Filing # 70585791 E-Filed 04/11/2018 04:42:44 PM

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.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT
Case No.: 1D16-3940

PETITIONER'S BRIEF ON JURISDICTION

PAMELA JO BONDI
Attorney General

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681
(850) 410-2672 (fax)
amit.agarwal@myfloridalegal.com
britt.thomas@myfloridalegal.com
rachel.nordby@myfloridalegal.com

AMIT AGARWAL (FBN 125637)
Solicitor General

BRITT THOMAS (FBN 962899)
Chief Assistant Attorney General

RACHEL NORDBY (FBN 056606)
Senior Deputy Solicitor General

Counsel for Petitioner

RECEIVED, 04/11/2018 04:43:29 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CITATIONS iii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. THE FIRST DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT ON THE SAME QUESTION OF LAW. 5

II. THE ABILITY OF A PARTY TO SEEK INTERLOCUTORY REVIEW WHEN A TRIAL COURT ERRONEOUSLY DENIES A CLAIM OF SOVEREIGN IMMUNITY IS A SIGNIFICANT ISSUE WARRANTING THIS COURT'S REVIEW. 7

CONCLUSION 10

CERTIFICATE OF SERVICE 12

CERTIFICATE OF COMPLIANCE 13

TABLE OF CITATIONS

Cases

Beach Community Bank v. City of Freeport,
150 So. 3d 1111 (Fla. 2014) ..... passim

Commercial Carrier Corp. v. Indian River Cty.,
371 So. 2d 1010 (Fla. 1979) 8

Keck v. Eminisor,
104 So. 3d 359 (Fla. 2102) 10

Miami-Dade County v. Pozos,
No. 3D15-2167, 2017 WL 621233 (Fla. 3d DCA Feb. 15, 2017) 9

Mitchell v. Gillespie,
161 So. 2d 842 (Fla. 1st DCA 1964) 6

Rodriguez v. Miami-Dade Cty.,
117 So. 3d 400 (Fla. 2013) 8

Spangler v. Fla. State Tpk. Auth.,
106 So. 2d 421 (Fla. 1958) 8

Wainwright v. Taylor,
476 So. 2d 669 (Fla. 1985) 5

Statutes

§ 768.28, Fla. Stat. 10

§ 90.202, Fla. Stat. 6

Rules

Fla. R. App. P. 9. 120 3

Constitutional Provisions

Art. V, § 3, Fla. Const. 5

STATEMENT OF THE CASE AND FACTS

This case arose from a fatal vehicle collision on Interstate 75. App. 5. Respondent Jackson, as personal representative of the estate of one of the victims, brought suit alleging Petitioner Florida Highway Patrol (FHP) was negligent in reopening the interstate following a brush fire on Paynes Prairie Preserve in Alachua County. App. 5. Smoke from the brush fire was a contributing factor in two separate vehicle crashes (one on I-75 and one on US-441). *Id.* Both roads were temporarily closed "due to the crashes and visibility concerns." *Id.* Several hours later, having weighed the safety risk of keeping the interstate closed (and thereby diverting traffic to smaller roads), FHP determined that visibility conditions had improved and reopened I-75. *Id.* Soon after, there was a sudden deterioration in visibility, and a fatal, multiple-vehicle crash occurred. *Id.* Vontavia Robinson was one of the fatalities, and his estate's personal representative subsequently filed the underlying negligence case against FHP. *Id.*

FHP moved for summary judgment in the negligence suit on alternate grounds: 1) FHP did not owe a common-law duty of care to Robinson, and 2) sovereign immunity shielded FHP's discretionary decision to reopen I-75. *Id.* The trial court denied the motion on the grounds that "[d]isputed issues of material fact exist, including, but not limited to, the extent and adequacy of [FHP]'s continued

monitoring of the roadway that prevent the entry of Final Summary Judgment." *Id.* at 13. FHP appealed that order to the First District under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(xi), which authorizes appellate review of non-final orders which determine "as a matter of law" that a party is not entitled to sovereign immunity. App. 5.

Finding itself "constrained" by this Court's precedent addressing appellate review of non-final orders denying other forms of immunity, *id.* at 13, the First District dismissed FHP's appeal for lack of jurisdiction "because the order under review did not explicitly determine, as a matter of law, that FHP was not entitled to sovereign immunity," *id.* at 2. In his thorough opinion, however, Judge Winokur detailed a "perceived conflict" in this Court's precedent addressing interlocutory review of denials of various forms of immunity. *Id.* at 16. Specifically, Judge Winokur noted that, although this Court has required an explicit statement on the face of the order regarding the inapplicability of workers' compensation immunity as a matter of law, *id.* at 11, in a more recent decision from 2014, this Court did not impose such a requirement in the context of a denial of sovereign immunity, *id.* at 14-15. In light of this conflict, it was "unclear" if this Court "intend[ed] to signal a departure" from its earlier caselaw addressing what is required for a court to have jurisdiction over a non-final order denying immunity "as a matter of law." *Id.* at

16. Notably, all three judges on the panel concurred to certify a question of great public importance to this Court to address and resolve the issue. *Id.*

FHP now seeks this Court's discretionary review on the basis that the First District's decision: 1) passed upon a question of great public importance, and 2) presents an express and direct conflict with this Court's decision in *Beach Community Bank v. City of Freeport*, 150 So. 3d 1111 (Fla. 2014). Because jurisdictional briefing is not authorized for certified questions of great public importance, *see* Fla. R. App. P. 9. 120(d), this brief will address only the express and direct conflict basis for this Court's discretionary review.

SUMMARY OF THE ARGUMENT

This Court should grant review. The decision below expressly and directly conflicts with this Court's decision in *Beach Community Bank v. City of Freeport*, 150 So. 3d 1111 (Fla. 2014), and that conflict warrants review because it implicates a significant issue of statewide impact.

Specifically, the First District held that it did not have jurisdiction under Rule 9.130(a)(3)(C)(xi) to review the underlying non-final order because the trial court "did not *explicitly determine*, as a matter of law, that FHP was not entitled to sovereign immunity." App. 5 (emphasis added). This squarely conflicts with *Beach Community*, which did not impose any explicit-statement requirement in applying

Rule 9.130. Rather, this Court held that where a party's claim to sovereign immunity rests "on a pure question of law," then an order denying entitlement to that immunity "falls squarely within" the parameters of Rule 9.130(a)(3)(C)(xi). 150 So. 3d at 1113.

As to this Court's discretion, this case warrants review because a sovereign entity's ability to seek interlocutory review of a trial court's erroneous denial of immunity presents a significant issue of statewide impact. First, where a defendant is entitled to sovereign immunity from suit as a matter of law, it should have the ability to resolve that legal question at the earliest possible stage of litigation—especially where, as in this case, the record demonstrates that sovereign immunity applies, and no further factual development is necessary to resolve the legal question. Second, imposing an explicit-statement requirement in order for appellate jurisdiction to vest—as the First District did here—elevates form over substance. As a result, a party's ability to appeal a denial of sovereign immunity turns on the facial sufficiency of the trial court's order, rather than whether the party's claim to immunity presents solely a question of law. Finally, all parties involved in litigation where a governmental entity has asserted sovereign immunity have a strong interest in resolving entitlement to that immunity as early in the course of litigation as possible. Indeed, litigating a case through trial to final judgment only

to have it reversed on appeal due to a defendant's sovereign immunity results in wasted resources for all parties involved, including the judicial branch. This Court has jurisdiction and should grant review.

ARGUMENT

I. THE FIRST DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT ON THE SAME QUESTION OF LAW.

This Court's conflict jurisdiction exists to resolve irreconcilable holdings within Florida on the same question of law. *Wainwright v. Taylor*, 476 So. 2d 669, 670 (Fla. 1985); *see also* Art. V, § 3(b)(3), Fla. Const. Here, the requisite conflict exists because the First District's decision expressly and directly conflicts on the same point of law with this Court's decision in *Beach Community Bank v. City of Freeport*, 150 So. 3d 1111 (Fla. 2014).

Specifically, the First District determined it did not have jurisdiction under Rule 9.130(a)(3)(C)(xi) to review the underlying non-final order because the trial court "did not *explicitly determine*, as a matter of law, that FHP was not entitled to sovereign immunity." App. 5 (emphasis added); *see also id.* at 14 ("[T]he absence of a trial court ruling on immunity as a matter of law means we lack jurisdiction to consider this appeal.") (Bilbrey, J., concurring in result with opinion). This holding directly and expressly conflicts with *Beach Community*, which this Court issued the exact same day it amended Rule 9.130(a)(3)(C)(xi) to authorize non-final

appeals of denials of sovereign immunity. This Court described the newly amended Rule as "permit[ting] district courts to review nonfinal orders of decisions determining entitlement to sovereign immunity where the case involves a pure legal question." 150 So. 3d at 1113. In applying the newly-adopted Rule amendment, this Court did not impose any explicit-statement requirement. Rather, *Beach Community* held that where a party's claim to sovereign immunity rests "on a pure question of law," then an order denying entitlement to that immunity "falls squarely within" the parameters of Rule 9.130(a)(3)(C)(xi). 150 So. 3d at 1113 ("In this case, the First District concluded that the City's claim to sovereign immunity rested on a pure question of law. We agree. Because this case falls squarely within the new rule amendment, we determine that the City should be entitled to the benefit of the new rule."). Notably, a review of the underlying order in *Beach Community Bank* reveals a pro forma order denying a motion to dismiss.[1] Like the

[1] "The practice of consulting records of the Supreme Court as an aid to a proper understanding and interpretation of its published opinions is a common practice among the courts of this state, and has proved helpful in determining the applicability of a published decision to the facts of a given case." *Mitchell v. Gillespie,* 161 So. 2d 842, 843 (Fla. 1st DCA 1964). Additionally, this Court may take judicial notice of the underlying order in *Beach Community Bank*, which was part of this Court's records in *Beach Community Bank v. City of Freeport, Fla.*, Case No. SC13-455. *See* § 90.202(6), Fla. Stat. ("A court may take judicial notice of the . . . [r]ecords of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States.").

order at issue in the present case, it implicitly denied a claim of sovereign immunity as a matter of law—that is, it contained no express mention of sovereign immunity, nor any explicit statement that it was denying entitlement to that immunity as matter of law. Yet this Court held that the *Beach Community* order fell "squarely within" the parameters of Rule 9.130(a)(3)(C)(xi). 150 So. 3d at 1113.

In short, as the decision below noted, *Beach Community* "permitted interlocutory appellate review of an order denying immunity without any discussion of whether the order under review 'explicitly' stated that the governmental entity was not entitled to sovereign immunity as a matter of law." App. 14-15. In light of this, the First District's decision, which imposed an explicit-statement requirement, expressly and directly conflicts with *Beach Community*, which did not impose any such requirement.

II. THE ABILITY OF A PARTY TO SEEK INTERLOCUTORY REVIEW WHEN A TRIAL COURT ERRONEOUSLY DENIES A CLAIM OF SOVEREIGN IMMUNITY IS A SIGNIFICANT ISSUE WARRANTING THIS COURT'S REVIEW.

This Court should grant review because a sovereign entity's ability to seek interlocutory review of a trial court's erroneous denial of immunity presents a significant issue of statewide impact. As this Court has noted, sovereign immunity is grounded in the constitutional principle of separation of powers and is "part of

the public policy of the State." *Spangler v. Fla. State Tpk. Auth.*, 106 So. 2d 421, 424 (Fla. 1958); *see also Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1022 (Fla. 1979) (recognizing that "certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance"). The express and direct conflict created by the First District's decision warrants review for three main reasons.

First, where a defendant is entitled to sovereign immunity as a matter of law, it should have the ability to resolve that legal question at the earliest possible stage of litigation. This stems from the fact that, upon establishing that sovereign immunity applies as a matter of law, "the sovereignly immune entity is both immune from liability and immune from suit." *Rodriguez v. Miami-Dade Cty.*, 117 So. 3d 400, 410 (Fla. 2013) (Canady, J., concurring in result only). From that point, "the erroneous continuation of legal proceedings against the immune governmental entity constitutes irreparable harm because the full benefit of the legal immunity from suit cannot be restored on appeal." *Id.* And this principle applies especially where the record demonstrates that sovereign immunity applies, and no further factual development is necessary to resolve the legal question. *See* App. 13 ("Any dispute related to the quality of FHP's monitoring the interstate does not seem to relate to the question of whether FHP is immune from suit.

Instead, these disputed facts relate to the question of FHP's negligence, rather than its immunity from suit.").

Second, imposing an explicit-statement requirement in order for appellate jurisdiction to vest under Rule 9.130(a)(3)(C)(xi) elevates form over substance by mandating the use of "magic words" by a trial court. As the decision below noted, this "permits a trial court to frustrate a party's legitimate assertion of immunity simply by failing to provide reasons" for its denial of a motion asserting sovereign immunity. App. 12; *see, e.g.*, *Miami-Dade County v. Pozos*, No. 3D15-2167, 2017 WL 621233 at *10 (Fla. 3d DCA Feb. 15, 2017), *motion for rehearing & rehearing en banc pending*, (Rothenberg, J., dissenting) ("The trial court's order denying the County's motion for summary judgment provides this Court with absolutely no guidance. The order does not contain the basis for the trial court's ruling, perform even a perfunctory analysis, indicate whether there were any material factual issues in dispute or factual issues generally reserved for the trier of fact, or specify which of the prong(s) of the analysis the County failed to establish."). For that reason, a party's ability to appeal a non-final order denying entitlement to sovereign immunity should not turn on the facial sufficiency of the trial court's order. Instead, it should turn on whether the party's claim to immunity presents the district court with "solely a question of law." *Keck v. Eminisor*, 104

So. 3d 359, 370 (Fla. 2102) (Pariente, J., concurring).

Finally, this case warrants review because the issue presented reaches beyond just the parties to this case. Sovereign immunity can be claimed by the State and its agencies or subdivisions; this includes "executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority." § 768.28(2), Fla. Stat.. These governmental entities have a strong interest in resolving legal entitlement to immunity as early in the course of litigation as possible. And this is true for plaintiffs bringing suit against these entities as well. Indeed, litigating a case through trial to final judgment only to have it reversed on appeal due to a defendant's sovereign immunity results in wasted resources for all parties involved, including the judicial branch.

For these reasons, this case warrants this Court's review.

CONCLUSION

This Court has jurisdiction and should grant review.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

AMIT AGARWAL (FBN 125637)
Solicitor General

BRITT THOMAS (FBN 962899)
Chief Assistant Attorney General

/s/ *Rachel Nordby*
RACHEL NORDBY (FBN 56606)
Senior Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3681
(850) 410-2672 (fax)
amit.agarwal@myfloridalegal.com
britt.thomas@myfloridalegal.com
rachel.nordby@myfloridalegal.com

Counsel for Petitioner Florida Highway Patrol

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 11th day of April 2018, to the following:

Counsel for Respondent

Jack J. Fine
Melissa Susan Sheldon
FINE, FARKASH & PARLAPIANO, P.A.
622 NE 1st Street
Gainesville, Florida 32601
Telephone: (352) 376-6046
Facsimile: (352) 372-0049
jfine@ffplaw.com
msheldon@ffplaw.com
swright@ffplaw.com
gdyson@ffplaw.com

Daniel Glassman
GLASSMAN & ZISSIMOPULOS
804 NW 16th Ave., Ste. B
Gainesville, FL 32601
dan@putclientsfirst.com

/s/ *Rachel Nordby*
Rachel Nordby

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ *Rachel Nordby*
Rachel Nordby