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CLERK, SUPREME COURT
By _____
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IN THE SUPREME COURT OF FLORIDA

HUGO U. VELA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 91,795

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

CYNTHIA J. DODGE
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FLORIDA BAR NUMBER 345172

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner plead no contest to the charges of carrying a concealed firearm and resisting an officer without violence without the benefit of an agreement as to his sentence. (R18-20, 24-26) On December 30, 1996, the Honorable E. Randolph Bentley sentenced Petitioner to five years probation, with a condition of one year in the county jail as to each count to run concurrently. (R15, 18-20) The court granted Petitioner's request and struck the 18 points for possession of a firearm from the scoresheet, leaving 38.6 points. (R22) The score with the 18 points would have been 56.6 points. (R22) The state appealed the sentence on January 3, 1997. (R30)

By order dated October 17, 1997, the Second District Court of appeal reversed the Petitioner's sentence, holding that the trial court should not have struck the 18 points for a firearm off the Petitioner's scoresheets. State v. Vela, 22 Fla. L. Weekly D2432A (Fla. 2d DCA 1997);(Appendix A-1). The Second District Court noted conflict with the decision of the Fourth District Court of Appeal in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996). The Second District had previously certified the same conflict in White v. State, 689 So. 2d 371 (Fla. 2d DCA 1997), review granted, 696 So. 2d 343 (Fla. 1997)(Case No. 89,998), which is currently pending before this Court.

Petitioner then timely filed his notice to invoke the jurisdiction of this Court on November 5, 1997. (Appendix A-2)

SUMMARY OF THE ARGUMENT

The trial court was correct in striking 18 points from the Petitioner's scoresheet. Petitioner was convicted in the trial court of the offense of carrying a concealed firearm. Petitioner was not convicted of any other felony offense. Possession of a firearm is an essential element of carrying a concealed firearm. Scoring eighteen points for possession of a firearm in this instance is a violation of the double jeopardy protections of both the United States and Florida Constitution. This Court should reverse the Second District Court of Appeal because the scoring of eighteen points in his case is a violation of double jeopardy principles.

The Second District Court of Appeal reversed the trial court, but certified a conflict between its decision and the Fourth District Court of Appeal's decision in Galloway v. State, 680 So. 2d (Fla. 4th DCA 1996). The Galloway decision was decided upon its construction of Fla. R. Crim. P. Rule 3.702(d)(12). In the alternative, Petitioner believes that this Court should adopt the reasoning of Galloway and construe Rule 3.702(d)(12) to be inapplicable in his case.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN STRIKING EIGHTEEN POINTS ON THE GUIDELINES SCORESHEET FOR POSSESSION OF A FIREARM WHEN A FIREARM IS ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME FOR WHICH PETITIONER WAS BEING SENTENCED.

Petitioner was sentenced under the 1994 Revised Guidelines. Fla. R. Crim. P. 3.702(d)(12) allows the addition of eighteen points for predicate felonies involving firearms in the following language:

> Possession of a firearm, destructive device, semiautomatic weapon, or a machine gun during the commission or attempt to commit a crime will result in additional sentence points. Eighteen sentence points shall be assessed where the defendant is convicted of committing or attempting to commit any felony other than those enumerated in subsection 775.087(2) while having in his or her possession a firearm as defined in 790.001(6)....

The offenses enumerated in Section 775.087(2)(a), Florida Statutes (1993), are the following: murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, an attempt to commit any of the aforementioned crimes, or any battery upon a law enforcement officer or firefighter.

The only felony for which Petitioner was convicted, carrying a concealed firearm, is not among the enumerated felonies in Section 775.087(2)(a), Florida Statutes (1993). Nevertheless, the

eighteen points should not be scored because a possessing a firearm is an essential element of that crimes. Scoring the eighteen points in this case would be a violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution.

Furthermore, the reasoning of the Fourth District Court of Appeal in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996), is correct on this issue. In Galloway, the Fourth District Court rejected the double jeopardy argument, but construed Rule 3.702(d)-(12) to be inapplicable to convictions for carrying a concealed firearm and possession of a firearm by a convicted felon when the convictions were unrelated to the commission of any additional substantive offense. Galloway, 680 So. 2d at 617.

In Galloway, the defendant was convicted of carrying a concealed firearm and possession of a firearm by a convicted felon. The Fourth District Court of Appeal disagreed with the Second District's interpretation of the language of Rule 3.702(d)(12). The Rule provides for assessment of the eighteen points when a defendant is convicted of a felony "while having in his or her possession a firearm." (Emphasis added.) The Fourth District reasoned that although the addition of the points did not offend principles of double jeopardy, the plain language of the Rule requires a conviction of another substantive offense during which a defendant possesses a firearm. Galloway, 680 So. 2d at 617. The Galloway Court held that if the felonies for which a defendant is convicted are offenses in which a firearm was an essential element

of the crime, then the eighteen points should not be scored.

The Fifth District Court of Appeal has also considered this issue in Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995). In Gardner, the defendant was convicted of trafficking in cocaine, possession of marijuana with intent to sell, and carrying a concealed firearm. The firearm was secreted in the waistband of Gardner's trousers at the time he was committing the other two crimes. Gardner, 661 So. 2d at 1275.

In Gardner, eighteen points had been assessed for possession of a firearm pursuant to Rule 3.702(d)(12). The Fifth District rejected Gardner's argument that the eighteen points should not be scored because a firearm was an essential element of the crime of carrying a concealed firearm. The Gardner Court construed Rule 3.702(d)(12) to allow the scoring of the eighteen points because it provided that the points should be assessed when a person committed "any felony." However, in Gardner's case, "any felony" included the offenses of trafficking in cocaine and possession of marijuana with the intent to sell. (Emphasis added.) Gardner, 661 So. 2d at 1275.

Petitioner believes that the Gardner Court did not address the exact issue being raised in his case. Furthermore, Petitioner believes that it is implied, but not directly stated in Gardner, that if the only offenses a defendant is convicted of are felonies where a firearm is an essential element of the crimes and no other substantive offenses are involved, then the eighteen points should not be scored. Essentially, on this issue, Gardner and Galloway

would appear to be in agreement.

Prior to its ruling in Petitioner's case, the Second District Court of Appeal addressed a similar issue in State v. Davidson, 666 So. 2d 941 (Fla. 2d DCA 1995). Davidson had been convicted of carrying a concealed firearm. The State wanted twenty-five points scored because the firearm was a semiautomatic weapon. Davidson, 666 So. 2d at 942.

Fla. R. Crim. P.3.702(d)(12) provides:

> ...Twenty-five sentence points shall be assessed where the offender is convicted of committing or attempting to commit any felony other than those enumerated in subsection 775.087(2) while having in his or her possession a semiautomatic weapon as defined in subsection 775.087(2) or a machine gun as defined in subsection 790.001(9).

In Davidson, the trial judge declined to score the twenty-five points. The Second District Court of Appeal reversed the trial judge. In doing so, the Davidson Court rejected the double jeopardy argument and the argument that the scoring of the additional points was an improper enlargement of the sentence solely as a result of an essential element of the underlying offense; i.e., the firearm. Davidson, 666 So. 2d at 942.

Davidson can be distinguished from Petitioner's case. A semiautomatic weapon or a machine gun is not per se an essential element of the crime of carrying a concealed firearm. Although a semiautomatic weapon or a machine gun is a firearm, it could be argued that the punishment is enhanced because of the dangerous nature of the firearm. Machine guns and semiautomatic weapons pose a special danger to society, and increased punishment for their

possession may be valid without offending double jeopardy or other prohibitions.

However, as in Petitioner's case, the enhancement of punishment for a crime such as carrying a concealed firearm or possession of a firearm by a convicted felon because of a factor which is an essential element of the crime is improper and it is not called for by the Rules. The scoring of the eighteen points would amount to multiple or enhanced punishment for the same offense in violation of double jeopardy protections. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which is enforceable against the State of Florida through the Fourteenth Amendment to the United States Constitution, forbids multiple punishment for the same offense. Lippman v. State, 633 So. 2d 1061 (Fla. 1994). Additionally, Article I, Section 9, of the Florida Constitution provides defendants with at least as much protection from double jeopardy as is provided by the United States Constitution. Wright v. State, 586 So. 2d 710 (Fla. 1991).

Petitioner's offense, carrying a concealed firearm and possession of a firearm by a convicted felon, require possession of a firearm as an essential of element of the crime. Double jeopardy has been found to be a bar to adjudicate a defendant guilty for possession of a firearm during commission of a felony where other counts are enhanced for use of the same firearm. Cleveland v. State, 587 So. 2d 1145 (Fla. 1991); Clarington v. State, 636 So. 2d 860 (Fla. 3d DCA 1994).

In Gonzalez v. State, 585 So. 2d 932 (Fla. 1991), this Court

held that where a firearm is an essential element of the crime for which the defendant is convicted, the sentence cannot be enhanced because of the use of a firearm. In Gonzalez, the defendant was found guilty of third-degree murder with a firearm, a second-degree felony. The trial judge enhanced the charge to a first-degree felony because of the use of a firearm. Gonzalez v. State, 585 So. 2d at 933. This Court reversed the trial court, relying upon the reasoning of then Judge Anstead's dissenting opinion in Gonzalez v. State, 569 So. 2d 782 at 784-85 (Fla. 4th DCA 1990). See also, Lareau v. State, 573 So. 2d 813 (Fla. 1991).

Consequently, the scoring of eighteen points on the guidelines scoresheet in Petitioner's case is an error. His possession of a firearm was already factored into his sentence by the degree classification of the felony and by the offense severity ranking each offense receives (possession of a firearm by a convicted felon is a second-degree felony and a level five offense severity ranking.) For these reasons, Petitioner's sentence should be affirmed.

CONCLUSION

In light of the foregoing arguments and authorities, Petitioner respectfully requests that this Honorable Court reverse the decision of the Second District court and affirm Petitioner's sentence in the trial court.

APPENDIX

dence from the internal affairs investigation before the hearing, and could make an oral or written statement to the shooting review board. Geoghegan chose not to do so.

The undisputed facts show that the individual defendants provided Geoghegan with sufficient procedural due process before his termination. Moreover, as in *Loudermill*, Geoghegan had the opportunity for a full hearing, post-termination. Because Stephens, Upman and Worlds did not violate Geoghegan's clearly established statutory or constitutional rights, as delineated in *Loudermill*, they are entitled to qualified immunity from his federal civil rights claim. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. Again, because the record conclusively demonstrates that these public officials are entitled to immunity, the circuit court's order denying them immunity from that claim is a departure from the essential requirements of law.

CONCLUSION

We grant, in part, the petitions for writs of certiorari. We quash the portions of the circuit court's orders denying Stephens, Upman and Worlds, in their individual capacities, absolute immunity from the Geoghegans' claims of defamation and intentional infliction of emotional distress, and denying them qualified immunity from the claim based on 42 U.S.C. § 1983. We remand for the court to enter summary judgment on the immunity issues in the individual defendants' favor.

The defendants also have asserted that the circuit court erred in denying their individual-capacity motion directed to the federal statutory claim on the issues of their entitlement to summary judgment on the merits and Mrs. Geoghegan's ability to state a claim for loss of consortium. On these points, the defendants have failed to demonstrate the requisite irreparable harm necessary to invoke our certiorari jurisdiction. Therefore, we dismiss the portion of their petition addressing these claims. *Parkway Bank*, 658 So. 2d at 650.

We also dismiss the portion of the petition challenging the denial of the defendants' motion in their official capacities and in conjunction with the City of St. Petersburg. A suit against a defendant in his official capacity is, in actuality, a suit against the governmental entity which employs him. *See* § 768.28(9)(a), Fla. Stat. (1991); *Dept. of Education v. Roe*, 679 So. 2d 756, 759 (public officials who defend tort suits against the state are not sued in their personal capacities); *cf. Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 361, 116 L. Ed. 2d 301 (1991) (under 42 U.S.C. § 1983, official-capacity suits are merely another way of pleading an action against the entity of which the officer is an agent). 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.

Certiorari granted and orders quashed in part, certiorari dismissed in part. (THREADGILL, A.C.J., and QUINCE, J., Concur.)

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[1]In this opinion we refer to three of a quartet of cases involving the Tucker and Resha litigants. For clarity, we provide short synopses of those decisions:

Tucker I: Tucker v. Resha, 610 So. 2d 460 (Fla. 1st DCA 1992). Certiorari review of an order denying defendant's motion for summary judgment based on qualified immunity from a federal civil rights claim. Order quashed by *Tucker II*.

Tucker II: Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994). Florida Supreme Court holds that review by interlocutory appeal is available on the issue raised in *Tucker I*, paving the way for enactment of Florida Rule of Appellate Procedure 9.130(a)(3)(C)(viii).

Tucker III: Tucker v. Resha, 634 So. 2d 756 (Fla. 1st DCA 1994). Violation of privacy provisions of the Florida Constitution does not give rise to a cause of action for money damages.

Tucker IV: Resha v. Tucker, 670 So. 2d 56 (Fla. 1996). *Tucker III* is approved by the Florida Supreme Court.

[2]We note that *Goetz v. Noble*, 652 So. 2d 1203 (Fla. 4th DCA 1995), in which the court reviewed a denial of qualified immunity from state tort claims as an appealable nonfinal order, was decided after *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994), but before the supreme court adopted Florida Rule of Appellate Procedure 9.130(a)(3)(C)(viii). In a later decision, the supreme court declined to extend *Tucker II* "beyond the circumstances of that case." *Department of Education v. Roe*, 679 So. 2d 756, 758 (Fla. 1996) (refusing to permit interlocutory appeal of a nonfinal order denying a claim to sovereign immunity). Rule 9.130(a)(3)(C)(viii) plainly states that it is applicable only to claims arising under federal law.

[3]Stephens, Upman and Worlds initially filed their challenge to the portion of the order denying their claim of qualified immunity to the federal civil rights cause of action as both an interlocutory appeal and as a petition for writ of certiorari. This court made a preliminary determination that the denial of immunity from suit on the federal claim was appealable as a nonfinal order. As we have discussed, we now recognize that *Tucker II* does not confer jurisdiction here. Therefore, on our own motion we have consolidated the case addressing the state claims, which was filed as a petition for writ of certiorari, with the case addressing the federal claims, and review both under our jurisdiction to issue writs of certiorari.

[4]To be sure, the defendants and society suffer the same costs when legitimate issues of material fact preclude summary judgment but are later resolved in the defendants' favor at trial. But when a court denies summary judgment in the face of disputed issues of material fact, it commits no legal error, let alone a departure from the essential requirements of law. *See Tucker I*, 610 So. 2d 460. In those instances, the denial of immunity prior to trial is unavoidable and irremediable.

[5]We emphasize that our holding is applicable only to cases where the public official is seeking immunity from *suit*. Our holding is not applicable to an official seeking immunity from *liability*. *Cf. Roe*, 679 So. 2d at 759 (refusing to expand interlocutory appeal right established in *Tucker II*, 648 So. 2d 1187, to order denying sovereign immunity; sovereign immunity is an immunity from liability and its benefits will not be lost simply because review must wait until after judgment).

[6]The defendants' petition also contended they are immune from the Geoghegans' state law claim of conspiracy. In their response, the Geoghegans advised that they have not asserted a separate conspiracy claim. This concession obviates the need for us to address the defendants' argument on this point.

[7]The Geoghegans correctly concede that they have no substantive due process claim; their action is based on an alleged violation of procedural due process.

[8]For purposes of this certiorari petition, we presume that Geoghegan had a property interest in his position as police officer.

* * *

Criminal law—Carrying concealed firearm—Resisting officer without violence—Sentencing—Guidelines—Scoresheet—Points properly added for possession of firearm—Conflict certified—Error to strike points from scoresheets

STATE OF FLORIDA, Appellant, v. HUGO U. VELA, Appellee. 2nd District. Case No. 97-00701. Opinion filed October 17, 1997. Appeal from the Circuit Court for Polk County; E. Randolph Bentley, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Deborah F. Hogge, Assistant Attorney General, Tampa, for Appellant. James Marion Moorman, Public Defender, Bartow, and Cynthia J. Dodge, Assistant Public Defender, Bartow, for Appellant.

(PER CURIAM.) The state challenges a sentencing order, which struck eighteen points from the guidelines scoresheet of the appellee, Hugo U. Vela, relative to his 1996 convictions for carrying a concealed weapon and resisting an officer without violence. We reverse and remand for resentencing, based on scoresheet error.

Eighteen points for possession of a firearm during the commission of a felony were originally added to Vela's guidelines score pursuant to Florida Rule of Criminal Procedure 3.703(d)(19). Rule 3.703(d)(19) is a provision of the amended 1994 sentencing guidelines and is essentially the same as rule 3.702(d)(12) of the 1994 sentencing guidelines, which was at issue in *White v. State*, 689 So. 2d 371 (Fla. 2d DCA 1997), *Smith v. State*, 677 So. 2d 393 (Fla. 2d DCA 1996), and *State v. Davidson*, 666 So. 2d 941 (Fla. 2d DCA 1995). Both rules provide for the addition of eighteen points for firearm possession unless the defendant has been convicted of one of the felonies "enumerated in subsection 775.087(2)." The state argues that since Vela was not convicted of one of the excluded felonies enumerated in section 775.087(2), Florida Statutes (1995), the trial court erred in striking the eighteen points from Vela's guidelines score. We agree.

Accordingly, based on this court's holdings in *White*, *Smith*, and *Davidson*, this cause is reversed and remanded for resentencing upon the correction of Vela's guidelines scoresheet to include the additional eighteen points pursuant to rule 3.703(d)(19). As in *White*, we again certify that our decision is in conflict with *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996). On remand, the trial court is also directed to correct the

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written judgment to reflect that Vela pleaded guilty to the crimes involved here, rather than no contest.

Reversed and remanded for resentencing. (FRANK, A.C.J., THREADGILL and ALTENBERND, JJ., Concur.)

* * *

Declaratory judgment—Injunction—Public utilities—Jurisdiction—Action by property owner against electric utility, alleging that defendant caused oak trees in plaintiff's yard to be severely trimmed without plaintiff's permission, alleging that circumstances may arise again, and seeking injunctive and declaratory relief—Trial court erred in dismissing complaint on ground that Public Service Commission has exclusive jurisdiction of subject matter—Subject matter of action is not within jurisdiction of Commission, and remedies sought are outside Commission's authority—Courts are not precluded from determining whether a utility company, in serving a customer, has acted arbitrarily to the detriment of that customer or in a manner that results in unnecessary damage to the customer's property

HENRY P. TRAWICK, JR. and LOUISE J. TRAWICK, husband and wife, Appellants, v. FLORIDA POWER & LIGHT COMPANY, Appellee. 2nd District. Case No. 96-00965. Opinion filed October 15, 1997. Appeal from the Circuit Court for Sarasota County; Peter A. Dubensky, Judge. Counsel: John D. Hawkins of Grimes Goebel Grimes Hawkins & Gladfelter P.A., Bradenton, for Appellants. Aimee D. Stein of Florida Power & Light Company Law Department, Miami, for Appellee.

(CAMPBELL, Acting Chief Judge.) Appellants, Henry P. Trawick, Jr. and Louise J. Trawick, challenge the final judgment of dismissal entered against them in their action against appellee, Florida Power & Light Company (FPL). Appellants filed this action for declaratory and injunctive relief after FPL caused the live oak trees in appellants' yard to be severely trimmed. The trial court dismissed their complaint with prejudice, finding that the Florida Public Service Commission (FPSC) had exclusive jurisdiction of the subject matter and that the action was not a proper one for declaratory relief. We disagree and reverse.

Appellee FPL, which provides residential electrical service to appellants' home, had directed Asplundh Tree Expert Company, purportedly as part of its line maintenance program, to trim the live oak trees on appellants' property. Following the pruning, appellants filed this action for declaratory and injunctive relief, claiming that appellee was not authorized to trim the trees without appellants' permission and that, moreover, the trimming was unnecessarily severe, causing not only a substantial loss of shade, but severely reducing the visual beauty of the trees and thereby reducing the value of appellants' property. Appellants also allege that these circumstances may arise again in the future; thus, the need for a declaration of their rights to prevent or contest such action by FPL. On appellee's motion, the trial court dismissed the declaratory judgment portion of appellants' first complaint, granting appellants time to amend. Appellants filed an amended complaint, to which appellee filed another motion to dismiss. The court finally dismissed with prejudice appellants' amended complaint, finding that FPSC had exclusive jurisdiction of the subject matter and that the action was not a proper one for declaratory relief.

In reaching this determination, however, the court misapprehended the nature of the jurisdiction of FPSC. Not only is the subject matter of the action not within FPSC's jurisdiction, but the remedies sought are outside FPSC's authority as well. While it is true that FPSC has exclusive jurisdiction to "regulate and supervise each public utility with respect to its rates and service," (§ 350.011, Fla. Stat. (1995)) the instant action does not implicate rates or service. The mere fact that the action was filed by a FPL customer does not relegate it to the exclusive jurisdiction of FPSC. Appellants requested remedies that are exclusively judicial: a declaration of rights and an injunction. FPSC is not authorized to grant such relief. *See* § 366.05, Fla. Stat. (1995). These are judicial remedies. *See Fla. Power & Light Co. v. Glazer*, 671 So. 2d 211 (Fla. 3d DCA 1996).

We conclude that courts are not precluded from determining whether a utility company, in serving a customer, has acted arbitrarily to the detriment of that customer or in a manner that results in unnecessary damage to the customer's property. Neither are courts precluded, in such situations, from fashioning a remedy to prevent future damage.

Similarly, although the trial court concluded that the action was not proper for declaratory judgment, we disagree. We conclude that the six requirements for a declaratory judgment set forth in *May v. Holly*, 59 So. 2d 636 (Fla. 1952), were alleged in appellants' amended complaint.

Having found that the court erred in dismissing appellants' amended complaint with prejudice, we reverse and remand for further proceedings consistent with this opinion. (THREADGILL and NORTHCUTT, JJ., Concur.)

* * *

Torts—Negligence—Action against owner of private school by mother of student at school who was injured when she was hit by vehicle while crossing road which abuts school property—Landowner may, on certain occasions, be liable for dangerous condition that results in injury off his property—Trial court properly dismissed complaint where plaintiff did not plead sufficient ultimate facts to demonstrate the foreseeable zone of danger, the duty of the landowner, and the breach of that duty—Error to dismiss first amended complaint without leave to amend where plaintiff's counsel, in requesting additional leave to amend, advised court that plaintiff had consulted with safety expert who would provide specifics as to what the actual failure was on the part of defendant

KIM SHORT, Individually and as Parent and Natural Guardian of Dawn Short, a minor, Appellant, v. LAKESIDE COMMUNITY CHURCH, Appellee. 2nd District. Case No. 96-04760. Opinion filed October 15, 1997. Appeal from the Circuit Court for Pinellas County; Crockett Farnell, Judge. Counsel: Sylvia H. Walbolt and Susan L. Landy of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., St. Petersburg, and Wolfgang M. Florin and Christopher D. Gray of Florin, Roebig & Walker, P.A., Clearwater, for Appellant. Patricia Kelly of Harris, Barrett, Mann & Dew, St. Petersburg, for Appellee.

(PATTERSON, Judge.) Kim Short appeals from the order which dismisses with prejudice counts III and IV of her complaint for damages arising out of an injury to her daughter, Dawn. We affirm the trial court's dismissal, but remand to allow Short to amend her complaint.

The appellee, Lakeside Community Church (Lakeside), operates a private school in the City of Clearwater. The school property abuts Sunset Point Road. On September 24, 1993, as Dawn, a student at Lakeside, was crossing Sunset Point Road to the school property, she was struck by a motor vehicle.

Short brought a four-count negligence action against the City and Lakeside. Counts I and II assert that the City was negligent in not providing a school crossing zone as authorized by section 316.1895, Florida Statutes (1993). These counts remain pending in the trial court and are not a subject of this appeal. In counts III and IV, Short attempted to state a cause of action against Lakeside for not maintaining its property in a reasonable and safe manner so as to prevent accidents such as Dawn's. These counts were dismissed for failing to state a cause of action. Short filed an amended complaint that contained some minor changes, but did not add any ultimate facts directed to the legal conclusion that Lakeside had breached a duty owed to Dawn. This amended complaint was dismissed with prejudice for failing to state a cause of action. In so doing, the trial court stated, "It does not appear that the Plaintiff can state any set of facts to show that the Defendant caused the injury suffered by Dawn Short."

Although it is not the general rule, there are occasions when a landowner may be liable for a dangerous condition that results in injury off his property. *See Johnson v. Howard Mark Prods., Inc.*, 608 So. 2d 937 (Fla. 2d DCA 1992). As we said in *Johnson*:

> [T]he general standard of care which the common law places on all landowners to protect invitees under a wide spectrum of circumstances can authorize a case-specific standard of care requiring protection of invitees on nearby property if the landowner's foreseeable zone of risk extends beyond the boundaries of its property.

Id. at 938. In seeking to avail oneself of such a case-specific standard, a party must plead sufficient ultimate facts to demonstrate the foreseeable zone of danger, the duty of the landowner, and the breach of that duty. Because Short's complaint fails as to each

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

HUGO U. VELA, :

Defendant, Petitioner, :

vs. : Case No. 97-0701

STATE OF FLORIDA, :

Plaintiff, Respondent. :

_____ :

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

Notice is hereby given that the Petitioner, HUGO U. VELA, invokes the discretionary jurisdiction of the Supreme Court of Florida to review the decision of this court rendered on October 17, 1997. The decision expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Deborah Hogge, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 5th day of November, 1997.

Respectfully submitted,

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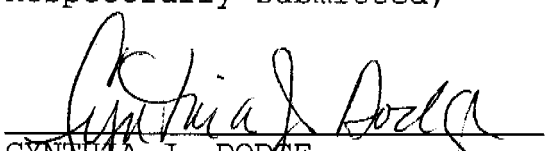
CJD/lbw

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Deborah Hogge, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 26 day of November, 1997.

Respectfully submitted,



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