IN THE SUPREME COURT OF FLORIDA

Case No.: SC10-2306
Lower Tribunal No.: 1D10-6
Trial Court No.: 16-2006-8519

ANDREAS KECK,

Petitioner,

v.

ASHLEIGH K. EMINISOR,

Respondent.

PETITIONER'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ……..… iv

PRELIMINARY STATEMENT ……..… 1

STATEMENT OF THE CASE AND FACTS …… 2

I. SUMMARY OF THE CASE …… 2

II. STATEMENT OF FACTS …… 4

SUMMARY OF THE ARGUMENT …….. 8

ARGUMENT ……..…….. 9

I. CERTIORARI JURISDICTION EXISTS TO REVIEW THE DENIAL OF SUMMARY JUDGMENT ON THE BASIS OF § 768.28(9)(a), FLA. STAT., WHICH PROVIDES IMMUNITY FROM SUIT. ……...…… 9

A. Individual Employees of the State or its Subdivisions Are Immune from Liability Based on Sovereign Official Immunity. ……...……. 10

B. The First DCA Failed to Recognize that Sovereign Official Immunity, Like Qualified Immunity, is Immunity from Suit. ……..……. 12

C. The First DCA Misconstrued the Express Language of § 768.28(9)(a). …….. 18

D. The First DCA Incorrectly Applied Precedent Regarding Entity Sovereign Immunity. ……..…… 20

II. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW WHEN IT DENIED MR. KECK'S CLAIM OF IMMUNITY. ……...…… 26

A. JTA is a State Agency. ……..……. 27

B. JTM is a State Agency Because it is a Corporation Exclusively Acting as an Instrumentality of JTA. …… 28

C. Mr. Keck is Entitled to Immunity from this Suit Pursuant to § 768.28(9)(a), Florida Statutes. ……...…… 40

CONCLUSION ……. 46

CERTIFICATE OF SERVICE …….. 48

CERTIFICATE OF COMPLIANCE ……. 48

TABLE OF AUTHORITIES

Allstate Ins. Co. v. Langston, 655 So. 2d 91 (Fla. 1995) ……. 9

American Home Assurance Co. v. Nat'l RR Passenger Corp.,
908 So. 2d 459 (Fla. 2005) ……...……...…... 18-19, 35

Borden v. East-European Ins. Co., 921 So. 2d 587 (Fla. 2006) …… 18

Brown v. McKinnon, 964 So. 2d 173 (Fla. 3d DCA 2007) …….……. 22-24

Carter v. City of Stuart, 468 So. 2d 955 (Fla. 1985) …….…… 11

Cianbro Corp. v. Jacksonville Transp. Auth.,
473 So. 2d 209 (Fla. 1st DCA 1985) ……. 28

Commercial Carrier Corp. v. Indian River County,
371 So. 2d 1010 (Fla. 1979) ……..…… 11, 15

Dep't of Education v. Roe, 679 So. 2d 756 (Fla. 1996) …….....….. 21-23

Dep't of Legal Affairs v. Dist. Court of Appeal, 5th Dist.,
434 So. 2d 310 (Fla. 1983) ……...……. 23

DeRosa v. Shands Teaching Hospital & Clinics, Inc,
504 So. 2d 1313 (Fla. 1st DCA 1987) …….……...…….. 44-46

Dorse v. Armstrong World Industries, Inc., 513 So. 2d 1265 (Fla. 1987) ……..... 44

Elred v. N. Broward Hosp. Dist., 498 So. 2d 911 (Fla. 1986) …….. 35

Fuller v. Truncale, 50 So. 3d 25 (Fla. 1st DCA 2010) ……...….. 16-17

Harlow v. Fitzgerald, 457 U.S. 800 (1982) …….……..…….. 12, 25

Hayes v. State, 750 So. 2d 1 (Fla. 1999) …...…… 18

Hollis v. School Board of Leon County,
384 So. 2d 661 (Fla. 1st DCA 1980) ……. 45

Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004) ……. 15

Keck v. Eminisor,
46 So. 3d 1065 (Fla. 1st DCA 2010) ……..…. 3, 4, 9, 15, 20, 21, 34-35, 39-40

Keith v. News & Sun Sentinel Co., 667 So. 2d 167 (Fla. 1995) …… 44

Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002) …… 12

M.S. v. Nova Southeastern Univ., Inc.,
881 So. 2d 614 (Fla. 4th DCA 2004) ……..……..…….. 41, 46

Maggio v. Florida Dep't of Labor & Employment Security,
899 So. 2d 1074 (Fla. 2005) …….. 34

Manatee County v. Town of Longboat Key, 365 So. 2d 143 (Fla. 1978) ……..… 19

Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987) …… 9

Martin K. Eby Constr. Co., Inc. v. Jacksonville Transp. Auth.,
178 Fed.Appx. 894 (11th Cir. 2006) ……..…….. 28

McGhee v. Volusia County, 679 So. 2d 729 (Fla. 1996) ……..….. 11, 41

Miami-Dade County v. Miller, 19 So. 3d 1037 (Fla. 3d DCA 2009) ……..…. 11

Mitchell v. Forsyth, 472 U.S. 511 (1985) …….. 13

Ondrey v. Patterson, 884 So. 2d 50 (Fla. 2d DCA 2004) ……..…….. 16

Pagan v. Sarasota County Public Hospital Bd.,
884 So. 2d 257 (Fla. 2d DCA 2004) ……..……. 35-36

Pan-Am Tobacco Corp. v. Dep't of Corr., 471 So. 2d 4 (Fla. 1984) …… 35

Prison Rehabilitative Industries. v. Betterson,
648 So. 2d 778 (Fla. 1st DCA 1994) ……..…… 28-31, 35

Rabideau v. State, 409 So. 2d 1045 (Fla. 1982) …… 19

Routon v. PBS&J Construction Services, Inc.,
971 So. 2d 252 (Fla. 2d DCA 2008) ……. 44

Shands Teaching Hosp. v. Lee, 478 So. 2d 77 (Fla. 1st DCA 1985) ..…… 28-31, 45

Smith v. Rankin, 950 So. 2d 1278 (Fla. 2d DCA 2007) ……. 16

State v. Family Bank of Hallandale, 623 So. 2d 474 (Fla. 1993) …….. 31

Stephens v. Geoghegan, 702 So. 2d 517 (Fla. 2d DCA 1997) …….. 11, 16, 21

Stoll v. Noel, 694 So. 2d 701 (Fla. 1997) ……..……..….. 41-44, 46

Theodore v. Graham, 733 So. 2d 538 (Fla. 4th DCA 1999) …….…… 44

Town of SW Ranches v. Kalam, 980 So. 2d 1121 (Fla. 4th DCA 2008) ...…… 17

Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994) ……..…...…...….. 13-16, 23, 25

Wallace v. Dean, 3 So. 3d 1035 (Fla. 2009) ……. 15

Windham v. Fla. Dep't of Transp., 476 So. 2d 735 (Fla. 1st DCA 1985) …… 35

OTHER AUTHORITIES

Article X, § 13, Florida Constitution ……..……. 10, 19

Rule 9.100, Florida Rules of Appellate Procedure …… 22

Rule 9.130, Florida Rules of Appellate Procedure ……..15, 22-23

§ 349.02(1)(a), Florida Statutes (2009) …….…...…...…….. 4

§ 349.02(10), Florida Statutes (2005) ……...……. 27

§ 349.03, Florida Statutes …… 4, 7, 27, 34

§ 349.04, Florida Statutes ……...……..... 36-39

§ 768.28, Florida Statutes ……..…..... 9, 10, 24, 26, 28-32, 34-36, 46

§ 768.28(1), Florida Statutes ……..…….. 8, 10

§ 768.28(2), Florida Statutes ……..……... 7, 16, 26, 27-36, 40-41

§ 768.28(5), Florida Statutes …… 10

§ 768.28(9)(a), Florida Statutes ……... *Passim.*

Fla. H.R. Comm. on Govtl. Ops., PCB 31 Staff Analysis
(May 2, 1980) …… 20

Fla. Staff Analysis, H.B. 1213, (April 17, 2009) ……..……. 38

Op. Att'y Gen. Fla. 99-05 (1999) …….. 32

Op. Att'y Gen. Fla. 03-21 (2003) …….. 32

Op. Att'y Gen. Fla. 05-24 (2005) ……..……..…… 32, 36

Op. Att'y Gen. Fla. 06-36 (2006) ……...……..……... 32, 36

Op. Att'y Gen. Fla. 06-40 (2006) …….. 38

PRELIMINARY STATEMENT

This Court has ordered the Clerk of the First District Court of Appeal to file a record of the proceedings below on or before March 1, 2011. Since the deadline for the Petitioner's Initial Brief is February 24, 2011, this brief will cite to the Appendix to this initial brief, containing the relevant documents. References to the Appendix will be designated by citing to the relevant page number and line number (or paragraph number, if appropriate). Example: [App. 320:2-321:16]. Petitioner Andreas Keck will be referred to as "Petitioner" or by name. Respondent Ashleigh Eminisor will be referred to as "Respondent" or by name. The Jacksonville Transportation Authority will be referred to by name or as "JTA." Jacksonville Transit Management will be referred to by name or as "JTM."

STATEMENT OF THE CASE AND FACTS

I. SUMMARY OF THE CASE

This case involves a petition for certiorari from the denial of a motion for summary judgment by an individual employee of a state agency or subdivision based on immunity from suit pursuant to § 768.28(9)(a), Florida Statutes. On August 4, 2005, Respondent Eminisor was struck by a bus driven by Petitioner Keck, and subsequently filed a negligence action, naming the Jacksonville Transportation Authority ("JTA") (the owner of the bus), Jacksonville Transit Management ("JTM") (the corporation acting as employer of record for JTA's drivers and mechanics), and Mr. Keck (the driver of the JTA bus), in his personal capacity, as defendants. [App. 1-7]. Mr. Keck moved for summary judgment, arguing that he was entitled to immunity from suit pursuant to § 768.28(9)(a), Fla. Stat., because: (1) he was an employee of JTM, a corporation wholly-owned by, and acting as an instrumentality of, JTA, a state agency, and (2) he was acting within the scope of his employment at the time of the incident. [App. 17-49].

The trial court denied Mr. Keck's motion, finding that JTA was an "independent establishment of the state," and therefore JTM was a corporation acting primarily as an instrumentality or agency of an independent establishment. [App. 466, ¶ 2]. Concluding that JTM was not a state agency or subdivision for

purposes of § 768.28, the trial court held that Mr. Keck was not entitled to the immunity afforded to individuals by § 768.28(9)(a). [App. 466-67].

Mr. Keck timely filed a petition for certiorari in the First District Court of Appeal ("First DCA"). The petition invoked certiorari jurisdiction by arguing that the denial of summary judgment caused irreparable harm that could not be remedied on plenary appeal after a final judgment, because Mr. Keck's entitlement to immunity from suit could not be reinstated after a trial, and the trial court's order departed from the essential requirements of law. The First DCA denied the petition on jurisdictional grounds, finding that Mr. Keck was merely a bus driver sued for ordinary negligence, and therefore would not suffer irreparable harm if his entitlement to immunity from suit was reviewed on plenary appeal after the entry of a final judgment. *Keck v. Eminisor*, 46 So. 3d 1065, 1066-67 (Fla. 1st DCA 2010). Contrary to the language of § 768.28(9)(a) and existing case law, the majority concluded that an employee, officer, or agent of the state would suffer irreparable harm from the denial of immunity from a tort lawsuit only if he/she performed "discretionary public functions." *Id.* at 1066-67. However, recognizing that § 768.28(9)(a) has been interpreted as providing immunity from suit, and acknowledging contrary decisions by other district courts, the majority certified the following question of great public importance:

> Whether review of the denial of a motion for summary judgment, based on a claim of individual immunity under § 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.

Dissenting from the decision, but agreeing that the above question should be certified, Judge Wetherell found that the court had jurisdiction to review the petition because Mr. Keck would suffer irreparable harm if required to wait until the end of the trial for appellate review of his claim of immunity from suit. *Id.* at 1068-74. In addition, Judge Wetherell concluded that the trial court's order denying summary judgment should be quashed for departing from the essential requirements of law. *Id.* at 1074-77.

This Court accepted jurisdiction of this case on December 30, 2010.

II. STATEMENT OF FACTS

The undisputed facts before the trial court at summary judgment, establishing Mr. Keck's entitlement to immunity from suit, reveal that Mr. Keck was an employee of JTM, acting in the course and scope of his employment at the time of the accident; that JTM is a corporation wholly owned by the JTA and acting solely as an instrumentality of JTA, a state agency; and, therefore, JTM is a "state agency or subdivision," as defined in § 768.28, Fla. Stat.

JTA is a state agency, first created by general law in 1971. § 349.03, Fla. Stat. JTA, denoted as the "Authority" in chapter 349 of the Florida Statutes, is defined as a "body politic and corporate, an agency of the state." § 349.02(1)(a),

Fla. Stat. In the early 1980's, JTA assumed control and responsibility of the day-to-day operations of Jacksonville's mass transit system. [App. 90:8-91:10]. Prior to JTA's take over, a private corporation employed the system's bus drivers and mechanics, who were unionized and enjoyed the right to strike and participated in a private pension plan. *Id.* While these drivers and mechanics wanted to continue their employment for the transit system, they also wanted to retain their right to strike and to maintain their private pension plan, which would not have been possible had they become state employees. *Id.* Thus, to accommodate these employees, the corporation JTM was created by JTA to serve as an employer of record. *Id.*

JTM is a not-for-profit corporation[1] created by JTA for the sole purpose of providing certain employees the right to strike and the right to maintain a private pension fund. [App. 90:20-91:10, 250:15-251:2]. JTM is wholly-owned by, and entirely encompassed within, JTA, and its sole function and business activity is to provide bus drivers and maintenance workers for JTA; JTM has absolutely no business activity outside of providing services for and to JTA. [App. 67 ¶6(A) and (B), 362:25-363:11, 409:13-15, 280:25-281:13].

[1] JTM is registered with the State of Florida as a not-for-profit corporation. Although it is considered a for-profit corporation for purposes of federal income tax filing, the JTM never realizes a profit. App. 427:25- 428:22, 436.

JTA exercises complete control over JTM's day-to-day operations. This is demonstrated by the exclusive level of supervision and control JTA maintains over JTM employees and their employment conditions. JTA makes ultimate decisions on what work rules will govern the JTM employees. [App. 377:11-19]. JTA establishes the routes that the JTM drivers are to drive and JTA employees directly supervise JTM bus drivers in their day-to-day performance on the road. [App. 68 ¶6 (E)-(G), 259:17-20]. JTA screens and hires all JTM employees and pays all JTM employees' wages, and JTM employees may only be terminated with JTA approval. [App. 149:6-19, 423:19-23, 144:10-16, 357:5-21]. Collective bargaining negotiations between JTM and the labor unions representing JTM employees are directed by JTA and the collective bargaining agreements must be approved by JTA's Executive Director. [App. 274:21-276:25, 288:9-24, 377:4-10, 408:24- 409:12].

The extensive and exclusive degree of JTA's control over JTM is also demonstrated by the financial relationship between JTA and JTM. JTA pays all expenses and costs of operating the transit system, including all of JTM's operational costs. [App. 68 ¶6(J)]. JTM has no bank accounts other than a payroll account which is funded by JTA immediately prior to each payroll being paid. [App. 277:20-278:7, 423:19-23]. JTA also pays all JTM employees' pension funds and healthcare benefits. [App. 286:22-287:20, 425-426]. JTA provides all buses,

equipment, and facilities to JTM, and JTM does not own any assets. [App. 68 ¶6(H),(I), and (M)]. JTA is the sole shareholder of JTM stock and JTA's Executive Director is also the Chairman of JTM's Board of Directors. [App. 68 ¶6(N),(O)]. Additionally, a contract between JTA and JTM, governing the services that JTM provides for JTA, establishes that JTA controls JTM. [App. 71-77].

The Respondent offered no facts in opposition to Mr. Keck's motion for summary judgment, and the factual relationship between JTA and JTM is undisputed. [App. 437-464]. The undisputed facts conclusively establish that JTM is not an autonomous corporation; it merely acts as an employer-of-record for the purpose of providing certain employment benefits to certain employees. It is also undisputed that JTA is a "state agency" as specified in § 768.28(2), Fla. Stat.[2] Because JTM exists solely to support JTA, at JTA's direction, JTM acts as an instrument or agency of JTA. As such, JTM is a state agency as defined in § 768.28(2).

Further, it is undisputed that at the time of the accident, Mr. Keck was acting in the course and scope of his employment with JTM. [App. 41-45].[3] The undisputed facts reveal that Mr. Keck is entitled to immunity from this suit, pursuant to § 768.28(9)(a), since he was acting in the scope of his employment for

[2] *See* § 349.03(1), Fla. Stat. (defining JTA as an agency of the state).
[3] Likewise, Respondent does not allege that Keck acted in bad faith, with malicious purpose, or in a willful or wanton manner, only that he acted negligently. [App 1-7].

a corporation (JTM) acting as an instrumentality of a state agency (JTA).

SUMMARY OF THE ARGUMENT

Section 768.28(1), Fla. Stat., waives sovereign immunity for governmental entities as to tort actions, implementing a key, bedrock principle of local government. It has long been determined that the best interests of the state lie in ensuring officers, employees, and agents of the state or its subdivisions are personally immune from tort suits, if the challenged act falls within the scope of their employment and was not committed in bad faith, with malicious purpose, or in a willful and wanton manner. § 768.28(9)(a), Fla. Stat. The exclusive remedy for injury or damage resulting from such an act shall be by action against the governmental entity, the head of such entity in his official capacity, or the constitutional officer who employs the officer, employee, or agent. *Id.*

The denial of personal immunity from suit is recognized in Florida courts as sufficient irreparable injury to justify certiorari review, regardless of the type of work performed by the individual invoking immunity. In the instant case, since the issue was Mr. Keck's entitlement to immunity from suit, this was sufficient to establish irreparable injury to review the denial of his motion for summary judgment: if Mr. Keck must go to trial and wait for a final judgment in order to obtain review of the order denying summary judgment, he would lose his entitlement to immunity from suit. Accordingly, contrary to the majority opinion

below, the district court had jurisdiction to review the trial court's order by certiorari.

In addition, the trial court's order departed from the essential requirements of law. The undisputed record shows that, at the time of the conduct at issue, Mr. Keck was either an employee or an agent of the state, as defined in § 768.28, since he was acting in the scope of his employment with JTM, a corporation primarily acting as an instrumentality or agency of a state agency – JTA. Since it is uncontested that his conduct fell within the scope of § 768.28(9)(a), Mr. Keck had immunity from suit, and was entitled to summary judgment in his favor.

ARGUMENT

I. CERTIORARI JURISDICTION EXISTS TO REVIEW THE DENIAL OF SUMMARY JUDGMENT ON THE BASIS OF § 768.28(9)(a), FLA. STAT., WHICH PROVIDES IMMUNITY FROM SUIT.

In order to obtain certiorari review of a non-final order, a petitioner must show that the order: (1) would cause irreparable harm that cannot be remedied on appeal, and (2) departs from the essential requirements of law. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995); *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987). Both the majority and the dissent in the case below agree that the first prong of the analysis is jurisdictional, and that the First DCA would not review a petition for certiorari in the absence of a showing of irreparable harm that cannot be remedied on appeal. *Keck*, 46 So. 3d at 1066, 1068. The trial

court's order denying Mr. Keck immunity from suit under § 768.28(9)(a) causes him irreparable harm that cannot be remedied on appeal. The majority's conclusion below that Mr. Keck has not shown irreparable harm is based on a misunderstanding of the law on immunity from tort suits under § 768.28(9)(a). The majority opinion below: (A) made an incorrect distinction between qualified immunity of public officials sued for violation of federal civil rights laws, and the immunity of state officers, employees, or agents sued in tort under state law; (B) added words to, or attempted to change the meaning of, the clear and unambiguous language of § 768.28(9)(a), in violation of the principles of statutory construction; and (C) erroneously relied on case law addressing the immunity of governmental entities or the immunity of individuals sued in their official capacity, instead of relying on cases addressing the immunity of parties sued in their personal capacity.

A. Individual Employees of the State or its Subdivisions Are Immune from Liability Based on Sovereign Immunity.

In 1973, the Florida Legislature, pursuant to the authority given by the Florida Constitution, provided a limited waiver of immunity from tort lawsuits. Art. X, § 13, Fla. Const.; § 768.28, Fla. Stat. The waiver applies only to the state and its agencies and subdivisions, which are now liable for the tortious acts of their employees. § 768.28(1), Fla. Stat. The liability is limited to the amounts specified in § 768.28(5), and the case law has established that the state and its subdivisions and agencies are still immune from tort suits concerning discretionary functions.

Carter v. City of Stuart, 468 So. 2d 955, 957 (Fla. 1985); *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1022 (Fla. 1979); *Miami-Dade County v. Miller*, 19 So. 3d 1037 (Fla. 3d DCA 2009).

Significant to the instant case, § 768.28(9)(a) specifies that all officers, employees, or agents of the state, or of state subdivisions, remain immune from suit and liability in tort for any act within the scope of employment, unless acting in bad faith, with malicious purpose, or in a wanton and willful manner. § 768.28(9)(a), Fla. Stat. The only remedy available to a plaintiff in such situations is an action in tort against the state, a state subdivision or agency, or an individual officer, employee, or agent, in his/her official capacity.[4] *Id.* Such a remedy is not available against the employees, agents, or officers, who are immune from suit in their individual capacity. *Id.; see also*, *McGhee v. Volusia County*, 679 So. 2d 729, 733 (Fla. 1996).

In the instant case, the Respondent sued Mr. Keck, in his individual capacity, under state tort law, for an accident that occurred while Mr. Keck was driving a bus. Since the driving was within the scope of Mr. Keck's employment with JTM, a corporation acting solely as an instrumentality of JTA, a state agency, and it is uncontested that there was neither bad faith, malicious purpose, nor

[4] State law claims against governmental employees, officers, or agents in their official capacity are in actuality suits against the governmental entity that employs them. *Stephens v. Geoghegan*, 702 So. 2d 517, 527 (Fla. 2d DCA 1997).

wanton and willful conduct, Mr. Keck is entitled to immunity from this action, pursuant to § 768.28(9)(a), Florida Statutes.

B. The First DCA Failed to Recognize that Sovereign Official Immunity, Like Qualified Immunity, is Immunity from Suit.

The majority below in this case wrongly distinguished the end effect of immunity from suit enjoyed by employees of the state or its subdivisions in § 768.28(9)(a), Fla. Stat., and qualified immunity from suit enjoyed by governmental officers in certain federal civil rights claims. The First DCA erroneously concluded that only denials of qualified immunity from federal civil rights claims cause the irreparable harm giving rise to certiorari jurisdiction. There is, however, no logical basis for this conclusion, since the harm is identical: imposing on the employee, and ultimately on the state agency, the burdens and cost of the defense. It is the denial of ***any*** individual government employee, agent, or officer's immunity from suit that gives rise to such irreparable harm.

State officials have qualified immunity from certain federal civil rights suits for actions taken as part of their discretionary functions, and are entitled to interlocutory appellate review of denials of that immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The purpose of this qualified immunity from federal civil rights actions is to allow public officials to carry out their discretionary functions without fear of litigation, when those actions do not infringe upon clearly established rights. *Id.* at 819; *Lee v. Ferraro*, 284 F.3d 1188, 1193 (11th Cir.

2002). Since qualified immunity shields public officials from suit, not just from liability, a Court's denial of qualified immunity may be appealed, even in the absence of a final decision, if it is an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

In *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994), a public official was sued for violations of federal civil rights, and the trial court denied summary judgment on the official's claim of qualified immunity. The First DCA "recognized that [the official's claim of] immunity from suit involves a type of protection that cannot be adequately restored once lost by exposure to trial," and certified a question to the Florida Supreme Court regarding the entitlement to certiorari review. *Id.* at 1188. The Florida Supreme Court concluded that the denial of summary judgment was subject to certiorari review, because the public official claimed immunity from suit, and that entitlement would be lost without remedy if the case continued to trial on the basis of an erroneous order. *Tucker*, 648 So. 2d at 1189. The Court explained that "the public official cannot be 're-immunized' if erroneously required to stand trial or face the other burdens of litigation." *Id.* The Court noted that the immunity from suit protected public officials from undue interference with their duties, and from liability threats that could disable the performance of duties. *Id.* at 1189-90. While officials have no immunity from lawsuits for violations of federal civil rights laws, unless they can show qualified immunity because they

were performing discretionary functions, Mr. Keck, who is sued only for a state law tort, has full immunity, from the start, for any acts committed in the scope of his employment, without bad faith, malicious purpose, or in a wanton and willful manner. Unfortunately, the majority below erroneously applied the "discretionary functions" standard for qualified immunity to a state law claim of immunity under § 768.28(9)(a). However, § 768.28(9)(a) immunity has no discretionary functions element, and there is no basis for such a requirement for the establishment of irreparable injury for the purpose of certiorari review of a denial of immunity under § 768.28(9)(a).

This Court, in *Tucker*, squarely held that a government employee suffers irreparable harm if forced to erroneously defend himself at trial. This holding was not premised on whether the action taken was a discretionary function, as no possible pertinence could be derived from such a fact. It is the erroneous obligation to defend oneself at trial, when immunity from suit is at issue, that this Court relied upon in its holding in *Tucker*, and that holding remains intact. While *Tucker* involved qualified immunity from a federal civil rights action, it is instructive on the point that a governmental employee, officer, or agent, who enjoys immunity from suit – whether qualified immunity from a federal civil rights claim, or official immunity under § 768.28(9)(a) from a state law tort suit – suffers

irreparable harm if forced to proceed to trial without the right to interlocutory review of an order denying summary judgment on the immunity issue.

Unfortunately, the First DCA in the instant case erroneously interpreted *Tucker* to only apply where the immunity from suit involves discretionary public functions and not where the immunity is for a suit involving "ordinary negligence." *Keck*, 46 So. 3d at 1067. [5] The majority overlooked the fundamental premise in *Tucker*, that regardless of the type of immunity, if the immunity asserted by the public official or employee is an ***immunity from suit***, irreparable harm occurs if that employee is forced to go to trial without affording interlocutory review of a denial of immunity, since the public employee cannot be "re-immunized."

[5] In addition to erroneously applying the discretionary functions requirement to certiorari review of the denial of immunity under § 768.28(9)(a), it should be noted that the First DCA also misinterpreted the meaning of "discretionary functions" in the context of qualified immunity from suit. The majority stated that "[b]ecause this case involves only ordinary negligence and does not implicate other policy concerns or the discretionary functions of public officials," Mr. Keck did not suffer irreparable harm giving rise to certiorari jurisdiction. *Keck*, 46 So. 3d at 1067. It appears the First DCA erroneously applied the discretionary function standard for governmental entity sovereign immunity for state law tort cases to this issue. The "discretionary function" standard for qualified immunity in federal civil rights claims includes purely ministerial functions. *See Holloman v. Harland*, 370 F.3d 1252, 1265-66 (11th Cir. 2004). Thus, even if Mr. Keck was being sued for a federal civil rights claim arising out of the bus accident, and claimed qualified immunity, he would be entitled to the same interlocutory review he seeks here, notwithstanding the passage of Fla. R. App. P. 9.130(a)(3)(C)(vii), enacted subsequent to, and as a result of, *Tucker, supra.* It is only the discretionary functions of a ***governmental entity*** claiming sovereign immunity from a state law suit that refers to policy making or planning level decisions, as opposed to operational decisions. *Wallace v. Dean*, 3 So. 3d 1035, 1053-54 (Fla. 2009); *Commercial Carrier*, 371 So. 2d at 1019-22.

Accordingly, if Mr. Keck shows he is an official/employee/agent of the state or of a state subdivision, as defined in § 768.28(2), he is entitled to immunity from tort suits, regardless of whether his actions were discretionary.

The denial of summary judgment based on a claim of immunity from suit by a government employee or agent sued in his individual capacity, regardless of the basis for the entitlement, constitutes irreparable harm and entitles a claimant to certiorari review prior to trial. Courts have found that a government employee, agent, or official who is erroneously denied immunity from suit, regardless of whether it is official immunity under § 768.28(9)(a) or qualified immunity, cannot be re-immunized on appeal from a final judgment, since the purpose of the immunity – to shield the immunized party from trial – has already been defeated by forcing the party to go through a trial. *Tucker*, *supra*. (qualified immunity); *Smith v. Rankin*, 950 So. 2d 1278, 1279 (La Rose, J., concurring) (Fla. 2d DCA 2007) (sovereign official immunity); *Ondrey v. Patterson*, 884 So. 2d 50, 54 (Fla. 2d DCA 2004) (qualified and sovereign official immunity); *Stephens*, 702 So. 2d at 521 (qualified and sovereign official immunity). *See also, Fuller v. Truncale*, 50 So. 3d 25, 28 (Fla. 1st DCA 2010) (granting certiorari review and explaining that "[t]he harm would be irreparable because if the parties wait to address the issue of judicial immunity until appeal, any protection the immunity affords against suit would be sacrificed"), *citing Tucker*, *supra*. Accordingly, an individual

government employee would suffer irreparable harm, justifying certiorari review of the denial of immunity. *Id.* Therefore, when an individual government employee seeks certiorari review of a pre-trial denial of immunity from suit, the issue before the court cannot be whether the party would suffer irreparable harm, since this jurisdictional element has already been established by the subject of the claim, i.e. immunity from suit. Instead, the court must consider whether the trial court departed from the essential requirements of law by erroneously denying immunity.

Although, for purposes of certiorari review, irreparable harm is determined by the subject matter (i.e. claim of immunity from suit), the First DCA unexplainably held that a claimant of official immunity must establish irreparable harm by meeting the burden of proof for establishing qualified immunity from federal civil rights claims. As discussed above, a public official does not have immunity from federal civil rights lawsuits, unless he can show that the actions at issue were taken as part of his discretionary job functions. Accordingly, it is the burden of the qualified immunity claimant to show that the acts at issue were discretionary. *Town of SW Ranches v. Kalam*, 980 So. 2d 1121, 1123 (Fla. 4th DCA 2008). By contrast, Mr. Keck does not claim qualified immunity from a federal civil rights claim, and such a claim would be irrelevant in the context of a negligence action pursuant to state law. Instead, he claims official immunity under

§ 768.28(9)(a), which merely requires him to show that he is an "officer, employee, or agent of the state or of any of its subdivisions." § 768.28(9)(a), Fla. Stat.

C. The First DCA Misconstrued the Express Language of § 768.28(9)(a).

The First DCA misconstrued the clear and unambiguous language of § 768.28(9)(a), Fla. Stat., when it concluded that the statute only affords some immunity from suit, to some individuals, for some acts. The purpose of statutory construction is to give effect to the intent of the legislature. *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006). To the extent to which the language of the statute is clear and unambiguous, the courts will not look beyond it to discern legislative intent. *Id.* Even if the statutory language is not clear and unambiguous, courts are not at liberty to add words to statutes. *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999). This Court has recently addressed the purpose, and legal import, of sovereign immunity in responding to a certified question from the Eleventh Circuit Court of Appeals. In *American Home Assurance Co. v. Nat'l RR Passenger Corp.*, 908 So. 2d 459, 471-73 (Fla. 2005), this Court reviewed the constitutional and statutory jurisprudence in Florida sovereign immunity law, and reiterated the key principles:

> Florida law has enunciated three policy considerations that underpin the doctrine of sovereign immunity. First is the preservation of the constitutional principle of separation of powers. *See Commercial*

> *Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1022 (Fla.1979) (stating that "certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance"). Second is the protection of the public treasury. *See Spangler v. Fla. State Tpk. Auth.*, 106 So.2d 421, 424 (Fla.1958) (explaining that "immunity of the sovereign is a part of the public policy of the state[, which] is enforced as a protection of the public against profligate encroachments on the public treasury"). Third is the maintenance of the orderly administration of government. *See State Rd. Dep't v. Tharp*, 146 Fla. 745, 1 So. 2d 868, 869 (1941) ("If the State could be sued at the instance of every citizen, the public service would be disrupted and the administration of government would be bottlenecked.").

Id. at 471. Noting that the Legislature retained the power under Art. X, § 13 of the Florida Constitution, to waive sovereign immunity, this Court reiterated its long-standing holding that such waiver must be proven by clear and convincing evidence. *Id*. at 472, *citing, inter alia*, *Manatee County v. Town of Longboat Key*, 365 So. 2d 143, 147 (Fla. 1978), and *Rabideau v. State*, 409 So. 2d 1045, 1046 (Fla. 1982).

In the instant case, § 768.28(9)(a) is neither ambiguous nor unclear. The plain language of the statute provides that the immunity from suit applies to "***any*** action for ***any*** injury or damage suffered as a result of ***any*** act, event, or omission of action" within the scope of employment and without bad faith, malicious purpose, or wanton and willful disregard of human rights, safety, or property. § 768.28(9)(a), Fla. Stat. (emphasis added). There is no indication in the statute that only some state jobs, or functions, may be entitled to immunity, while others

are not sufficiently important to qualify for the protection. In addition, the Staff Analysis to the 1980 amendment of § 768.28(9) specified that the amendment:

> returns the personal immunity to public employees except for acts of an employee which are: (1) outside the scope of employment, or (2) willful or committed in bad faith or reckless disregard of human life.

Fla. H.R. Comm. on Govtl. Ops., PCB 31 Staff Analysis (May 2, 1980) [App. 470]. The clear language of the analysis shows that the Florida Legislature intended to shield from suit all public employees, not just those who performed certain functions or duties. *See Keck*, 46 So. 3d at 1069 (Wetherell, J., dissenting) ("Section 768.28(9)(a) expressly provides that governmental employees shall not be 'held personally liable in tort or named as a party defendant' in any tort action alleging only ordinary negligence."). Accordingly, the First DCA's conclusion that "this case involves only ordinary negligence and does not implicate other policies concerns or the discretionary functions of public officials as in *Tucker*," therefore precluding jurisdiction for certiorari review, is not pertinent to this analysis, and is erroneous as a matter of law. *Keck*, 46 So. 3d at 1067.

D. The First DCA Incorrectly Applied Precedent Regarding Entity Sovereign Immunity.

The majority opinion below also relied on governmental entity sovereign immunity cases that are inapposite. Each case cited by the majority opinion, in support of its conclusion that Mr. Keck would not suffer irreparable harm, addresses a suit against a state entity or against individuals sued in their official

capacity. Since Mr. Keck is not a public entity and has not been sued in an official capacity, the case law cited by the majority opinion does not apply to the instant case, and evinces a misapprehension of sovereign immunity law.

For example, the analysis of *Stephens, supra.*, by the majority below, is erroneous, and in fact is inconsistent with the decision in that case. As Judge Wetherell pointed out in his dissent, the defendants in *Stephens* had been sued in their individual and official capacities. *Keck*, 46 So. 3d at 1073; *Stephens*, 702 So. 2d at 522, 527. The *Stephens* court found that the defendants were immune from suit in their individual capacity, and therefore quashed the trial court's order as to those claims. *Stephens*, 702 So. 2d at 522, 525. The court went on to observe that the defendants did not have immunity from suit in their official capacity; however, the interlocutory review of governmental entity immunity is not at issue in this case. *Id.* at 527. In the instant case, Mr. Keck has been sued in his ***individual capacity***, not in an official capacity. Following a correct reading of *Stephens*, Mr. Keck is entitled to certiorari review of his claim of immunity under § 768.28(9)(a), and the trial court's order at issue must be quashed, since Mr. Keck is entitled to immunity from suit.

The First DCA also relied on *Dep't of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), for the conclusion that the denial of individual immunity can be remedied by appeal after a final judgment. *Keck*, 46 So. 3d at 1067. As with

Stephens, this is a misreading of the case. In *Roe*, the Florida Supreme Court considered whether the Department of Education ("DOE"), a governmental entity, was entitled to interlocutory appellate review of its denied claim of sovereign immunity. The case did not involve an individual's immunity under § 768.28(9)(a), and the holding in *Roe* did not determine the availability of discretionary certiorari jurisdiction. Instead, *Roe* decided the limited question of whether a non-final order denying sovereign immunity to a governmental entity could be appealed as a matter of right under Florida Rule of Appellate Procedure 9.130. *Id.* at 758-59. The fact that the denial of sovereign immunity cannot be appealed as a matter of right under Rule 9.130, however, in no way limits a court's ability to exercise certiorari review over an order denying sovereign official immunity to an individual. Indeed, certiorari jurisdiction is available precisely because Rule 9.130 does not provide for any appellate remedy as a matter of right. *See* Fla. R. App. P. 9.130(a)(1) (indications that non-final orders that are not reviewable under Rule 9.130 ***are reviewable under Rule 9.100***, the rule providing for certiorari jurisdiction). Thus, because the instant case involves an individual seeking certiorari review, *Roe*'s limited holding is inapplicable.

To the extent to which the First DCA's majority below finds support for its conclusions in *Brown v. McKinnon*, 964 So. 2d 173 (Fla. 3d DCA 2007), that reliance fails to apply required construction principles to this one-paragraph per

curiam decision. The majority in *Brown* simply stated that the court did not have jurisdiction to hear an appeal denying a motion to dismiss based on immunity, citing to *Roe* and to Fla. R. App. P. 9.130(a)(3)(C)(vii). 964 So. 2d at 173. A per curiam opinion with no facts and no legal analysis has no precedential value.[6] *Dep't of Legal Affairs v. Dist. Court of Appeal, 5th Dist.*, 434 So. 2d 310, 311-13 (Fla. 1983). The cited rule states that appellate review of non-final orders is allowed for trial court orders determining that, as a matter of law, a party is not entitled to immunity in a federal civil rights action. Fla. R. App. P. 9.130(a)(3)(C)(vii). The *Brown* opinion does not cite to any particular page of *Roe*, and the decision in *Roe* is irrelevant to Mr. Keck's case. In addition, since the instant case is not an appeal, but a petition for certiorari, the appellate rule cited is inapplicable and cannot form the basis for a denial of jurisdiction. Further, the well-reasoned dissent in *Brown* correctly noted that *Roe, supra.*, is inapplicable to claims of individual immunity from suit, *Tucker* is not limited to cases in which qualified immunity is claimed, and the majority should have treated the appeal as a petition for certiorari for which jurisdiction would lie. 964 So. 2d at 173-77 (Shepherd, J., dissenting). The dissent proceeded to correctly state:

> Because statutory immunity and common law immunity shield officials from suit**,** it follows that an erroneous denial of the immunity

[6] While the dissent provides some facts and some analysis, these are not sufficient to establish the precedential value of the majority opinion on which the First DCA relies in *Keck*.

> results in irreparable injury incurable by plenary appeal. Once the official is forced to litigate, she cannot be reimmunized from suit after the fact. *See Stephens*, 702 So.2d at 521 ("[A]bsolute and qualified immunity for public officials are not merely defenses to liability; as the terms themselves imply, they protect a public official from having to defend a suit at all. This entitlement 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.") (internal citations omitted). It makes little sense to afford a shield of immunity from suit to a public official and then fail to enforce it at the earliest moment when enforcement is appropriate. For this reason, it is a departure from the essential elements of law to fail to dismiss a complaint when it is clear on the face of the complaint that the government official is entitled to statutory or common law immunity. *Alfino v. Dep't of Health & Rehabilitative Services*, 676 So.2d 447, 449 (Fla. 5th DCA 1996)(holding a motion to dismiss a complaint was proper when defendant was protected by government immunity).

Id. at 176-77.

Mr. Keck properly invoked the First DCA's certiorari jurisdiction when he stated that the purpose of his petition was to review the trial court's order denying his claim of sovereign official immunity under § 768.28(9)(a). Since jurisdiction was established by the subject-matter of the claim (i.e. sovereign official immunity), the First DCA should have proceeded to analyze the merits of the claim, namely whether the trial court's order departed from the essential requirements of the law. Mr. Keck's burden at this point would be to show that he is a state officer/employee/agent, as defined by § 768.28.

Refusing certiorari review of the denial of a motion for summary judgment based on immunity from suit under § 768.28(9)(a), has a detrimental effect not

only on Mr. Keck, but on society as a whole. This Court discussed the detrimental societal effects of not allowing certiorari review of a denial of immunity from suit in *Tucker*, where it explained:

> society as a whole also pays the "social costs" of "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' "

648 So. 2d at 1190, *citing Harlow, supra*.

In addition, if governmental employees are not entitled to certiorari review of the denial of their immunity from suit under § 768.28(9)(a), governmental entities of the state will be required to incur the burden of litigation costs to defend tort suits against their employees, through trial before determination of the employee's immunity from suit. Such an unnecessary expense, by governmental entities facing ever increasing budgetary strains, is not only unfair to the citizens they serve, but is contrary to the Legislature's intent and this Court's precedent.

Accordingly, the answer to the certified question is that the review of the denial of a motion for summary judgment based on a claim of individual immunity under § 768.28(9)(a), Florida Statutes, must not await the entry of a final judgment in the trial court. The fact that the claim does not implicate discretionary functions of public officials is irrelevant to individual immunity under § 768.28(9)(a). Certiorari jurisdiction to review the claim of immunity is automatic, due to the

subject matter, since the erroneous denial of immunity from suit would cause irreparable harm that cannot be remedied after trial. The exercise of discretionary functions is also irrelevant to the merits of an immunity claim under § 768.28(9)(a), since officers, employees, and agents of the state, or of state subdivisions, are entitled to immunity for ***any*** acts, events or omissions within the scope of employment committed without bad faith, malicious purpose, or in a wanton and willful manner.

II. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW WHEN IT DENIED MR. KECK'S CLAIM OF IMMUNITY.

Mr. Keck was acting in the scope of his employment with a state agency, and is thus immune from this suit. *See* §768.28(9)(a), Fla. Stat. Actions in tort against the state, its agencies or subdivisions, and its employees and agents are governed by Florida's sovereign immunity waiver statute, §768.28. The statute defines state agencies as follows:

> [a]s used in this act, state agencies or subdivisions include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; ***and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities***, including the Florida Space Authority.

§ 768.28(2), Fla. Stat. (emphasis added). In this case, as discussed below, it is unrebutted that JTA is a state agency, entitled to the protections of § 768.28, Fla.

Stat. It is also uncontested that JTM is a corporation that is wholly-owned by JTA, exists entirely within JTA, and is completely controlled by JTA. Because of JTA's complete control over it, JTM acts primarily as an instrumentality of the state, and it clearly meets the definition of a "state agency or subdivision." § 768.28(2), Fla. Stat. The uncontested record evidence also shows that Mr. Keck was acting in the scope of his employment with JTM at the time of the accident. Although the majority in the First DCA opinion never analyzed this issue, the dissent correctly concluded that Mr. Keck is entitled to the protections of § 768.28(9)(a) and is immune from this suit.

A. JTA is a State Agency.

It is undisputed that JTA is an agency of the State of Florida. Section 349.03(1), Florida Statutes (2005), states: "[t]here is hereby created and established a body politic and corporate and an ***agency of the state*** to be known as the Jacksonville Expressway Authority, redesignated as the Jacksonville Transportation Authority. . . " (emphasis added). An "agency of the state" is defined as "includ[ing] the state and any department of the state, the authority, or any corporation, agency, or instrumentality heretofore or hereafter created, designated, or established by the state." § 349.02(10), Fla. Stat. (2005). Thus, without question, JTA is a "state agency or subdivision" as defined in § 768.28(2). It follows that because JTA is a state agency, as discussed below, JTM, a

corporation acting as an instrumentality of JTA, is also a state agency pursuant to § 768.28(2).[7]

B. JTM is a State Agency Because it is a Corporation Exclusively Acting as an Instrumentality of JTA.

In this case, the undisputed evidence shows that JTM is a corporation primarily acting as an instrumentality or agency of JTA, a state agency; therefore, tort actions against JTM and its employees, including Mr. Keck, are controlled by § 768.28. The test to determine whether a corporation primarily acts as an instrumentality of a governmental entity, and is thus considered a state agency itself, is whether the governmental entity controls the "day-to-day operations" of the corporate entity. *See Prison Rehabilitative Industries. v. Betterson*, 648 So. 2d 778 (Fla. 1st DCA 1994); *Shands Teaching Hosp. v. Lee*, 478 So. 2d 77 (Fla. 1st DCA 1985). In *Prison Rehabilitative Industries*, the plaintiff sued PRIDE,[8] a non-profit corporation, for personal injuries sustained in an auto accident. 648 So. 2d at 779. The First DCA reversed the trial court's denial of PRIDE's motion to dismiss and held that PRIDE was a "state agency" as defined in § 768.28(2), and was thus

[7] In addition, Florida courts have treated JTA as a state agency. *See Cianbro Corp. v. Jacksonville Transp. Auth.*, 473 So. 2d 209 (Fla. 1st DCA 1985) (applying to JTA the provisions of chapter 120, Fla. Stat., a statutory chapter that applies only to state agencies); *Martin K. Eby Constr. Co., Inc. v. Jacksonville Transp. Auth.*, 178 Fed.Appx. 894 (11th Cir. 2006) (finding that JTA is an independent state agency of the State of Florida).

[8] PRIDE is an acronym for Prison Rehabilitative Industries and Diversified Enterprises, Inc. *Prison Rehabilitative Industries*, 648 So. 2d at 779.

entitled to the sovereign immunity provisions of § 768.28. *Id*. at 780-81. In doing so, the court explained that the test to determine whether a corporation primarily acts as an instrumentality of a state agency is whether the state agency controls the day-to-day operations of the corporation. *Id*. at 780, *citing Shands Teaching Hospital*, s*upra*. The court reasoned that although PRIDE was "accorded substantial independence in the running of the work programs, its essential operations nevertheless remained subject to a number of legislatively mandated constraints over its day-to-day operations."[9] 648 So. 2d at 780. The court noted the specific controls that the Florida Department of Corrections had over PRIDE. Because the Florida Department of Corrections maintained the aforementioned extensive control over PRIDE's day-to-day operations, the First DCA held that PRIDE was a "state agency" as defined in § 768.28(2) and thus subject to the provisions of § 768.28. *Id.* at 779-781.

In the instant case, the undisputed facts reveal that JTA's control over JTM's day-to-day operations is tighter and much more extensive than even the Florida Department of Corrections' control over PRIDE. For example, while PRIDE was permitted to sell products to private entities with state permission, JTM never provides services to any entity other than JTA. Likewise, where PRIDE was

[9] That the Florida Department of Corrections' control over PRIDE was statutorily mandated is not material. § 768.28(2) defines a state agency to include corporations that primarily act as instrumentalities or agencies of the state, making no reference to a requirement of statutorily mandated state oversight.

subjected to state financial audits, JTM's finances are completely run and controlled by JTA. [App. 68 ¶ 6(J)(L), 430:22-431:3]. Further, while the state had a reversionary interest in all property acquired by PRIDE, JTM has no property as it is all owned by JTA. [App. 68 ¶ 6(H),(I), and (M)].

The First DCA, in *Prison Rehabilitative Industries,* noted that PRIDE was accorded "substantial independence in the running of its work programs," but nevertheless held that its essential operations remained subject to a number of constraints over its day-to-day operations. *Id*. at 780. Here, JTM has absolutely no independence from the JTA. Because JTM's day-to-day operations are controlled by JTA, JTM is an instrumentality of JTA and thus a "state agency" as defined in § 768.28(2).

Likewise, in *Shands Teaching Hosp., supra.,* the First DCA discussed that the ***critical factor*** in determining whether an entity is a state agency pursuant to § 768.28(2) is the existence of government ***control*** over the "detailed physical performance" and "day to day operation" of that entity. 478 So. 2d at 79. There, the defendant Shands Hospital sought the protection of § 768.28 in limiting the award of attorney's fees against it following a medical malpractice judgment. *Id*. The court held that Shands was not a corporation primarily acting as an instrumentality of the state because the record evidence showed that Shands' day-to-day operations were not under direct state control. *Id.* The court focused on

legislation that authorized the state to lease Shands to a private non-profit corporation organized solely for the purpose of operating the hospital, with the legislative intent of giving Shands local autonomy and flexibility. *Id.* In reviewing the statute and its legislative history, the court determined that the intent of the legislature was to treat Shands as an autonomous and self-sufficient entity, one not primarily acting as an instrumentality on behalf of the state. *Id.* Thus, because of its independence and lack of state control, the court found that Shands was not a state agency. *Id*. In the instant case, contrary to the facts in *Shands Teaching Hosp*., JTM was not created to act as an autonomous, self-sufficient entity; rather, JTM was created to act solely as an instrumentality of JTA. [App. 250 and 286]. As discussed at length above, JTM has no autonomy and JTA retains complete control over it. Clearly, JTA's control over JTM satisfies the tests set forth in *Prison Rehabilitative Industries* and *Shands Teaching Hosp.;* thus, JTM is a state agency pursuant to § 768.28(2).

Florida's Attorney General has likewise concluded that certain non-governmental entities were "corporations primarily acting as instrumentalities or agencies of the state," and were thus entitled to the sovereign immunity protections of § 768.28.[10] Specifically, Florida's Attorney General opined that non-

[10] "Although an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive." *State v. Family Bank of Hallandale*, 623 So. 2d 474, 478 (Fla. 1993).

governmental Community Transportation Coordinators (CTC), entities that provide transportation to the disadvantaged population outside the purview of a metropolitan planning organization, are entitled to the protections of § 768.28, even though these coordinators have full responsibility for the delivery of transportation services. Op. Att'y Gen. Fla. 99-05 (1999). It was reasoned that because the CTC's are subject to the oversight of the Florida Commission for the Transportation Disadvantaged, as well as the local coordinating board, the CTC's were entities acting primarily as instrumentalities of the state. *Id*. *See also* Op. Att'y Gen. Fla. 03-21 (2003); Op. Att'y Gen. Fla. 05-24 (2005); Op. Att'y Gen. Fla. 06-36 (2006). In the instant case, JTM is not only subject to JTA's oversight, but is completely controlled by JTA.

Respondent did not dispute that JTM is an instrumentality of JTA and that the undisputed record evidence establishes JTA exercises sufficient control over JTM for JTM to be considered an instrumentality of JTA. Notwithstanding, the trial court agreed with Respondent and erroneously held that JTM was not a state agency for purposes of sovereign immunity. [App. 466 ¶ 4]. The trial court interpreted the §768.28(2) definition of "state agency or subdivision" to specifically exclude corporations acting as instrumentalities or agents of independent establishments of the state. The trial court's statutory interpretation is erroneous and inconsistent with Florida law.

Section 768.28(2) uses three clauses to identify the entities within its definition of a "state agency or subdivision":

> First Clause: the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees;
> Second Clause: counties and municipalities;
> Third Clause: corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.

The trial court reasoned that because the words "independent establishments of the state" were not included in the third clause, the legislature did not intend to include corporations acting primarily as instrumentalities of independent establishments of the state in the sovereign immunity statute. [App. 466, ¶2]. This reasoning is clearly erroneous. In addition to "independent establishments of the state," the third clause also fails to specifically mention the executive departments, the Legislature, the judicial branch, and state university boards of trustees. Thus, following the lower court's logic, a corporation acting as an instrumentality or agency of any part of the state's three branches of government would also be excluded from the definition of "state agency or subdivision." According to the lower court's rational, only corporations acting primarily as instrumentalities of counties, municipalities, or the Florida Space Authority are "state agencies" pursuant to § 768.28(2), since the state can only act through its executive departments, the Legislature, the judicial branch, or its independent establishments.

The trial court's conclusion is illogical and erroneous because the Legislature included "the state" in the third clause. For a corporation to act as an instrumentality of the state, it obviously must act as an instrumentality of one of the entities named in the first clause.

"When construing a statutory provision, legislative intent is the polestar that guides the Court's inquiry." *Maggio v. Florida Dep't of Labor & Employment Security*, 899 So. 2d 1074, 1076-77 (Fla. 2005). Legislative intent is determined primarily from the language of the statute. *Id.* Construction of a statute which would lead to an absurd result should be avoided. *Id*. It is clear, from the plain reading of the statute, that the Legislature intended that corporations acting as instrumentalities of the state, and not just counties and municipalities, be included in the § 768.28(2) definition of state agency. The legislature stated unambiguously that JTA is a "state agency" in § 349.03, Florida Statutes (2005), and it is undisputed that JTM is a corporation acting as an instrumentality of JTA. The lower court's ruling that "by the express terms of § 768.28(2) JTM is not a 'state agency or subdivision' for sovereign immunity purposes," is an erroneous interpretation of the statute.

As noted by the dissent below, the trial court's hyper-technical interpretation of § 768.28(2) is inconsistent with the principle that § 768.28 should be construed in favor of the state because sovereign immunity is the rule, rather than the

exception. *Keck*, 46 So. 3d at 1075 (Wetherell, J., dissenting) *citing Am. Home Assurance Co.*, 908 So. 2d at 471-72; *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984); *Windham v. Fla. Dep't of Transp.*, 476 So. 2d 735, 739 (Fla. 1st DCA 1985).

The trial court's ruling is also inconsistent with appellate court precedent. Indeed, appellate courts have held that corporations acting as instrumentalities of both executive departments and independent establishments of the state are state agencies within the definition of § 768.28(2). In *Prison Rehabilitative Industries, supra*, the First DCA held as a matter of law, that PRIDE, a non-profit corporation acting as an instrumentality of an executive department – the Florida Department of Corrections – was a state agency for sovereign immunity purposes. Likewise, as noted in the dissent below, in *Pagan v. Sarasota County Public Hospital Bd.*, 884 So. 2d 257 (Fla. 2d DCA 2004), the Second DCA upheld the granting of the benefits of sovereign immunity under § 768.28 to a non-profit corporation which served as an instrumentality of an independent establishment of the state – the Sarasota County Public Hospital District.[11] In addition, in his concurring opinion, Chief Justice Canady, while serving on the Second DCA, stated "I see no reason to shrink back from announcing as a rule of law that a corporate entity . . . , which was established by a sovereignly immune independent establishment of the state

[11] *See also, Elred v. N. Broward Hosp. Dist.*, 498 So. 2d 911, 914 (Fla. 1986) (a hospital district is an independent establishment of the state).

and which is subject to the type of control to which [the corporation] is subject, is entitled to sovereign immunity." *Pagan*, 884 So. 2d at 266 (Canady, J., concurring). *See also* Op. Att'y Gen. Fla. 05-24 (2005) (because the Southeast Volusia Hospital District, an independent tax district of the state, exercises significant control over a non-profit corporation, that corporation is subject to the provisions of § 768.28); Op. Att'y Gen. Fla. 06-36 (2006) (Citrus County Hospital Board, an independent establishment of the state, created a non-profit corporation which acts primarily as an instrumentality of the Hospital Board, and is thus considered a "state agency" for purposes of § 768.28). In the instant case, contrary to the trial court's erroneous finding, a plain reading of the statute, case law and the opinions of Florida's Attorney General establish that JTM is a "state agency" as defined in § 786.28(2).

The trial court further premised its order by erroneously concluding that JTA lacked authority to form the JTM. [App. 467 ¶ 8]. Although, as will be discussed below, this has no bearing on Mr. Keck's entitlement to sovereign immunity, JTA had the authority to create JTM. Section 349.04, Fla. Stat. (2005), in effect at the time of the incident at issue, provided that the JTA's purpose includes, in part, to operate and maintain a mass transit system employing buses. § 349.04(1)(b), Fla. Stat. In order to fulfill its purposes, the Legislature stated in § 349.04(2) that:

> (2) The authority [JTA] is hereby granted, and shall have and may exercise all powers necessary, appurtenant, convenient, or incidental

> to carrying out of the aforesaid purposes, ***including, but without being limited to***, the right and power:
>
> * * *
>
> (l) To do all acts and things necessary or convenient for the conduct of its business and the general welfare of the authority, in order to carry out the powers granted to it by this chapter or any other law.

(Emphasis added).

In addition, among JTA's many powers, are the powers to construct, own, and operate a bus system:

> The authority may, in addition, acquire, hold, ***construct, improve, operate, maintain, and lease in the capacity of lessor a mass transit system employing motor cars or buses***; street railway systems beneath the surface, on the surface, or above the surface; or any other means determined useful to the rapid transfer of large numbers of people among the locations of residence, commerce, industry, and education in Duval County.

§ 349.04(1)(b), Fla. Stat. (2009) (emphasis added). Lest there be any confusion over the broad powers of this state agency to effectuate what it deems to be appropriate for bus operations, the legislature added the following provisions:

> ***In addition to the other powers set forth in this chapter, the authority has the right to plan, develop, finance, construct, own, lease, purchase, operate, maintain, relocate, equip, repair, and manage those public transportation projects, such as express bus services; bus rapid transit services***; light rail, commuter rail, heavy rail, or other transit services; ferry services; transit stations; park-and-ride lots; transit-oriented development nodes; or feeder roads, reliever roads, connector roads, bypasses, or appurtenant facilities, that are intended to address critical transportation needs or concerns in the Jacksonville, Duval County, metropolitan area.

§ 349.04(1)(e), Fla. Stat. (emphasis added).[12]

These provisions gave the JTA the authority to create the JTM. *See also,* Op. Att'y Gen. Fla. 06-40 (2006) (city was permitted to form a private corporation even though not specifically permitted to do so by law). The trial court considered the 2009 amendment to § 349.04(2) in support of its erroneous conclusion. In the 2009 amendment, § 349.04(2) specified that JTA had authority "to form, alone or with one or more other agencies of the state or local governments, public benefit corporations to carry out the powers and obligations granted in this chapter or the powers and obligations of such other agencies or local governments." § 349.04(2)(s), Fla. Stat. (2009). The trial court erroneously concluded that, because this provision was not in the earlier version of § 349.04(2), JTA wasn't previously authorized to create such a corporation. The 2009 amendment to § 349.04(2) clarified JTA's powers. This is further illustrated by the 2009 amendment's addition of § 349.04(2)(q) which specifies that the JTA has the power "to retain legal counsel and financial, engineering, real estate, accounting, design, planning, and other consultants from time to time . . . in the carrying out of the powers and obligations granted in this chapter." Applying the trial court's erroneous logic, this would mean that prior to 2009 JTA could not have hired legal

[12] While § 349.04(1)(e), as quoted, was amended in 2009, the purpose of that amendment was to "make JTA's enabling language ***consistent with its current activities and mission***." Fla. Staff Analysis, H.B. 1213 (April 17, 2009) (emphasis added).

counsel, engineers, and real estate professionals even though its long-stated purpose was to also construct and operate an expressway system and it has long enjoyed the power of eminent domain. This demonstrates the erroneous conclusion of the trial court that if the power wasn't specified in § 349.04(2) prior to the 2009 amendment, JTA did not have that power, despite the language in § 349.04(2)(l), Fla. Stat. (2005), which gave JTA the power to "do all acts and things necessary and convenient" to fulfill it purpose.

The dissent below correctly noted:

> I also find no significance in the fact that JTA's enabling statute was amended in 2009 to specifically authorize the JTA to "form ... public benefits corporations to carry out [its] powers and obligations." *See* ch. 2009-111, § 3, at 1480, Laws of Fla. (amending section 349.04(2)(s)). As was the case with the corporation at issue in *PRIDE,* JTM was in existence long before the statutory amendment purportedly authorizing its formation. Thus, as was the case in *PRIDE,* it is reasonable to assume that the amendment to section 349.04 was simply intended to clarify JTA's existing authority to have formed JTM. *See* 648 So.2d at 779-80 (concluding that the statutory amendment to PRIDE's enabling statute that deemed it to be an instrumentality of the state entitled to sovereign immunity merely clarified PRIDE's existing status).

Keck, 46 So. 3d at 1076.

Further, the trial court's reliance, in part, on the fact that JTM employees are entitled to strike, unlike public employees, has absolutely no bearing on Mr. Keck's entitlement to sovereign official immunity. As correctly noted by the dissent below:

> Unlike the trial court, I do not discern any inherent contradiction between the determination that JTM employees are entitled to sovereign immunity and their apparent right to strike notwithstanding the statutory and constitutional prohibition against strikes by public employees. The criteria for determining whether an entity is a public employer for labor relations purposes are different than those used to determine whether a private entity is primarily acting on behalf of a public agency for purposes of sovereign immunity. *Compare* § 447.203(2), Fla. Stat. (definition of "public employer" for labor relations purposes) *with* § 768.28(2), Fla. Stat. (defining "state agencies or subdivisions" for purposes of sovereign immunity).

Id. It is also notable that the assumption that the employees could strike has never been the subject of a legal challenge or holding, and must await another day and another case, as there is no record of a strike having ever taken place.

C. Mr. Keck is Entitled to Immunity from this Suit Pursuant to § 768.28(9)(a), Florida Statutes.

The undisputed material facts, the precedent discussed above, and a plain reading of the statute establish that JTM is a state agency as defined in § 768.28(2), Florida Statutes. Because Mr. Keck was an employee of JTM, and was acting in the course and scope of his employment with JTM at the time of the incident described in the complaint, he is immune from this suit pursuant to § 768.28(9)(a). Section 768.28(9)(a) provides:

> [n]o 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.

Thus, the action against Mr. Keck, an employee or agent of a "state agency," is statutorily barred.[13] *See also McGhee*, 679 So. 2d at 733 (intent of 1980 amendment to § 768.28 was to extend the veil of sovereign immunity to governmental employees acting in the scope of their employment). Therefore, the denial of summary judgment to Mr. Keck was a departure from the essential requirements of law.

Even assuming *arguendo* that JTA did not have authority to create JTM, or that JTM isn't to be considered a "state agency" as defined in § 768.28(2), Mr. Keck would still be entitled to summary judgment as an agent of JTA. Florida courts have held that § 768.28(9)(a) immunity "extends to certain private parties who are involved in contractual relationships with the state, provided that such parties are 'agents' of the state." *M.S. v. Nova Southeastern Univ., Inc.*, 881 So. 2d 614, 617 (Fla. 4th DCA 2004), *citing Stoll v. Noel*, 694 So. 2d 701 (Fla. 1997). The determination of agency status "turns on the degree of control retained or exercised by the state agency." *Nova Southeastern Univ., Inc.*, 881 So. 2d at 617. In the instant case, the absolute control JTA exercised over Mr. Keck's day-to-day

[13] There is no evidence, nor is it alleged in the Complaint, that Mr. Keck acted in bad faith or with malicious purpose or in a wanton and willful manner. Respondent merely alleges Mr. Keck acted negligently. [App. 1-7].

actions created an agency relationship which entitles Mr. Keck to sovereign immunity.

In *Stoll, supra,* this Court addressed the issue of extending sovereign immunity to state "agents." There, the plaintiffs filed suit against the defendants, a group of physicians, in a medical malpractice action. 649 So. 2d at 702. The defendant physicians asserted that they were entitled to sovereign immunity based upon their contractual agency relationship with Children's Medical Facility (CMS), run by the Florida Department of Health and Rehabilitative Services (HRS). *Id*. The physicians claimed that they were employees or agents of the state through CMS and HRS and, therefore, immune from liability and suit. *Id*. This Court stated that the issue of whether the physicians were agents of the state turned on the degree of control retained or exercised by CMS, and the right to control depended upon the terms of their employment contract. *Id*. at 703. The employment contract between CMS and the physicians required each physician to agree to abide by the terms in the HRS Manual and CMS guide. *Id*. The CMS guide contained provisions which gave CMS the following control over the physicians' actions: (1) all services provided to patients had to be authorized in advance by the clinic medical director; (2) CMS had the responsibility to supervise and direct the medical care of all patients; (3) CMS had supervisory authority over all personnel; (4) the CMS medical director had absolute authority over payment

for treatments proposed by the physicians; and (5) CMS had final authority over all care and treatment provided to CMS patients. *Id*. In addition, HRS acknowledged that the manual created an agency relationship between CMS and the physicians and acknowledged full financial responsibility for the physicians' actions. *Id*. This Court stated that HRS's interpretation of its manual was entitled to judicial deference and great weight. *Id*. Based on the significant control set out in the employment contract and on HRS's acknowledgment, this Court held that the physicians were clearly acting as agents of the state and were therefore entitled to summary judgment in their favor. *Id*.

Similarly, the contract between JTA and JTM creates an agency relationship between JTM employees and JTA. The instant contract gives JTA clear control over all aspects of JTM and its employees. For example, the contract provides that (1) all services provided by JTM are subject to the supervision of JTA; (2) JTA has final authority on all matters relating to operation and management of JTM; (3) JTM must perform its duties as determined and directed by JTA; (4) JTA provides and reserves "absolute control" of all facilities and equipment required by JTM; (5) all purchasing, storing, and distribution of materials, parts, tools, and supplies are done with JTA funds and in a manner determined and approved by JTA; and (6) the organizational and functional relationships between JTA and JTM is determined by JTA. [App. 71-77]. Additionally, as in *Stoll*, the terms of the

contract give JTA final authority on all matters and day-to-day control of JTM. [App. 156:16-157:3]. This fact is entitled to judicial deference and great weight. *Stoll*, 649 So. 2d at 703. Thus the contract between JTA and JTM makes clear that JTM employees, including Mr. Keck, are agents of JTA and are entitled to sovereign immunity pursuant to § 768.28(9)(a). *See also Routon v. PBS&J Construction Services, Inc.*, 971 So. 2d 252 (Fla. 2d DCA 2008).

In addition to the terms of the contract between JTA and JTM, the actual relationship between JTA and JTM employees demonstrates the strict control JTA has over JTM employees. It is this actual relationship that determines whether there is an agency. *Keith v. News & Sun Sentinel Co.*, 667 So. 2d 167, 171 (Fla. 1995). Further, the existence of a true agency relationship depends on the degree of control exercised by the principal. *Theodore v. Graham*, 733 So. 2d 538, 539-540 (Fla. 4th DCA 1999) *citing Dorse v. Armstrong World Industries, Inc.*, 513 So. 2d 1265, 1268 n.4 (Fla. 1987). Here, because JTA is responsible for the entire management and operation of the transit system and completely controls JTM and its employees, there is no question that Mr. Keck serves as an agent for JTA.

Further, in *DeRosa v. Shands Teaching Hospital & Clinics, Inc*, 504 So. 2d 1313 (Fla. 1st DCA 1987), the First DCA analyzed the employment status of two defendant physicians who worked at Shands Hospital. Although the court had previously determined that Shands was not a corporation primarily acting as an

instrumentality or agency of the state (*Shands Teaching Hospital*, *supra*), the defendant physicians nevertheless claimed they were agents of the state and thus immune from suit pursuant to §768.28(9)(a). *DeRosa*, 504 So. 2d at 1314. The court in *DeRosa* identified that the primary test for determination of employment or agency status is the control over the alleged agent's work. *Id*. at 1315 *citing Hollis v. School Board of Leon County*, 384 So. 2d 661 (Fla. 1st DCA 1980). Interpreting the agreement between Shands and the University of Florida, the court determined that the University, a state agency, had control of the physicians' conduct such that they were agents of the state and were entitled to immunity. *DeRosa*, 504 So. 2d at 1315. In its analysis, the court noted that:

> [f]actors considered to determine the existence of an employer and employee [or agent] relationship include[ ] the selection and engagement of the employee, the payment of wages, the power of dismissal, and the right of control over conduct. The least determinative factor may be the bare payment of wages.

Id.

In the instant case, the undisputed facts reveal that the factors set out in *DeRosa* are met. JTA screens and hires all JTM employees. [App. 149:6-19, 280:25-281:13]. JTM employees may only be terminated with JTA approval. [App. 144:10-16, 357:5-21]. JTA employees directly supervise JTM bus drivers, including Mr. Keck, in their day-to-day performance on the road. [App. 68 ¶ 6(E) and (F), 259:17-20]. Although the JTM technically pays its employees, the funds

for JTM payroll come directly from JTA. [App. 423:19-424:23]. Additionally, the First DCA stated that "the least determinative factor [in the agency analysis] may be the bare payment of wages." *DeRosa*, 504 So. 2d 1315.

Section 768.28, Fla. Stat., extends sovereign immunity to private parties who, through contractual relationships, are agents of the state. *Nova Southeastern Univ., Inc.*, 881 So. 2d at 617; *Stoll*, 694 So. 2d 701. The undisputed facts show that even if Mr. Keck is not considered an employee of a state agency, he must nevertheless be considered an agent of JTA, acting in the course and scope of JTM's contract with JTA, and is likewise entitled to immunity from suit pursuant to § 768.28(9)(a), and is entitled to summary judgment.

Because Mr. Keck's employer, JTM, is a corporation primarily acting as an instrumentality or agency of the JTA, a state agency, Mr. Keck is entitled to the immunity from suit in § 768.28(9)(a). Alternatively, Mr. Keck is an agent of JTA, entitled to the same statutory immunity. The trial court's denial of Mr. Keck's motion for summary judgment was a clear departure from the essential requirement of law.

CONCLUSION

Petitioner Keck is entitled to certiorari review of the denial of his motion for summary judgment. The trial court's denial of the motion on the grounds that he was not entitled to immunity under § 768.28(9)(a) creates irreparable harm that

cannot be remedied on appeal. The trial court departed from the essential requirements of law by denying Mr. Keck's motion for summary judgment because he was acting within the scope of his employment with JTM, a corporation primarily acting as an instrumentality of the JTA, a state agency. Alternatively, Mr. Keck was acting as an agent for the JTA. This Court should grant Mr. Keck's petition for certiorari, and direct the trial court to enter summary judgment in his favor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this motion has been furnished by U.S. Mail this _23rd__ day of February, 2011, to counsel for the Respondent: Thomas F. Slater, Esq., Stephen J. Pajcic, III, Esq., and Benjamin E. Richard, Esq., One Independent Dr., Ste. 1900, Jacksonville, FL 32202; William Bald, Esq., 200 West Forsyth Street, Ste. 1100, Jacksonville, Florida 32202.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the present Initial Brief complies with the font requirements of Fla. R. App. P. 9.100.

Respectfully submitted,
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