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SC18-468

In the Supreme Court of Florida

FLORIDA HIGHWAY PATROL, A DIVISION OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,
Petitioner,

v.

LASHONTA RENEA JACKSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF VONTAVIA KIARA ROBINSON, DECEASED, ON BEHALF OF MULTIPLE BENEFICIARIES,
Respondent.

PETITIONER'S REPLY BRIEF

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

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ARGUMENT

I. RULE 9.130(A)(3)(C)(XI) PERMITS AN APPEAL OF A NON-FINAL ORDER DENYING SOVEREIGN IMMUNITY IF THE RECORD SHOWS THAT THE DEFENDANT IS ENTITLED TO SOVEREIGN IMMUNITY AS A MATTER OF LAW BUT THE TRIAL COURT DID NOT EXPLICITLY PRECLUDE IT AS A DEFENSE.

A. The plain text of Rule 9.130(a)(3)(C)(xi) establishes that an express statement is not required.

Jackson's chief textual argument is that "[t]he plain language of the rule requires an express determination that 'as a matter of law, a party is not entitled to sovereign immunity.'" Answer Br. 10, 14-15. Yet she does not point to any text requiring an "express determination"—because it is not in the rule. *See* Fla. R. App. P. 9.130(a)(3)(C)(xi) (authorizing "[a]ppeals to the district courts of appeal of non-final orders . . . that . . . *determine* . . . that, as a matter of law, a party is not entitled to sovereign immunity," regardless of whether such an order uses magic words or otherwise expressly states that a party is not entitled to sovereign immunity (emphasis added)); *Dep't of Children & Families v. Feliciano*, 259 So. 3d 957, 961 (Fla. 3d DCA 2018) (Rothenberg, C.J., concurring in result only) ("This text does not contain any words limiting the appeal of non-final orders to those orders that *expressly* state that a party is not entitled to sovereign immunity."). Nor does Jackson offer any persuasive basis for judicially inserting the word "expressly" into the text of the rule. *See* Init. Br. 18.

Although Jackson faults *FHP* for "defining the word 'determine' without discussing the word's context within the phrase or addressing its relation to any of the other words in the rule" (Answer Br. 14), FHP relies on *this Court's definition* of "determine" in Rule 9.130. *See Doctor's Hospital of Hollywood, Inc. v. Madison*, 411 So. 2d 190, 191 (Fla. 1982). And contrary to Jackson's argument, the rule's text does not contain either direction to appellate courts regarding where they *must* look or any constraint on where appellate courts *may* look in determining the character of the trial court's order. *See* Init. Br. 16-18.

Next, Jackson argues that *Hastings v. Demming*, 694 So. 2d 718 (Fla. 1997) "serves as a clear rebuttal" to FHP's textual argument. Answer Br. 16. In *Hastings*, the Court held that to be appealable under Rule 9.130(a)(3)(C)(v), an order denying summary judgment based on entitlement to workers' compensation immunity must "specifically stat[e] that, as a matter of law, such a defense is not available to a party." *Id.* at 720. But this Court has never extended *Hastings*' express-statement rule to orders denying sovereign immunity. And for good reason: Courts need not and should not resort to canons of construction when, as here, the text is unambiguous; Jackson's counter-textual interpretation of Rule 9.130(a)(3)(C)(xi) cannot be reconciled with this Court's decision in *Beach Community Bank v. City of Freeport*, 150 So. 3d 1111 (Fla. 2014) (per curiam), which post-dates *Hastings* and construes the precise subsection of the rule at issue here; certain policy-based

reasons for judicially inserting an express-statement requirement into the rule addressing appeals in workers' compensation cases do not apply to appeals challenging legally erroneous denials of sovereign immunity; and Jackson's proposed extension of *Hastings* would frustrate the purpose of Rule 9.130(a)(3)(C)(xi), significantly diminish the value of sovereign immunity, exalt form over substance, and yield arbitrary and indefensible results. *See* Init. Br. 24-28.

Jackson falls back on the argument that, because the relevant language in the two rules is identical, the rules *must* be construed identically. Answer Br. 16-20, 21-22. That argument is unpersuasive for several reasons.

First, Jackson seeks to convert a canon of construction that is often, but not always, applicable (*see*, *e.g.*, *Citizens Prop. Ins. Corp. v. Calonge,* 246 So. 3d 447, 450 (Fla. 3d DCA 2018) (explaining that courts "may assume [the Legislature] intended the same meaning to apply)), into an irrebuttable presumption that the Court *must* have intended the rules to mean the same thing. *E.g.*, Answer Br. 19 (arguing that *Hastings* "*must* apply," and that the rules "*must* be considered analogous" (emphases added)). For the reasons described above and in FHP's Initial Brief, they need not be considered analogous. *See* Init. Br. 24-28.

Second, although some district courts of appeal have extended the workers' compensation rule into this context, it is understandable that lower courts would seek to harmonize the text of a rule with this Court's authoritative interpretation of a

different rule that uses the same language. *See*, *e.g.*, *Feliciano*, 259 So. 3d at 970 (Luck, J., concurring) (relying on *Hastings*, 694 So. 2d 718; *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 821 (Fla. 1997)). That is in part because lower courts do not have the authority to reconsider prior decisions of this Court. Unlike the lower courts, however, this Court is free to reconsider its prior rulings and to amend the text of its own procedural rules; and, in any event, this Court is not required to mechanically extend prior rulings to substantially different contexts.

Third, and relatedly, Jackson offers no persuasive reason for extending *Hastings* at the expense of *Beach Community Bank*, instead of applying *Beach Community Bank* at the expense of *Hastings*. *See* Amicus Br. of Florida League of Cities & City of Boca Raton 17-20. For purposes of this case, the Court need not decide whether *Hastings* should be reconsidered. It is enough to conclude that *Hastings* should not be extended, and that any ostensibly insurmountable tension between *Hastings* and *Beach Community Bank* may be addressed by either reconsidering the former decision in an appropriate case or amending the text of the workers' compensation rule to require an express statement.

B. This Court's precedent confirms that the Rule does not require an express statement.

As explained in FHP's initial brief, this Court has never held that Rule 9.130(a)(3)(C)(xi) requires an express statement that the defendant is not entitled to

sovereign immunity as a matter of law; the only case in which the Court has applied that rule confirms that it does not require such a statement; and the rule for workers' compensation immunity appeals should not be extended to cases involving sovereign immunity. Init. Br. 18-28; *see Beach Community Bank*, 150 So. 3d at 1112-13.[1]

Jackson argues that the Court should ignore *Beach Community Bank*. She maintains that there "the issue presented was not *compliance* with or *application* of rule 9.130. The non-final order could not have been analyzed for [its] compliance with procedural requirements which were not in existence when entered." Answer Br. 23. Yet the *precise issue* before the Court in *Beach Community Bank* was the First District's jurisdiction, the subject of Rule 9.130: The First District had relied on its certiorari jurisdiction, but that basis disappeared after this Court decided *Rodriguez v. Miami-Dade County*, 117 So. 3d 400, 404-06 (Fla. 2013). *See Beach Community Bank*, 150 So. 3d at 1112-13. Thus, the Court decided (1) that the First District had jurisdiction under the new Rule 9.130(a)(3)(C)(xi), and (2) that the City was entitled to sovereign immunity. And even though the rule was "not in existence" when the trial court entered its non-final order, this Court expressly determined that

[1] Jackson erroneously asserts that *Beach Community Bank* is "the only basis" proffered by FHP for "expanding this Court's rule." (Answer Br. 15-16). To the contrary, FHP relies on the text, *Beach Community Bank*, the purpose of the rule, and the practical consequences of an express-statement requirement in advocating against expanding the Court's workers' compensation immunity rule to apply in sovereign immunity cases.

"the City should be entitled to the benefit of the new rule" because the non-final order there fell "squarely within the new rule amendment." *Beach Community Bank*, 150 So. 3d at 1113; *see also id.* at 1115 (Lewis, J., concurring in part and dissenting in part) (stating that the Court had "retroactive[ly] appli[ed]" the new Rule 9.130(a)(3)(C)(xi)). In other words, the Court did exactly what Jackson says it "could not have" done: It "analyze[d] . . . the non-final order . . . for [its] compliance with" Rule 9.130(a)(3)(C)(xi). Answer Br. 23.[2]

In short, *Beach Community Bank* addressed the "exact scenario" presented here: an interlocutory appeal of a non-final order denying a claim of sovereign immunity without any express statement that the defendant is not entitled to sovereign immunity as a matter of law. 150 So. 3d at 1115. Affirming the First District's decision here would thus be flatly inconsistent with *Beach Community Bank*.

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[2] Jackson mistakenly suggests that the Court "never addressed" the non-final order appealed from in *Beach Community Bank*. Answer Br. 15-16, 23. Yet the appealability, and merits, of that non-final order were the only issues before the Court, and the Court resolved both issues. *See Beach Community Bank*, 150 So. 3d at 1115.

C. An express-statement requirement would frustrate the purpose of Rule 9.130(a)(3)(C)(xi).

Addressing FHP's discussion of this Court's purpose in adopting Rule 9.130(a)(3)(C)(xi), Jackson asserts that FHP has reached an "illogical conclusion" and has called for an "erroneous application of the holding" in *Keck v. Eminisor*, 104 So. 3d 359 (Fla. 2012). Answer Br. 20. A careful review of the pertinent authorities supports FHP's submission.

In both *Keck* and *In re Amendments to Fla. R. App. P. 9.130*, 151 So. 3d 1217 (Fla. 2014), the Court made clear that it sought to adopt a rule that would allow appellate review of orders denying sovereign immunity where "the issue turns on a matter of law." *Keck*, 104 So. 3d at 369; *In re Amendments*, 151 So. 3d at 1217.[3] That purpose was based on the Court's understanding that erroneous denials of sovereign immunity deprive defendants of the right bestowed by statute to be protected from suit altogether. *Keck*, 104 So. 3d at 366; *see* Init. Br. 30. And whether an issue *turns on* a matter of law does not depend on whether a trial court has included magic words in its opinion. Thus, an express-statement rule would frustrate

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[3] Jackson asserts (Answer Br. 20-21) that Rule 9.130 serves generally as a restriction on the type and number of interlocutory appeals, but the plain text of Rule 9.130(a)(3)(C)(xi), as well as this Court's specific description in *Keck* of the purpose underlying that particular subsection, offer far better evidence of the Court's purpose in adopting that specific provision than Jackson's characterization of the general "thrust" of Rule 9.130.

Rule 9.130(a)(3)(C)(xi)'s purpose by preventing appellate review in cases where the sovereign-immunity issue sought to be raised on appeal turns on a matter of law but the trial court either sought to insulate its legal ruling from appellate review or failed to draft its order with sufficient precision. *See*, *e.g.*, Init. Br. 32-33 (citing examples).

D. Construing Rule 9.130(a)(3)(C)(xi) to include an express-statement requirement would significantly diminish the practical value of sovereign immunity and would yield arbitrary and indefensible results.

An express-statement rule in this context would be a drain on the resources of plaintiffs, defendants, and courts alike. Init. Br. 31-32. It would also result in arbitrary and indefensible results, allowing trial courts and plaintiffs to insulate demonstrably erroneous legal rulings from appellate review. *Id.* at 32-33. In response, Jackson argues that allowing review of non-final orders without an express statement "would constitute the creation of a substantial judicial inefficiency." Answer Br. 25. Jackson is incorrect.

Jackson first contends that appellate courts will be forced to "revie[w] an untold number of interlocutory appeals" (Answer Br. 34), or "virtually any denied motion on the basis of sovereign immunity" (Answer Br. 24). Not so. The appellate courts may only review cases over which they have appellate jurisdiction; they cannot review cases where the record reveals that genuine issues of material fact going to sovereign immunity exist. Moreover, increased appellate review of orders

denying sovereign immunity would *increase* efficiency, as it would end many cases at an earlier stage in the litigation and would prevent trials against sovereignly immune defendants from ever taking place.

Second, Jackson contends that refusing to extend the express-statement rule would invade "the critical function of the trial judge." Answer Br. 24; *see id.* at 32-35. Yet *appellate* courts, not trial courts, determine *appellate* jurisdiction. *E.g.*, *English v. McCrary,* 348 So. 2d 293, 298 (Fla. 1977) ("Every court has judicial power to hear and determine the question of its own jurisdiction . . . ."). So far from invading a "critical function" of the trial court, FHP's position vindicates the authority of appellate courts and ensures that trial courts are not licensed to arbitrarily divest appellate courts of jurisdiction to resolve pure issues of law.

II. THE FIRST DISTRICT'S DISMISSAL SHOULD BE REVERSED AND THE CASE SHOULD BE REMANDED.

As explained in FHP's initial brief, the First District's decision should be reversed and the Court should remand for the First District to decide in the first instance whether FHP is entitled to sovereign immunity. Although Jackson contends (Answer Br. 31-34) that genuine issues of material fact relating to sovereign immunity exist, this Court should not address that question in the first instance. *See Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 950 (Fla. 2011) (remanding to district

court of appeal to "consider and decide issues that were raised but not reached by the district court").

Jackson also asserts that the First District "ma[de] its own determination about the availability of sovereign immunity." Answer Br. 26. That is incorrect. Because the First District held that it lacked jurisdiction under Rule 9.130(a)(3)(C)(xi), the court had no occasion to resolve the merits of the parties' dispute concerning sovereign immunity.

Nor did the court purport to do so. In his separate opinion, Judge Winokur cast doubt on Jackson's merits arguments, opining: "*Without ruling on the merits of this appeal*, FHP makes a sound argument that the trial court erred in finding that issues of material fact precluded a ruling that it was immune from suit." *Fla. Highway Patrol v. Jackson*, 238 So. 3d 430, 436 (Fla. 1st DCA 2018) (Opinion of Winokur, J.) (emphasis added); *see also id.* (noting that "[a]ny dispute related to the quality of FHP's monitoring the interstate," the only dispute to which the trial court referred in its order, "does not seem to relate to the question of whether FHP is immune from suit," and that "these disputed facts relate to the question of FHP's negligence, rather than its immunity from suit"). As Judge Winokur took care to explain, however, he did not purport to offer any "ruling on the merits of this appeal." *Id.* Even if he had, moreover, the other two members of the panel concurred in the result only. *See id.* at 438 (noting that Judge Lewis "concurs in result and

concurs in certification," and that Judge Bilbrey "concurs in result with opinion," which opinion did not offer any view on the merits of the sovereign immunity issue).

In short, while Judge Winokur referred to the "possible error" of the trial court regarding the merits of FHP's sovereign immunity claim, the First District disposed of the case "[w]ithout ruling on the merits of this appeal." *Id.* at 436 (Winokur, J.); *see also id.* at 438 (Bilbrey, J., concurring in result) ("Dismissal of the appeal is therefore the correct result."). Thus, remanding this issue to the First District is the proper course here.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in FHP's initial brief, the Court should reverse and remand.

Respectfully submitted.

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