.130 and Hastings.*

As phrased, the question certified by the First District Court of Appeal presupposes the erroneous conclusion that *Beach* is in conflict with precedent in order to allow for review of the record and effectively expand the jurisdictional limitations of rule 9.130. However, the holding in *Beach* does not conflict with this Court's prior holdings regarding the express statements required by rule

9.130(a)(3)(C). In *Beach*, the non-final order was never addressed by the Court as the issue presented was not *compliance* with or *application* of rule 9.130. The non-final order could not have been analyzed for its' compliance with procedural requirements which were not in existence when entered. *Beach Community Bank v. City of Freeport*, 150 So.3d 1111 (Fla. 2014).

In their opinion below, the First District cites this Court's decision in *Beach*, allowing interlocutory review of a motion to dismiss on the basis of sovereign immunity. *Fla. Highway Patrol v. Jackson*, 238 So.3d 430, 433, 437-38 (Fla. 1st DCA 2018) (citing *Beach Community Bank*, 150 So.3d at 1112-13). This Court's decision in *Beach*, a case where a pure legal question existed regarding the defendant's entitlement to sovereign immunity, held that the municipality was entitled to immunity as a matter of law. However, the determination of entitlement was clearly not presented to this Court by way of rule 9.130, as it did not exist. Nevertheless, the First District opinion below relied heavily on *Beach*, and uses the distal, if not nonexistent, Supreme Court precedent (as it relates to the interpretation of rule 9.130), to call into question well-reasoned case law and established policies of appellate review that balance judicial economy and the substantive rights of litigants. *Jackson*, 238 So. 3d at 433.

Its misplaced reliance leads to incorrect results. In contravention of stare decisis, FHP and the First District proffer a new interpretation and practice based on

cases that address different motions with different standards of review, often involving different kinds of immunity. They are essentially asking this Court to allow appellate courts to review virtually any denied motion on the basis of sovereign immunity. This goes against the great weight of case law and the rules preserving the critical function of the trial judge. *See e.g., Department of Educ. v. Roe*, 679 So. 2d 756 (Fla. 1996), *Keck v. Eminisor*, 104 So. 3d 359 (Fla. 2012). As argued above, the rule that courts must make the denial of sovereign immunity in a non-final order explicitly as a matter of law in order for a party to seek interlocutory review, is grounded in well-reasoned policy. *Pozos*, 242 So. 3d at 1154; *Roe*, 679 So.2d at 756.

In the *Roe* case, a family sued the Florida Department of Education (DOE) for negligently renewing the teaching certificate of an employee who had allegedly sexually molested the plaintiff. *Roe*, 679 So.2d at 756. DOE filed a motion to dismiss on the basis of sovereign immunity, which the trial court denied, and the First District Court of Appeal granted. *Id.* After a superseding opinion was issued on rehearing, the First District's decision ultimately conflicted with a subsequent opinion issued by the Fifth District, sending the question of whether a non-final order was subject to interlocutory review to this Court. *Id.* at 757–58. This Court resolved the question solely on the basis of underlying policies. *Passim*. Explicitly addressing the contours of sovereign immunity in contrast to qualified or individual immunity,

Justice Grimes, writing for a unanimous Court, identified a clear distinction, that sovereign immunity is not concerned with the prevention of undue interference by the threat of suit and that allowing review of non-final orders on this fact-intensive issue would constitute the creation of a substantial judicial inefficiency. *Id.* at 758–759.

The decisive and clear *Roe* decision was modified by the specter of influence of the 2014 amendment to rule 9.130. *In re Amendments to Florida Rule of Appellate Procedure 9.130*, 151 So.3d 1217, 1217 (Mem) (Fla. 2014). As discussed by FHP and the First District, the amendment added that non-final orders that determine, as a matter of law, a party is not entitled to sovereign immunity, are subject to interlocutory review. *Id.*; *Fla. Highway Patrol v. Jackson*, 238 So.3d 430, 433 (Fla. 1st DCA 2018). FHP and the First District do not, however, address the fact that this case fits squarely into the situation described in *Roe*, where the question of sovereign immunity is not a “pure legal question,” but a fact intensive one.

The First District’s dismissal should be affirmed as rule 9.130(a)(3)(C)(xi) should continue to be interpreted narrowly, so as not to read out the technical meaning of the requirement that an order determine “*as a matter of law*, a party is not entitled to sovereign immunity” in order to be subject to interlocutory review. Fla. R. App. P. 9.130(a)(3)(C)(xi) (emphasis added); *accord Citizens Property Insurance Corporation v. Calonge*, 246 So.3d 447, 448, 450–51 (Fla. 3d DCA

2018). Furthermore, this Court should not answer the certified question as phrased, because it would create inconsistencies within the rule's plain and unambiguous language. The Third District, in *Citizens Property Insurance Corporation v. Calonge*, 246 So.3d 447, 448, 450–51 provided in summary, that

Nothing in the rule suggests that we may adduce or surmise such a determination by reviewing documents in the record apart from the trial court's written order. Such a search for jurisdiction within the record would lead to imprecise and even presumptuous conclusions. To allow a district court to make its jurisdictional determination by engaging in its own examination of the underlying record essentially would allow the district court to make the sovereign immunity determination in the first instance. Surely, such a search for jurisdiction would undermine the purpose of rule 9.130(a)(3) itself, which is to expressly circumscribe the categories of non-final orders subject to interlocutory review.

(citing *Miami-Dade Cty. v. Pozos*, 242 So. 3d 1152 (Fla. 3d DCA 2017)).

***(ii) As phrased, the certified question erroneously asserts, without elaboration, the record establishes entitlement to immunity.***

The First District, within their certified question, seemingly reviewed certain facts of the case, making its own determination about the availability of sovereign immunity. *Fla. Highway Patrol v. Jackson*, 238 So.3d 430, 434, 437-38 (Fla. 1st DCA 2018). There is no precedent for such a standard of review, especially where a court determines that it lacks jurisdiction for appellate review at all. There is no evidence that the trial court made a determination of law, nor departed from the essential requirements of law, on the issue of sovereign immunity, and appellate courts lack the authority to reverse that determination on an interlocutory basis for the policy reasons outlined discussed below in *Dep't of Educ. v. Roe*, 679 So.2d 756,

756 (Fla. 1996). The First District Court of Appeals erroneously assumed that the trial court record demonstrates that FHP is entitled to sovereign immunity as a matter of law.

Respondent concedes that the trial court order in this case does not *explicitly* state whether FHP's motion for summary judgment was denied as a matter of law, fact, or both. However, the trial court order does explain that the denial is based at least in part, on "[d]isputed issues of material fact [that] exist, including, but not limited to, the extent and adequacy of [FHP]'s continued monitoring of the roadway, [which] prevent the entry of Final Summary Judgment." (R. at 1698). This kind of determination is clearly distinguishable from cases where sovereign immunity would apply by virtue of the absence of FHP's "control over the situation" or its full compliance with operational policies. *See e.g., Pollock*, 882 So.2d at 928; *Beach Community Bank*, 150 So.3d at 1111.

While the First District Court believes that these factual issues are not dispositive of FHP's entitlement to immunity, this Court's reasoning in *Keck* respectfully suggests otherwise. *Keck* cites to this Court's equally instructive opinion in *Roe*, discussed *supra*:

[I]n light of the statutory waiver, it can no longer be said that the issue of sovereign immunity is always independent of the cause itself. Oftentimes, the applicability of the sovereign immunity waiver is inextricably tied to the underlying facts, requiring a trial on the merits. *Keck*, 104 So.3d at 265 (quoting *Roe*, 679 So.2d at 758–59).

Unlike *Keck*, this case is not concerned with individual immunity, but rather the applicability of sovereign immunity, which this Court has deemed to be a particularly fact-intensive inquiry. *Id.* It is unrealistic to require the trial court to identify with any absolute degree of specificity the factual issues remaining for resolution for the jury; indeed, many of the disputed issues may be unknown until the conclusion of discovery and even the trial itself. *Id.* However, it is sufficient that the trial court found at least some issues related to the applicability of sovereign immunity “inextricably tied to the underlying facts, requiring a trial on the merits.” *Id.*

The Florida Supreme Court has clearly signaled that an order denying a summary judgment motion based on a claim of sovereign immunity is only reviewable as an interlocutory appeal where the defendant establishes that the trial court has departed from an essential requirement of law that results in irreparable harm. *Keck*, 104 So.3d at 364. In *Keck*, a pedestrian sued a trolley driver, a municipal transit authority, and a transit management company. *Id.* at 361-362. The driver asserted individual immunity as an indirect agent of the State of Florida, pursuant to Section 768.28, Florida Statutes. *Id.* The trolley driver moved for final summary judgment on this basis. *Id.* at 362. The trial court denied the motion, and the driver sought certiorari from the First District Court of Appeal. *Id.* Constrained by the Rules of Appellate Procedure and unable to exercise jurisdiction, the First District

denied certiorari and issued a certified question to the Florida Supreme Court.<sup>10</sup> *Id.* at 359

This Court amended the certified question and determined that review of a summary judgment motion denying individual immunity as a matter of law should not wait until entry of final judgment. *Id.* at 362. In reaching this conclusion, the Court analyzed Section 768.28, Florida Statutes (2018), which codifies the waiver of sovereign immunity. *Id.* at 363. It determined that all forms of individual immunity were covered by this statute and reasoned that a denied motion for summary judgment was only allowed interlocutory review when the denial departed from essential requirements of law. *Id.* The Court reasoned that where a summary

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<sup>10</sup> In that case, the First District Court of Appeal issued the question: “Whether review of the denial of a motion for summary judgment, based on a claim of individual immunity under section 768.28(9)(a) without implicating the discretionary functions of public officials, should await the entry of a final judgment in the trial court?”

Finding this question broad and lacking necessary distinctions, the Florida Supreme Court amended the question: “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?”

Respondent urges this Court to consider a similar amendment here, as the question from the First District does not specify the kind of immunity it is calling into question (sovereign, qualified, individual, etc.), nor does it specify the procedural posture of the case in the trial court, which may be dispositive in this Court’s ruling and further instruction.

judgment motion is denied because of disputed issues of material fact, interlocutory review is inappropriate. *Id.* The Court did not find that there were disputed issues of material fact on this issue in *Keck* and resolved the question in favor of the state employee, granting immunity. *Id.*

FHP's position in the instant case is contrary to the well-reasoned policy analysis this court adopted in *Roe*, particularly because this case turns on a denied motion for final summary judgment rather than a denied motion to dismiss. While both are non-final orders, typically not subject to interlocutory review, these motions posture the case differently, and it is Respondent's position that the policy is even more applicable where the case involves a denial of summary judgment. When a party files motion to dismiss, "the court may [not] rely on facts adduced in depositions, affidavits, or other proofs," as is permitted in motions for summary judgment; rather, "all material allegations are accepted as true." *Barbado v. Green and Murphy, P.A.*, 758 So.3d 1173, 1174–75 (Fla. 4th DCA 2000); *But see Fla. Agency for Health Care Admin. v. McClain*, 244 So.3d 1147, 1148 n. 4 (Fla. 1<sup>st</sup> DCA 2018) (discussing how even with motions to dismiss, when on the basis of affirmative defenses, facts may be necessary for disposition). Thus, where there is no presumption about the truth of material facts, it is more reflective of a trial court's determination that there are issues—including sovereign immunity—that are not disposable as pure legal questions.

***b. Disputed issues of material fact related to entitlement to sovereign immunity remained in the record.***

A motion for summary judgment can only be granted when there “is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.” *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc.*, 127 So.3d 1258, 1268 (Fla. 2013). An order denying a motion for summary judgment is a common example of a nonappealable order, because the moving party is almost never deprived of any substantive legal right,<sup>11</sup> since the facts in dispute are presented at trial. It is wholly in the province of that judge to look at arguments on both sides and determine if disputed material facts exist.

In Florida, a “material fact” has been defined as one “that is essential to the resolution of the legal question raised in the case.” *Continental Concrete, Inc. v. Lakes at La Paz III Ltd. Partnership*, 758 So.2d 1214, 1217 (Fla. 4<sup>th</sup> DCA 2000). In the instant case, the legal question Petitioner was seeking disposition on was whether FHP was entitled to sovereign immunity. (R. at 4-9). As discussed in *Roe*, this exact question is often “inextricable from the underlying facts of the case.” *Roe*, 679 So.2d at 756. To prevail on this kind of motion, the moving party must “prove a negative

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<sup>11</sup>Furthermore, even granted motions for summary judgment may not be so dispositive of the issues of the case that they amount to entry of final judgment and are subject to interlocutory review. *Bank of N.Y. Mellon for Certificate Holders of CWABS, Inc. v. Swain*, 217 So.3d 226, 227 (Fla. 5<sup>th</sup> DCA 2007).

the nonexistence of a genuine issue of material fact.” *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29, 30 (Fla. 1977).

The trial court had before it various pieces of evidence that created disputed issues of material fact directly related to the issue of sovereign immunity. (R. at 4-9, 1599-1609). Respondent here presented numerous facts that created and showed the existence of at least ten genuine disputes, including, but not limited to: (1) whether FHP failed to adhere to policies, (2) whether FHP communicated with the proper entities prior to reopening I-75, as required by official policies, (3) whether FHP obtained all necessary information prior to reopening I-75, as required by official policies, (4) whether certain FHP employees were aware of such protocols/policies, and (5) whether FHP sufficiently monitored the highway after responding, taking control of, and then reopening it. (R. at 4-9, 1599-1609).

Accordingly, the trial court was tasked with looking at whether there was a genuine dispute as to FHP’s entitlement of sovereign immunity, viewing the facts in the light most favorable to respondent. While Respondent’s position is that the trial court did clearly express an intent to deny the motion for summary judgment at least as a mixed question of fact and law, it is not in the province of the appellate courts to examine the record to make these kinds of determinations. *See Fla. R. App. P. 9.130(a)(3)(C) et seq* (delineating what non-final orders are reviewable by an appellate court). FHP did not meet its burden of proving the non-existence of

genuine issues of fact as this court has required on summary judgment. *Wills*, 351 So. 2d at 30. Appellate courts should not be permitted to supplant the province of the jury where a trial court has not made a dispositive, final determination as a matter of law.

As discussed *supra*, the Florida legislature has consented for the State to be sued in its own courts for tort actions since 1995. §768.28, Fla. Stat. Here, Respondent brought a tort action for negligence against FHP for failure to use reasonable care after taking control and reopening I-75 when visibility was obscured by smoke and fog. (R. at 213-217). This action is based in part on allegations that FHP failed to follow *non-discretionary operational procedures* prior to reopening the highway. (R. at 214-215, 1613-23). *Cf. Trianon Park Condominium Ass'n., Inc. v. City of Hialeah*, 490 So.2d 912, 917 (1985) (explaining that no governmental duty arises in the context of discretionary decisions). FHP contests that a deviation from official policies occurred. (R. at 1634-47). This *ipso facto* leaves the determination of sovereign immunity to the jury, because it becomes inextricably tied to underlying facts, which can only be presented through a trial on the merits. *Keck*, 104 So.3d at 265.

This type of immunity is distinguishable from qualified immunity, worker's compensation immunity, and other forms of individual immunity that seek to prevent a chilling effect on the discretionary action of individuals acting in their official

capacity as governmental employees. Here, there is no absolute immunity from being sued by virtue of the waiver statute, and suit against an agency for operational defects differs inherently from suits against an individual for discretionary actions. Only the latter is afforded the protection of immunity, because the state favors a policy of ensuring agencies conduct their activities in such a way so as not to harm the public, which means adhering to a prescribed set of policies.

Furthermore, adopting a policy of interlocutory review when something is “clear from the record” unavoidably places the appellate court in the position of reviewing an untold number of interlocutory appeals, supplanting the trial court’s sacred role as factfinder, particularly in pre-trial motions practice. This change would stand in opposition to the efficiency of the judicial process and the economy of the appellate system.

### **CONCLUSION**

WHEREFORE, for the reasons explained herein, Respondent respectfully requests that this Honorable Court refrain from answering the certified question as phrased or answer the certified question in the negative and remand this case to the trial court for proceedings in compliance with this Court’s ruling.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY for the foregoing document, has been furnished to ASHLEY MOODY and BRITT THOMAS, Office of the Attorney General, The Capitol – Suite OL01, Tallahassee, Florida 32399 ([britt.thomas@myfloridalegal.com](mailto:britt.thomas@myfloridalegal.com)) by U.S. Mail or by email on March 28, 2019.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that this Brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2).



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