IN THE SUPREME COURT OF FLORIDA

Case No. SC11-1913

(Third DCA Case No. 3D10-856)

JOSE LAZARO RODRIGUEZ,

Petitioner,

vs.

MIAMI-DADE COUNTY,

Respondent.

PETITIONER'S INTIAL BRIEF ON THE MERITS

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

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STATEMENT OF THE CASE AND FACTS[1]

Jose Rodriguez was the owner of a car stereo and detailing business who was shot multiple times and severely injured by a Miami-Dade police officer when Mr. Rodriguez responded to his store after being alerted by his alarm service that his burglar alarm had been triggered. Mr. Rodriguez survived the shooting but suffered severe permanent injuries. He brought a complaint in two counts against Miami-Dade County ("the County"): Count I alleged a negligence claim against the County based on the conduct of its agent, Officer Jesus Hernandez, at the burglary scene; Count II alleged a negligent retention and supervision claim against the County for the retention of Officer Hernandez as a frontline patrol officer while he was under investigation for criminal conduct on the job. Pet. App. Ex. G.

The County moved for summary judgment on both counts. With respect to Count I, the County argued that it was entitled to summary judgment on the grounds that the County owed no duty to Mr. Rodriguez and that the County was entitled to sovereign immunity for Officer Hernandez's actions. The trial court

[1] The decision of the district court of appeal contained in the appendix to this brief shall be referred to as "Op." The Petition for Writ of Certiorari and the Appendix to the Petition for Writ of Certiorari filed in the district court shall be referred to as "Pet. for Cert." and as "Pet. App." The Response to the Petition for Writ of Certiorari and the Appendix to the Response to the Petition for Writ of Certiorari filed in the district court of appeal shall be referred to as "Resp. to Pet. for Cert." and as "Resp. App."

granted summary judgment as to Count II but denied summary judgment on the negligence claim in Count I based on the existence of disputed issues of material fact. Pet. App. Ex. A. The County then filed a petition for writ of certiorari with the Third District Court of Appeal, seeking review of the denial of its motion for summary judgment. As the basis for invoking the jurisdiction of the appellate court, the County asserted that the denial of its motion for summary judgment based on sovereign immunity was reviewable by certiorari. Op. 2. In response, Rodriguez argued that the petition should be dismissed for lack of certiorari jurisdiction based upon this Court's opinion in *Department of Education v. Roe*, 679 So.2d 756 (Fla. 1996). Op. 12-13.

In an opinion filed on August 31, 2011, the Third District Court of Appeal held that it had certiorari jurisdiction based on its conclusion that if the County is entitled to sovereign immunity the trial itself constitutes irreparable harm. Op. 13-14 & n.4. It went on to address the merits and granted the petition, holding that the suit was precluded by sovereign immunity. Op. 14-19. The Third District certified conflict with the decisions in *Florida A & M University Board of Trustees v. Thomas*, 19 So.3d 445 (Fla. 5th DCA 2009),[2] and *Pinellas Suncoast Transit*

[2] In its opinion, the Third District incorrectly identified *Florida A & M University Board of Trustees v. Thomas* as a decision of the First District Court of Appeal.

Authority v. Wrye, 750 So.2d 30 (Fla. 2d DCA 1996), with respect to the issue of certiorari jurisdiction. Op. at 19. On September 28, 2011, Jose Lazaro Rodriguez timely filed his notice to invoke the discretionary jurisdiction of this Court. On December 1, 2011, this Court accepted jurisdiction of this case.[3]

[3] Additional facts pertinent to the district court's decision on the merits will be detailed below in Argument II.

SUMMARY OF ARGUMENT

The district court erred in holding that it had certiorari jurisdiction to review the trial court's denial of a motion for summary judgment based on grounds of sovereign immunity. That holding directly and expressly conflicts with *Florida A & M University Board of Trustees v. Thomas,* 19 So.3d 445, and *Pinellas Suncoast Transit Authority v. Wrye,* 750 So.2d 30, in which the Fifth District and Second District held that a district court lacks certiorari jurisdiction to review the denial of a motion for summary judgment or a motion to dismiss, respectively, based on the assertion of a defense of sovereign immunity. In addition, the district court's decision conflicts with and misapplies this Court's opinion in *Department of Education v. Roe,* 679 So.2d 756, which held that interlocutory review is not available for a nonfinal order denying a governmental entity's claim of sovereign immunity as a defense to a state law cause of action. In *Roe,* this Court expressly rejected the conclusion reached by the Third District here, that having to await postjudgment review of interlocutory orders on sovereign immunity would cause irreparable harm that cannot be corrected on final appeal. *Id.* at 759. Thus, the jurisdictional prerequisites for the exercise of certiorari jurisdiction have not been met and the district court lacked jurisdiction to grant the petition for certiorari.

The district court also erred in granting the petition on the merits and holding that Jose Rodriguez's negligence claim against the County was barred by sovereign immunity as a matter of law. The trial court properly denied summary judgment based on the existence of disputed issues of material fact. In holding that the County was sovereignly immune as a matter of law, the district court ignored the disputed issues of fact and failed to view the evidence in the light most favorable to the plaintiff as required on summary judgment. The actions of Officer Hernandez at the burglary scene which resulted in injury to Jose Rodriguez were operational, not discretionary, and therefore the County is not shielded from liability for Officer Hernandez's conduct. Contrary to the district court's opinion, there was no pressing emergency here requiring Officer Hernandez to choose between shooting Mr. Rodriguez and risking the safety of other members of the public. The evidence raises factual issues which should be determined at trial by a jury. The district court erred in making these findings as a matter of law and holding that this action was barred by sovereign immunity. Its decision should be reversed and this matter remanded to the trial court for resolution by the trier of fact.

ARGUMENT

I. THE DISTRICT COURT DID NOT HAVE CERTIORARI JURISDICTION TO REVIEW THE TRIAL COURT'S DENIAL OF THE COUNTY'S MOTION FOR SUMMARY JUDGMENT ON GROUNDS OF SOVEREIGN IMMUNITY

As certified, the Third District's opinion below, holding that it had certiorari jurisdiction to review the trial court's denial of a motion for summary judgment based on grounds of sovereign immunity, directly and expressly conflicts with the decisions of the Fifth District in *Florida A & M University Board of Trustees v. Thomas,* 19 So.3d 445, and the Second District in *Pinellas Suncoast Transit Authority v. Wrye,* 750 So.2d 30. In each of those cases, the Fifth District and Second District held that it lacked certiorari jurisdiction to review the denial of a motion for summary judgment or a motion to dismiss, respectively, based on the assertion of a defense of sovereign immunity. In direct conflict, here the Third District held that it had certiorari jurisdiction to review the denial of the motion for summary judgment based on grounds of sovereign immunity, and granted the petition.

In addition, the opinion below conflicts with and misapplies this Court's opinion in *Department of Education v. Roe*, 679 So.2d 756, which denied interlocutory review of a nonfinal order denying a motion to dismiss a negligence claim based on a defense of sovereign immunity. That opinion was relied on by the Fifth District in holding that it lacked certiorari jurisdiction in *Thomas*, 19 So.3d at 446. Similarly, in holding that it lacked jurisdiction in *Wrye*, 750 So.2d at 30, the Second District aligned itself with the First District's opinion in *Department of Education v. Roe*, 656 So.2d 507 (Fla. 1st DCA 1995), which was subsequently approved by this Court in *Roe*, 679 So.2d at 759.[4] The opinion below also conflicts with the decision in *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 46 So.3d 1051 (Fla. 1st DCA 2010), *review granted*, 56 So.3d 765 (Fla. 2011), in which the First District applied *Roe* to preclude certiorari review of the denial of a motion to dismiss based on sovereign immunity. Therefore, this Court has jurisdiction to resolve the conflict. Art. V, § 3(b)(3), Fla. Const.

[4] In *School Bd. of Miami-Dade County v. Leyva*, 975 So.2d 576 (Fla. 3d DCA 2008), the Third District itself relied on *Roe* in holding it did not have certiorari jurisdiction to review denial of a motion to dismiss based on grounds of sovereign immunity:

> Asserting sovereign immunity, the School Board of Miami-Dade County petitions for a writ of certiorari, asking that we quash a trial court's order denying its motion to dismiss the negligence action brought by the estate of a child killed at a school crosswalk. Relying on *Department of Education v. Roe*, 679 So.2d 757 (Fla. 1996), ***we conclude that we do not have jurisdiction to review this denial of the motion to dismiss based on sovereign immunity***.

Id. at 576.

Certiorari is an extraordinary remedy that should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders and is available only in limited circumstances. *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So.2d 812, 822 (Fla. 2004); *Jaye v. Royal Saxon, Inc.*, 720 So.2d 214, 214-15 (Fla. 1998); *Martin-Johnson, Inc. v. Savage,* 509 So.2d 1097, 1098-99 (Fla. 1987), *superseded by statute on other grounds,* § 768.72, Fla. Stat. (1989), *as recognized in Williams v. Oken,* 62 So.3d 1129, 1134 (Fla. 2011). "It is well settled that to obtain a writ of certiorari, there must exist '(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.'" *Reeves*, 889 So.2d at 822 (quoting *Bd. of Regents v. Snyder*, 826 So.2d 382, 387 (Fla. 2d DCA 2002)). A court's grant of certiorari is subject to an abuse of discretion standard of review. *Williams v. Oken,* 62 So.3d at 1132.

This Court has repeatedly emphasized the very limited availability of certiorari review. As explained in *Reeves*:

> This Court has held that "common law certiorari is an extraordinary remedy and should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders." *Martin-Johnson, Inc. v. Savage,* 509 So.2d 1097, 1098 (Fla. 1987); *see also Belair v. Drew*, 770 So.2d 1164, 1166 (Fla. 2000); *Jaye v. Royal Saxon, Inc.,* 720 So.2d 214, 214-15 (Fla. 1998). Further, we have written: "A

> non-final order for which no appeal is provided by Rule 9.130 is reviewable by petition for certiorari only in limited circumstances." *Martin-Johnson, Inc.* 509 So.2d at 1099; *see also Brooks v. Owens*, 97 So.2d 693, 695 (Fla. 1957)("This court will review an interlocutory order in law only under exceptional circumstances."). Limited certiorari review is based upon the rationale that "piecemeal review of nonfinal trial orders will impede the orderly administration of justice and serve only to delay and harass." *Jaye*, 720 So.2d at 215. As the appellate rules committee commented on the interaction of rules 9.030 and 9.130:
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>> The advisory committee was aware that the common law writ of certiorari is available at any time and did not intend to abolish that writ. However, because that writ provides a remedy only if the petitioner meets the heavy burden of showing that a clear departure from the essential requirements of law has resulted in otherwise irreparable harm, it is extremely rare that erroneous interlocutory rulings can be corrected by resort to common law certiorari. It is anticipated that because the most urgent interlocutory orders are appealable under this rule, there will be very few cases in which common law certiorari will provide relief.
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> Fla.R.App. P. 9.130 (Committee Notes, 1977 Amendment).

Reeves, 889 So.2d at 822.

In *Department of Education v. Roe*, 679 So.2d 756, this Court held that interlocutory review is not available for a nonfinal order denying a governmental entity's claim of sovereign immunity as a defense to a state law cause of action. In reaching that conclusion, the Court rejected the argument that suits against governmental entities grounded upon the statutory waiver of sovereign immunity were analogous to, and should be treated similarly to, suits against public officials involving claims of qualified immunity and declined to extend its decision in *Tucker v. Resha,* 648 So.2d 1187 (Fla. 1994), to nonfinal orders denying a claim of sovereign immunity. In light of that decision, the exercise of certiorari jurisdiction by the Third District here violates the principle that certiorari should not be used to circumvent the interlocutory appeal rule.

As a jurisdictional prerequisite to the exercise of certiorari jurisdiction, and prior to reaching the issue of whether the trial court's order departs from the essential requirements of law, a district court must determine that the petitioner has met its burden of establishing that it has suffered an irreparable injury that cannot be remedied on direct appeal. *Jaye v. Royal Saxon, Inc.*, 720 So.2d at 215 ("[I]t is settled law that, as a condition precedent to invoking a district court's certiorari jurisdiction, the petitioning party must establish that it has suffered an irreparable harm that cannot be remedied on direct appeal."); *Commonwealth Land Title Ins. Co. v. Higgins*, 975 So.2d 1169, 1176-77 (Fla. 1st DCA 2008); *Sardinas v. Lagares,* 805 So.2d 1024, 1025 (Fla. 3d DCA 2001); *Beekie v. Morgan,* 751 So.2d 694, 698 n. 4 (Fla. 5th DCA 2000); *Bared & Co. v. McGuire,* 670 So.2d 153, 156-

57 (Fla. 4th DCA 1996). Here that jurisdictional condition precedent was not met and, therefore, the district court lacked certiorari jurisdiction.

Denial of a motion for summary judgment or a motion to dismiss will generally not be reviewed through certiorari because the petitioner will have an adequate remedy on final appeal. *South Broward Hosp. Dist. v. Dupont*, 683 So.2d 1135 (Fla. 4th DCA 1996); *Brown & Williamson Tobacco Corp. v. Carter,* 680 So.2d 546 (Fla. 1st DCA 1996). And, the authorities are clear that the expense and inconvenience of an unnecessary trial is considered insufficient harm to justify certiorari review. *See Martin-Johnson, Inc. v. Savage*, 509 So.2d at 1100 ; *Sunrise Gift & Souvenir, Inc. v. Marcotte,* 698 So.2d 345, 346 (Fla. 5th DCA 1997); *Stoever v. Vedder Homes, Inc.*, 697 So.2d 1247, 1248 (Fla. 5th DCA 1997); *Brown & Williamson*, 680 So.2d 546.

In *Roe*, this Court expressly rejected the conclusion reached by the Third District here, that if the County is entitled to sovereign immunity the trial itself constitutes the harm, and the benefit of sovereign immunity will be lost by having to await postjudgment review:

> Florida has agreed to be sued in its own courts for tort actions. § 768.28. Further, forcing the state to wait until a final judgment before appealing the issue of sovereign immunity does not present the same concerns that exist in the area of qualified immunity. For example, public officials who defend tort suits against the state are not

> sued in their personal capacities. As a result, defending these suits is not likely to have a chilling effect on the exercise of public officials' discretion in the discharge of their official duties. In addition, although the state will have to bear the expense of continuing litigation, ***the benefit of immunity from liability, should the state ultimately prevail on the sovereign immunity issue, will not be lost simply because review must wait until after final judgment.***

Roe, 679 So.2d at 759. In light of that clear statement, it cannot be said that having to await postjudgment review of interlocutory orders on sovereign immunity will cause the County irreparable harm that cannot be corrected on final appeal. Therefore, the jurisdictional prerequisite to the exercise of certiorari jurisdiction has not been met.

Similarly, in *Stephens v. Geoghegan*, 702 So.2d 517 (Fla. 2d DCA 1997), claims were brought against a municipality and several police officers in both their individual and official capacities. The defendants' motions for summary judgment on grounds of qualified and absolute immunity were denied by the trial court and the defendants petitioned for certiorari. The district court granted certiorari with respect to the claims brought against the officers in their individual capacities but dismissed the portion of the petition challenging the denial of the defendants' motion in their official capacities and in conjunction with the municipality. *Id.* at 527. It explained: "***The material harm, irreparable on postjudgment appeal, that***

impelled us to exercise our certiorari jurisdiction with regard to the individual defendants, that is, denial of immunity from defending a suit, with its attendant expenses, diversion of official energy and deterrence of able citizens from pursuing public employment, ***is simply not present in a suit against a municipality.***" *Id. See also CSX Transportation. Inc. v. Kissimmee Utility Authority.*, 153 F.3d 1283, 1286 (11th Cir. 1998)(citing *Roe*).

Likewise, in *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 46 So.3d 1051, the district court declined interlocutory review by appeal, prohibition or certiorari, of the denial of Citizens' motion to dismiss based on grounds of sovereign immunity. *Id.* at 1053. In reaching that decision, the First District found that, "***[a]s Roe suggested, there is no irreparable harm in requiring that appellate consideration of the sovereign immunity claim await the entry of a final judgment.***" *Id.* That case is presently pending before this Court for review in *Citizens Property Ins. Corp. v. San Perdido Ass'n, Inc.*, No. SC10-2433 (*review granted*, Feb. 17, 2011).

The Third District reached the exactly opposite result here. It based its determination that it had certiorari jurisdiction to review the trial court's denial of summary judgment on grounds of sovereign immunity on its conclusion that the County would suffer irreparable harm if it were required to go to trial because if it is entitled to sovereign immunity "it is the trial itself that constitutes the harm." Op. at 13-14 & n.4. That conclusion is a misapplication of this Court's decision in *Roe*, and directly and expressly conflicts with the district cases cited above.

In holding that it had certiorari jurisdiction in this case, the Third District stated: "[W]e conclude that in cases where immunity from suit rather than solely immunity from liability is at issue, our intervention by way of certiorari is appropriate." Op. 10 & n.3 (citing *Roe*, 679 So.2d at 758). However, as the district court recognized in its opinion below, "[in *Roe*,] the court distinguished the *immunity from suit* accorded to public officials which is effectively forfeited if trial is permitted, from the *immunity from liability* accorded to the sovereign, an immunity not lost if trial is permitted." Op. 6, n. 2. As this Court noted in *Roe*, rejecting the DOE's argument that the public policy that animates sovereign immunity is similar to the public policy that animates qualified immunity, sovereign immunity is distinguishable from the immunity from suit accorded by qualified immunity because qualified immunity is rooted in the need to protect public officials from undue interference, whereas sovereign immunity is not. *Roe*, 679 So.2d at 758-59.

The negligence claims in the present case were brought solely against the County; Rodriguez did not assert any claims against former Officer Hernandez or any other public official in an individual capacity. The County's defense is one of sovereign immunity against liability. As this Court found in *Roe*, the benefit of such immunity from liability, should the County ultimately prevail on the sovereign immunity issue, will not be lost simply because review must wait until after final judgment.

The Third District's decision here ignores an important factor. The Florida Constitution grants the legislature the power to waive sovereign immunity. *See* Art. X, § 13, Fla. Const. ("Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."). In enacting Fla. Stat. § 768.28, the state agreed to be sued in its own courts for tort actions, and in so doing gave the courts jurisdiction to determine whether or not a suit falls within the scope of that statute's limited waiver of sovereign immunity. *See Wallace v. Dean*, 3 So.3d 1035, 1044 n. 14, 1046 (Fla. 2009); *Klonis v. Dep't of Revenue*, 766 So.2d 1186, 1189 (Fla. 1st DCA 2000); *Hutchins v. Mills,* 363 So.2d 818, 821 (Fla. 1st DCA 1978). It thereby voluntarily subjected itself to the "harm" of defending such suits at trial. *See Roe*, 679 So.2d at 758 ("It is only because of the limited waiver of sovereign immunity in section 768.28 (Fla. 1995), that such a claim may now proceed in the trial court.")

In addition, this Court has recognized that the sovereign immunity determination is frequently intertwined with the facts. As it observed in denying interlocutory review of sovereign immunity orders in *Roe*: "Oftentimes, the applicability of the sovereign immunity waiver is inextricably tied to the underlying facts, requiring a trial on the merits. Thus, many interlocutory decisions would be inconclusive and in our view a waste of judicial resources." 679 So.2d at 758. That observation is fully applicable here. The trial court did not reject the County's assertion of sovereign immunity as a matter of law but simply declined to enter summary judgment in light of disputed issues of fact surrounding the shooting, as more fully outlined below. *See e.g.* Pet. App. Ex. B at 60-61. The assertion of sovereign immunity is a fact-intensive defense. Typically, the trial court must ascertain the facts in order to determine whether the governmental actions at issue are discretionary planning decisions or operational acts. Allowing certiorari review of denials of motions to dismiss or summary judgment in these cases would effectively force trial courts to prematurely determine at the outset, prior to full factual development, where the actions at issue in a particular case fall on the discretionary vs. operational spectrum. And, as noted in *Roe*, 679 So.2d at 758, permitting interlocutory review in sovereign immunity cases would add substantially to the caseloads of the district courts of appeal.

Even with respect to those claims of absolute or qualified immunity for which interlocutory appeals are authorized, they are not permitted where the trial court denies a motion for summary judgment based on the existence of material issues of fact, rather than as a matter of law. *See* Fla.R.App.P. 9.130(a)(3)(C)(vii); *Murray v. Rosati*, 929 So.2d 1090, 1092 (Fla. 4th DCA 2006)("where there are material issues of fact regarding the asserted immunity, they are not entitled to appeal a trial court's decision on a motion for summary judgment"); *cf. Reeves,* 889 So.2d at 819 (provision permitting interlocutory appeal of denial of workers compensation immunity was not intended to grant right of nonfinal review if lower tribunal denies motion for summary judgment based on existence of material factual dispute); *Coastal Bldg. Maintenance, Inc. v. Priegues*, 22 So.3d 148 (Fla. 3d DCA 2009)(order denying motion for summary judgment for insufficient evidence to support summary judgment on defense of workers' compensation immunity was "neither reviewable under Florida Rule of Appellate Procedure 9.130 as a non-final order *nor under the certiorari jurisdiction of this court*"). Here, the trial court did not hold that the County was not entitled to sovereign immunity as a matter of law. It simply declined to grant the County summary judgment on the issue based on the existence of material factual disputes.

The Third District's suggestion that Rodriguez misreads *Roe*, and that his reliance on it is misplaced because *Roe* did not determine the availability of discretionary jurisdiction but simply declined to extend the right of interlocutory appeal granted in *Tucker v. Resha* to orders denying sovereign immunity, also ignores the procedural history of both *Roe* and *Tucker*. In *Roe*, in seeking review of the denial of its motion to dismiss on grounds of sovereign immunity, the Department of Education (DOE) filed a *petition for writ of certiorari*. The First District Court of Appeal initially chose to treat it instead as an interlocutory appeal, and ultimately ruled in DOE's favor, remanding with directions to dismiss the complaint. However, on rehearing, the district court retreated from its decision to treat the petition for certiorari as an interlocutory appeal; it then reconsidered the petition according to the certiorari standard and denied the petition, on the ground that it did not qualify for certiorari review. *Roe,* 679 So.2d at 757-58; *Dep't of Education v. Roe*, 656 So.2d at 507-08. This Court approved the First District's decision and did not hold that the district court's conclusion that certiorari review was unavailable was in error. *Roe,* 679 So.2d at 759. Similarly, in *Tucker*, the defendant sought review of the denial of her motion for summary judgment by a petition for writ of certiorari. The district court determined that the order did not depart from the essential requirements of law based on the existence of genuine factual issues and denied the petition. On review, this Court did not fault that determination but moved on to consider whether orders denying a motion for summary judgment based on qualified immunity should be added to the non-final orders reviewable under Fla. R. App. P. 9.130. *Tucker*, 648 So.2d at 1188-89.

The Third District's opinion emphasizes that certain governmental functions remain immune despite the statutory waiver of sovereign immunity. While that proposition is unassailable, it begs the question of whether the state will suffer irreparable harm if required to wait until final judgment for a determination of whether the governmental actions in question in a particular case fall within the statutory waiver or remain shielded by sovereign immunity. The Third District based its finding of irreparable harm on its view that sovereign immunity involves an immunity from suit, rather than a mere defense to liability. Op. at 13 ("If the County is entitled to immunity from suit, it is the trial itself that constitutes the harm."). However, this Court's decision in *Roe* supports the view that, in light of the statutory waiver, sovereign immunity is properly viewed as an immunity from liability, rather than an immunity from suit.

In concluding in *Roe* that, unlike qualified immunity, the benefit of immunity from liability will not be lost by forcing the state to wait until a final judgment before appealing the issue of sovereign immunity, this Court found the federal decisions in *Alaska v. United States*, 64 F.3d 1352 (9th Cir. 1995), and *Pullman Constr. Indus., Inc. v. United States*, 23 F.3d 1166 (7th Cir. 1994), persuasive. *Roe*, 679 So.2d at 759. As the *Alaska* court explained in holding that a denial of federal sovereign immunity was not sufficiently urgent to warrant immediate review:

> We hold that, despite the label "immunity," federal sovereign immunity is not best characterized as a "right not to stand trial altogether." The only other case to consider the issue, *Pullman Construction,* concluded that federal sovereign immunity was more accurately considered a right to *prevail* at trial, *i.e.*, a defense to payment of damages. 23 F.3d at 1169. . . . [F]ederal sovereign immunity is better viewed as a right not to be subject to a binding judgment. Such a right may be vindicated effectively after trial. *See Van Cauwenberghe v. Biard,* 486 U.S. 517, 524, 108 S.Ct. 1945, 1950, 100 L.Ed.2d 517 (1988).

64 F.3d at 1355 (emphasis by court). The *Alaska* court observed that because sovereign immunity is a defense to liability rather than a right to be free from trial, the benefits of immunity are not lost if review is postponed; the only foreseeable hardship of postponing review of sovereign immunity issues is the need to prepare for trial, which is generally not sufficient to justify immediate appeal. *Id.* at 1356-57. In addition, the denial of sovereign immunity is more efficiently reviewed after trial since, in most situations, the issue will be whether the facts are such that the plaintiff's claim fits under the statutory waiver of immunity; like motions to dismiss or for summary judgment, because the inquiry is "highly fact-specific, appellate resources would be squandered if appeals were heard before the relevant

facts have been fully developed." *Id.* at 1357.

In *CSX Transportation,* 153 F.3d 1283, the Eleventh Circuit held that it had no jurisdiction to consider an appeal from a denial of summary judgment based on grounds of sovereign immunity under Florida law, rejecting the defendant's argument that Florida sovereign immunity is immunity from suit and would be lost if it were forced to litigate without immediate review. In reaching its decision, the Eleventh Circuit looked to Florida law, in particular this Court's decision in *Roe*, to determine the nature and scope of Florida's sovereign immunity protection:

> In *Department of Education v. Roe,* 679 So.2d 756 (Fla. 1996), the Florida Supreme Court made it fairly clear that sovereign immunity under Florida law is no immunity from suit, but only immunity from liability: "although the state will have to bear the expense of continuing the litigation, the benefit of the *immunity from liability*, should the state ultimately prevail on the sovereign immunity issue, will not be lost simply because review must wait until after final judgment." *Id.* at 759 (emphasis added [by court]); *see also Stephens v. Geoghegan,* 702 So.2d 517, 525 n. 5 (Fla. Dist. Ct. App. 1997)(summarizing *Roe*, parenthetically, as establishing that "sovereign immunity is an immunity from liability [such that] its benefits will not be lost simply because review must wait until after judgment").

CSX Transp., 153 F.3d at 1286. The court concluded that because the defendant's claim to sovereign immunity under Florida law could be effectively reviewed after completion of the litigation in the district court, it had no jurisdiction to consider the appeal. *Id.*

The Third District court's opinion places much emphasis on this Court's statement in *Wallace v. Dean*, 3 So.3d at 1044-45, that the sovereign immunity inquiry addresses the question of whether the governmental entity remains *immune from suit* notwithstanding the legislative waiver present in Fla. Stat. § 768.28. *See* Op. at 7-10. However, that reference was made in the context of this Court's clarification of the conceptual distinction between the necessity for a duty analysis under traditional principles of tort law and the separate, subsequent determination of whether the doctrine of sovereign immunity shields the government from liability from its otherwise tortious conduct. *Id.* Moreover, this Court frequently referred to the sovereign immunity issue in alternative terms of whether a governmental entity is *insulated from tort liability*. *See e.g. Wallace*, 3 So.3d at 1040 ("the decision below misapplied *Everton*, as we expressly limited our holding in that case to the question of whether a law-enforcement officer's decision to make an arrest or to enforce the criminal law is a discretionary function *insulated from tort liability by sovereign immunity*"); *Id.* at 1045 (criticizing the district court for "conflating the issue of whether the government owes the plaintiff a duty of care with the separate, distinct issue of whether the doctrine of sovereign immunity *shields the government from tort liability*"); *Id.* at 1053 ("In *Commercial Carrier* . .

. 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."*). Unlike *Roe, Wallace* did not directly address the question presented here of whether the benefits of sovereign immunity will be lost if the governmental entity is required to wait until after judgment to obtain appellate review. In *Roe*, this Court concluded that they would not. Therefore, it cannot be said that in the absence of immediate review a governmental entity, such as the County here, will suffer irreparable harm that cannot be remedied on final appeal so as to meet the requirements for the exercise of certiorari jurisdiction.

In light of the foregoing, the Third District erred in holding that it had certiorari jurisdiction to review the trial court's denial of summary judgment on grounds of sovereign immunity in this case. Therefore, this Court should resolve the conflict between the circuits by reversing the decision below and approving the decisions of the Fifth and Second Districts in *Florida A & M University Board of Trustees v. Thomas*, 19 So.3d 445 (Fla. 5th DCA 2009), and *Pinellas Suncoast Transit Authority v. Wrye*, 750 So.2d 30 (Fla. 2d DCA 1996), and holding that the district courts do not have jurisdiction to review the denial of a motion for summary judgment based on sovereign immunity by petition for writ of certiorari.

II. THE DISTRICT COURT ERRED IN HOLDING THAT JOSE RODRIGUEZ'S NEGLIGENCE CLAIM AGAINST THE COUNTY WAS BARRED BY SOVEREIGN IMMUNITY AS A MATTER OF LAW[5]

Having concluded that it had certiorari jurisdiction, the Third District went on to consider the sovereign immunity issue on the merits and granted the petition, holding that Rodriguez's negligence claim in this case was barred by sovereign immunity as a matter of law.[6] It based its decision on its determination that the doctrine of separation of powers precluded judicial review of Officer Hernandez's actions because, as the district court viewed the facts, the police were faced with an

[5] In the event this Court holds that the district court did not have certiorari jurisdiction, in the interests of judicial economy, Rodriguez respectfully requests that the Court proceed to address this issue in order to provide guidance to the trial court on remand. In the absence of such guidance, the trial court's consideration of the sovereign immunity issue on the merits will be governed by the views expressed in the district court's opinion.

[6] In addition to arguing that it was entitled to sovereign immunity, the County argued that Rodriguez's negligence claim was barred by the public duty doctrine. Pet. for Cert. at 8-11. Rodriguez argued that the County owed a duty under the zone of risk exception to the public duty doctrine. Resp. to Pet. for Cert. at 22-30. Apparently based on its view that certiorari jurisdiction only extended to the issue of sovereign immunity and that it did not have certiorari jurisdiction to consider whether the County owed Rodriguez a duty of care, the district court did not address the duty issue. *See* Op. at 5. It rested its decision on the merits solely on the sovereign immunity issue. Therefore, the issue of whether the County had a duty to Mr. Rodriguez will not be addressed here. *See Wallace v. Dean*, 3 So.3d at 1044-45 (explaining that a duty analysis is conceptually distinct from the issue of sovereign immunity).

emergency situation. The Third District's decision fails to apply the appropriate standard of review for a motion for summary judgment. In holding that the County was sovereignly immune in this case as a matter of law, the district court ignored disputed issues of fact and failed to view the evidence in the light most favorable to the plaintiff as required on summary judgment. Its decision should be reversed and this matter remanded to the trial court for resolution by the trier of fact.

A. Summary judgment standards

It is well-settled Florida law that summary judgment is only proper when there is a complete absence of genuine issues of material fact and should not be granted unless the facts are so clear and undisputed that only questions of law remain. *Dade County School Board v. Radio Station WQBA*, 731 So.2d 638, 643 (Fla. 1999); *Moore v. Morris*, 475 So.2d 666, 668 (Fla. 1985); *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966). As the moving party, it was the County's burden to conclusively demonstrate the absence of any genuine issue of material fact, with every possible inference drawn in favor of Jose Rodriguez against whom summary judgment was sought. *See Moore*, 475 So.2d at 668; *Ramos v. Wright Superior, Inc.*, 610 So.2d 46, 48 (Fla. 3d DCA 1992). If varying reasonable inferences can be drawn, questions of fact are presented that should be determined by a jury. *Id.*

The burden on the County was not simply to show that the facts support its own theory of the case, but rather to demonstrate that the plaintiff cannot prevail. *See Florida E. Coast Ry. Co. v. Metropolitan Dade County*, 438 So.2d 978, 980 (Fla. 3d DCA 1983). If the record raised even the slightest doubt, the trial court was required to resolve that doubt against the County and deny summary judgment. *See Hervey v. Alfonso*, 650 So.2d 644, 646 (Fla. 2d DCA 1995); *Ramos*, 610 So.2d at 48; *Briadi Trading Co. v. Anthony R. Abraham Enter., Inc.*, 469 So.2d 955, 956 (Fla. 3d DCA 1985); *Florida E. Coast Ry*., 438 So.2d at 980. The trial court properly did so here.

The standard of review of a summary judgment order is de novo. *State v. Presidential Women's Center*, 937 So.2d 114, 116 (Fla. 2006); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000). In reviewing a summary judgment order, the appellate court is likewise required to view the evidence in the light most favorable to the non-moving party. *Merced v. Qazi*, 811 So.2d 702, 703 (Fla. 5th DCA 2002); *Sierra v. Shevin*, 767 So.2d 524, 525 (Fla. 3d DCA 2000). "A fundamental principle of appellate procedure is that an appellate court is not empowered to make findings of fact." *Farneth v. State*, 945 So.2d 614, 617 (Fla. 2d DCA 2006); *see also State Farm Mut. Auto. Ins. Co. v. Lawrence*, 65 So.3d 52, 56 (Fla. 2d DCA 2011)(same); *Featured Prop., LLC v. BLKY, LLC*, 65 So.3d 135, 137 (Fla. 1st DCA 2011)("'Sitting as an appellate court, we are precluded from making factual findings ourselves in the first instance.'")(quoting *Douglass v. Buford,* 9 So.3d 636, 637 (Fla. 1st DCA 2009)). As this Court stated in *Yost v. Miami Transit Co.,* 66 So.2d 214, 216 (Fla. 1953): "In matters of summary judgment neither the trial court nor the appellate court is justified in weighing facts and meting out justice according to the conclusion reached." *See also Bruno v. Destiny Transp., Inc.*, 921 So.2d 836, 839-40 (Fla. 2d DCA 2006)(same). In holding that the County was entitled to sovereign immunity as a matter of law here, the district court ignored the appropriate standard of review and improperly engaged in fact-finding.

B. The evidence

Contrary to the district court's statement (Op. at 16), the material facts in this case are not undisputed. The County and the plaintiff have a fundamental dispute as to what the facts are in this case and what they show about Officer Hernandez's conduct. It is the County's position that the facts show that Hernandez responded appropriately to the scene of the burglary alarm, found himself in fear of his life through no fault of his own, and was reasonable in his decision to shoot Jose Rodriguez in the parking lot in front of his store. It is the plaintiff's position that the facts (including the video footage) show that Hernandez responded recklessly to the scene of the burglary alarm, violated basic police safety procedures, and negligently created a situation which resulted in the use of deadly force against an innocent civilian.[7] The district court's recitation of the facts, in support of its conclusion that the police officers here were faced with an emergency, fails to take the evidence, including reasonable inferences therefrom, in the light most favorable to Rodriguez, as required. Op. at 10-11.

While the County asserted that Officer Hernandez did not fire at Jose Rodriguez until after Mr. Rodriguez pointed a gun at him, Mr. Rodriguez stated in his affidavit that he was first shot in his left buttock from behind and that the impact from that shot spun him around towards the direction of the shooter. Resp. App. Ex. B.1 at ¶ 9. The videotape is not conclusive on this point. Because the videotape has no audio, it is not possible to tell precisely when the shots were fired in relation to the positions of Officer Hernandez and Mr. Rodriguez. Jose

[7] The fact that there is a videotape of key portions of the event at issue does not mean that all facts are undisputed and that one side or the other is entitled to summary judgment. *See, e.g., Green v. New Jersey State Police*, 246 Fed. Appx. 158, 159, 163 (3rd Cir. 2007)(denying summary judgment in a police excessive force case where "the videotape evidence is inconclusive on several of the key disputed facts," and stating that "we must accept [Plaintiff's] allegations, to the extent they do not conflict with the videotapes, as true"); *Grinage v. Leyba*, 2008 WL 199720, at *8-*9 (D. Nev. Jan. 17, 2008)(denying summary judgment in part in an excessive force case and stating that "the video recording is not so clearly determinative" and that "[w]hile the video recording is material, it requires testimony by those involved as to what was said and what transpired out of view of the camera"). The videotape here is inconclusive on several key disputed facts and is not determinative of the issues. As the trial court expressly recognized, here "the video does not tell the entire story." Pet. App. Ex. B at 61.

Rodriguez also stated that until he was shot, he was not even aware that there was anyone behind him. No one shouted any warning such as "Police," "Freeze," "Stop" or "Drop it." Resp. App. Ex. B.1 at ¶ 10. Hernandez confirmed that he never shouted anything to Jose Rodriguez; he never said to him "Stop, police," "drop it" or "freeze." Pet. App. Ex. F at 53.[8] The evidence, taken in the light most favorable to the plaintiff, supports the conclusion that Officer Hernandez shot the plaintiff from behind prior to Mr. Rodriguez turning in his direction, and not that Hernandez shot in self-defense when faced with a weapon. It was for the jury to decide which version of the events is most credible.

Both the videotape and Officer Hernandez's testimony confirmed that the police vehicle arrived at the scene prior to Jose Rodriguez's pickup truck and that the officers saw the burglar inside the business as they approached. Officer

[8] Officer Hernandez's testimony was itself conflicting and inconsistent, raising issues of fact and doubts as to his credibility. In his deposition testimony, Hernandez claimed that when he got out of the car he shouted "Police, get on the ground" to the subject inside the store *before* he shot Mr. Rodriguez. Pet. App. Ex. F at 48-49, 51-53. This testimony conflicts with his own sworn statement given in the investigation of the shooting and finds no support in the videotape footage. In that sworn statement recounting the incident, Officer Hernandez stated that he had no time to give any verbal commands after exiting the police vehicle before shooting Jose Rodriguez; he testified that he gave commands to the subject inside the store *after* he shot Rodriguez and retrieved his weapon. Resp. App. Ex.B.3, Miner Aff. ex. A at 8-10. Again, there is no audio on the videotape to help resolve this conflict. Even if Hernandez's deposition testimony is believed, it confirms that Hernandez had sufficient time to address Mr. Rodriguez and to give a warning or command for safety.

Hernandez saw the pickup truck pull into the parking lot; he was thus aware that the occupant of the pickup was not the burglar who had broken into the business and had no idea whether it was an undercover policeman, the owner of the business responding to the alarm call, or some other civilian, but made no attempt to find out before shooting Mr. Rodriguez. *See* Pet. App. Ex. C & Ex. F at 40-44.

The County and district court characterized this as an "emergency situation." But, as explained in detail by plaintiff's police training and tactics expert, it was precisely Officer Hernandez's own negligent actions which caused the events to unfold so precipitously. There was no "emergency situation" that required Hernandez to shoot anyone until Hernandez recklessly created one himself. In opposition to the motion for summary judgment, plaintiff submitted the expert affidavit of Michael Manning, a retired Lieutenant from the City of Miami Police Department with over 25 years of law enforcement experience, who has trained hundreds of officers in police procedures and the use of deadly force. Mr. Manning detailed numerous ways in which Officer Hernandez and his partner, Officer Albite, were negligent and failed to follow proper police procedures to insure their own safety, resulting in the unnecessary shooting of Mr. Rodriguez, an innocent civilian. As outlined by Mr. Manning, Hernandez violated a number of basic police procedures and created a situation where he was likely to have to use deadly force – the exact opposite of what a reasonable police officer is supposed to do. Resp. App. Ex. B.2.

C. This action is not barred by the discretionary function exception

As the district court recognized, the question of whether a tort action is barred by sovereign immunity despite the legislative waiver in Fla. Stat. § 768.28 rests upon the principle of separation of powers. This Court has 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.'" *Wallace v. Dean*, 3 So.3d at 1053 (quoting *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1020 (Fla. 1979)).[9] However, "the Court consistently has held that liability may exist when the act of the government or its agent is not discretionary, but operational in nature." *Kaisner v. Kolb*, 543 So.2d 732, 736 (Fla. 1989). Here, the actions of Officer Hernandez which resulted in injury to Jose Rodriguez were operational, not discretionary, and therefore the County is not shielded from liability for Officer Hernandez's conduct.

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[9] The district court's distinction between the doctrine of separation of powers and immunity resting on the sovereign character of the state or municipality in the performance of its governmental functions, (Op. at 14), is confusing in light of this Court's reaffirmation in *Wallace*, 3 So.3d at 1045, that, "in Florida, '[g]overnmental immunity derives entirely from the doctrine of separation of powers . . . .'"

As this Court explained in *City of Pinellas Park*:

> [I]n *Kaisner* . . . we noted that sovereign immunity does not shield acts that are "operational" in nature but only those that are "discretionary." As to this question, we held that an act is operational if it
>
> > is one *not necessary to or inherent in policy or planning,* that merely reflects a secondary decision as to how those policies or plans will be implemented.
>
> *Id.* at 747 (emphasis added). Governmental acts are "discretionary" and immune, on the other hand if they involve
>
> > an exercise of executive or legislative power such as that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning.
>
> *Id.*

City of Pinellas Park v. Brown, 604 So.2d 1222, 1226 (Fla. 1992)(emphasis supplied by court).

While the decision of *whether* to enforce the law is a discretionary function, the *way* in which that decision is carried out is operational. As the Eleventh Circuit explained in holding that a city was not immune from a claim of negligence arising from the fatal shooting of a motorist:

> [U]nder Florida law, "[t]he decision of whether to enforce the law by making an arrest is a basic judgmental or discretionary governmental function that is immune

> from suit." *Everton v. Willard*, 468 So.2d 936, 937 (Fla. 1985). [Plaintiff], however, does not challenge the prudence of the officers' discretionary decision whether to arrest or detain, rather, she challenges the manner in which the officers implemented that decision. Under Florida law, when an officer has made an initial discretionary decision to conduct a stop and then proceeds to carry out that decision, the officer is no longer exercising a "discretionary" function, but is engaged in an "operational" task. *Kaisner*, 543 So.2d at 734, 737-38.

Lewis v. City of St. Petersburg, 260 F.3d 1260, 1265 (11th Cir. 2001). Specifically with respect to the officers' shooting of the plaintiff's decedent, the court observed that "***the decision as to whether the use of a firearm is necessary is 'not necessary to or inherent in policy or planning,' and 'merely reflects a secondary decision as to how those policies or plans will be implemented.'***" *Id.* at 1264 (citing *Kaisner*, 543 So.2d at 737). Here, while the decision of whether to respond to the burglary alarm call at Jose Rodriguez's business was a discretionary one, having undertaken to respond to the call, the manner in which Officer Hernandez implemented the response was operational; whether the officer should have acted in a manner more consistent with the safety of the innocent business owner is an issue that should be determined by a jury.

The Court's conclusion that the actions of the police in *Kaisner* were "operational," not "discretionary," is equally applicable here:

> While the act in question in this case certainly involved a degree of discretion, we cannot say that it was the type of discretion that needs to be insulated from suit. Intervention of the courts in this case will not entangle them in fundamental questions of policy or planning. It merely will require the courts to determine if the officers should have acted in a manner more consistent with the safety of the individuals involved.

543 So.2d at 737-38. *See also Wallace*, 3 So.3d at 1054 ("Subjecting the Sheriff to responsibility and accountability in this case does not involve judicial scrutiny of any discretionary, quasi-legislative policy-making or planning; instead such a legal inquiry will merely require the trier of fact to determine–consistent with traditional principles of Florida tort law–whether the deputies should have acted in a manner more consistent with the safety of the decedent.")

Applying the four-part test adopted by this Court in *Commercial Carrier* likewise supports the conclusion that actions of Officer Hernandez which resulted in injury to Jose Rodriguez were operational. First, the actions of Officer Hernandez did not involve a basic governmental policy, program or objective. His decisions of how to approach the burglary scene and whether to use his firearm were at best secondary decisions of implementation. *See Kaisner*, 543 So.2d at 737; *Lewis*, 260 F.3d at 1264. Second, his actions were not essential to the realization of basic governmental policy–safer methods existed for responding to the burglary scene. *See Wallace*, 3 So.2d at 1054; *Kaisner*, 543 So.2d at 737;

Lewis, 260 F.3d at 1264. Third, his actions did not require basic policy evaluation or expertise but simply an assessment of how to implement policy; this action merely asks the court to consider the operational manner in which the response to the burglary scene was conducted and implemented. *See id.* As to the fourth question, whether the governmental agency possesses the requisite authority–the police have the authority to respond to a burglary call. *See id.*

Officer Hernandez's decision to run up behind Mr. Rodriguez in a dark parking lot, point his gun at him without shouting any warning or announcing his presence, and then shoot Mr. Rodriguez multiple times was clearly not an exercise of discretion that involved "fundamental questions of policy and planning." Rather, it was an operational decision by a police officer on how to implement his law enforcement powers on the scene. Indeed, in concluding that "this lawsuit merely asks the courts to consider the way in which [a] basic policy is implemented, not its fundamental wisdom," the Court noted in *Kaisner*: "We implicitly recognized this distinction in *Trianon* when we noted that some activities of police officers in carrying out their duties, such as the way motor vehicles ***or firearms are used***, may be actionable." *Kaisner*, 543 So.2d at 737 & n.2 (citing *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So.2d 912, 920 (Fla. 1985)). Subjecting the County to suit in this case will not involve judicial scrutiny of any discretionary questions of policy or planning; it will merely require a jury to determine whether Officer Hernandez should have acted in a manner more consistent with the safety of Jose Rodriguez in responding to the burglary.

The district court held that this suit was barred by sovereign immunity based on the exception for police actions in certain emergency situations. Op. at 15-19. As noted in *Kaisner*, 543 So.2d at 738 n.3, and explicated in *City of Pinellas Park*, 604 So.2d at 1226-27, special deference is given to police actions in pressing emergencies which require officers to choose between two different risks posed to members of the public and may reach a level of such urgency as to be considered discretionary and not operational. However, contrary to the district court's opinion, there was no such "emergency" here requiring Officer Hernandez to choose between shooting Mr. Rodriguez and risking the safety of other members of the public.

As this Court explained in finding the events in *City of Pinellas Park* to be operational:

> *Kaisner* specifically noted that special deference is given to pressing emergencies, and that certain police actions may involve a level of such urgency as to be considered discretionary and not operational. *Kaisner*, 543 So.2d at 738 n. 3. However, ***this does not mean that state agents can escape liability if they themselves have created or substantially contributed to the emergency through their own negligent acts or failure to adhere to***

> ***reasonable standards of public safety***.
>
> To fall within the *Kaisner* exception, the serious emergency must be one thrust upon the police by lawbreakers or other external forces, that requires them to chose between different risks posed to the public. In other words, no matter what decision police officers make, someone or some group will be put at risk; and officers thus are left no option but to choose between two different evils. It is this choice between risks that is entitled to the protection of sovereign immunity in appropriate cases because it involves what essentially is a discretionary act of executive decision-making. *Id.* at 737 (exercises of executive power are sovereignly immune).

604 So.2d at 1226-27 (footnote omitted).

The district court found that the actions of the police here fell within the *Kaisner* exception because "[i]n the present case, the undisputed facts show that (a) a serious emergency existed, (b) the emergency was thrust upon the police by the acts of others, and (c) Officers Hernandez and Albides were required to make split-second choices that could result in harm either way." Op. at 16. To the contrary, as discussed above, the pertinent facts here are not undisputed, to the extent there was any "emergency" it was of the police officers' own making, and they were not forced to chose between two different evils posing risks to the public.

In the district court's view, the mere fact that a burglary was occurring is sufficient to constitute a pressing emergency of such urgency to fall within the

Kaisner exception as a matter of law. Op. at 16 ("Burglary is a forcible felony . . . that, by its nature . . . is a serious emergency which poses a level of danger to members of the public.") The district court states: "No matter what choices the police officers made in this case, someone or some group would be put at risk." Op. at 17. However, the district court fails to explain how the burglary of an unoccupied business at night is a pressing emergency, nor does it identify in what manner the officers were forced to choose between two different evils which each posed risk to the public. And, as explained by plaintiff's expert, Officers Hernandez and Albite created or substantially contributed to the so-called "emergency" through their own negligent acts and failure to adhere to reasonable standards of police procedure and safety. Under the district court's view of the *Kaisner* exception, virtually any crime in progress would be sufficient to shield the police from liability as a matter of law, regardless of whether the police response was reasonable under the circumstances; the exception would effectively engulf the rule.

This was a simple property crime in progress involving a nighttime break-in at a closed business. There was no level of urgency and no member of the public was in serious danger of injury here until Officer Hernandez ambushed and shot Jose Rodriguez in the parking lot despite knowing he was not the burglar. At the least, the evidence raises factual issues which should be determined at trial by a jury. The district court erred in making these findings as a matter of law and holding that this action was barred by sovereign immunity.

The case of *Robles v. Metropolitan Dade County*, 802 So.2d 453 (Fla. 3d DCA 2001), relied on by the County and cited by the district court in support of its decision, does not support the result here. While *Robles* exemplifies the type of emergency situation envisioned in *Kaisner* and *City of Pinellas Park*, the facts in this case are not remotely akin to those in *Robles* and there was no such "emergency" here requiring Hernandez to chose between shooting Rodriguez and risking the safety of others.

In *Robles*, a man hijacked a school bus with a number of children and several adults on board, and forced it to drive from the Palmetto Expressway to Joe's Stone Crab on Miami Beach. The hijacker was said to be armed and carrying an explosive device. When a police sharpshooter shot the hijacker in an effort to protect the life of the children on board, one of the children was injured in his eye by debris thrown off by the gunshot. The parents of the injured child brought a negligence action and the trial court granted summary judgment in favor of the county. On appeal, the district court affirmed on grounds of sovereign immunity, citing *City of Pinellas Park*, 604 So.2d at 1227. *Robles*, 802 So.2d at 454-55. In reaching that conclusion, the appellate court noted that there was no contradiction concerning the facts of how the event occurred, and while the plaintiff's expert opined that the officer should not have fired his gun, the expert testified that there was nothing else improper in the officer's actions, that the circumstances facing the officer were a serious emergency thrust upon the police by the lawbreaker, and that the officer had to choose between different actions, each of which posed a potential threat to the public. In contrast here, there was a simple property crime in progress which did not involve a risk of life or serious injury to members of the public, and the uncontradicted expert testimony was that the officers acted negligently and failed to follow proper police procedures. There is simply no similarity between the emergency created by the armed hijacking of schoolchildren in *Robles* and the run-of-the-mill burglary here.[10]

The decision in *Brown v. Miami-Dade County*, 837 So.2d 414 (Fla. 3d DCA 2001), is more closely on point. In that case, an innocent bystander brought assault and negligence claims against the County after a police officer conducting a prostitution sting operation at a hotel pointed a gun at him in a hallway and shouted

[10] The cases of *Seguine v. City of Miami*, 627 So.2d 14 (Fla. 3d DCA 1993), *criticized in Wallace*, 3 So.3d at 1045; *Everton v. Willard*, 468 So.2d 936 (Fla. 1985); and *Wong v. City of Miami*, 237 So.2d 132 (Fla. 1970), cited by the district court, did not address the emergency exception and therefore do not support the district court's decision here.

"freeze," resulting in injuries to the plaintiff. Rejecting the same arguments made by the County in this case, the court found that the County police created a foreseeable zone of risk to innocent bystanders such as the plaintiff and therefore owed a duty to exercise reasonable care. *Id.* at 418. Going on to address whether the County's actions were nevertheless protected from suit by sovereign immunity, the Court found that they were not: "We conclude that they are operational in nature, as the [plaintiffs] are essentially claiming that their injuries were sustained by virtue of the manner in which the police implemented their sting operation. As such, the County is not immune from suit for its alleged failure to exercise reasonable care to safeguard innocent bystanders such as [plaintiff] while effectuating its police operations at the hotel." *Id.* The same conclusion should be reached here.

As the district court recognized, the applicability of the sovereign immunity doctrine is often so inextricably tied to the underlying facts that factual development, up to and including trial on the merits, is necessary to resolve the immunity issues. Op. at 18-19. The trial court found that this was such a case and denied summary judgment. The district court disagreed but failed to view the evidence in the light most favorable to the plaintiff. Rodriguez respectfully suggests that the trial court correctly found that there were issues of fact precluding summary judgment and that the district court erred in reversing that decision and holding that the negligence claim in this action was barred by sovereign immunity as a matter of law. This action should be remanded to the trial court for trial on the merits.

CONCLUSION

For the foregoing reasons, Petitioner/Plaintiff Jose Rodriguez respectfully requests this Court to resolve the conflict between the district courts of appeal by holding that the district courts do not have certiorari jurisdiction to review non-final orders that deny a governmental agency's assertion of sovereign immunity as a defense to a negligence action, to further hold that the district court erred in determining that Respondent/Defendant Miami-Dade County was entitled to sovereign immunity as a matter of law, and to reverse the decision of the Third District Court of Appeal with instructions to remand this action to the trial court for trial on the merits.

Respectfully submitted,

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I HEREBY CERTIFY that the type size and style used in this brief is Times New Roman 14-point font, in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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