IN THE SUPREME COURT FOR THE STATE OF FLORIDA

Case No.: SC10-2433

(First DCA Case No. 1D09-6183)

CITIZENS PROPERTY INSURANCE CORPORATION, A GOVERNMENTAL ENTITY OF THE STATE OF FLORIDA,

Petitioner,

v.

SAN PERDIDO ASSOCIATION, INC., A FLORIDA NOT-FOR-PROFIT CORPORATION,

Respondent.

AMICUS CURIAE BRIEF

On Petition for Discretionary Jurisdiction to Review
Conflict Certified by First District Court of Appeal

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Miami-Dade County (the "County") is a political subdivision of the state created by Article VIII of the Florida Constitution. As such, the County is endowed with the benefit of sovereign immunity, *see Arnold v. Shumpert*, 217 So. 2d 116, 120 (Fla. 1968), and routinely does assert the defense of sovereign immunity in appropriate cases.

The First District Court of Appeal's ("District Court") opinion addresses the availability of certiorari review to a statutorily-created governmental entity that was denied an immunity defense found in the particular statute governing it. However, in framing the certified question, the District Court referred to the immunity at issue as "sovereign immunity." The County fears that the certified question, if answered as currently framed, would limit its own ability to have a decision denying its sovereign immunity reviewed immediately by certiorari writ.

SUMMARY OF THE ARGUMENT

This Court has been asked whether a denial of a motion to dismiss based upon sovereign immunity must await final judgment before an appellate court can review it. The County submits that this certified question is overbroad. The only immunity at issue below was the immunity that can be found in a statute that applies only to Citizens Property Insurance Corporation ("Citizens"). As such, the

County asks that the Court rephrase the certified question to ask whether Citizens may pursue certiorari review following a denial of its specific statutory immunity.[1]

At issue before the District Court was Citizens' claim for immunity under Florida Statutes section 627.351(6)(s)(1). That statute provides that, "[t]here shall be no liability on the part of, and no cause of action of any nature shall arise against" Citizens or its agent and employees "for any action taken by them in the performance of their duties or responsibilities under this subsection." The statute goes on to except from the stated immunity any willful torts committed by the covered parties. Fla. Stat. § 627.351(6)(s)(1)(a).

Citizens argued that it was immune from San Perdido Association, Inc.'s ("San Perdido") bad faith claim against it on account of the aforementioned statutory immunity. San Perdido had prevailed on a coverage dispute following Hurricane Ivan, and thereafter filed suit against Citizens for denying its coverage in bad faith. San Perdido successfully contended that Citizens' immunity defense failed because the bad faith amounted to a willful tort, which is one of the exceptions to immunity found in the statute. Citizens pursued certiorari review of that decision based upon its immunity under section 627.351(6)(s)(1).

[1] In the end, the County supports the outcome desired by Citizens, but disagrees with Citizens that it is in a special class, and enjoys particular protections, not available to the County.

Which viewpoint prevailed required a straightforward interpretation of the statutory language at issue. Nevertheless, the District Court went beyond the statutory framework to draw an unnecessary analogy between Citizens' statutory immunity and the common law doctrine of sovereign immunity, ultimately ruling that the two immunities had the same protections and limitations. The District Court went on to conclude that a writ of certiorari seeking review of a denial of sovereign immunity was impermissible. The result of the District Court's reasoning and subsequent certified question is that it puts this Court in the tenuous position of addressing a form of immunity that neither party to the case had raised, nor is interested in defending. As such, the County urges this Court to rephrase the District Court's certified question so that it can rule upon the distinct issue presented by the facts below, that is, whether Citizens can seek certiorari review of a denial of its immunity under Florida Statutes section 627.351(6)(s)(1).

ARGUMENT

I. THIS COURT SHOULD REPHRASE THE CERTIFIED QUESTION TO COMPORT WITH THE FACTS AT ISSUE BELOW

On February 14, 2011, this Court accepted jurisdiction to review the following question:

> Whether, in light of the supreme court's ruling in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), review of the denial of a motion to dismiss based on a claim of ***sovereign immunity*** should await the entry of a final judgment in the trial court?

Citizens Prop. Ins. Corp. v. San Perdido Ass'n, 46 So. 3d 1051, 1053 (Fla. 1st DCA 2010) (emphasis added). The County suggests that this Court should rephrase the certified question to account for the arguments presented below:

> Whether review of the denial of a motion to dismiss based on a claim of immunity pursuant to 627.351(6)(s)(1) should await the entry of a final judgment in the trial court?

The rephrased question would address the precise issue presented to the District Court – the propriety of certiorari review from an order denying Citizens' statutory immunity – without impinging on an issue effecting parties not presently before the Court. Indeed, whether entities claiming sovereign immunity – which, as discussed in Section III of this Brief, encompasses immunity from the suit itself – may seek certiorari review of a denial of that immunity is an issue that affects, or could affect, the State of Florida, sixty-seven counties, hundreds of municipalities, and scores of other governmental bodies and agencies. The County itself has two cases pending before the Third District Court of Appeal that raise this very issue. *See Petition for Writ of Certiorari* at 3-4, *Miami-Dade County v. Rodriguez*, No. 3D10-856 (Fla. 3d DCA Mar. 31, 2010); *Petition for Writ of Certiorari* at 2-3, *The Pub. Health Trust of Miami-Dade County v. Rolle*, No. 3D10-1018 (Fla. 3d DCA Apr. 19, 2010). That the District Court has asked this Court to decide the issue

without the benefit of argument from any of the entities purportedly affected is imprudent.[2]

The failure of the District Court to state the question appropriately does not deprive this Court of its exercise of discretionary jurisdiction, *Finkelstein v. DOT*, 656 So. 2d 921, 922 (Fla. 1995), and the Court can certainly exercise its discretion by rephrasing the certified question to reflect the underlying legal issue. *State v. Smith*, 641 So. 2d 849, 850 (Fla. 1994). The Court should therefore rephrase the certified question to limit it to whether Citizens can seek certiorari review following denials of its immunity defense under section 627.351(6)(s)(1).

II. THE FIRST DISTRICT COURT OF APPEAL ERRED IN EQUATING STATE LAW SOVEREIGN IMMUNITY WITH CITIZENS' STATUTORY IMMUNITY UNDER FLORIDA STATUTES SECTION 627.351(6)(s)(1)

The District Court erroneously concluded that a ruling denying Citizens' immunity under its specific statute is equivalent to one denying sovereign immunity. Sovereign immunity is a concept dating back to medieval England. *Cauley v. City of Jacksonville*, 403 So. 2d 379, 381 (Fla. 1981). In 1907, Justice Holmes explained that sovereign immunity was based on the "'logical and practical ground that there can be no legal right as against the authority that makes

[2] Alternatively, the County would ask that the Court not answer the certified question as it raises issues that are not directly related to those in the instant case. *Poole v. Veterans Auto Sales & Leasing Co.*, 668 So. 2d 189, 191 (Fla. 1996).

the law on which the right depends.'" *Id.* (quoting *Kawananakoa v. Polyblank*, 204 U.S. 349 (1907)).

A more contemporary view of the doctrine is that it "protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property and instrumentalities." 72 Am. Jur. 2d *States, Etc.* § 97 (2011). Indeed, the public welfare could be endangered "if the supreme authority could be subjected to suit at the instance of every citizen." *Davis v. Love*, 99 Fla. 333, 343, 126 So. 374, 378 (Fla. 1930). As the Third District Court of Appeal so succinctly said in 1981:

> The doctrine of sovereign immunity rests on two public policy considerations: the protection of the public against profligate encroachments on the public treasury, and the need for orderly administration of government, which, in the absence of immunity, would be disrupted if the state court [sic] be sued at the instance of every citizen.

Berek v. Metro. Dade County, 396 So. 2d 756, 758 (Fla. 3d DCA 1981), *approved in result*, 422 So. 2d 838 (Fla. 1982) (internal citations omitted).

The State of Florida formally recognized the doctrine of sovereign immunity in 1822. *City of Miami v. Valdez*, 847 So. 2d 1005, 1006-07 (Fla. 3d DCA 2003). At that point in time, the only means of recovery left open to a citizen injured by a governmental entity was through the claims bill process in the legislature. *Id.*

In the 1868 version of the Florida Constitution, the people of Florida granted the legislature the right to waive sovereign immunity upon enactment of "general

law." *Cauley,* 403 So. 2d at 381; art. IV, § 19, Fla. Const. (1868). For years following, the Florida courts decreed the immunity of the State and its agencies to be "absolute and unqualified" in the absence of general law clearly waiving that immunity. *Buck v. McLean*, 115 So. 2d 764, 765 (Fla. 1st DCA 1959); *see also Spangler v. Florida State Turnpike Auth.*, 106 So. 2d 421, 424 (Fla. 1958) ("immunity of the sovereign is a part of the public policy of the state."); *Klonis v. Dep't of Revenue*, 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000) (observing that the immunity of the State of Florida and its agencies was "'absolute…absent waiver by legislative enactment or constitutional amendment.'") (quoting *Circuit Court of Twelfth Judicial Circuit v. Dep't of Natural Res.*, 339 So. 2d 1113, 1114) (Fla. 1976)). Attempts to repudiate what this Court in 1930 described as the "ancient" doctrine of sovereign immunity were rejected over and over again. *See, e.g., Davis v. Love*, 99 Fla. 333, 342, 126 So. 374, 377 (Fla. 1930); *see also Circuit Court of Twelfth Judicial Circuit,* 339 So. 2d at 1116-17 (affirming writ of prohibition based on a sovereign immunity defense that deprived the court of subject matter jurisdiction because at the time the plaintiffs' child died at a state park, the Florida legislature had not yet enacted section 768.28); *Buck,* 115 So. 2d at 768 (rejecting other opinions that had renounced sovereign immunity as inconsistent with the "established law of this jurisdiction").

It was not until 1973 that the State of Florida exercised its constitutional right to waive sovereign immunity in certain instances through enactment of section 768.28. *Cauley*, 403 So. 2d at 381; *Klonis*, 766 So. 2d at 1189 ("the limited waiver of sovereign immunity embodied in section 768.28, Florida Statutes (1973), …, now means that the trial court had jurisdiction to determine whether the defense of sovereign immunity applies to Appellant's claims."). Section 768.28 waives sovereign immunity for tort actions only, and only up to a certain dollar amount.[3] Courts have been clear since its enactment to "employ a rule of strict construction against waiver of immunity beyond this amount." *Berek*, 396 So. 2d at 758. Indeed, it is the law today that in Florida, "'sovereign immunity is the rule, rather than the exception…,'" *see City of Orlando v. West Orange Country Club*, 9 So. 3d 1268, 1272 (Fla. 5th DCA 2009) (quoting *Pan-Am Tobacco Corp. v. Dep't of Corrs.*, 471 So. 2d 4, 4 (Fla. 1984)), and attempts to waive sovereign immunity must be strictly construed. *Berek v. Metro. Dade County*, 422 So. 2d 838, 840 (Fla. 1982).

In contrast to the lengthy history establishing a sovereign entity's – such as the County's – immunity from suit, the immunity at issue in this case arises under

[3] The initial statutory cap, per person, was $50,000, $100,000 per occurrence. The amount was doubled to $100,000, per person, and $200,000 per occurrence in 1981. Fla. Stat. § 768.28(5); *Pensacola Jr. College v. Montgomery*, 539 So. 2d 1153, 1154 (Fla. 1st DCA 1989). Last year, the Florida Legislature in chapter 2010-26, section 1, Laws of Florida, increased the per person amount to $200,000, $300,000 per occurrence. The new threshold goes into effect October 1, 2011.

statutory language that first appeared in 2002 with the creation of Citizens Property Insurance Corporation. The relevant language, codified at subsection (6)(i) at the time of Citizens' inception, remains unchanged and reads as follows:

> There shall be no liability on the part of, and no cause of action of any nature shall arise against, any assessable insurer or its agents or employees, the corporation or its agents or employees, members of the board of governors or their respective designees at a board meeting, corporation committee members, or the department or its representatives, for any action taken by them in the performance of their duties or responsibilities under this subsection. Such immunity does not apply to:
> 1. Any of the foregoing persons or entities for any willful tort;
> 2. The corporation or its producing agents for breach of any contract or agreement pertaining to insurance coverage;
> 3. The corporation with respect to issuance or payment of debt; or
> 4. Any assessable insurer with respect to any action to enforce an assessable insurer's obligations to the corporation under this subsection.[4]

The language clearly immunizes Citizens and its employees for actions taken in connection with their statutory responsibilities, subject to the enumerated exceptions.

In this case, the District Court decided to treat Citizens' statutory immunity as akin to sovereign immunity because of purported similarities between sections 768.28 and 627.351(6)(s)(1). To the extent that the First District's decision

[4] In 2007, the Legislature added a section that, among other things, required the good faith handling of claims by Citizens' employees and independent adjustors. § 627.351(6)(r)(2), Fla. Stat. While Citizens and San Perdido have different views about how this section relates to the scope of the waiver of immunity, the language is irrelevant to the County's position in this brief that section 768.28 is not equivalent to section 627.351(6)(s)(1).

equates Citizens' express and limited immunity with the historically-based and broadly-interpreted common law doctrine of sovereign immunity – which is waived in certain instances by section 768.28 – it is in error. The District Court's conclusion that the two immunities are equivalent is flawed for at least two reasons.[5]

First, it is important to note that while section 627.351(6)(s)(1) ***creates*** Citizens' immunity, section 768.28 neither confers nor creates sovereign immunity. Rather, section 768.28 is merely the Florida Legislature's attempt to ***waive*** sovereign immunity in the context of tort actions that reach a particular statutory threshold. *Wallace v. Dean*, 3 So. 3d 1035, 1044 (Fla. 2009) (describing section 768.28 as a "legislative waiver"). In other words, section 627.351(6)(s)(1) expresses both Citizens' immunity, and the exceptions to that immunity, while 768.28 presupposes the existence of sovereign immunity, and merely waives that immunity for tort actions up to certain monetary limits.[6]

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[5] Citizens apparently views the immunities as distinct as well, describing "Florida's general sovereign immunity" as a "partial immunity from liability," which differs from its own immunity from suit. Init. Br. at 6.

[6] While section 768.28 is not the ***source*** of sovereign immunity for governmental entities, it is a source of immunity for governmental officers. *See* Fla. Stat. § 768.28(9)(a). That section 768.28 ***grants*** immunity to governmental officers but not to governmental entities merely reflects the Legislature's awareness of the historical underpinnings, and long existence, of sovereign immunity at common law. By comparison, section 627.351(6)(s)(1) is the source of immunity for ***both*** Citizens and its employees, demonstrating another way in which the two statutes differ.

The Court's recent decision in *Wallace* makes clear that Florida recognizes sovereign immunity as a common law concept, with Section 768.28 merely representing a limited waiver of that immunity in certain kinds of tort actions. Section 627.351(6)(s)(1), by contrast, creates Citizens' statutory immunity ***and*** exceptions to that immunity. The exceptions themselves are subject-specific to the nature of Citizens' role as a public entity, and are more expansive than the limited waiver of immunity for tort actions, up to a certain threshold, found in section 768.28. In fact, the exceptions to statutory immunity under 627.351(6)(s)(1) are so comprehensive (willful torts, breach of contract, and debt recovery, to name three of the five) as to almost swallow the immunity provision whole.

There has been no suggestion by either party, nor can the conclusion be soundly reached, that Citizens' immunity might be broader than what exists in section 627.351(6)(s)(1), especially in light of the number of exceptions. Indeed, even the District Court has described 627.351(6)(s)(1) as a "limited grant of immunity." *San Perdido*, 46 So. 3d at 1052; *see also Citizens Prop. Ins. Corp. v. Garfinkel*, 25 So. 3d 62, 66 (Fla. 5th DCA 2010) (discussing Citizens' immunity from suit in the context of section 627.351(6)). Thus, the District Court's decision to equate Citizens' express and specific statutory immunity with the historically-based and broadly-interpreted common law doctrine of sovereign immunity was in error given the historical underpinnings and broad scope of sovereign immunity.

Second, the District Court's efforts to equate sovereign immunity with Citizens' immunity because "section 768.28 provides for a waiver in tort actions, and section 627.351(6)(s)(1) provides for a waiver of any willful tort, as well as upon a breach of the insurance contract" are misplaced as well. *San Perdido*, 46 So. 3d at 1053. As stated above, Citizens' entire immunity defense can be found in section 627.351(6)(s)(1). Whether a governmental entity is entitled to sovereign immunity depends on a number of factors beyond whether 768.28 applies. Indeed, this Court has recognized that certain claims remain barred by sovereign immunity despite the waiver present in Section 768.28. *Wallace*, 3 So. 3d at 1053. This would include tort claims where the government has engaged in "discretionary functions." *Id.* (citing *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1020 (Fla. 1979)).

In *Commercial Carrier*, this Court held that "even absent an express exception in section 768.28 for discretionary functions, certain policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability." *Id.* Thus, even claims appearing viable under the waiver set forth in section 768.28 may be barred by sovereign immunity in the end. This is because sovereign immunity, a doctrine that reaches back well before the enactment of 768.28, protects certain discretionary functions in accordance with the separation-of-powers provision in article II, section 3 of the Florida Constitution. *Wallace v.*

Dean, 3 So. 3d at 1053; *Kaisner v. Kolb*, 543 So. 2d 632, 737 (Fla. 1989) ("governmental immunity derives entirely from the doctrine of separation of powers not from a duty of care or from any statutory basis."). Put otherwise, the government is immune from the interference of executive or legislative power into actions that involve "fundamental questions of policy and planning," *Kaisner*, 543 So. 2d at 737, reinforcing the notion that, regardless of the enactment of 768.28, sovereign immunity is the rule, not the exception. *West Orange Country Club, Inc.*, 9 So. 3d at 1272.

Citizens' statutory immunity has never been found to be as broad as the sovereign immunity that exists at common law. For these reasons, it was improper for the District Court to find that the two statutes are equivalent, and then rely on this finding in support of a sweeping ruling that precludes all governmental entities from seeking certiorari review after the denial of a sovereign immunity defense.

III. THE FIRST DISTRICT COURT OF APPEAL OVERLOOKED RECENT PRECEDENT FROM THIS COURT AFFIRMING THAT SOVEREIGN IMMUNITY IS IMMUNITY FROM SUIT

In this case, Citizens moved to dismiss San Perdido's bad faith claim on grounds of immunity pursuant to section 627.351(6)(s)(1), the motion was denied, and Citizens attempted to correct the denial through a petition for writ of certiorari. Citizens never sought certiorari review based upon a denial of traditional sovereign immunity. Therefore, Citizens never argued that a writ of certiorari was the

appropriate vehicle to follow a denial of such immunity. Since Citizens never made the point, and it was not in San Perdido's interest to make it, the argument remains unarticulated even though it is the issue this Court is asked to decide.

In fact, Citizens actually attempts to minimize the impact of what it describes as "sovereign immunity under section 768.28," in an effort to distance itself from the holding in *Department of Educ. v. Roe*, 679 So. 2d 756 (Fla. 1996). Init. Br. at 16. According to Citizens, the District Court should not have looked to *Roe* as authority because it does not apply to this case given that, unlike the petitioner in *Roe*, Citizens is immune from suit. *Id.* at 17. Citizens' reasoning is flawed for three reasons. First, as explained above, Citizens' statutory immunity under section 627.351(6)(s)(1) is not broader than traditional sovereign immunity. Second, Citizens misinterprets the holding in *Roe*, which is limited to the propriety of interlocutory review of a denial of sovereign immunity under Florida Rule of Appellate Procedure 9.130, and not by way of certiorari writ. Third, the Court recently held that sovereign immunity is immunity from suit, thereby abrogating whatever *Roe* said to the contrary.

Roe, which this Court issued in 1996, holds that governmental entities cannot seek interlocutory review of a trial court's denial of sovereign immunity. 679 So. 2d at 759. Importantly, however, *Roe* does not address the availability of ***certiorari*** review to governmental entities that have been denied a sovereign

immunity defense. This is an important distinction because interlocutory review is only available in the instances delineated in Florida Rule of Appellate Procedure 9.130(a), while certiorari review is available if there has been a departure from the essential requirements of law and potential irreparable harm. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995).

Citizens' view is that *Roe* stands for the proposition that section 768.28 is a "mere defense to liability," which Citizens describes as a "cap on damages" that "does not implicate jurisdiction" and therefore cannot cause irreparable harm.[7] Init. Br. at 16, 17, 19. Not only are the quoted portions from *Roe* taken completely out of context, but the conclusion that Citizens draws from them, and the one reached by the District Court below – that sovereign immunity is an immunity from liability only – stands in stark contrast to opinions both old and new which say that sovereign immunity is immunity from suit.

Some of this Court's earliest opinions on sovereign immunity indicate that it is an immunity from suit. *See, e.g., Hampton v. State Bd. of Educ. of Florida*, 90 Fla. 88, 104, 105 So. 323, 328 (Fla. 1925) ("the immunity of the state from suit" justified dismissal of a claim for specific performance of a contract entered into by

[7] Regardless, as argued at length above, section 768.28 is not the equivalent of sovereign immunity and does not somehow convert what was immunity from suit for governmental entities into immunity from liability only. It only waives, to a limited extent, the immunity that has existed in this state for hundreds of years.

the State Board of Education); *Davis*, 126 So. at 377-78 (writ of prohibition was appropriate remedy to preclude action against the state road department because the "immunity of the state from suit, which the Legislature may provide for by general law…can[not] be taken away by a mere provision incidentally embraced in an act dealing with another subject"). That trend continued when, in 1958, 1959, and again in 1976, this Court described sovereign immunity as immunity from suit. *Spangler v. Florida State Turnpike Auth.*, 106 So. 2d at 422 (affirming dismissal of complaint against State Turnpike Authority because "[a]s a state agency, absent a specific waiver, it shares in the sovereign immunity to suit," and the Court did not view statutory language granting the agency the power to sue and be sued as constituting a waiver); *Buck*, 115 So. 2d at 765 ("The immunity of the State from suit is absolute and unqualified and the constitutional provision securing it is not to be so construed as to place the State within reach of the court's process. County boards of public instruction are agencies of the State and as such are clother[sic] with the same degree of immunity from suit as is the State.") (internal footnotes omitted); *Circuit Court of Twelfth Judicial Circuit*, 339 So. 2d at 1115 (Department of Natural Resources was protected by "constitutional immunity from suit").

Citizens' position appears to be that the Court's opinion in *Roe*, decided after the enactment of section 768.28 in 1973, somehow abrogated decades of

precedent deeming sovereign immunity to be immunity from suit.[8] That conclusion is unfounded. More importantly, the issue was definitively resolved by this Court just two years ago when, in *Wallace v. Dean*, 3 So. 3d 1035, 1044 (Fla. 2009), this Court declared that sovereign immunity is, indeed, immunity from suit.

In *Wallace*, this Court confronted the question of whether deputies who responded to a 911 call about a non-responsive person were liable for that person's eventual death. *Id.* at 1040-42. The Court ultimately found that the deputies owed a duty of care to the deceased because their actions fit within the requirements of the "undertaker's doctrine." *Id.* at 1052. The Court then went on to consider whether sovereign immunity barred the action against the deputies anyway, clarifying the distinction between a duty analysis from "whether the governmental entity remains ***sovereignly immune from suit*** notwithstanding the legislative waiver present in section 768.28, Florida Statutes." *Id.* at 1044 (emphasis added). Making clear the difference, the Court reiterated that:

> the absence of a duty of care between the defendant and the plaintiff results in *a lack of liability, not* application of immunity from suit. Conversely, sovereign immunity may shield the government from an action in its courts (i.e., a lack of subject-matter jurisdiction) even

[8] To avoid what it considers the death knell to certiorari review of a sovereign immunity defense sounded by *Roe*, Citizens argues that the waiver in section 768.28 "replaces immunity from suit with a limitation on liability." Init. Br. at 16. Again, 768.28 is not the equivalent of sovereign immunity. It presupposes the existence of traditional sovereign immunity, then merely waives it to a limited extent. Thus, there is no justification for saying that 768.28 somehow changed the meaning of sovereign immunity itself.

> when the State may otherwise be liable to an injured party for its tortious conduct.

Id. (internal citations omitted) (emphasis in original).[9]

The Court referred to an opinion from the First District Court of Appeal that discussed the effect of section 768.28 on the well-established rule of law that "courts did not have subject matter jurisdiction of tort suits against the State and its agencies because they enjoyed sovereign immunity pursuant to Article X, [s]ection 13, Florida Constitution." *Id.* at 1045 n. 14 (quoting *Hutchins v. Mills*, 363 So. 2d 818, 821 (Fla. 1st DCA 1978)); *see also Garfinkel*, 25 So. 3d at 63 ("It is well-established that a trial court lacks subject matter jurisdiction if a party enjoys the benefits of sovereign immunity with respect to the subject matter of the case before the court, and the issuance of the writ is appropriate to prevent the court from acting in the absence of such jurisdiction."). Following the effective date of section 768.28, says *Hutchins*, courts obtained "subject matter jurisdiction to consider which suits fall within the parameters of the statute." 363 So. 2d at 821.

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[9] The Court ultimately ruled that sovereign immunity did not bar the action, but only after applying the *Commercial Carrier* test and noting that:

> Despite the absence of an express discretionary-function exception within [section 768.28] itself, we held that the separation-of-powers provision present in article II, section 3 of the Florida Constitution requires that "certain [quasi-legislative] policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability."

Id. at 1053 (quoting *Commercial Corp. v. Indian River County*, 371 So. 2d 1010, 1020 (Fla. 1979)).

This is because article X, section 13 of the Florida Constitution provided "complete sovereign immunity unless waived by the legislature or constitutional amendment" and it was "[o]nly with the limited waiver of sovereign immunity found in the statute" that the appellant had found his way in to court. *Id.* at 821-22.

Using clear and unambiguous language, this Court very recently declared that sovereign immunity is immunity from suit and that it divests courts of subject matter jurisdiction unless the actions alleged fall within an express waiver of sovereign immunity, such as exists in section 768.28. Whatever interpretations of *Roe* existed before 2009, it is no longer accurate to say that the Florida Supreme Court views sovereign immunity as merely immunity from liability. Moreover, the denial of that immunity from suit constitutes the kind of irreparable harm that enables a party to seek review by way of certiorari writ. *AVCO Corp. v. Neff*, 30 So. 3d 597, 601 (Fla. 1st DCA 2010); *see also Vermette v. Ludwig*, 707 So. 2d 742, 744 (Fla. 2d DCA 1997) ("Because of the nature and purpose of a claim of immunity from suit, an appeal after final judgment would not be an adequate remedy; a party cannot be reimmunized from suit after-the-fact."); *Tucker v. Resha*, 648 So. 2d 1187, 1189-90 (Fla. 1994) (recognizing that a denial of qualified immunity, which is an immunity from suit, may be reviewed by writ of certiorari because the official cannot be reimmunized after an improperly-held trial).

The Court will note that *Wallace v. Dean* is not mentioned in any of the briefs submitted by the parties to this case. This is undoubtedly because it does not necessarily suit either party to preserve the right to certiorari review of a denial of sovereign immunity. The Court will be better served by leaving the issue to the governmental entities that have such immunity, and that are prepared to argue and defend it to the trial and appellate courts of this State.

CONCLUSION

Based upon the foregoing, the County requests that this Court rephrase the certified question to ask whether a decision denying Citizens' statutory immunity under section 627.351(6)(s)(1) of the Florida Statutes may be reviewed by writ of certiorari. The certified question is overbroad as currently framed, and it invites this Court to reach a holding that extends further than necessary given the proceedings below. The Court need not, and should not, decide that a government asserting sovereign immunity cannot have a denial of that deep-rooted immunity reviewed by writ of certiorari until the issue is squarely before it.

Respectfully submitted this 27th day of June, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via FedEx to: Barry Richard, Esq. and Glenn Burhans, Jr., Esq. Greenberg Traurig, P.A., 101 East College Avenue, Tallahassee, FL 32301; and Richard M. Beckish, Jr., Esq., Liberis Law Firm, 212 W. Intendencia St., Pensacola, FL 32502, this 27th day of June, 2011.

_____
Assistant County Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been prepared in Times New Roman 14-point font and complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Assistant County Attorney