SC18-468

IN THE SUPREME COURT OF FLORIDA

FLORIDA HIGHWAY PATROL,
a division of the Florida Department of
Highway Safety and Motor Vehicles,
Petitioner,

v.

LASHONTA RENEA JACKSON,
as personal representative of the
Estate of Vontavia Kiara Robinson,
Respondent.

SUPREME COURT CASE NO: SC18-468
FIRST DISTRICT CASE NO: 1D16-3940

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This matter arises from a wrongful death claim filed by Respondent Lashonta Renea Jackson ("Jackson") as personal representative of the estate of Vontavia Robinson ("Decedent") against the Petitioner Florida Highway Patrol ("FHP") alleging negligence in reopening Interstate 75 (I-75) after a fire reduced visibility in Alachua County. References to Petitioner's Appendix will be designated by the abbreviation "App. ___" followed by PDF page number; references to Petitioner's Brief on Jurisdiction will be designated by the abbreviation "P. Brief ___" followed by the document page number.

On January 29, 2012, FHP reopened I-75, which the Alachua County Sheriff's Office had earlier closed due to smoke which had created conditions that completely obscured visibility for drivers. App. 5. Multiple crashes and eleven deaths, including the death of Vontavia Robinson subsequently occurred. App. 5. When choosing to reopen the highway, FHP did not follow the operational checklist for Smoke/Fog Incidents located in its own policy manual. FHP was also made aware that there was extremely limited visibility on the road. After reopening I-75, FHP did not monitor the roadway or warn drivers of the fatal hazards. *See* App. 10. FHP reopened the highway despite the National Weather Service's warnings, as well as the Florida Forest Service's warnings regarding extremely low visibility and dangerous driving conditions. Jackson alleged that FHP's decision to reopen I-75—despite the clear

danger and without adequate monitoring and warning to approaching drivers — was an operational choice pursuant to the assumption of a special tort duty, that is not protected by sovereign immunity. *See Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928 (Fla. 2004).

FHP filed a motion for summary judgement, claiming its discretionary decision to re-open the interstate was protected by sovereign immunity. App. 5. The trial court denied FHP's motion, because this cause of action involves various forms of negligence, which are disputed on the basis of fact, that extend beyond the protection of sovereign immunity. App. 5. FHP appealed the trial court's order to the First District Court of Appeal. App. 5.

The First District dismissed FHP's appeal for lack of jurisdiction on the grounds that the trial court did not explicitly determine, as a matter of law, that FHP was not entitled to sovereign immunity, consistent with the requirements of Fla. R. App. P. 9.130. App. 5. Petitioner requests that this Court invoke discretionary jurisdiction on the grounds of express and direct conflict and/or on a certified question of great public importance. P. Brief 3. In conflict with Fla. R. App. P. 9.120, Petitioner filed the initial brief on April 11, 2018, forty-seven days after rendition of the First District decision on February 23, 2018. Respondent replies herein in opposition.

SUMMARY OF ARGUMENT

This Court should not grant discretionary review. FHP petitions this Court for review of the district court's decision under Article V, §§ 3(b)(3)-(4), Fla. Const., alleging that the First District's decision is in express and direct conflict with *Beach Cmty. Bank v. City of Freeport*, 150 So. 3d 1111 (Fla. 2014), on the issue of whether, absent an explicit denial of sovereign immunity "as a matter of law," governmental entities may seek an interlocutory appeal of a nonfinal order. P. Brief 3. However, FHP has not shown express and direct conflict between *Beach Community* and the First District's decisions on the same issue of law. The Supreme Court of Florida does not overrule itself sub silentio, and the District Court itself acknowledged the coherence of prior case law and, in doing so, denied FHP's appeal for lack of jurisdiction. *See Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002); App. 4, 8, 16.

Petitioner also argues that the ability of an entity to seek interlocutory review when a trial court erroneously denies sovereign immunity is an important issue and that the trial court erroneously denied sovereign immunity in this case. P. Brief 7. This argument is not appropriate for two reasons. First, the trial court did not *erroneously* deny sovereign immunity here, because FHP was not entitled to sovereign immunity due to mixed issues of fact and law related to warnings and continued monitoring of the highway. The trial court's timely denial of sovereign immunity was thus proper and well within its discretion.

Second, despite Petitioner's admitted knowledge that jurisdictional briefs are not permitted to address certified questions of great public importance, Petitioner nonetheless advocates that this Court invoke discretionary jurisdiction about a "significant issue of statewide impact." P. Brief 3; *see also* Fla. R. App. P. 9.120(d). The question certified by the First District misstates the factual and legal reality of this case, because the record does not clearly demonstrate that FHP is entitled to immunity from suit on every allegation at issue. *See* App. 5-6 n. 1. Since there is no express and direct conflict, and because the trial court's denial of sovereign immunity was proper, this Court should not invoke jurisdiction.

ARGUMENT

A. No Express and Direct Conflict

The First District erred in perceiving an express and direct conflict between *Beach Community* and other case law. *Beach Community Bank v. City of Freeport*, 150 So. 3d 1111, 1113 (Fla. 2014) (determining that defendant's claim of immunity rested on a pure question of law); *but see Hastings v. Demming*, 694 So. 2d 718, 720 (Fla. 1994); *Reeves v. Fleetwood Homes of Florida, Inc.*, 889 So. 2d 812, 821 (Fla. 2004); *Fla. Dep't of Corrs. v. Culver*, 716 So. 2d 768, 769 (Fla. 1998) (holding that the trial court must specifically state that the defense of immunity is not available "as a matter of law" in its order to allow for district court of appeal jurisdiction under Fla. R. App. P. 9.130(a)(3)(C)(vi)). Without the explicit "as a matter of law"

language, interlocutory appeals are not permitted. *See* i*d*. *Miami-Dade County v. Pozos*, 42 Fla. L. Weekly D418, D419 (Fla. 3d DCA Feb. 15, 2017), applies the same rule and confirms that a defendant in Florida may not appeal unless the trial court's order explicitly states, "as a matter of law," that the defendant is not entitled to immunity.

In *Beach Community*, the Court remained consistent with prior case law and with Fla. R. App. P. 9.130, which dictates that for an interlocutory appeal of a non-final order, that order must determine, as a matter of law, whether a party is entitled to sovereign immunity. *Beach Community,* 150 So. 3d at 1112. *Beach Community* focuses on the issue of whether the City's claim rested on a pure question of law and whether the claim brought against it asserted a breach of functional or operational duties. *Id*. at 1113. There is nothing in the opinion to suggest that the "as a matter of law" language was not present in the order being discussed, nor that the determination was not reached in some legally tantamount manner by looking at the record. *See* i*d*. Thus, not only is there no *express* contradiction of precedent requiring the "as a matter of law" language, there is also no suggestion that the Court had the intention of removing the well-established requirement for this specific language. In perceiving a conflict, the First District went outside of the opinion in *Beach Community* and read in a conflict that was never expressly stated, or even implicitly suggested.

The Supreme Court of Florida does not overrule itself sub silentio. *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). Without an express contradiction of prior case law, it is improper to assume that the Court had the intention of overruling or signaling a departure from a well-established requirement. *Id.*

Petitioner claims that the issue of sovereign immunity in this case rests on a pure question of law and that this Court should therefore review the order denying entitlement to that immunity. P. Brief 6. Neither the record nor the trial court's order supports this conclusion. Notwithstanding Respondent's position that the immunity determination was a mixed question of fact and law, and hence non-appealable, the law still clearly requires that an order must indicate that immunity is denied "as a matter of law" for the order to be appealable. *See Beach Community*, 150 So. 3d at 1112. In the absence of such language, parties must afford due deference to the trial court's discretion in determining what issues of fact remain for the jury, and whether those fact issues are determinative in whole or in part to the claim of immunity. Here, it is clear that the trial court determined that the existence of sovereign immunity was, at best, a mixed question of fact and law regarding the "extent and adequacy" of Petitioner's duties. App. 5, 13.

B. Trial Court Did Not Erroneously Deny Sovereign Immunity

The trial court in this case did not erroneously deny immunity to FHP. Considering that there is no express or direct conflict between the First District's

decision and prior case law, the trial court's decision to deny sovereign immunity was proper and consistent with prior law, and the trial court's ruling should be interpreted accordingly. The language of the trial court's denial of Petitioner's motion for summary judgment on the basis of sovereign immunity specifically identifies the kinds of material issues of fact that relate to both the existence of a duty (the "*extent*. . . of [FHP]'s continued monitoring of the roadway") (emphasis added) and the performance of FHP's operational functions ("the *adequacy*. . . of [FHP]'s continued monitoring of the roadway") (emphasis added), which are not issues precluded from suit by the defense sovereign immunity. App. 13; *see Beach Community Bank*, 150 So.3d at 1114. Trial court judges are best situated to have knowledge and understanding of the issues before them, as well the applicable case law and procedural rules in the cases over which they preside.

The First District should have followed the example set by the Fourth District in *Cantalupo v. Lewis*, 47 So. 3d 896, 899 (Fla. 4th DCA 2010), and read *Beach Community* to avoid conflict instead of deriving that *Beach Community* implied a conflict simply because it did not explicitly impose a rule or state facts relating to the language of the trial court's order. Even the trial court in the instant case recognized the coherence of prior case law, which is why, despite certifying a question of great public importance to this court, the First District dismissed FHP's appeal. App. 5.

Petitioner argues that it is in the best interest of all parties to have a determination as early as possible on the question of whether sovereign immunity applies. In the instant case, this determination has already been properly made by the trial court, which denied FHP's motion for summary judgement because it found that the question of sovereign immunity was one at least partially contingent on issues of fact for the jury. App. 4-5, 7. Further response to this argument would not only come perilously close to arguing the certified question of great public importance but would also not be in the best interest of judicial economy.

Finally, Petitioner claims that the record demonstrates that sovereign immunity applies, but that claim is patently untrue based on the facts of this case and the nature of FHP's choice to re-open the roadway, as well as the nature of the duty undertaken. *Contra* P. Brief 1. Petitioner's argument that requiring an explicit statement by the trial court regarding the denial of sovereign immunity would "elevate form over substance" is baseless, because substantive issues of fact may well be determinative in the applicability of sovereign immunity. *Contra* P. Brief 4. Indeed, the trial court found that this case is not one where immunity can be granted as a pure matter of law. App. 4-5.

CONCLUSION

Wherefore, this Court does not have jurisdiction and should deny review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on this 1st day of May, 2018 to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Jack J. Fine
Jack J. Fine