IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF EDUCATION,

Petitioner,

vs. Case No. 86,061

SALLY ROE, et al,

Respondents.

ANSWER BRIEF ON JURISDICTION OF RESPONDENTS SCHOOL BOARD, MERRICK AND ALDERMAN

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Florida Constitution

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STATEMENT OF THE CASE AND OF THE FACTS

Respondents, Leon County School Board, Richard Merrick (in his official capacity as Superintendent of Leon County Schools) and Samuel Alderman, have no disagreement with Petitioner's Statement of the Facts and of the Case, but would respectfully add the following items of significance which were omitted from Petitioner's Initial Brief on Jurisdiction.

Petitioner Department of Education was joined into the present matter by Order of July 26, 1993, allowing Respondents Roe to amend their complaint to add a count against that party, sounding in negligence[1]. Petitioner moved to dismiss the Amended Complaint, alleging among other things, that it was immune from suit. Petitioner's Motion to Dismiss Amended Complaint was eventually denied by Order of August 22, 1994.

Petitioner thereafter filed a Petition for Common Law Writ of Certiorari on September 20, 1994, raising the issue of sovereign immunity.[2] On March 4, 1995, after the filing of briefs and numerous motions, the First District rendered its Opinion in Case No. 94-3040. It treated Petitioner's petition for writ of certiorari as an appeal of an interlocutory order, and for the reasons stated therein, reversed the lower court Order of August 22, 1994, thereupon effectively dismissing Petitioner from the

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[1]Leon County Circuit Court Case No. 92-3635.

[2]First District Court of Appeal Case No. 94-3040.

underlying tort action (A 1-6). The First District specifically held that Respondents Roe[3] had failed to allege any common-law duty or statutory duty owed to the plaintiffs by Petitioner Department of Education. 20 Fla.L. Weekly D686b (Fla. 1st DCA 1995).

Respondents followed with Motions for Rehearing, Rehearing En Banc, and for Certification of Conflict. The principal points raised on the Motion for Rehearing were that (1) Roe should have been given leave to amend its Amended Complaint against Petitioner in the lower court; (2) it was improper to review the lower court Order by way of certiorari, pursuant to Martin-Johnson v. Savage, 509 So. 2d 1097 (Fla. 1987); (3) a denial of a motion to dismiss was not one of those enumerated appealable non-final orders set out in Rule 9.130, Florida Rules of Appellate Procedure; and (4) that the First District's reliance on Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994), as a vehicle for justifying the exercise of appellate jurisdiction over the matter was perhaps misplaced.[4] The Motion for Certification of Conflict involved an apparent conflict between the March 14, 1995, opinion of the First District and Page v. Ezell, 452 So. 2d 582 (Fla. 3d DCA 1984).

On rehearing, the First District withdrew its previous opinion (A 7-9). It declined to extend Tucker v. Resha beyond the specific

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[3]Plaintiffs in the lower court in Case No. 92-3635.

[4]This last point is the issue presented in the present matter before the court.

question answered by this court in that case.[5] 656 So. 2d 507 (Fla. 1st DCA 1995). The petition for writ of certiorari was not considered as an interlocutory appeal. The petition for writ of certiorari was denied as an order denying a motion to dismiss did not ordinarily qualify for certiorari review. 656 So. 2d 507 (Fla. 1st DCA 1995) (citing Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987) and Fieselman v. State, 566 So. 2d 768).

Petitioner thereafter filed its own Motion for Rehearing and Rehearing En Banc and Motion for Certification. These motions were denied on June 16, 1995 and the present Notice to Invoke Discretionary Jurisdiction of this court was served on July 14, 1995.

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[5] "Is a public official asserting qualified immunity as a defense to a federal civil rights claim entitled in the Florida courts to the same standard of review of denial of her motion for summary judgment as is available in the federal court?" 648 So. 2d at 1187 (Fla. 1994), rehearing denied.

SUMMARY OF ARGUMENT

The decision of the First District Court in Department of Education v. Roe, 656 So. 2d 507 (Fla. 1st DCA 1995) does not expressly and directly conflict with this court's decision in Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994), on the same question of law. Tucker involves the appropriate standard of review for a public official asserting qualified immunity as a defense to a civil rights claim, upon denial of a motion for summary judgment. The present case involves review of an order denying a motion to dismiss based upon the grounds of sovereign immunity.

ARGUMENT

The decision of the First District Court in Department of Education v. Roe, 656 So. 2d 507 (Fla. 1st DCA 1995), does not expressly and directly conflict with this court's decision in Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994), on the same question of law.

Pursuant to Article V, Section 3(b)(3), Florida Constitution, and Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, the discretionary jurisdiction of the Supreme Court may be sought to review decisions of District Courts of Appeal that expressly and directly conflict with a decision of the Supreme Court on the same question of law. Further, the only facts relevant to the determination as to whether there is decisional conflict are those facts contained within the four corners of the decisions allegedly in conflict. Reeves v. State, 485 So. 2d 829, fn. 3(Fla. 1986). Review is not to be undertaken simply because this court might disagree with the view expressed by the district court. Weston v. Nathanson, 173 So. 2d 451 (Fla. 1964). The jurisdictional standard requires conflict on the same point of law. Kincaid v. World Ins. Co., 157 So. 2d 517 (Fla. 1963).

There is no conflict on the same point of law in this case and Tucker v. Resha. Tucker succinctly holds that a public official asserting qualified immunity as a defense to a federal civil rights claim is entitled in the Florida courts to the same standard of review of denial of a motion for summary judgment as is available in federal court. 648 So. 2d at 1190.

The present case does not involve qualified immunity. It does not involve a federal civil rights claim. It does not involve the legal issue of whether a party is entitled to a certain standard of review in state court, different from or the same as that standard of review in federal court.

Instead, it involves the simple issue of whether a party is entitled to certiorari review of a order denying a motion to dismiss. That real issue has been decided on several occasions by this court, and those opinions confirm that the First District was entirely correct in withdrawing its initial opinion and then declining to review the lower court order denying Petitioner's Motion to Dismiss. Generally, the denial of a motion to dismiss is not reviewable by certiorari. Fieselman v. State, 566 So. 2d 768 (Fla. 1990); Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987).

At best, the present case involves the state's claim of sovereign immunity in a tort action, and the lower court denial of a motion to dismiss based upon that affirmative defense.[6] It does not involve the denial of a motion for summary judgment. Thus, on the facts, on the law and even in their procedural aspects, the present case and Tucker v. Resha are not in any irrevocable

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[6]Orders which deny motions to dismiss based upon the defense of sovereign immunity are not yet subject to interlocutory appeal. Page v. Ezell, 452 So. 2d 582 (Fla. 3d DCA 1984); State Road Dept. v. Brill, 171 So. 2d 229 (Fla. 1st DCA 1964); accord Florida Dept. of Highway Safety v. Desmond, 568 So. 2d 1354 (Fla. 2d DCA 1990).

conflict. Respondents would respectfully argue that Petitioner's attempt to manufacture conflict where none exists has no present foundation in law, facts or procedure, and that this court should decline the exercise of its discretionary review in this case.[7]

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[7]Throughout its Initial Brief on Jurisdiction, Petitioner has interspersed its argument on jurisdiction with arguments on the merits. Rule 9.210, Fla.R.App.P., especially (d) and (f) would suggest making argument on the merits is not appropriate. However, as Petitioner has addressed the merits, Respondents respectfully include this brief rejoinder in this footnote:

It is neither wise nor a savings of judicial resources to review orders denying motions to dismiss, even those based upon grounds of sovereign immunity, by interlocutory appeal or by writ of certiorari. For example, the State of Florida is involved in an enormous volume of tort litigation. As a matter of course, the state always raises sovereign immunity as an affirmative defense and invariably moves for dismissal on the very same grounds. Review of orders denying motions to dismiss based upon sovereign immunity will simply flood the appellate districts at an early stage in litigation where the underlying facts have yet to be fully developed. Why should the State of Florida be entitled to some special procedure and standard of review unavailable to other citizens?

The common law writ of certiorari is an extraordinary remedy and is to applied only in exceptional cases. Venezia A., Inc. v. Askew, 314 So. 2d 254, 255 (Fla. 1st DCA 1975). Certiorari will not be granted unless the court acts beyond its jurisdiction, or the interlocutory order does not comport with the essential requirements of law and will cause material harm which cannot be remedied on appeal. Anderson v. Lore, 618 So. 2d 369 (Fla. 1st DCA 1993). Certiorari should not be used to circumvent the rule providing a limited review of interlocutory orders. State Farm Mut. Auto. Ins. Co. v. Peters, 611 So. 2d 597, 598 (Fla. 2d DCA 1993) (citing Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097 (Fla. 1987)). If certiorari review were approved in the instant case, it would strip the common law writ of its extraordinary nature. The extraordinary writ would become "ordinary".

This court should adopt Judge Sharp's well reasoned dissent in Department of Transportation v. Wallis, Case No. 95-492, Fifth District Court of Appeal, and attached to Petitioner's Notice of Supplemental Authority served on or about August 14, 1995.

CONCLUSION

This court's decision in Tucker v. Resha does not conflict with the decision of the First District Court in Department of Education v. Roe on the same issue of law. As a result this court should decline exercise of its discretionary jurisdiction to review the decision of the First District Court.

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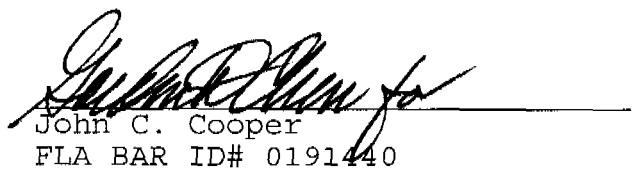

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CERTIFICATE OF SERVICE

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