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IN THE SUPREME COURT OF THE STATE OF FLORIDA

BEACH COMMUNITY BANK,

Petitioner,

v.

CITY OF FREEPORT, FLORIDA,

Respondent.

SC CASE NO.: SC13-455
DCA CASE NO.: 1D12-3415
LT CASE NO.: 2012-CA-163

PETITIONER'S BRIEF ON JURISDICTION

March 28, 2013

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Preliminary Statement

Petitioner, Beach Community Bank, will be referred to as "Beach Bank". Respondent, City of Freeport, Florida, will be referred to as "Freeport". The abbreviation "DCA" will be used in lieu of "District Court of Appeal".

The DCA opinion that Beach Bank seeks this Court's review of is *City of Freeport, Florida, v. Beach Community Bank*, First DCA Case No. 1D12-3415, 38 Fla. L. Weekly D380, 2013 WL 598417 (Fla. 1st DCA 2013). Beach Bank is providing an appendix along with this brief which contains the original unreported copy of the aforementioned First DCA opinion at issue. The original unreported opinion will be cited to within this brief as "Op.".

Statement of Case and Facts

On or about March 23, 2006, Freeport issued a development order to a developer of real property located within Freeport's city limits. As a condition of issuing the development order and pursuant to Freeport's Land Development Code (hereinafter referred to as the "LDC"), Freeport required the developer to post a letter of credit to secure the completion of the development's infrastructure. Ultimately the development failed, the letter of credit securing infrastructure was discovered to be fraudulent/worthless, and Beach Bank was forced to foreclose on the underlying property.

Upon discovering that Freeport had accepted a worthless letter of credit as security for the infrastructure, Beach Bank filed a negligence action against Freeport alleging that Freeport breached a duty owed pursuant to Article 2, Section 2.01.05(N) of the LDC. Specifically, Beach Bank alleged that under the LDC, Freeport owed a special and unique duty to legal and equitable interest holders in lots within the subject development to determine that adequate security was posted by the developer to ensure that the infrastructure was completed. It is Beach Bank's contention that Freeport made the discretionary/policy decision to require the security, and then negligently performed the operational functions necessary to see the discretionary decision through to completion.

Freeport responded to Beach Bank's Complaint by filing a motion to dismiss based on the defense of sovereign immunity, which was denied. Freeport then filed a petition for writ of certiorari with the First DCA, seeking interlocutory review of the denial of its motion to dismiss. As the basis for invoking the jurisdiction of the appellate court, Freeport asserted that the denial of its motion to dismiss based on sovereign immunity was reviewable by certiorari. Op. 3. In response, Beach Bank argued that the petition should be dismissed for lack of certiorari jurisdiction based upon this Court's ruling in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996). Op. 6-7. In an opinion filed on February 18, 2013, the First DCA held that it

had certiorari jurisdiction based on its conclusion that if Freeport is entitled to sovereign immunity, then being subject to the litigation itself constitutes irreparable harm. Op. 9. The First DCA went on to address the merits, and subsequently granted Freeport's petition. Op. 13. On March 20, 2013, Beach Bank, timely filed its notice to invoke the discretionary conflict jurisdiction of this Court, pursuant to rule 9.030(a)(2)(A)(iv), *Florida Rules of Appellate Procedure.*

Summary of Argument

The First DCA's decision, at issue here, that it had certiorari jurisdiction to review the trial court's denial of a motion to dismiss based on grounds of sovereign immunity, directly and expressly conflicts with this Court's opinion in *Department of Education v. Roe,* 679 So. 2d 756 (Fla. 1996), which denied interlocutory review of a nonfinal order denying a motion to dismiss a negligence claim based on a defense of sovereign immunity. In addition, the First DCA's decision conflicts with decisions of the Fifth DCA in *Florida A & M University Board of Trustees v. Thomas*, 19 So. 3d 445 (Fla. 5th DCA 2009), and the Second DCA in *Pinellas Suncoast Transit Authority v. Wrye*, 750 So. 2d 30 (Fla. 2d DCA 1996), which hold that the DCAs lack certiorari jurisdiction to review the denial of a motion for summary judgment or motion to dismiss based on a defense of sovereign immunity.

This Court should accept jurisdiction here to resolve the conflict on this

important issue with respect to the certiorari jurisdiction of the DCAs.

Argument

I. 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.

A. The Decision of the First District Court of Appeal, which forms the basis of this petition, conflicts with the decision of this Court in *Department of Education v. Roe*, 679 So. 2d 757 (Fla. 1996).

The First DCA's decision, at issue here, conflicts with this Court's decision in *Roe*, 679 So. 2d 756. *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 DCA 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 DCA addressed the merits and ruled in the DOE's favor, remanding with directions to dismiss the claim with prejudice. However, on rehearing the First DCA 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

DCA'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 its 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.

This Court expressly found that forcing the state to wait until after final judgment for appellate review of the issue sovereign immunity does not deprive the state of the benefit of the immunity. Specifically, this Court stated:

> [f]orcing 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 other words, the fact that the state will have to wait to appeal the sovereign immunity issue post-judgment, does not constitute irreparable harm. *Id.*

In direct conflict here, the First DCA reached the exactly opposite result, and stated that:

> [*R*]*oe* is inapplicable to discretionary review by certiorari where immunity is based on the separation of powers doctrine...**Because the City claims immunity from suit, and the effect of the challenged order requires the City to submit to litigation beyond such time as its immunity can be properly determined, we conclude that the City has established the requisite material, irreparable harm necessary to invoke our certiorari jurisdiction....**
>
> Op. at 7-9 (emphasis supplied).

This conclusion is a misapplication of this Court's decision in *Roe*, and creates a direct conflict between the instant case and *Roe*.

B. The decision of the First District Court of Appeal, which forms the basis of this petition, directly conflicts with decisions of the Second and Fifth District Courts of Appeal.

There is an express and direct conflict between the First DCA's decision at issue here and the decisions of the Fifth and Second DCAs in *Florida A & M University Board of Trustees v. Thomas*, 19 So. 3d 445 (Fla. 5th DCA 2009), and *Pinellas Suncoast Transit Authority v. Wrye*, 750 So. 2d 30 (Fla. 2d DCA 1996), with respect to the certiorari jurisdiction of the DCAs. In each of those cases, the Fifth DCA and Second DCA held that they lacked certiorari jurisdiction to review the

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

In *Thomas*, 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.

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 DCA dismissed the appeal, and held:

> **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, in reaching the opposite conclusion, the First DCA adopted the Third DCA's position taken in *Miami-Dade County v. Rodriguez*, 67 So. 3d 1213 (Fla. 3d DCA 2011), which is currently on review before this Court in case number SC11-1913 captioned *Rodriguez v. Miami-Dade County*, and held that it (the First DCA) had certiorari jurisdiction to review the trial court's denial of the Freeport's motion to dismiss based upon its defense of sovereign immunity, and stated:

> The erroneous denial of sovereign immunity has been held to be a material, irreparable injury to justify certiorari review. *See Miami–Dade Cnty. v. Rodriguez*, 67 So. 3d 1213, 1219 (Fla. 3d DCA 2011), *rev. granted*, 76 So. 3d 938 (Fla. Dec.1, 2011)...This holding in Rodriguez is consistent with the host of cases where certiorari jurisdiction was properly invoked to review trial court orders denying other types of immunities from suit...The reasoning underlying these decisions is that if the defendant is entitled to immunity from suit, it is the trial itself that constitutes the material harm. *See Tucker v. Resha*, 648 So. 2d 1187, 1189 (Fla. 1994); *Rodriguez*, 67 So. 3d at 1219–20 & n. 3–4. This harm cannot be cured by plenary appeal because it is impossible to "reimmunize" the defendant from suit after the fact. *Bd. of Regents v. Snyder*, 826 So. 2d at 387...."

Op. at 5-6.

Thus, the First DCA's decision in this case expressly and directly conflicts with the Fifth DCA's decision in *Thomas*, 19 So. 3d 445, and the Second DCA's decision

in *Wrye*, 750 So. 2d 30, on the question of whether the DCAs 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 First DCA's decision. Art. V, § 3(b)(3), *Fla. Const*; R. 9.030(a)(2)(A)(iv), *Fla. R. App. P.*

Conclusion

In light of the conflict among the DCAs, and the First DCA'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). For the foregoing reasons, Beach Bank respectfully requests that this Court accept jurisdiction to resolve the conflict and settle this important issue with respect to the certiorari jurisdiction of the district courts of appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Clerk of the Florida Supreme Court on March 28, 2013, and has been furnished by E-mail to Scott J. Seagle, Esq., and Gwendolyn P. Adkins, Esq., Coppins Monroe Adkins & Dincman, P.A., Post Office Drawer 14447, Tallahassee,Florida 32317 at sseagle@coppinsmonroe.com and gadkins@coppinsmonroe.com.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the font requirements of Rule 9.210(2). Fla.R.App.P.

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