IN THE SUPREME COURT OF FLORIDA

ANDREAS KECK,

Petitioner,

v.

Case No.: SC10-2306
1st DCA No.: 1D10-6
L.T. Case No.: 16-2006-008519

ASHLEIGH K. EMINISOR

Respondent.
_____/

FLORIDA ASSOCIATION OF COUNTY ATTORNEY'S, INC. BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER KECK

BY CERTIFIED QUESTION FROM THE FIRST DISTRICT COURT OF APPEAL

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STATEMENT OF IDENTITY AND INTEREST

The Florida Association of County Attorneys, Inc. is a Florida not-for-profit corporation whose purpose is to advise and consult with the Florida Association of Counties' Board of Directors on issues of significant county interest and to provide a forum for research, advice and discussion in the development of local governmental law. The issues on appeal involve the appellate court's ability to review trial court decisions involving the statutory grant of immunity provided in Section 768.28(9)(a), Florida Statutes, under immediate interlocutory review by certiorari. Because the issues relate to, affect, and impact the ability to engage and retain public employees who are protected by official immunity in tort actions, as well as other policy concerns, the decision of this Court will have wide ranging implications throughout the state, impacting all 67 counties.

PREFACE

The First District Court of Appeal, rendering the opinion in *Keck v. Eminisor*, 46 So. 3d 1065 (Fla. 1st DCA 2010), shall be referred to as the District Court. The Circuit Court, in and for the Fourth Judicial Circuit, Duval County, Florida, denying Petitioner's motion for summary judgment shall be referred to as the Trial Court. Andreas Keck, Defendant before the Trial Court and Petitioner before the District Court and herein, shall be

referred to as Petitioner Keck. Amicus Curiae, Florida Association of County Attorneys, Inc. shall be referred to as FACA.

STANDARD OF REVIEW

When reviewing a certified question concerning a denial of a summary judgment and "the substantive question posed is a legal question of statutory construction," the standard of review is *de novo*. *Progressive Auto Pro Ins. Co. v. One Stop Medical, Inc.*, 985 So. 2d 10, 12 (Fla. 4th DCA 2008) (citations omitted).

SUMMARY OF ARGUMENT

The District Court erred when it concluded that, "[b]ecause this case involves only ordinary negligence and does not implicate other policy concerns or the discretionary functions of public officers as in *Tucker*, this court will not now undertake immediate interlocutory review by certiorari." *Keck*, 46 So. 3d at 1067. Certiorari jurisdiction does not require that such "other policy concerns or the discretionary functions of public officials" exist in claims of official immunity under Section 768.28(9)(a), Florida Statutes. As a result, a restatement of the certified question of great public importance is appropriate.

The denial of Petitioner's immunity claims under Section 768.28(9)(a), Florida Statutes, resulted in material injury, leaving no

adequate remedy at law. It is the District Court's failure to undertake immediate interlocutory review by certiorari, and the incumbent public policy consequences, including the ability to retain, engage and fund qualified public employees, the expense and rigors of litigation, and judicial economy, that require this Court to answer the certified question in the negative.

Lastly, the considerations that led to an amendment to Florida Rule of Appellate Procedure 9.130, resulting from the decision in *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994), presently exist sub judice. Accordingly, this Court should initiate a rule change to amend Florida Rule of Appellate Procedure 9.130, to specifically authorize interlocutory appeals of non-final orders that deny claims of official immunity under Section 768.28(9)(a), Florida Statutes.

ARGUMENT

I. REPHRASED CERTIFIED QUESTION

By Order dated December 30, 2010, this Court accepted jurisdiction to review the following certified question of great public importance from the District Court:

> 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?

Keck, 46 So. 3d at 1068 (emphasis added).

FACA suggests that this Court should rephrase the certified question and omit the emphasized language above because of the District Court's apparent misapprehension of the distinction between qualified immunity, applicable to public officers sued for federal civil rights claims, and both sovereign immunity applicable to state governmental entities, and official immunity[1] applicable to public officers, employees and agents of the state sued for tort claims under state law.

In the context of this case, qualified immunity provides public officers immunity from suit for federal civil rights claims when performing the discretionary functions of office. Sovereign immunity applies to state governmental entities sued in tort and provides a limited waiver, but maintains two distinct exceptions to that waiver, one for public officers

[1] Individual immunity from suit under Section 768.28(9)(a) has been referred to as "statutory immunity," *Stoll v. Noel*, 694 So. 2d 701 (Fla. 1997); "sovereign official immunity," *Brown v. McKinnon*, 964 So**.** 2d 173 (Fla. 3d DCA 2007), *rev*. *den*. 980 So. 2d 488 (Fla. 2008) (Shepherd, J., dissenting); "sovereign immunity," *Lemay v. Kondrk*, 923 So. 2d 1188 (Fla. 5th DCA 2006); and "absolute immunity," *Stephens v. Geoghegan*, 702 So. 2d 517 (Fla. 2d DCA 1997) (immunity from suit for defamation); such immunity, however, will be referred to as "official immunity" here, as referred to by Petitioner Keck in Petitioner's Initial Brief.

performing discretionary functions of her or his office and one for breaching a duty to the public generally, as opposed to a particular individual. Official immunity, on the other hand, applies to state officers, employees and agents, acting within the course and scope of employment, and contains no such "discretionary functions" element.

This Court, in *Tucker v. Resha*, 648 So. 2d 1187, 1189 (Fla. 1994), explained that, "[u]nder the qualified immunity doctrine, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). *Cf. Stephens v. Geoghegan*, 702 So. 2d 517, 526 (Fla. 2d DCA 1997) (under federal law, the first step in establishing qualified immunity is that "the defendant must demonstrate that he or she performed the acts in question as part of a discretionary governmental function") (case involving police chief and two police officials).

Petitioner Keck, however, was sued for the tort claim of negligence under state law. In such instance, Petitioner Keck is immune from suit for any acts committed in the scope of his governmental employment, provided such acts are not committed in bad faith, with malicious purpose, nor

conducted in a wanton and willful manner. *See*, *e.g.*, *Simon v. Murphy*, 895 So. 2d 1245, 1246 (Fla. 4th DCA 2005) (stating that under Section 768.28(9)(a), a city employee (police officer) involved in a traffic accident in the scope of her employment may be held personally liable in tort only where she was acting "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property"); *see also, Metropolitan Dade County v. Kelly*, 348 So. 2d 49 (Fla. 1st DCA 1977); *Lemay v. Kondrk*, 923 So. 2d 1188 (Fla. 5th DCA 2006).

The District Court has improvidently added the requirement that "other policy concerns or the discretionary functions of public officials" be implicated before the court will find irreparable harm has occurred to a petitioner seeking certiorari review of denial of an immunity claim. *Keck*, 46 So. 3d at 1067.[2] As a result, the certified question propounded included the misapplied "discretionary functions" phrase.

Official immunity is granted by Section 768.28(9)(a), Florida Statutes, which provides in part that:

> 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

[2] Arguably, the District Court recognized that policy level officials would be entitled to certiorari review of the denial of a claim for official immunity under Section 768.28(9)(a).

> as a result of any act, event, or omission of action in the scope of her or his employment or function…

Section 768.28(9)(a), Florida Statutes, further provides in part that:

> The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity…

Official immunity under Florida law is recognized as a separate doctrine that protects government employees, rather than governmental entities. *See, e.g., Stoll v. Noel,* 694 So. 2d 701, 703 (Fla. 1997) (acknowledging that government "agents or employees" are entitled to "statutory immunity from suit and liability") (physician consultants); *see also, Willingham v. City of Orlando*, 929 So. 2d 43, 48 (Fla. 5th DCA 2006) (recognizing that government employees (police officers) are entitled to immunity from suit and from liability as provided by statute).

Sovereign immunity, however, protects "the state and its subdivisions… from tort liability unless such immunity is expressly waived by statute." *Seguine v. City of Miami,* 627 So. 2d 14, 16 (Fla. 3d DCA 1993). When a governmental entity is sued in tort, Section 768.28 provides a limited waiver of sovereign immunity, subject both to the discretionary function exception and the public duty doctrine exception. *Id*. at 16-17.

Like sovereign immunity, the concept of official immunity has its roots in the English common law. As explained by the *Restatement (Second) of Torts*:

> The origin of the immunity of public officers and employees is found in that of the king… which was extended to protect the servants who were carrying out his commands. The development of the parliamentary system in England gradually substituted the idea that, while the king himself could not be charged with wrongdoing, his ministers were personally responsible when they acted illegally. The rules of immunity from liability in tort that were finally worked out by the common law were essentially a compromise between these two positions.

Restatement (Second) of Torts § 895D cmt. a (1979).

In Florida, the legislature chose to address both types of immunity, sovereign and official, in Section 768.28, Florida Statutes. As this Court recently stated, "the Legislature has waived sovereign immunity for the State, its agencies, and subdivisions in tort actions… ." *Wallace v. Dean*, 3 So. 3d 1035, 1046 (Fla. 2009).[3] In Section 768.28(9)(a), however, the

[3] The Court held that "a brief clarification was necessary concerning the differences between a lack of liability under established tort law and the presence of sovereign immunity." In providing this clarification, the Court referred to sovereign immunity as an immunity from suit. ("When addressing the issue of governmental liability under Florida law, we have repeatedly recognized that a duty analysis is conceptually distinct from any later inquiry regarding whether the governmental entity remains *sovereignly immune from suit* notwithstanding the legislative waiver present in section 768.28, Florida Statutes) (emphasis added).

legislature granted governmental employees individual immunity from both suit and liability. *Stoll v. Noel.* 694 So. 2d 701 (Fla. 1997); *Lemay v. Kondrk*, 923 So. 2d 1188 (Fla. 5th DCA 2006).

In *McGhee v. Volusia County*, 679 So. 2d 729, 733 (Fla. 1996), Chief Justice Kogan, speaking for the Court, quoted extensively from the staff analysis prepared by the House Committee on Governmental Operations concerning the 1980 legislative amendments to Section 768.28(9)(a), Florida Statutes, and clearly recognized, that in light of the Court's earlier decision in *District School Board of Lake County v. Talmadge,* 381 So. 2d 698 (Fla. 1980), there was a "need for such a clear statement preventing personal liability of public employees for damages or injuries suffered as a result of an act, event or omission of action occasioned within the scope of their employment…" *McGhee*, 679 So. 2d at 732. The *McGhee* Court stated "that the purpose underlying the 1980 amendments was to abrogate…" the Court's prior holding in *Talmadge*, that government employees could be sued under traditional legal principals regarding tort actions without invoking the provisions of Section 768.28. *Id.* at 733. The *McGhee* Court:

> thus conclude[d] that the intent behind the 1980 amendments was to extend the veil of sovereign immunity to the specified governmental employees when they are acting within the scope of employment, with the employing agency alone remaining liable up to the limits provided by the statute. That veil is lifted only where the employee's act fell outside the scope of

> employment, in which event sovereign immunity then shields the employing agency from liability.

Id.

That the Legislature chose to provide government officers and employees with immunity from suit as well as from liability, is also clear from the text of Section 768.28(9)(a), Florida Statutes, which states that no government employee "shall be held personally liable in tort **or named as a party defendant**" in a tort action. (Emphasis added.) *See, e.g., Stoll v. Noel*, 694 So. 2d 701 (Fla. 1997).[4]

The District Court based its opinion in *Keck* upon a misapprehension of the guiding principles of law related to qualified immunity under federal law as distinguished from official immunity provided under Section 768.28(9)(a), Florida Statutes, and thus erroneously included the language "without implicating the discretionary functions of public officials" in its

[4] Florida's appellate courts have also recognized that Section 768.28(9)(a) provides immunity from suit as well as from liability. *See Willingham*, 929 So. 2d at 48 ("Importantly, the immunity provided by section 768.28(9)(a) is both an immunity from liability *and* an immunity from suit…"); *Lemay v. Kondrk*, 923 So. 2d 1188, 1992 (Fla. 5th DCA 2006) ("We fully recognize that the immunity provided by section 768.28(9)(a) is both an immunity from suit and an immunity from liability…"); *Simon v. Murphy*, 895 So. 2d 1245, 1246 (Fla. 4th DCA 2005) (finding an officer entitled to "immunity from suit as a matter of law pursuant to Florida Statutes section 768.28(9)(a)"); *Furtado v. Yun Chung Law*, 36 Fla. L. Weekly D238b (Fla. 4th DCA, Feb. 2, 2011) (concluding that official immunity under Section 768.28(9)(a) is immunity from suit and liability).

certified question. For a qualified immunity claim, the threshold question remains whether a public employee acted "within the scope of his discretionary authority" – that is, whether those actions were "(1) undertaken pursuant to the performance of his duties, and (2) within the scope of his authority." *Harbert Int'l, Inc. v. James*, 157 F. 3d 1271, 1282 (11th Cir. 1998). Though not identical, the threshold question for official immunity is similar, in that a public employee is entitled to official immunity if he acted "in the scope of… his employment or function." § 768.28(9)(a), Fla. Stat. Apparently, the District Court utilized Florida's "discretionary function" doctrine applicable to governmental entities.[5]

While the failure of the District Court to state the question adequately does not deprive this Court of its exercise of discretionary jurisdiction, *Finkelstein v. Department of Transportation*, 656 So. 2d 921, 922 (Fla.

[5] It is only when a *governmental entity* is claiming sovereign immunity that the court looks to policy making or planning level decisions, as opposed to operational decisions, as "'discretion in the *Commercial Carrier* sense refers to discretion at the *policy making or planning level*.' (emphasis supplied)). '*Planning level functions* are generally interpreted to be those requiring basic policy decisions, while *operational level functions* are those that implement policy.'" *Wallace v. Dean*, 3 So. 3d 1035, 1053 (Fla. 2009), citing *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1021 (Fla. 1979) (emphasis supplied). *See also*, *Seguine v. City of Miami*, 627 So. 2d 14, 16-17 (Fla. 3d DCA 1993) (explaining the exception to waiver of sovereign immunity to governmental entities for public officers performing discretionary functions of office).

1995), it is appropriate in such instances for the certified question to be rephrased by the Supreme Court to reflect the underlying legal issue. *State v. Smith*, 641 So. 2d 849, 850 (Fla. 1994).

FACA believes it appropriate for this Court to rephrase the certified question of great public importance, omitting the phrase "without implicating the discretionary functions of public officials," to read as follows:

> Whether review of the denial of a motion based on immunity from suit under Section 768.28(9)(a), Florida Statutes, should await entry of a final judgment in trial court?

II. CERTIORARI JURISDICTION – IRREPARABLE INJURY

Florida Rule of Appellate Procedure 9.030(b)(2)(A) provides the district courts of appeal with certiorari jurisdiction to review non-final orders of lower tribunals other than as prescribed by Rule 9.130.

> A certiorari petition must pass a three-pronged test before [the court] may grant relief from an erroneous nonfinal order. To obtain a writ of certiorari the petitioner must establish: (1) a departure from the essential requirements of the law; (2) resulting in material injury for the remainder of the case; (3) that cannot be corrected on postjudgment appeal. …Before we have the power to determine whether an interlocutory order departs from the essential requirements of law, the petitioner must demonstrate that the order causes material harm that cannot be remedied on postjudgment appeal.

Stephens v. Geoghegan, 702 So. 2d 517, 521 (Fla. 2d DCA 1997) (internal citations omitted).

As explained by the Florida Supreme Court in *Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983):

> In granting writs of common-law certiorari, the districts courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the districts courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

The District Court clearly focused on the materiality of the injury element in reaching its conclusion that certiorari jurisdiction was lacking. FACA, however, urges this Court to expand its ruling in *Tucker* to find irreparable injury exists in denial of official immunity claims under Section 768.28(9)(a).[6] As the dissent in *Keck* stated, in determining whether irreparable injury exists, the Supreme Court in *Tucker* found in a federal qualified immunity case that, "immunity is 'effectively lost if a case is erroneously permitted to go to trial' because a party entitled to the immunity cannot be 're-immunized' if erroneously required to stand trial or face the

[6] FACA recognizes that this Court in *Dept. of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), refused to expand its decision in *Tucker* to apply to claims of sovereign immunity, finding that the same policy concerns do not exist when a government entity is sued rather than an individual government actor.

other burdens of litigation.'" *Keck*, 46 So. 3d at 1071 (Whetherell, J., dissenting), quoting *Tucker*, 648 So. 2d at 1189 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

Irreparable injury in the context of qualified immunity has been discussed by the Supreme Court in several cases and thoroughly explored by this Court in *Tucker*. For example, in *Harlow v. Fitzgerald*, the Supreme Court held that qualified immunity seeks to protect government officials from "the costs of trial" and "the burdens of broad-reaching discovery." 457 U.S. at 817-18 (1982). The Court explained that qualified immunity shields officials from improper interference in the performance of their public duties, both from having to defend against such litigation and being deterred from public service due to threat of personal liability. *Id*. at 814.

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Supreme Court likewise emphasized that where the defense of qualified immunity has been raised, "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Id.* at 526, citing *Harlow*, 457 U.S. at 817 (U.S. Attorney General). In *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009), the Supreme Court again instructed:

> Because qualified immunity is "an immunity from suit rather than a mere defense to liability… it is effectively lost if a case

> is erroneously permitted to go to trial." Indeed, we have made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' against government officials [will] be resolved prior to discovery." Accordingly, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."

129 S. Ct. at 815 (internal citations omitted) (police officers).

It is precisely for the reasons identified by the Supreme Court in its review of federal qualified immunity claims, that denial of immunity from suit under Section 768.28(9)(a) constitutes irreparable injury which cannot be remedied on post judgment appeal.[7]

Further, public policy concerns, such as notions of judicial economy require immunity from suit claims be disposed of at the earliest possible time. *See Metropolitan Dade County v. Kelly*, 348 So. 2d 49, 50 (Fla. 1st DCA 1977) ("we find it proper to dispose of the issue in the interest of judicial economy and accordingly to treat that part of the interlocutory appeal as a petition for common law certiorari"). Although the doctrine of judicial economy is not fully defined by the Florida courts, principles of judicial economy would include "shielding parties from excessive litigation and preventing unnecessary demands on the judicial system." *See, e.g., Hill*

[7] *See also, Seminole Tribe of Florida v. McCor*, 903 So. 2d. 353, 358 (Fla. 2d DCA 2005) (discussing denial of claims of tribal sovereign immunity from suit, rather than a defense to liability, creating irreparable injury).

v. American Family Mutual Insurance Co., ___ P. 3d. ___, 2011 WL 13900 at 10 (Idaho, Jan. 5, 2011).

Judicial economy is particularly important in light of overcrowded court dockets at a time of diminishing budgets.

> [T]he ongoing challenges to state government associated with the current economic crisis have resulted in considerable reductions in trial court funding. Trial court expense budgets and support staff have been significantly reduced. … The loss of staff translates into slower case processing times, crowded dockets, and long waits to access judicial calendars.

See, e.g., In re: Certification of Need for Additional Judges, No. SC11-182 at 3 (Fla. Feb. 17, 2011).

For example, the denial of official immunity claims that are not immediately subject to review may require retention of separate counsel in the event of a conflict, thereby resulting in increased litigation expense, in contravention to one of the important public policy goals of official immunity. In fact, the Senate staff analysis of the 1980 amendments to Section 768.28(9)(a), even noted "that the bill should result in a costs savings since suits against employees would be eliminated and the department [of insurance] would not have to defend them," *see* Senate Staff Analysis and Economic Impact Statement, SB 1285 (May 22, 1980). Any such savings should be guarded by the courts.

When, as here, there is no assertion by a plaintiff in the complaint that the governmental employee has acted in a willful and wanton manner or that his actions are malicious or taken in bad faith, and the defendant claims official immunity from suit provided by Section 768.28(9)(a), then it is the court's responsibility to "implement the immunity from *suit,* and to fulfill its responsibilities as gatekeeper." *Willingham v. City of Orlando*, 929 So. 2d 43, 48 (Fla. 5th DCA 2006) (granting certiorari relief) (emphasis in original); *see also*, *Ondrey v. Patterson*, 884 So. 2d 50 (Fla. 2d DCA 2004); *rev*. *den*., 888 So. 2d 18 (Fla. 2004) (Altenbernd, C.J., concurring in part and dissenting in part) (describing duties of the trial judge as a gatekeeper in similar circumstances). For these reasons, the District Court should have accepted certiorari jurisdiction and quashed the decision of the Trial Court.

III. RULE CHANGE

This Court should amend Florida Rule of Appellate Procedure 9.130 to specifically authorize interlocutory appeals of non-final orders that deny claims of official immunity. This Court addressed an analogous situation in *Tucker*, and its holding dictates the proper result here. 648 So. 2d 1187 (Fla. 1994). The Court first noted that the Florida Rules of Appellate Procedure did not provide for district court review of a denial of federal qualified immunity from suit claim on an interlocutory basis. *Id.* at 1189. The Court,

thereafter "examine[d] the nature of the rights involved," namely immunity from suit. *Id.* The Court considered that the "central purpose of affording public officials qualified immunity from suit is to protect them 'from undue interference with their duties and from potentially disabling threats of liability.'" *Id.* (quoting *Elder v. Holloway*, 510 U.S. 510, 514 (1994) (quoting *Harlow*, 457 U.S. at 806)).

The *Tucker* Court noted that qualified immunity provides immunity from suit, and that the right is "effectively lost if a case is erroneously permitted to go to trial." 648 So. 2d at 1189 (quoting *Mitchell*, 472 U.S. at 526). In that event, not only does the official suffer from erroneously lost immunity, but society as a whole bears the burden of litigation expenses, diversion of official energy, and deterred interest in pursuing public office. *Tucker*, 648 So. 2d at 1189-90. The *Tucker* Court ultimately held that the denial of a federal qualified immunity claim was subject to interlocutory certiorari review. *Id.* at 1190.

Like qualified immunity, official immunity pursuant to Section 768.28(9)(a), Florida Statutes, is an immunity from suit. *Stoll v. Noel*, 694 So. 2d 701 (Fla. 1997). There is no principled reason or rational basis why government employees, like Petitioner Keck, should be able to immediately appeal the denial of a claim for qualified immunity from suit for federal civil

rights claims, but not the denial of a Section 768.28(9)(a), Florida Statutes, claim for official immunity from suit. Forcing government employees to wait until final judgment to appeal the denial of a claim for official immunity would render that immunity "illusory," causing "the very policy that animates the decision to afford such immunity [to be] thwarted." *Tucker*, 648 So 2d at 1190. The solution is both simple and available. Constitutional authorization exists for the district court to review "interlocutory orders [from trial courts] to the extent provided by rules adopted by the supreme court." Art. V, § 4(b)(1), Fla. Const.

In fact, responding to the issues presented to this Court by way of a procedural rules amendment is certainly not new. *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 854-55 (Fla. 1992) (amending Rule 9.130(a)(3)); *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992). In addition to overturning the district court's opinion in *Tucker*, the Court authorized "the Florida Bar Appellate Court Rules Committee to submit a proposed amendment [to] address… [its] decision." 648 So. 2d at 1190. This Court should likewise initiate an amendment to Florida Rule of Appellate Procedure 9.130, to specifically authorize interlocutory appeals of non-final orders that deny claims of official immunity, to ensure that the public policy concerns raised herein are appropriately addressed. A rule change would also obviate the

possibility that denial of qualified immunity of federal claims and official immunity of state claims, in the same case, could lead to differing results and consequently a bifurcation of the case.

CONCLUSION

Based upon the foregoing, FACA requests this Court to answer the certified question in the negative and take other appropriate action to effectuate its decision.

Respectfully submitted this _____ day of March, 2011.

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CERTIFICATE OF COMPLIANCE

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

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