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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-455

FIRST DCA CASE NO.: 1D12-3415
TRIAL COURT CASE NO.: 2012-CA-163

BEACH COMMUNITY BANK,
Petitioner

v.

CITY OF FREEPORT, FLORIDA,
Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

Rules

PRELIMINARY STATEMENT

Petitioner, Beach Community Bank, will be referred to as "the Bank." Respondent, the City of Freeport, Florida, will be referred to as "the City."

All references to the opinion of the First District Court of Appeal (the "First District") in this action are by page number in the following format: [Op.__].

STATEMENT OF THE CASE AND FACTS

The Bank sued the City for its alleged negligent failure to investigate and determine that a bank issuing an irrevocable standby letter of credit (intended to guarantee funds for the completion of improvements in a local subdivision) was a "legitimate business," that it had "the financial ability and wherewithal . . . to pay," and that the letter of credit was not otherwise fraudulent or uncollectable. [Op.2-3].

The City moved to dismiss the Complaint asserting that policy decisions related to how it spends its funds – including the decision to not allocate its limited resources towards such investigations – was a qusi-legislative discretionary function of government into which the courts could not intrude under Article II, § 3 of the Florida Constitution. The question turned on the interpretation of portions of the City's Land Development Code ("LDC") – a written municipal ordinance interpreted as a matter of law. The issue was whether the language of the LDC *required* the City to investigate such that its failure to do so could be considered operational negligence. The trial court denied the City's motion.

Although this Court's decision in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996) prevented the City from pursuing an interlocutory *appeal as a matter of right*, the City requested that the First District exercise its discretionary jurisdiction under Article V, § 4(b) of the Florida Constitution to intervene and protect its sovereign *immunity from suit*. In a unanimous opinion following oral arguments, Judges Ray, Padovano and Rowe, held that, in these circumstances, the City had met the stringent requirements for establishing the court's certiorari jurisdiction and quashed the trial court's order.[1]

The First District recognized that under Article II, § 3 of the Florida Constitution, the City's policy-making decisions "cannot be the subject of traditional tort liability." [Op.4-5 (citing *Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009))]. The court determined that the issue was not merely the City's *lack of liability* flowing from the absence of duty but rather an inherent "absolute

[1] The First District found that while "the LDC obliged the City to approve as adequate the *amount* of the security," the amount of the security was not contested by the Bank. [Op.2, 12 (emphasis in original)]. The First District further found that "security could be fully satisfied [under the LDC] in several ways, including . . . an irrevocable letter of credit." [Op.2]. The court concluded that "[t]he City's decision that receipt of a[n irrevocable letter of credit] was sufficient compliance with the LDC falls within a municipality's inherent, fundamental policy-making authority" and that "[r]egardless of its wisdom, the City's decision not to dedicate resources towards fraud prevention by investigating the authenticity of the security or the financial solvency of its backer, was a policy decision that we are not permitted to second-guess." [Op.12].

immunity from suit" itself. [Op.5].[2] The First District recognized that because it is impossible to "reimmunize" a defendant from suit after the fact, intervention by way of certiorari was appropriate given the clear issues in the case. [Op.5-6].

SUMMARY OF THE ARGUMENT

The Bank seeks this Court's discretionary review under Article V, § 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(iv), Fla. R. App. P. This Court must decline review because the First District's opinion does not expressly and directly conflict with *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), *Florida A & M Univ. Bd. of Trust. v. Thomas*, 19 So. 3d 445 (Fla. 5th DCA 2009), or *Pinellas Suncoast Transit Authority v. Wrye*, 750 So. 2d 30 (Fla. 2d DCA 1996).

In *Roe*, this Court simply declined to create a new class of non-final orders *appealable as a matter of right* under Rule 9.130; it did not address the availability of discretionary jurisdiction by way of certiorari under Rule 9.030(b)(2)(A). Although the courts in *Thomas* and *Wrye* declined to exercise their discretionary jurisdiction (via unelaborated citation to *Roe*), the opinions did not expressly or directly adopt a bright-line rule prohibiting discretionary review *in every case* involving sovereign immunity.

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[2] *See e.g. Wallace* at 1045 (Fla. 2009) ("[T]he absence of a duty of care between the defendant and the plaintiff results in *a lack of liability, not* application of immunity from suit. . . . the *presence of sovereign immunity* . . . simply means that the State has *not consented to suit* in its courts with regard to certain claims)) (emphasis in original) (listing cases erroneously "conflating" these issues).

ARGUMENT

THIS COURT MUST DECLINE REVIEW BECAUSE THE FIRST DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH *ROE*, *THOMAS*, OR *WRYE* ON THE AVAILABILITY OF CERTIORARI JURISDICTION IN AN APPROPRIATE CASE.

I. Discretionary review by the Florida Supreme Court is limited to district court opinions which "expressly and directly" conflict with decisions of the Court or the district courts of appeal.

This Court's discretionary jurisdiction to resolve conflicts is limited to those cases in which the decision of a district court "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. *See Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988) ("While our subject-matter jurisdiction in conflict cases necessarily is very broad, our discretion to exercise it is more narrowly circumscribed by what the people have commanded.").

By definition, "expressly" requires some written representation or expression of the legal grounds supporting the decision under review. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). A decision is not reviewable on grounds that examination of the record would demonstrate a conflict; rather, the conflict must be expressly stated "within the four corners of the opinion itself." *Fla. Star* at 288. [3] This Court has held that "[t]here can be no actual conflict discernible in an

[3] A common test to determine whether a conflict exists is to determine whether the opinions are "irreconcilable." *Aravena v. Miami-Dade Cnty.*, 928 So. 2d 1163, 1166 (Fla. 2006).

opinion containing only a citation to other case law unless one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court or of this Court." *Fla. Star* at 288, n.3.

II. The Decision of the First District Court of Appeal does not expressly or directly conflict with this Court's decision in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996).

The Bank argues that this Court's decision in *Roe* stripped the district courts of their discretionary jurisdiction to correct erroneous denials of sovereign immunity via certiorari review. *Roe*, however, was limited solely to the question of whether the logic of *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994) should be expanded to include additional categories of non-final orders subject to interlocutory *appeal as a matter of right* under Appellate Rule 9.130; it never addressed the availability of *discretionary* review.

In *Tucker*, this Court directed the creation of a new category of non-final orders subject to interlocutory *appeal* under Appellate Rule 9.130 for orders determining qualified immunity. *Tucker* at 1190 (mandating the immediate amendment of the Rule). One year later in *Dep't of Educ. v. Roe*, 656 So. 2d 507 (Fla. 1st DCA 1995),[4] the First District declined to expand "the principle stated in *Tucker*" so as to create an additional category of non-final orders reviewable by

[4] In order to distinguish between the decisions of the First District and that of this Court, the City will cite to them as *Roe (1st DCA)* and *Roe*, respectively.

interlocutory *appeal*. *Roe (1st DCA)* at 507 ("[W]e are now of the view that we should not construe *Tucker* as deciding any issue beyond that which was specifically asked in the certified question in that case.").

After concluding that *Tucker* did not authorize an *appeal as a matter of right*, the court also declined to exercise its discretionary jurisdiction noting that the "denial of a motion to dismiss does not *ordinarily* qualify for certiorari review." *Roe (1st DCA)* at 508 (emphasis added). Less than three months later, the Fifth DCA reached the opposite conclusion on the first issue and held that "claim[s] of sovereign immunity . . . fall within the ambit of *Tucker* and thus should be treated as a reviewable appeal of a non-final order." *Dep't of Transp. v. Wallis*, 659 So. 2d 429, 430 (Fla. 5th DCA 1995). Finding that an appeal was permitted, *Wallis* did not reach the issue of its discretionary jurisdiction.

This Court accepted jurisdiction to resolve the express conflict between *Roe (1st DCA)* and *Wallis* on whether *Tucker* authorized the creation of another non-final order subject to immediate *appeal*. *Roe* at 757. The cases did not conflict on the issue of *discretionary* jurisdiction and thus that issue was never before the Court. After engaging in an extensive analysis of the rationale and policy issues supporting the amendment of Rule 9.130 in *Tucker*, this Court "decline[d] to extend *Tucker* beyond the circumstances of that case to create yet another nonfinal order for which review is available." *Roe* at 759. The Court did not decide the

availability of certiorari jurisdiction under Rule 9.030(b)(2)(A) in an otherwise appropriate case.

The Third District has already noted this simple distinction:

> *Roe* did not determine the availability of discretionary jurisdiction. Instead, *Roe* simply declined the State's invitation to extend the same right of interlocutory appeal from orders denying immunity from suit to the state and its political subdivision as the court had extended to its employees acting in the scope of their employment.

Miami-Dade Cnty. v. Rodriguez, 67 So. 3d 1213, 1220 (Fla. 3d DCA 2011), *review granted by* 76 So. 3d 93 (Fla. 2011). Judge T. Kent Wetherell of the First District had also previously noted this distinction:

> *Roe* simply held that a nonfinal order denying an agency's motion to dismiss on sovereign immunity grounds was not subject to interlocutory appeal, *see* 679 So.2d at 759; the case did not address whether interlocutory review of an order denying immunity as a matter of law was available by extraordinary writ petition in an appropriate case.

Citizens Prop. Ins. Corp. v. San Perdido Ass'n, 46 So. 3d 1051, 1054 (Fla. 1st DCA 2010) (Wetherell, J. dissenting), *approved* by 104 So. 3d 344 (Fla. 2012).

Thus, *Roe* did not consider or address the availability of discretionary jurisdiction. It therefore did not create a bright-line rule prohibiting the district courts from exercising their discretion to correct erroneous denials of sovereign immunity via certiorari in an otherwise appropriate case. For these reasons, the First District's opinion below does not expressly or directly conflict with *Roe*.

III. The First District's opinion does not expressly and directly conflict with the Fifth and Second districts' opinions in *Thomas* or *Wrye*.

Article V, § 3(b)(3) of the Florida Constitution prohibits this Court from exercising its discretionary jurisdiction to review a conflict that is merely *implied* in an opinion. Moreover, this Court has held that an opinion which merely cites a controlling precedent without elaboration does not sufficiently expressly and directly conflict with another opinion even if a conflict could be demonstrated from the cited precedent.[5] *Persaud v. State*, 838 So. 2d 529, 531–32 (Fla. 2003); *Jollie v. State*, 405 So. 2d 418, 421 (Fla. 1981); *Dodi Publ'g Co. v. Editorial Am., S. A.*, 385 So. 2d 1369, 1369 (Fla. 1980). For these reasons, the Bank's cited cases, *Thomas* and *Wrye*, fail to demonstrate a sufficient conflict.

The *Thomas* court provided no explanation as to why it lacked certiorari jurisdiction beyond its unelaborated citations to *Roe* and *School Board of Miami–Dade County v. Leyva*, 975 So. 2d 576 (Fla. 3d DCA 2008). The Fifth District did not explain how or why either *Roe* or *Leyva* informed its decision and, more importantly, did not expressly declare that it lacked discretion to review the case via certiorari. The Bank can therefore only argue that *Thomas* implies a conflict – which is insufficient grounds for this Court's conflict jurisdiction.

Indeed, the *Leyva* decision (ignored by the Bank here) highlights the error in assuming a conflict where one is not expressly stated. The *Leyva* opinion is

[5] In this case, the cited precedent, *Roe*, does not demonstrate a conflict.

virtually indistinguishable from the *Thomas* opinion in that it simply held: "Relying on [*Roe*], we conclude that we do not have jurisdiction to review this denial of the motion to dismiss based on sovereign immunity." *Leyva* at 576. The Third District, however, would later clarify that it cited *Roe* only for its holding that "oftentimes, the applicability of the sovereign immunity waiver is inextricably tied to the underlying facts, requiring a trial on the merits." *See Rodriguez* at 1215, n.1. *Leyva*, the *Rodriguez* court explained, failed the test of certiorari jurisdiction because "it could not be discerned from the record that no duty existed." *Id.* at n.1, n2. Thus, even though *Leyva* could have been interpreted as implying a rule prohibiting certiorari review, such an interpretation would have been misplaced.

The *Wrye* decision – rendered prior to this Court's holding in *Roe* – merely expressed doubts about the holding of the soon-to-be overturned decision in *Wallis* and cited the dissent in *Wallis*, the Fourth District's opinion in *State, Dep't of Transp. v. Paris*, 665 So. 2d 381 (Fla. 4th DCA 1996) (adopting the dissent in *Wallis*), and the First District's decision in *Roe* (reaching the opposite conclusion of *Wallis*). Although *Wrye* expressly and directly conflicted with *Wallis* as to the limits of the *Tucker* decision, it included no discussion as to why it also declined to exercise its discretionary jurisdiction. *Wrye* does not even imply that certiorari review should be unavailable in every case involving sovereign immunity; it certainly does not *expressly* articulate such a sweeping decision.

Finally, even if the First District's decision in this case did conflict with *Thomas* or *Wrye*, intervention by this Court is unnecessary at this time. In light of the detailed analysis of the issue by both the Third District in *Rodriguez* and now the First District, there is no reason to believe that future district courts will continue to misconstrue *Roe* as stripping them of discretion to correct erroneous denials of sovereign immunity via certiorari. Furthermore, any such future opinion would likely be forced to explain its disagreement with the First and Third districts – thereby presenting this Court with an express conflict in need of resolution.

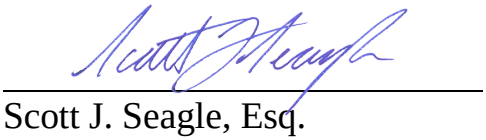
CONCLUSION

Because the opinion of the First District Court of Appeal does not expressly and directly conflict with the opinions in *Roe*, *Thomas*, or *Wrye*, this Court lacks discretion under Article V, § 3(b)(3) of the Florida Constitution to review the First District's decision in this case. Moreover, even if a conflict did exist with regards to the application of *Roe* among the district courts, this issue is being adequately resolved by the district courts and they are unlikely to continue to misapply *Roe* in the future. If they do, any such misapplication will likely expressly and directly conflict with the decision below and will provide this Court with an opportunity to intervene at that time for the purpose of announcing *Roe's* proper limits.

For all of these reasons, the Court should decline to review the decision of the First District Court of Appeal in this case.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing instrument complies with Florida Rule of Appellate Procedure 9.210(a)(2) in that it was prepared in Times New Roman, 14 point font.



Scott J. Seagle, Esq.

CERTIFICATE OF SERVICE

Pursuant to Rule 2.516, Fla. R. Jud. Admin., I certify that a true and correct copy of the foregoing was electronically served on this 10th day of April 2013 to:

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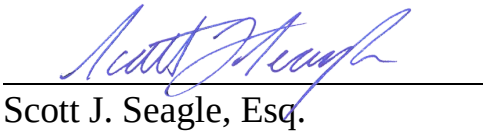

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