IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1913

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JOSE LAZARO RODRIGUEZ,

Petitioner,

v.

MIAMI-DADE COUNTY,

Respondent.

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# BRIEF OF THE STATE OF FLORIDA AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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On Review of a Certified Conflict From the District Court of Appeal, Third District of Florida

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PAMELA JO BONDI
Attorney General

Louis F. Hubener (FBN 0410084)
Chief Deputy Solicitor General
Diane G. DeWolf (FBN 59719)
Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 410-2672 (fax)

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**RULES**



**FLORIDA STATUTES**

**OTHER AUTHORITIES**

## IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

This brief is submitted by the Attorney General, Pamela Jo Bondi, on behalf of the State of Florida, as amicus curiae, in support of the Respondent, Miami-Dade County. The Attorney General is authorized by law to appear in any suit in which the State has an interest. § 16.02(4), Fla. Stat.

The State has an interest in this case because section 768.28, Florida Statutes, as a limited waiver of sovereign immunity in tort, imposes strict limits on suits against officers, employees, and agents of the State, as well as the State itself and its agencies and subdivisions. Case law recognizes that both individuals and agencies, in specified circumstances, can be immune from suit. That immunity is lost when a trial court erroneously fails to recognize that it bars a particular action, and the defendant, whether an agency or individual, is denied immediate appellate review. Immunity from suit cannot be regained when a defendant is forced to assume all the burdens of litigation, including discovery and trial. These burdens cause irreparable harm to any person or governmental entity entitled to immunity.

In this case, the Third District Court of Appeal correctly concluded that it could exercise certiorari jurisdiction "where a governmental entity's claim is that it remains immune from suit, rather than that it is not liable for lack of duty." Miami-Dade Cnty. v. Rodriguez, 67 So. 3d 1213, 1223 (Fla. 3d DCA 2011). In so

holding, the Third District certified conflict with Florida A & M University Board of Trustees v. Thomas, 19 So. 3d 445, 446 (Fla. 5th DCA 2009) (denying certiorari review), and Pinellas Suncoast Transit Authority v. Wrye, 750 So. 2d 30 (Fla. 2d DCA 1996) (denying certiorari review).

Unless the decision of the Third District in Rodriguez is approved, and the decisions of the Fifth District in Thomas and the Second District in Wrye overruled, state agencies that are legally immune from suit will be burdened with discovery and trial contrary to the clear intent of section 768.28(1)(a), Florida Statutes. Accordingly, the State's interest lies in this Court's approval of the Third District's opinion.

## SUMMARY OF THE ARGUMENT

Under well-established Florida law, an agency or political subdivision is entitled to immunity from suit in tort when an officer or employee is performing discretionary functions within the scope of his employment. That immunity is lost when its erroneous denial forces a party to endure all the burdens of litigation. This Court should therefore approve the Third District's decision in Miami-Dade County v. Rodriguez, 67 So. 3d 1213, 1223 (Fla. 3d DCA 2011). The Third District's well-reasoned opinion correctly finds that appellate review, if only by certiorari, is available when sovereign immunity is erroneously denied.

This Court's decision in Department of Education v. Roe, 679 So. 2d 756 (Fla. 1996), is not controlling. Roe simply declined to treat a nonfinal order denying sovereign immunity as appealable under Florida Rule of Appellate Procedure 9.130. It did not categorically rule out certiorari review. In any event, that ruling should now be reconsidered. Regardless of whether the defendant is an individual, an individual named in his official capacity, or a state agency or other entity, if sovereign immunity applies, appellate review should be available when the trial court fails to recognize that immunity.

For the reasons discussed herein, it would be preferable for this Court to amend Rule 9.130. The State thus requests this Court to direct the Appellate Rules Committee to propose an amendment to Rule 9.130. The issue of whether review is available for an erroneous denial of sovereign immunity should be settled and courts given clear guidance in the form of an appellate rule.

## ARGUMENT[1]

It is unsettled whether and to what extent review of an order denying immunity from suit is subject to appellate review. In addition to this case, this Court has at least two other cases currently pending in which the issue has arisen. See Keck v. Eminisor, No. SC10-2306 (whether a bus driver can seek certiorari review of an order denying a motion for summary judgment based on a claim of sovereign immunity); Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc., No. SC10-2433 (whether a state insurance provider can seek certiorari review of an order denying a motion to dismiss based on a claim of statutory immunity).

Because this issue is unsettled, the district courts are, unsurprisingly, at odds. See, e.g., Fla. A & M Univ. Bd. of Trs. v. Thomas, 19 So. 3d 445, 446 (Fla. 5th DCA 2009) (denying certiorari review on authority of Roe); Pinellas Suncoast Transit Auth. v. Wrye, 750 So. 2d 30 (Fla. 2d DCA 1996) (same); cf. Miami-Dade Cnty. v. Rodriguez, 67 So. 3d 1213 (Fla 3d DCA 2011). On one hand, the Fifth and Second districts have concluded that no review is available because the appellate rules do not expressly provide for it. Under this rationale, a sovereign

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

entity is forced to face all the burdens of litigation if a trial court denies its motion to dismiss, even though it could later be found to be immune from suit on appeal. Curiously, however, although the Fifth District denied certiorari review in Thomas, it granted a writ of prohibition in Citizens Property Insurance Corp. v. Garfinkel, 25 So. 3d 62 (Fla. 5th DCA 2009), as to a claim it considered barred by sovereign immunity. In any case, under the holdings of the Fifth and Second Districts, an entity that is legally immune from suit could conceivably endure an entire trial and a full appeal before its immunity is recognized. At that point, immunity cannot be restored.

On the other hand, the Third District has concluded that although Florida Rule of Appellate Procedure 9.130 does not provide for an interlocutory appeal, review must be available because to hold otherwise means that a state agency or political subdivision that is immune from suit, but that is nevertheless forced to go to trial, will forever lose its immunity and, consequently, suffer irreparable harm. Under the Third District's rationale, an order denying a motion to dismiss or a motion for summary judgment based upon a claim of immunity from suit must be reviewed by an appellate court, lest immunity be lost forever.

Given this choice of outcomes, and the jurisdictional character of sovereign immunity, the Third District must be correct. Regardless of whether the defendant

is a person named in his individual capacity, or a state agency or other entity, if the immunity is from suit, review must be available to avoid irreparable harm.

## I. This Court Should Definitively Hold That Orders Denying State Entities Immunity From Suit Are Entitled to Review.

This Court should approve the Third District's decision in Rodriguez. Moreover, it should rule that review of a non-final order is available in all cases where the governmental defendant asserts immunity from suit.

As this Court has recognized, there are many instances when interlocutory review is critical, even when the rules do not specifically provide for it. In Mandico v. Taos Construction, Inc., 605 So. 2d 850 (Fla. 1992), for example, this Court held that interlocutory appeals of non-final orders in worker's compensation cases are available when the issue is whether a party is entitled to immunity as a matter of law. Key to its conclusion was the overriding concern for early resolution of controlling issues in a case. Mandico, 605 So. 2d at 854. The Court thus amended Florida Rule of Appellate Procedure 9.130 to include interlocutory appeals of non-final orders in worker's compensation cases when the issue is whether a party is entitled to immunity as a matter of law. Id. at 854-55.

This Court has also recognized the importance of interlocutory review for government officials who are denied qualified immunity under federal law in a state trial court. See Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994). In Tucker, it

reasoned that "the public official cannot be 're-immunized' if erroneously required to stand trial or face the other burdens of litigation." Id. at 1189. This Court explained that if the official is improperly subjected to trial, it is not just the official who suffers the consequences. In addition, "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.' " Id. at 1190. Thus, if denials of summary judgment based on claims of qualified immunity are not subject to review, the immunity is "illusory and the very policy that animates the decision to afford such immunity is thwarted." Id. As in Mandico, Tucker mandated a change to the Florida Rules of Appellate Procedure, and the Court directed the Rules Committee to submit a proposed amendment. Id.

While Tucker established that claims of qualified immunity would be subject to interlocutory review, it did not address state claims of state sovereign immunity and, consequently, conflict erupted among the district courts. See, e.g., Dep't of Transp. v. Wallis, 659 So. 2d 429, 430 (Fla. 5th DCA 1995) (relying on Tucker and holding that a state agency (FDOT) was entitled to review of a nonfinal order denying sovereign immunity because the "entitlement to immunity from suit 'is effectively lost if a case is erroneously permitted to go to trial' "); cf. Fla. Dep't of Transp. v. Paris, 665 So. 2d 381 (Fla. 4th DCA 1996) (disagreeing

with Wallis and holding that state agencies are not entitled to review of nonfinal orders denying immunity barring a rule change); Pinellas Suncoast Transit Auth. v.Wrye, 750 So. 2d 30 (Fla. 2d DCA 1996) (same); Dep't of Educ. v. Roe, 656 So. 2d 507, 507 (Fla. 1st DCA 1995) (declining to expand Tucker to a claim of sovereign immunity under state law and holding that denial of motion to dismiss does not qualify for certiorari review).

Asserting its conflict jurisdiction, this Court subsequently decided Department of Education v. Roe, 679 So. 2d 756 (Fla. 1996). Roe disapproved of Wallis and determined that the Department was not entitled to review under Rule 9.130 of an order denying its motion to dismiss based upon a claim of sovereign immunity. Id. at 759. Nonetheless, the issue in Roe—whether DOE had negligently renewed a teaching certificate—is wholly dissimilar to the issue in this case—officers indisputably exercising their discretion in responding to an emergency situation. Id. at 757. The Court in Roe never discussed the defendant's duty of care or discretionary functions.

In Wallace v. Dean, 3 So. 3d 1035 (Fla. 2009), this Court clarified the distinction between lack of duty (meaning non-liability as a matter of law) and sovereign immunity, and it reiterated that sovereign immunity unequivocally means immunity from suit if the challenged actions occur while the defendant is performing discretionary functions within the scope of his employment. Id. at

1045. Although the waiver of sovereign immunity in section 768.28, Florida Statutes, is broad, "[the separation-of-powers provision of the Florida Constitution] requires the judicial application of a discretionary-function exception to the otherwise broad waiver." Id. (citing Commercial Carrier Corp. v. Indian River Cnty., 371 So. 2d 1010, 1017-22 (Fla. 1979). Moreover, sovereign immunity goes to subject matter jurisdiction, and where it exists presents an absolute bar to an action. Id. at 1044-45 & n.14.

That is not to say that every denial of a motion to dismiss based on sovereign immunity merits appellate review. This Court expressed concern in Roe that "[o]ftentimes the applicability of sovereign immunity is tied to the underlying facts, requiring a trial on the merits." Id. at 758. But where, as here, the legal question is dispositive, review should not be denied. Applying the principles in Tucker and Wallace, this Court should hold that review was appropriate in this case. Certiorari review is available when an order denying immunity causes irreparable injury that cannot be remedied on appeal, and the order departs from the essential requirements of law. See Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1099 (Fla. 1987). In cases of ordinary negligence, as alleged here, section 768.28(9)(a), Florida Statutes, confers immunity from suit upon all officers, employees, and agents of the State and its subdivisions. " 'State agencies or subdivisions' include the executive departments, the Legislature, the judicial

branch … and the independent establishments of the state, including … counties and municipalities." §768.28 (2), Fla. Stat.

Because the actions of the officers here were not attributed to bad faith, malicious purpose, or a wanton and willful disregard for the injured party, but rather were the result of a discretionary act executed during the course of an emergency situation, as opposed to any basic government plan or policy, no negligence can be attributed to the officers and, accordingly, this suit is barred.

To the extent Roe implied that agencies or political subdivisions do not suffer the same irreparable harm as individual defendants entitled to qualified immunity in civil rights suits, it should be revisited. State agencies bear all the burdens that individual defendants bear. In both instances the financial burden falls on taxpayers, and the agency itself must contend with the diversion of its resources. Faced with litigation, agency heads, subordinate officials, and legal counsel must often spend a significant amount of time engaging in discovery, trial preparation, and the trial itself. Their attention is thus diverted from daily responsibilities, which adversely affects the functioning of the agency as a whole. Put simply, it makes little sense to hold that state officers and employees entitled to qualified immunity are irreparably harmed by an improper trial but that state agencies—which must also actively defend lawsuits when sovereign immunity is erroneously denied—are not. Indeed, there is no difference in the degree of harm

suffered. Regardless of the nature of the defendant, burdens associated with a trial cannot be undone—an entity entitled to immunity simply cannot be "re-immunized." Keck v. Eminisor, 46 So. 3d 1065, 1071 (Fla. 1st DCA 2010) (Wetherell, J., dissenting).

For all these reasons, this Court should hold that an order denying a motion to dismiss or a motion for summary judgment based on a claim that the party is immune from suit is entitled to review by the appropriate appellate court. Accordingly, the State requests that this Court resolve the conflict and hold that regardless of the nature of the defendant, when an order is entered denying a motion to dismiss or a motion for summary judgment, and the motion was based on a claim of sovereign immunity, the order is entitled to review.

## II. This Court Should Direct the Rules Committee to Propose the Amendment of Rule 9.130.

Additionally, the State requests that this Court direct the Appellate Rules Committee ("Committee"), as it did in Tucker, to propose an amendment to Florida Rule of Appellate Procedure 9.130 firmly establishing that these nonfinal orders are entitled to interlocutory review. One salutary effect of review under Rule 9.130 would be to eliminate the uncertainty inherent in deciding what constitutes a departure from "the essential requirements of law" in certiorari review. See Judge Chris W. Alternbernd & Jamie Morcario, Certiorari Review of

Nonfinal Orders: Does One Size Really Fit All? Part I, Fla. Bar J., Feb. 2012, at 21, 22 (noting the term is so subjective that it nearly defies definition); Sylvia Walbolt & Leah A. Sevi, The "Essential Requirements of the Law"—When Are They Violated?, Fla. Bar J., Mar. 2012, at 21, 25 (noting the "amorphous" nature of the standard). It would also eliminate apparent confusion as to what particular circumstances warrant certiorari review of an order denying sovereign immunity. See Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc., 46 So. 3d 1051, 1054 (Fla. 1st DCA 2010) (Wetherell, J., dissenting). Judge Wetherell, citing to the First District's decision in Roe, observed that certiorari is not "ordinarily" available to review denial of a motion to dismiss but may be in an "extraordinary" case. Id. For reasons unexplained, the First District's decision in Roe did not find the trial court's denial of sovereignty immunity an "extraordinary" case. See Dept. of Education v. Roe, 656 So. 2d 507, 508 (Fla. 1st DCA 1995).

It will not be the first time that the Committee has exercised such discretion. In January 2003, the Committee evaluated whether Rule 9.130 should be expanded to cover non-final review of additional orders denying immunity from suit. See Fla. App. R. Comm. June 2003 Agenda 4 (Jun. 27, 2003), http://www.floridabar.org/cmdocs/cm205.nsf/WDOCS. The Committee's concern was the many "problems with rule 9.130 as it [was] currently worded" specifically with federal civil rights claims filed in state courts. Id. at 155. One suggestion

was to change the term "absolute immunity" to "sovereign immunity" and to exempt sovereign immunity in the rule itself. Id. at 156. The proposed amendment was not adopted.

Six months later, in January 2004, the Committee again considered whether Rule 9.130 should be expanded "so that the State and its officials will have the same right to an appellate determination of their entitlement to immunity to suit in state court as they do in federal court." See Fla. App. R. Comm. Jan. 2004 Agenda 5 (Jan. 16, 2004), http://www.floridabar.org/cmdocs/cm205.nsf/ WDOCS. The subcommittee designated to evaluate the proposed change unanimously agreed that no change should be made. Id. The subcommittee reasoned that the change was unnecessary because "appellate courts routinely hold that an erroneous deprivation of immunity from suit is a proper basis for certiorari" review. Id. at 58-59. Since then, as explained above, it has become clear that courts do not routinely grant certiorari review in these cases.

One way to amend Rule 9.130(3)(C)(vii), as underscored below, is to expand review to nonfinal orders denying immunity from suit when the claim is sovereign immunity. The rule could simply be amended as follows:

> that, as a matter of law, a party is not entitled to sovereign immunity under state law or to absolute or qualified immunity in a civil rights claim arising under federal law

Fla. R. App. P. 9.130(3)(C) (vii) (underlined text denotes proposed amendment).

This amendment would fulfill the purpose of sovereign immunity and provide review for (1) individuals denied immunity in a negligence claim for acts occurring within the scope of employment, see, e.g., Keck, No. SC10-2306; (2) state entities that have specific statutory immunity from suit, see, e.g., Citizens Prop. Ins., No. SC10-2433; and (3) state agencies that should be immune from suit because immunity has not been waived for the acts alleged.

## CONCLUSION

For all the foregoing reasons, this Court should approve the decision of the Third District in Rodriguez and disapprove the Fifth District's decision in Thomas and the Second District's decision in Wrye. In addition, it should direct the Appellate Rules Committee to submit a proposed amendment to Florida Rule of Appellate Procedure 9.130 providing for review of an order determining that as a matter of law a party is not entitled to sovereign immunity under state law.

Respectfully Submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Louis F. Hubener
Louis F. Hubener (FBN 0410084)
Chief Deputy Solicitor General
Diane G. DeWolf (FNB 59719)
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 410-2672 (fax)

## CERTIFICATE OF COMPLIANCE AND SERVICE

I HEREBY CERTIFY that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure, and that a true copy of the foregoing has been furnished this 23rd day of March, 2012 by U.S. Mail, postage prepaid, to:

Barbara A. Silverman, Esq.
Curtis B. Miner, Esq.
Ervin A. Gonzalez, Esq.
Colson Hicks Edison
255 Alhambra Circle , Penthouse
Coral Gables, FL 33134

Thomas W. Poulton, Esq.
DeBevoise & Poulton, P.A.
Lakeview Office Park, Suite 1010
1035 S. Semoran Boulevard
Winter Park, Florida 32792

R.A. Cuevas, Jr.
Miami-Dade County Attorney
Erica S. Zaron
Assistant County Attorney
Albert D. Lichy
Assistant County Attorney
Stephen P. Clark Center, Suite 2810
111 N.W. 1st Street
Miami, FL 33128

/s/ Louis F. Hubener
Attorney