IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-2306

ANDREAS KECK,

Petitioner,

v.

ASHLEIGH K. EMINISOR,

Respondent.

BRIEF OF THE STATE OF FLORIDA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

On Review of a Certified Question From the District Court of Appeal, First District of Florida

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA STATUTES

OTHER AUTHORITIES

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

This brief is submitted by the Attorney General, Pamela Jo Bondi, on behalf of the State of Florida, as amicus curiae, in support of the petitioner, Andreas Keck. The Attorney General is authorized by law to appear in this Court in any suit in which the state may be interested. § 16.02(4), Fla. Stat.

The state has an interest in this case because section 768.28(9)(a), Florida Statutes, confers *immunity from suit* upon all officers, employees, and agents of the state and its subdivisions irrespective of the duties they perform. In cases of alleged ordinary negligence, section 768.28(9)(a) provides that such persons shall not be named as a party defendant. This immunity from suit is effectively lost when the trial court erroneously fails to recognize it and the officer, employee, or agent is denied any form of appellate review before entry of a final judgment.

Finding that petitioner had no "discretionary functions" to perform as an employee of the Jax Transit Management Corporation, the First District panel majority denied certiorari review of an order holding that he was not, as claimed, an employee of the state. Keck v. Eminisor, 46 So. 3d 1065 (Fla. 1st DCA 2010). The dissent asserted that certiorari review should be available and further concluded that petitioner was entitled to immunity under the 768.28(9)(a). Id. at

1068-77. The court certified the following question as one of great public importance:

> 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?

Id. at 1068.

Unless reversed, the decision of the First District will have the effect of exposing state officers, employees, and agents erroneously named and sued in their personal capacity to the burdens of discovery and trial, contrary to the plain language of the statute. Accordingly, the state has an interest in correcting that decision.

SUMMARY OF THE ARGUMENT

Section 768.28(9)(a), Florida Statutes, immunizes officers, employees, and agents of the state (or any of its subdivisions) from suit in an ordinary tort case involving no allegations of bad faith, malicious purpose, or willful conduct. The statute was amended in 1980 specifically to avoid subjecting these persons to being named as defendants in the type of case presented in this appeal. For these cases, Florida courts have recognized unfailingly that immunity from suit, no matter its origin, is effectively lost if a defendant entitled to the immunity is subjected to the burdens of litigation. This injury cannot be remedied on appeal after a final judgment and is irreparable thereby warranting certiorari review.

The First District, however, has erroneously ruled that it lacks certiorari jurisdiction to review the denial of immunity below. In doing so, it failed to give effect to the unambiguous language of section 768.28(9)(a), which does not condition its grant of immunity on a governmental employee's performance of some discretionary duty. Nor does Florida caselaw support such an interpretation. Indeed, the effect of the decision below is to render a state employee's immunity from suit in tort illusory except in the rare circumstance where the employee has clearly exercised some "discretionary" function, which is not the intent of section 768.28(9)(a). Petitioner is entitled to certiorari review under these circumstances.

ARGUMENT[1]

I. CERTIORARI IS THE PROPER REMEDY TO REVIEW A NON-FINAL ORDER DENYING IMMUNITY TO AN OFFICER, EMPLOYEE, OR AGENT OF THE STATE UNDER SECTION 768.28(9)(a), FLORIDA STATUTES.

The plain, unambiguous language of section 768.28(9)(a), Florida Statutes,[2] confers immunity from suit upon all officers, employees, and agents of the state and its subdivisions. This immunity does not depend upon the nature of the duties a person may perform. In cases of ordinary negligence, as is alleged in this case, the statute mandates that no officer, employee, or agent may even be named as a party defendant.

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[1]The certified question presents an issue of law, which is subject to the de novo standard of review. Exec-Tech Business Systems, Inc. v. New Oji Paper Co., Ltd., 752 So. 2d 582 (Fla. 2000).

[2] Section 768.28(1), Florida Statutes, provides that actions at law against the state or its subdivisions to recover damages in tort "may be prosecuted subject to the limitations in this act." Subsection (9)(a) states the following limitation:

> No officer, employee, or agent of the state or 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. . . .

(Emphasis added.)

Notwithstanding the universally recognized fact that immunity from suit is effectively lost if an officer or employee is erroneously compelled to defend an action, and that such an injury cannot be remedied on appeal, the divided panel of the First District ruled that certiorari review is unavailable to those officers or employees who were not performing "discretionary" functions. Keck, 46 So. 3d at 1066-67. In creating this exception to the immunity conferred under section 768.28(9)(a), the First District disregarded the plain language of the statute and misapplied the judicially crafted federal doctrine of qualified immunity. Accordingly, the certified question should be answered in the negative.

A. Section 768.28(9)(a), Provides Immunity From Suit, and the Erroneous Denial of This Immunity Causes Injury That Cannot be Remedied on Appeal of a Final Order.

Florida courts have held without exception that section 768.28(9)(a) provides immunity not only from liability, but from suit.[3] Even the majority in the decision below acknowledged—and did not dispute—that section 768.28(9)(a)

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[3] *See* Furtado v. Yun Chung Law, 36 Fla. L. Weekly D238, 2011 WL 309411 (Fla. 4th DCA Feb. 2, 2011) (quoting Willingham v. City of Orlando, 929 So. 2d 43, 48 (Fla. 5th DCA 2006)); City of Winter Haven v. Allen, 541 So. 2d 128, 133 (Fla. 2d DCA 1989). *See also* Stoll v. Noel, 694 So. 2d 701, 703 (Fla. 1977) (holding that certain physicians, as agents of the state, were entitled to "statutory immunity from suit and liability as provided by section 768.28, Florida Statutes"); Brown v. McKinnon, 964 So. 2d 173, 176 (Fla. 3d DCA 2007) (Shepherd, J., dissenting) (citing cases).

"has been described as a grant of immunity both from liability and from suit." Keck, 46 So. 3d at 1067. It is also well-recognized that an entitlement to immunity from suit is lost if a case is erroneously permitted to go to trial. Florida courts considering the federal qualified immunity doctrine, the immunity conferred by 768.28, and other forms of immunity from suit have uniformly so held.[4]

As this Court stated in Tucker v. Resha, an order denying qualified immunity in a federal civil rights case is "effectively unreviewable on appeal from a final judgment as the public official cannot be 're-immunized' if erroneously required to stand trial or face the other burdens of litigation." 648 So. 2d at 1189 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). Nor is it possible to "re-immunize" a state official or employee erroneously denied immunity under section 768.28(9)(a).

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[4] *See* Tucker v. Resha, 648 So. 2d 1187, 1189 (Fla. 1994) (qualified immunity in federal civil rights action); Lemay v. Kondrk, 923 So. 2d 1188, 1192 (Fla. 5th DCA 2006) (immunity under section 768.28(9)(a)); Crowder v. Barbati, 987 So. 2d 166, 167 (Fla. 4th DCA 2008) (absolute immunity of public official from suit for alleged defamation); Stephens v. Geoghagan, 702 So. 2d 517, 521 (Fla. 2d DCA 1997) (absolute immunity for alleged defamation); Willingham, 929 So. 2d at 48 (immunity under section 728.68(9)(a)); Furtado, 36 Fl. L. Weekly D238 (immunity under section 768.28(9)(a)); Fuller v. Truncale, 50 So. 3d 25, 28 (Fla. 1st DCA 2010) (judicial immunity); *see also* Seminole Tribe of Fla. v. McCor, 903 So. 2d 353, 357-358 (Fla. 2d DCA 2005) (certiorari jurisdiction exists "because the inappropriate exercise of jurisdiction by a trial court over a sovereignly-immune tribe is an injury for which there is no adequate remedy on appeal").

The First District failed to give full effect to the unqualified language of section 768.28(9)(a). As discussed below, its decision is based on a misunderstanding of the federal doctrine of qualified immunity and the relevant caselaw. Petitioner is entitled to certiorari review.

B. The Decision of the First District Failed to Give Effect to the Plain Language of Section 768.28(9)(a), and Misconstrued Caselaw.

In cases of ordinary negligence, the legislative grant of immunity to state officers, employees, and agents in section 768.28(9)(a) is without exception or qualification. In no way does this statutory grant of immunity depend upon the nature of the duties performed; nothing in the language of the statute supports such a distinction. In ruling that this immunity from suit applies only when an employee's duties are discretionary, the First District failed to apply core principles of statutory construction. Indeed, it is fundamental that "[w]here the language of a statute is clear and unambiguous, [courts] cannot construe the statute in a manner that would extend, modify, or limit its express terms or its reasonable and obvious implications." In re Adoption of a Minor Child, 570 So. 2d 340, 344 (Fla. 4th DCA 1990) (citing State ex rel. Florida Jai Alai, Inc. v. State Racing Comm'n, 112 So. 2d 825 (Fla. 1959)). Courts "are not at liberty to add words to statutes that were not placed there by the legislature." Seagrave v. State, 802 So. 2d 281, 287 (Fla. 2001) (quoting Hayes v. State, 750 So. 2d 1, 4

(Fla. 1999)). Contrary to these basic principles, the First District erred in limiting immunity from suit under section 768.28(9)(a) to those who perform only "discretionary" functions. The statute does not so provide.[5]

The First District's apparent rationale, moreover, is based on a misreading of caselaw. Its decision principally relies on this Court's decision in Tucker v. Resha, 648 So. 2d 1187, which held that the judicially-crafted federal doctrine of qualified immunity would apply in federal civil rights actions brought in state court against state officials. That doctrine provides immunity from suit when the law governing an official's action is not clearly established, and it entitles an official to immediate appellate review of an order denying immunity. Tucker, 648 So. 2d at 1189. Whatever limitations may exist under the qualified immunity doctrine have no analogue in the statutory immunity established in the clear language of section 768.28(9)(a).

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[5] As Judge Wetherell correctly observed, section 768.28(9) was amended in 1980 by Chapter 80-271, Laws of Florida, to make clear that governmental employees are immune from tort claims unless they acted in bad faith, with malicious purpose, or in a manner exhibiting a willful and wanton disregard for human rights, safety, or property. *See* Keck, 46 So. 3d at 1069-1070 (Wetherell, J., dissenting). This unambiguous amendment can be read in no other way. Even if doubt existed, the staff analysis likewise makes clear the legislature's intent to immunize government employees from suit in cases of ordinary negligence. *See* Fla. H. R. Comm. on Govtl. Ops., PCB 31 Staff Analysis 1 (May 2, 1980).

In any event, properly understood, the federal qualified immunity doctrine would provide support for review of a nonfinal order rejecting a state officer's or employee's claim of immunity from suit under the unqualified language of section 768.28(9)(a). The federal doctrine recognizes that officials should not be subjected to suit, and all the attendant burdens of litigation, when the law they enforce or administer is not clearly established. Section 768.28(9)(a) *directly* confers this same type of *immunity from suit* (for ordinary negligence) on state officers, employees, and agents—without any qualification on the nature of their duties and employment. When a state employee loses immunity by being sued erroneously and potentially subjected to liability in his personal capacity, the injury he or she suffers is no different from that suffered when state officers are erroneously forced to stand trial in a federal civil rights action. The remedy should be the same: the right to immediate appellate review. The difference is that the Florida Legislature has made immunity from suit explicit and unequivocal; no need exists for a judicially developed immunity doctrine. Yet the First District would force petitioner to be subject to suit simply because he is a bus driver lacking discretionary duties; the statute clearly does not make or support this distinction.

Other cases upon which the First District relied fail to support its ruling. In Department of Education v. Roe, 679 So. 2d 751 (Fla. 1996), this Court declined

to extend Tucker to allow review of a nonfinal order under Rule 9.130, rejecting the department's claim of sovereign immunity. The department moved to dismiss a complaint, asserting that sovereign immunity barred an action for the negligent renewal of a teaching certificate. This Court viewed the case as one raising "a state law defense to an ordinary state law cause of action," and noted specifically that "public officials who defend tort suits against state agencies are not sued in their personal capacities." Roe, 679 So. 2d at 759. Unlike Roe where the Department was the official agency defendant, here the employee himself has been named in his personal capacity as a defendant. The immunity that section 768.28(9)(a) confers was meant to apply in precisely this context, where state officers, employees, and agents are sued directly for alleged torts involving ordinary negligence committed within the scope of their employment or functions.

Brown v. McKinnon, 964 So. 2d 173 (Fla. 3d DCA 2007), upon which the majority below relied, is a one-paragraph per curiam affirmed opinion, stating in a perfunctory way that the court was without jurisdiction (citing Roe and Fla. R. App. P. 9.130(a)(3)(c)(iv)). Notably, the majority per curiam opinion did not address whether the public employee sued in her personal capacity was entitled to certiorari review (an issue the dissent in Brown addresses at length under common law and statutory immunity principles). As such, Brown provides no

reasoned support for the First District's decision; indeed, it is an exceptionally unhelpful case upon which to conclude that certiorari review is unavailable when the majority did not even address the topic.

Nor can Stephens v. Geoghegan, 702 So. 2d 517 (Fla. 2d DCA 1997), support the First District's holding. To the contrary, in Stephens, the Second District acknowledged that public officials who make statements within the scope of their official duties are absolutely immune from suit for defamation under common law. Stephens, 702 So. 2d at 522. As such, it held that the defendant police officers were entitled to certiorari review of an order denying summary judgment. Id. The entitlement to immunity in such cases "is lost if the defendant is required to go to trial; having been forced to defend the suit, the public official cannot be reimmunized after-the-fact." Id. at 521. By virtue of section 768.28(9)(a), the petitioner here has the same immunity from suit in this case. No meaningful difference exists between his claim of immunity and that of the police officers in Stephens.

The last paragraph of the Stephens decision recognizes that section 768.28(9)(a) provides that suit may be brought against either agencies or agency heads in their official capacity. Id. at 527. The First District apparently construed this paragraph to mean that all immunity under section 768.28(9)(a) amounts to official immunity for only those state officials with discretionary duties, and that

erroneous denials of immunity for those with non-discretionary duties do not give rise to immediate review. This reading of the statute is erroneous. The statute confers unqualified personal immunity from suit on all officers, employees, and agents in cases of ordinary negligence, period.

In sum, Florida courts have held that immunity from suit—whether it is qualified, absolute, judicial, tribal, or, as here, personal against state employees under section 768.28(9)(a)—is lost where a defendant is forced to shoulder the irreparable injury of burdensome litigation without an opportunity for immediate appellate review. Under these circumstances, no reason exists to deny *only* state employees without discretionary duties the right of certiorari review in this context. The First District panel erred in holding to the contrary.

CONCLUSION

Based on the foregoing, the certified question should be answered in the negative. A right of a state officer, employee, or agent to certiorari review does not depend upon whether the functions he performed were discretionary.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I HEREBY CERTIFY that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure, and that a true copy of the foregoing has been furnished this 3 day of March, 2011, by U.S. Mail, postage prepaid, to:

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