

IN THE SUPREME COURT OF FLORIDA

Case No. SC11-1913

(Third DCA Case No. 3D10-856)

JOSE LAZARO RODRIGUEZ,

Petitioner,

vs.

MIAMI-DADE COUNTY,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

On Petition for Discretionary Jurisdiction to Review
Conflict Certified by Third District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

Jose Rodriguez was the owner of a car stereo and detailing business who was shot multiple times and severely injured by a Miami-Dade police officer when Mr. Rodriguez responded to his store after being alerted by his alarm service that his burglar alarm had been triggered. Mr. Rodriguez survived the shooting but suffered severe permanent injuries. He brought a negligence action against Miami-Dade County (“the County”) based on the conduct of its agent, Officer Jesus Hernandez, at the burglary scene. Op. 10-11

The County moved for summary judgment on the grounds, *inter alia*, that the County was entitled to sovereign immunity for Officer Hernandez’s actions. The trial court denied the motion for summary judgment with respect to the negligence claim. The County filed a petition for writ of certiorari with the Third District Court of Appeal, seeking review of the denial of its motion for summary judgment. As the basis for invoking the jurisdiction of the appellate court, the County asserted that the denial of its motion for summary judgment based on sovereign immunity was reviewable by certiorari. Op. 2. In response, Rodriguez argued that the petition should be dismissed for lack of certiorari jurisdiction based upon this Court’s opinion in *Department of Education v. Roe*, 679 So.2d 756 (Fla. 1996). Op. 12-13. In an opinion filed on August 31, 2011, the Third District Court of Appeal held that it had certiorari jurisdiction based on

its conclusion that if the County is entitled to sovereign immunity the trial itself constitutes irreparable harm. Op. 13-14 & n.4. It went on to address the merits, granted the petition, and certified conflict with the decisions in *Florida A & M University Board of Trustees v. Thomas*, 19 So.3d 445 (Fla. 5th DCA 2009),^{11/} and *Pinellas Suncoast Transit Authority v. Wrye*, 750 So.2d 30 (Fla. 2d DCA 1996). Op. at 19. On September 28, 2011, Jose Lazaro Rodriguez, timely filed his notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

As certified, the Third District's opinion below, holding that it had certiorari jurisdiction to review the trial court's denial of a motion for summary judgment based on grounds of sovereign immunity, directly and expressly conflicts with the decisions of the Fifth District in *Florida A & M University Board of Trustees v. Thomas*, 19 So.3d 445, and the Second District in *Pinellas Suncoast Transit Authority v. Wrye*, 750 So.2d 30, which held that the district court lacked certiorari jurisdiction to review the denial of a motion for summary judgment or motion to dismiss based on a defense of sovereign immunity. In addition, the opinion below conflicts with and misapplies this Court's opinion in *Department of*

^{1/} In its opinion, the Third District incorrectly identified *Florida A & M University Board of Trustees v. Thomas* as a decision of the First District Court of Appeal.

Education v. Roe, 679 So.2d 756, which denied interlocutory review of a nonfinal order denying a motion to dismiss a negligence claim based on a defense of sovereign immunity. The opinion below also conflicts with the decision in *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 46 So.3d 1051 (Fla. 1st DCA 2010), *review granted*, 56 So.3d 765 (Fla. 2011), in which the First District applied *Roe* to preclude certiorari review of the denial of a motion to dismiss based on sovereign immunity. That case is pending for review in this Court. *Citizens Property Ins. Corp. v. San Perdido Ass'n, Inc.*, Case No. SC10-2433. This Court should accept jurisdiction here to resolve the conflict on this important issue with respect to the certiorari jurisdiction of the district courts of appeal.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE A SIGNIFICANT CONFLICT IN FLORIDA LAW WITH RESPECT TO THE CERTIORARI JURISDICTION OF THE DISTRICT COURTS OF APPEAL

As certified by the Third District Court of Appeal, there is an express and direct conflict between the decision below and the decisions of the Fifth and Second District Courts of Appeal in *Florida A & M University Board of Trustees v. Thomas*, 19 So.3d 445, and *Pinellas Suncoast Transit Authority v. Wrye*, 750 So.2d 30, with respect to the certiorari jurisdiction of the district courts. In each of those cases, the Fifth District and Second District held that it lacked certiorari

jurisdiction to review the denial of a motion for summary judgment or a motion to dismiss, respectively, based on the assertion of a defense of sovereign immunity. In direct conflict, here the Third District held that it had certiorari jurisdiction to review the denial of the motion for summary judgment based on grounds of sovereign immunity, and granted the petition.

In *Thomas*, as here, the defendant/petitioner sought a writ of certiorari from the denial of its motion for summary judgment. In denying the writ, the court stated:

Petitioner seeks a writ of certiorari, contending that the trial court's denial of its motion for summary judgment constituted a departure from the essential requirements of law. It is petitioner's position that respondent's claim is barred by application of the sovereign immunity doctrine. ***We conclude that we lack jurisdiction to review this interlocutory order.*** See *Dep't of Education v. Roe*, 679 So.2d 756 (Fla. 1996); *School Bd. of Miami-Dade County v. Leyva*, 975 So.2d 576 (Fla. 3d DCA 2008).

19 So.3d at 446 (emphasis supplied).^{12/}

^{2/} In *School Bd. of Miami-Dade County v. Leyva*, 975 So.2d 576, 576 (Fla. 3d DCA 2008), the Third District itself held it did not have certiorari jurisdiction to review denial of a motion to dismiss based on grounds of sovereign immunity:

Asserting sovereign immunity, the School Board of Miami-Dade County petitions for a writ of certiorari, asking that we quash a trial court's order denying its motion to dismiss the negligence action brought by the estate of a child killed at a school crosswalk. Relying on *Department of Education v. Roe*, 679 So.2d 757 (Fla.

In *Wrye*, the plaintiffs filed a complaint against the Pinellas Suncoast Transit Authority alleging negligence and breach of contract. The transit authority sought to appeal the trial court's denial of its motion to dismiss based on sovereign immunity. The Second District dismissed the appeal:

We conclude that we do not have jurisdiction to review the denial of the motion to dismiss based on sovereign immunity either as a nonfinal appeal or as a certiorari proceeding. In reaching such a conclusion, we align ourselves with *State, Department of Transportation v. Paris*, 665 So.2d 381 (Fla. 4th DCA 1996); *Department of Education v. Roe*, 656 So.2d 507 (Fla. 1st DCA 1995), *review granted*, 663 So.2d 629 (Fla. 1995); and with Judge Sharpe's well-reasoned dissent in *Department of Transportation v. Wallis*, 659 So.2d 429 (Fla. 5th DCA 1995).

750 So.2d at 30 (emphasis supplied).

Here, the Third District reach the opposite conclusion and held that it had certiorari jurisdiction to review the trial court's denial of the County's motion for summary judgment based upon its defense of sovereign immunity: "We cannot, however, join our sister courts in refusing, on jurisdictional grounds, to entertain all writs from denials of motions to dismiss or for summary judgment on sovereign immunity grounds." Op. at 5-6. It went on to determine that the claim was barred by sovereign immunity, grant the petition and certify conflict, stating:

1996), we conclude that we do not have jurisdiction to review this denial of the motion to dismiss based on sovereign immunity. (emphasis supplied)

or the foregoing reasons, we exercise our jurisdiction to preclude prosecution as the sovereign remains immune from this suit and we grant the petition. In recognizing our jurisdiction to entertain, where appropriate, certiorari jurisdiction where a governmental entity's claim is that it remains immune from suit, rather than that it is not liable for lack of duty, we certify conflict with the decisions in *Florida A & M University Board of Trustees v. Thomas*, 19 So.3d 445, 446 (Fla. 1st [sic] DCA 2009) and *Pinellas Suncoast Transit Authority v. Wrye*, 750 So.2d 30 (Fla. 2d DCA 1996).

Op. at 19.

Thus, the Third District's decision in this case expressly and directly conflicts with the Fifth District's decision in *Thomas*, 19 So.3d 445, and the Second District's decision in *Wrye*, 750 So.2d 30, on the question of whether the district courts have certiorari jurisdiction to review denial of motions to dismiss or for summary judgment based on grounds of sovereign immunity. Therefore, this Court has discretionary jurisdiction to review the decision below. Art. V, § 3(b)(3), Fla. Const.

The Third District's decision also conflicts with this Court's opinion in *Roe*, 679 So.2d 756. That opinion was relied on by the Fifth District in holding that it lacked certiorari jurisdiction in *Thomas*, 19 So.3d at 446. It was also the basis of the Third District's holding that it lacked certiorari jurisdiction in *Leyva*, 975 So.2d at 576. In holding that it lacked jurisdiction in *Wrye*, 750 So.2d at 30, the Second District aligned itself with the First District's opinion in *Department of Education*

v. Roe, 656 So.2d 507 (Fla. 1st DCA 1995), which was subsequently approved by this Court in *Roe*, 679 So.2d at 759.

Roe involved a negligence claim against the Department of Education (“DOE”). Following the trial court’s denial of its motion to dismiss on grounds of sovereign immunity, the DOE filed a petition for writ of certiorari. The First District initially treated the petition as an interlocutory appeal, reasoning that this Court’s decision in *Tucker v. Resha*, 648 So.2d 1187 (Fla. 1994), which permitted interlocutory review of an order denying summary judgment based on a defense of qualified immunity, was also applicable to denial of a motion to dismiss based on sovereign immunity. The First District addressed the merits and ruled in DOE’s favor, remanding with directions to dismiss the claim with prejudice. However, on rehearing the district court retreated from its decision to treat the petition as an interlocutory appeal, and denied certiorari. *Roe*, 656 So.2d at 507-08.

This Court accepted jurisdiction to resolve the conflict between the First District’s opinion in *Roe* and the opinion in *Department of Transportation v. Wallis*, 659 So.2d 429 (Fla. 5th DCA 1995). *Roe*, 679 So.2d at 757. On review, this Court declined to extend its decision in *Tucker*, 648 So.2d 1187, to claims of sovereign immunity, and held that interlocutory review is not available for a nonfinal order denying a governmental entity’s claim of sovereign immunity as a defense to a state law cause of action. *Roe*, 679 So.2d at 759. In reaching that

decision, this Court rejected the argument that suits against governmental entities grounded upon the statutory waiver of sovereign immunity are analogous to, and should be treated similarly to, suits against public officials involving claims of qualified immunity. The Court expressly found that forcing the state to wait until after final judgment for appellate review of the issue sovereign immunity would not deprive the state of the benefit of the immunity:

Florida has agreed to be sued in its own courts for tort actions. § 768.28. Further, forcing the state to wait until a final judgment before appealing the issue of sovereign immunity does not present the same concerns that exist in the area of qualified immunity. For example, public officials who defend tort suits against the state are not sued in their personal capacities. As a result, defending these suits is not likely to have a chilling effect on the exercise of public officials' discretion in the discharge of their official duties. In addition, *although the state will have to bear the expense of continuing litigation, the benefit of immunity from liability, should the state ultimately prevail on the sovereign immunity issue, will not be lost simply because review must wait until after final judgment.*

Roe, 679 So.2d at 759 (emphasis supplied).

In direct conflict here, the Third District reached the exactly opposite result. It based its determination that it had certiorari jurisdiction to review the trial court's denial of summary judgment on grounds of sovereign immunity on its conclusion that the County would suffer irreparable harm if it were required to go to trial because if it is entitled to sovereign immunity "it is the trial itself that

constitutes the harm.” Op. at 13-14 & n.4. That conclusion is a misapplication of this Court’s decision in *Roe*, and directly and expressly conflicts with the Fifth District’s application of *Roe* in determining that it lacked certiorari jurisdiction in *Thomas*, 19 So.3d at 446.

In addition, the opinion below conflicts with the First District’s decision in *Citizens Prop. Ins. Corp. v. San Perdido Ass’n, Inc.*, 46 So.3d 1051. There the district court declined interlocutory review by appeal, prohibition or certiorari, of the denial of Citizens’ motion to dismiss based on grounds of sovereign immunity. *Id.* at 1053. The First District found that, “[a]s *Roe* suggested, there is no irreparable harm in requiring that appellate consideration of the sovereign immunity claim await the entry of a final judgment.” *Id.* It certified conflict and certified the following question as one of great public importance:

Whether in light of the Supreme Court’s ruling in *Department of Education v. Roe*, 679 So.2d 756 (Fla. 1996), review of the denial of a motion to dismiss based on a claim of sovereign immunity should await the entry of a final judgment in the trial court?

Id. That case is presently pending before this Court for review in *Citizens Property Ins. Corp. v. San Perdido Ass’n, Inc.*, No. SC10-2433 (*review granted*, Feb. 17, 2011). It has been fully briefed and is awaiting decision, having recently been argued before this Court on September 8, 2011.

In light of the conflict among the district courts and the Third District’s

misapplication of this Court's decision in *Roe*, this Court has discretionary conflict jurisdiction. *See Wallace v. Dean*, 3 So.3d 1035, 1039-40 (Fla. 2009). This Court should accept jurisdiction to resolve the conflict and settle this important issue with respect to the certiorari jurisdiction of the district courts of appeal.

CONCLUSION

For the foregoing reasons, Petitioner Jose Lazaro Rodriguez respectfully requests this Court to accept jurisdiction, pursuant to the certification of conflict, and to resolve the conflict between the Third District's opinion below and the opinions of the Second and Fifth Districts.

Respectfully submitted,

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I HEREBY CERTIFY that the type size and style used in this brief is Times New Roman 14-point font, in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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