IN THE SUPREME COURT OF FLORIDA

PIZZA HUT OF AMERICA, INC.,

Petitioner,

vs. Case No. 88,301

RICHARD MILLER, as personal representative of the Estate of NANCY MILLER, deceased, and ADT SECURITY SYSTEMS, MID-SOUTH, INC., a/k/a ADT SECURITY SYSTEMS, INC.,

Respondents.

RESPONDENT MILLER'S
ANSWER BRIEF ON THE MERITS

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INTRODUCTION

During the pendency of this appeal, the Supreme Court of Florida has effectively rejected the legal theory relied on by petitioner Pizza Hut of America, Inc. ("PizzaHut"), and approved the reasoning followed by the Second District Court of Appeal. The same day Pizza Hut served its initial brief on the merits, the Supreme Court issued its decision in Amendments to the Florida r , 685 So.2d 773 (Fla. 1996). In its decision, the Supreme Court adopts the Florida Appellate Court Rules Committee'srecommendation to amend Florida Rule of Appellate Procedure 9.130 (a)(3)(C)(vi). This amendment clarifies that subdivision (a)(3)(C)(vi) was never intended to grant a right of non-final review in the instant situation, in which the lower tribunal has not decided the workers' compensation immunity issue as a matter of law but has instead merely denied a motion for summary judgment based on the existence of a material fact dispute concerning the applicability of the defense.

It is only if the Supreme Court decides Pizza Hut's non-final appeal is authorized under subsection (a)(3)(C)(vi) that the facts going to the merits of Pizza Hut's summary judgment motion need be considered. The statement of the case and facts Pizza Hut has furnished understates, misapprehends, and in some instances omits facts and inferences that conflict with its view of the evidence, including facts and inferences it conceded below, For this reason, in the event the Supreme Court decides to reach the merits of Pizza Hut's summary judgment motion, the following statement of the case

and facts is provided to correct the deficiencies in Pizza Hut's recitation and place the issues in a context in which they can be fairly considered. See Fla. R. App. P. 9.210(c).

STATEMENT OF THE CASE AND OF THE FACTS

This is a wrongful death action in which Richard Miller, the personal representative of the estate of his murdered wife Nancy, sued Pizza Hut on behalf of himself and his three young children for Pizza Hut's negligent failure to take reasonable steps to protect Nancy from the criminal attack that resulted in her death. App. 1.[1] Nancy Miller was a waitress at a Pizza Hut restaurant in Brandon, Florida. It is undisputed that early one morning in May, 1992, after she completed her job duties and clocked out for the night, Nancy Miller was shot in the head and murdered. Richard Miller discovered his wife's body inside the Brandon Pizza Hut along with the body of Steven Snow, the assistant manager of the restaurant, who had also been shot to death. App. 15 at 1; App. 17 at 3.

The Second District's Decision That There Is No Appellate Jurisdiction to Review a Non-final Order Which Denies an Employer's Workers' Compensation Immunity Summary Judgment Motion Based on the Existence of a Material Fact Dispute

Pizza Hut filed a motion for summary judgment in which it contended it was entitled to workers' compensation immunity as a

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[1]For convenience and consistency, citations to Pizza Hut's Appendix are designated "App." followed by tab number and, if necessary, page number. Citations to Miller's Appendix are designated "MApp." followed by page number.

matter of law. The trial court denied the motion and held "[t]here are factual questions that must be submitted to the jury on the issue of the workers' compensation immunity." App. 25-1; Pizza Hut of America, Inc. v. Miller, 674 So.2d 178, **179** (Fla. 2d DCA 1996). Pizza Hut then instituted this non-final appeal.

The Second District issued an opinion in which it agreed with the trial court's conclusion that this case involved an "underlying factual dispute." Id. Before the legal issue of the applicability of the workers' compensation immunity defense can be decided, the District Court ruled, the jury must first determine the factual question of whether Mrs. Miller was "acting within the scope of her employment at the time of her murder or . . . acting in regard to purely personal matters." Id.

Instead of affirming the trial court, the Second District dismissed Pizza Hut's non-final appeal for lack of jurisdiction. Id. Dismissal was required, the District Court reasoned, because the existence of unresolved factual disputes precluded the trial court from making the determination that is a prerequisite for jurisdiction under Fla. R. App. P. 9.130(a)(C)(3)(vi) — that Pizza Hut is not entitled to workers' compensation immunity as a matter of law. Id. Until the disputed facts are resolved, the Second District held, the legal issue is "not ripe for determination." Id.

After its appeal was dismissed, Pizza Hut applied for discretionary review under the Supreme Court's conflict jurisdiction. According to Pizza Hut, the Second District's decision — that a non-final order denying a workers' compensation

immunity summary judgment motion because of factual disputes is not appealable under Rule 9.130(a)(3)(C)(vi) — conflicts with the opinions of the Fourth and Fifth Districts in Breakers Palm Reach, Inc. v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994), and City of Lake Mary v. Franklin, 668 So.2d 712 (Fla. 5th DCA 1996). Br. on Juris. at 3, 6-8; Init. Br. on Merits at 16-20. Pizza Hut also argued the Second District's decision "may" conflict with the Supreme Court's decision in Mandico v. Taox Constr., Inc., 605 So.2d 850 (Fla. 1992), in which the subdivision in issue was first articulated. Init. Br. on Juris. at 8; Init. Br. on Merits at 27.

Material Fact Disputes Concerning the Issue of Whether Miller Had Personal Reasons for Being on Pizza Hut's Premises When She Was Attacked and Murdered

Pizza Hut correctly argued in the Second District that to prevail on its workers' compensation immunity defense, it had to establish irrefutably and as a matter of law two legal prerequisites: That Miller's murder was both (1) "incidental" to and (2) a "risk inherent" in her employment as a waitress. MApp. 50, **55, 56, 59, 60, 62, 64, 65, 66.** As to the former, Pizza Hut urges there is "complete lack of record evidence" or "absolutely no evidence" Miller had any personal or non-work related reasons for still being on the restaurant's premises at the time she was attacked. Init. Br. on Merits at 9, 25. This assertion conflicts with the abundant record evidence supporting the reasonable if not compelling inference that before she was attacked, Miller was engaged in personal, non-business activities.

In this regard, the record shows that as a Pizza Hut waitress, Miller's duty at the end of her shift was to clean and restock the dining area as well as to put her own time records in order. App. 6 at 3; App. 17, Ex. A at 11; MApp. 4. It was a matter of company policy and practice that waitresses like Miller were not permitted to secure and close the restaurant for the night. MApp. 3-5. Under Pizza Hut's rules, the tasks of activating the security alarm and locking up are never assigned to waitresses, and waitresses are not given the code to the restaurant alarm system or the key to the restaurant door. MApp. 3, 4. Instead, Pizza Hut requires a management level employee — in this case, Snow — to lock up and set the alarm. MApp. 2-4.

Miller "clocked out" at 12:54 a.m., approximately five minutes before the restaurant's alarm system was activated.[2] App. 8 at 10; App. 12; App. 13 at 16; Init. Br. on Merits at 3, 6. Pizza Hut has never disputed that Miller was killed *after* she had completed her closing duties and clocked out for the day." MApp. 50; Init. Br. on Merits at 9. In fact, Pizza Hut does not dispute that the medical evidence shows Miller could have been murdered as late as two hours after she clocked out. App. 12; App. 18 at 4; App. 19 at 1, 2; Init. Br. on Merits at 7.

'While its present position on the point is unclear, in the Second District Pizza Hut's theory was that Miller and Snow must have been accosted as they exited the restaurant after Snow activated the alarm system. MApp. 40-41, 73.

[3]Pizza Hut has a strict company policy against employees working after clocking out, a violation of which could result in disciplinary action against the offending employee, including termination. App. 17 at 2; MApp. 6, 7, 8-10, 13-15.

The time at which Miller actually completed her closing duties of cleaning and restocking the dining area is unknown. It is known, however, that at some point Miller, Snow, or both of them turned from their employment duties to the personal matter of preparing food to take home for themselves and perhaps their families. In that regard, it is undisputed that two boxed pizzas and a large Mountain Dew soft drink, Miller's beverage of choice, were found at the murder scene next to her body. App. 17 at 3; App. 18 at 3, 8; App. 22 at 2; App. 23 at 3. It is also undisputed that Miller was in the habit of taking home pizzas and a large soft drink at the end of the work day. App. 22 at 2; App. 23 at 3.[4]

Although Pizza Hut now appears to dispute the fact, Init. Br. on Merits at 9, 10, 24, 25, in the trial court and in the District Court Pizza Hut conceded the inference that the food found at the murder scene belonged to Miller and that she intended to take it home with her. App. 23 at 3; MApp. 74. Pizza Hut further noted that Snow was also in the habit of taking pizzas home with him and that the food could have been his. App. 18 at 3, 8; App. 23 at 3; MApp. 73-74.

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[4]Because of the length of the criminal trial that preceded the instant civil case and the fact that the testimony in that proceeding had not been transcribed when the instant summary judgment motion was litigated, it was agreed that both sides could rely on proffers of evidence from the criminal trial. App. 17 at 4; App. 18 at 1. In the event one party challenged the accuracy of the other side's proffer, the proffering party would have the opportunity to make the challenged testimony a part of the record. App. 16 at 39-40; App. 17 at 4; App. 18 at 1. Pizza Hut never contested the accuracy of Miller's proffer concerning the food found at the murder scene. App. 18; App. 23 at 3; MApp. 74.

Material Fact Disputes Concerning the Issue of Whether Murder Was a "Risk Inherent" in Miller's Job as a Pizza Waitress

Although the specific legal requirement is mentioned only in passing in Pizza Hut's Brief on the Merits, Pizza Hut previously argued at length that it satisfied the workers' compensation immunity prerequisite that Miller's murder **was** a "risk inherent" in her job as a Pizza Hut waitress. MApp. 50, 62, 64, 65, 66. In the trial court and in the Second District, Pizza Hut tried to meet this requirement by citing general statistics concerning the frequency of acts of violence and theft "while the victims were working or on duty." MApp. 46, 47, 64, 65. In response, Miller pointed out that Pizza Hut's national figures actually refuted its inherent risk argument.' Miller also noted that Pizza Hut had ignored *its own corporate history,* which is that the type of crime in issue here — the murder of a waitress in connection with an apparent robbery — had never before taken place. In fact, Pizza Hut's Florida division security manager testified that **a** crime of the type involved here was "unheard of" in Pizza Hut's corporate experience. App. 9 at 29; App. 17 at 3. Similarly, Pizza Hut area manager Randal Johnson testified the instant murders were the only

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"Unlike the incidents in Pizza Hut's studies, the threshold issue of whether the instant victim was actually "working or on duty" is itself in dispute here. In addition, Pizza Hut's own report indicates Miller had a greater inherent risk of being a victim of violent crime away from work. It states "[t]he largest proportion of violent incidents occurred on a *street," not* in the workplace, and that victims of violent incidents or theft "were most likely to have been taking part in some type of leisure *activity* away from home," *not* working. App. 21 at fifth unnumbered page (emphasis added).

ones he had ever heard of in his eight years with the company. MApp. 11, 12. Now that this case has reached the Supreme Court, Pizza Hut has abandoned the inherent risk argument it made based on statistics,

At the same time Pizza Hut was trying to prove 'inherent risk" through data that ran counter to its theory, it was attempting to explain away a piece of evidence which strongly indicated Miller was not murdered in the course of an ordinary workplace robbery. In this regard, it is undisputed that a handwritten note was found on Snow's body at the murder scene. The note declares Miller and Snow were murdered not because their killer or killers were seeking money — the "inherent risk" workplace robbery Pizza Hut described — but instead as a part of an effort to secure the release of Carlos Lehder, a well known Colombian drug lord and narco-terrorist who at the time had recently been captured and tried in a highly publicized trial in Florida. United States v. Reed, 980 F.2d 1568, 1571 (11th Cir.), cert. denied, 509 U.S. , 113 S.Ct. 3063, 125 L.Ed.2d 745 (1993); United States v. Lehder-Rivas, 955 F.2d 1510 (11th Cir.), cert. denied, 506 U.S. ___, 113 S.Ct. 347, 121 L.Ed.2d 262 (1992). App. 10; App. 17 at 3; App. 18 at 3. The note reads:

> I will keep killing til he's out. Viva Carlos Lehder.

It is signed "Front of Colombian Liberation." App. 10.

In response to the fact that the purpose expressed in the note is inconsistent with Pizza Hut's theory that the instant murders were solely the by-product of a garden variety robbery and therefore not a "risk inherent" in Miller's position as a waitress,

Pizza Hut has stressed that a relatively small sum of money — $812 — was missing from the restaurant's safe. MApp. 40, 48; Init. Br. on Merits at 2, 9. The record also shows, however, that a number of valuable items were ***not*** taken, including Miller's wedding ring, her purse, and the tips she had in her apron. App. 16 at 35, 42, 43; App. 17 at 3; App. 18 at 3. Similarly, while Pizza Hut insisted Miller's murder was an inherent risk because she worked in a place which took in cash, Init. Br. on Merits at 9; MApp. 50, 64, 69, 70, it is undisputed that Miller's duties did not include opening or closing the safe or handling and depositing the restaurant's cash receipts. App. 17 at 17; MApp. 4.

ISSUES PRESENTED ON APPEAL

I* WHETHER RULE 9.130(a)(3)(C)(vi) AUTHORIZES A NON-FINAL APPEAL FROM AN ORDER THAT DOES NOT DECIDE THE ISSUE OF WORKERS' COMPENSATION IMMUNITY AS A MATTER OF LAW BUT INSTEAD MERELY DENIES SUMMARY JUDGMENT BASED ON THE EXISTENCE OF A MATERIAL FACT DISPUTE?

II. WHETHER THERE EXIST DISPUTED QUESTIONS OF FACT ON THE ISSUE OF PIZZA HUT'S WORKERS' COMPENSATION IMMUNITY DEFENSE WHICH WOULD PRECLUDE SUMMARY JUDGMENT EVEN IF THE INSTANT APPEAL WERE AUTHORIZED?

SUMMARY OF THE ARGUMENT

The Second District correctly held there is no jurisdiction under Rule 9.130(a)(3)(C)(vi) to entertain an appeal from a non-final order which denies an employer's motion for summary judgment due to the existence of material fact disputes concerning the application of the workers' compensation immunity defense. This decision is consistent with the Supreme Court's intention from the time it first articulated subdivision (a)(3)(C)(vi) in Mandico v. Taos Constr., Inc., **605** So.2d 850, 855 (Fla. 1992), to its recent adoption of an amendment specifically designed to correct the erroneous interpretation relied on by Pizza Hut. Simply put, the rule means what it says: Appeals are authorized under Rule 9.130(a)(3)(C)(vi) only if the trial court has decided the workers' compensation immunity issue "***as a matter of law.***" If as in this case the trial court has merely denied a motion for summary judgment based on the existence of a material fact dispute, the legal issue has not been reached and, as the Second District held, it is "not ripe for determination." Miller, **674** So.2d at 179.

But even if jurisdiction existed for Pizza Hut's appeal, the outcome of this case would be the same. To win a summary judgment based on the workers' compensation immunity defense, Pizza Hut had the heavy burden of establishing beyond dispute that Miller was engaged in an activity "incidental to her employment" at the time she **was** accosted and murdered. Pizza Hut's assertion that Miller's murder was incidental to her employment conflicts with record evidence indicating that after Miller's job duties concluded but

before she departed, she remained in the restaurant to engage in the purely personal task of preparing food to take home to her family. Under Aloff v. Neff-Harmon, Inc., 463 So.2d 291 (Fla. 1st DCA 1984), the one decision on all fours, the workers' compensation defense cannot be resolved on summary judgment if as here there is evidence an injured waitress was attending to personal, non-business matters before she was attacked.

To prevail on summary judgment Pizza Hut also had to establish as a matter of law that Miller's murder was caused by a risk inherent in her employment as a waitress. Again, the evidence going to this legal requirement is sharply in dispute. The record establishes that in Pizza Hut's own corporate history, no attack on a waitress like the instant one had ever occurred — it was literally "unheard of." In addition, it is undisputed that a handwritten note was left at the murder scene indicating Miller's killer or killers were motivated by a political or terrorist purpose. Evidence indicating the type of crime in issue here had never before occurred at Pizza Hut and that the crime was prompted at least in part by reasons unrelated to theft yields a material fact dispute as to whether murder was a "risk inherent" in Miller's job as a pizza waitress. Like the "incidental to employment" requirement, under the rules governing summary judgment, this dispute can only be resolved by a jury.

ARGUMENT

I. THE SECOND DISTRICT CORRECTLY DISMISSED PIZZA HUT'S NON-FINAL APPEAL BECAUSE RULE 9.103(a)(3)(C)(vi) DOES NOT AND HAS NEVER AUTHORIZED AN EMPLOYER'S NON-FINAL APPEAL FROM AN ORDER THAT DOES NOT DECIDE THE ISSUE OF WORKERS' COMPENSATION IMMUNITY AS A MATTER OF LAW BUT INSTEAD DENIES SUMMARY JUDGMENT BASED ON THE EXISTENCE OF A MATERIAL FACT DISPUTE.

The same day Pizza Hut served its initial brief on the merits, the Supreme Court issued its decision in Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996). In its decision, the Supreme Court adopts an amendment to Fla. R. App. P. 9.130(a)(3)(C)(vi), which clarifies the intention and meaning of the subdivision. The Supreme Court's adoption of the amendment rejects the interpretation of the subdivision upon which Pizza Hut's appeal rests. At the **same** time, it approves the interpretation the Second District employed in this case, which is that (a)(3)(C)(vi) was never intended to grant a right of non-final review when the trial court has not determined the applicability of workers' compensation immunity as a matter of law but has instead merely denied a motion for summary judgment based on the existence of a material fact dispute concerning the defense. Because the Second District correctly applied the subdivision precisely as it has always been intended to be applied, the Supreme Court should affirm.

The conclusion that the Second District should be affirmed flows directly from the history of Rule 9.130(a)(3)(C)(vi). In 1992, the Florida Supreme Court first articulated the subdivision in Mandico v. Taos Constr., Inc., 15 Fla. L. Weekly S445, S447

(Fla. July 9, 1992); MApp. 16, 18. The original version of the subdivision did not contain the word "as a matter of law." Id. The Court invited comment from interested parties and stated the provision would be further considered after the comments were reviewed. Id.

In response, the Florida Appellate Court Rules Committee filed a comment which urged the Supreme Court to add language to make it certain that non-final review would be limited only to orders which actually determined workers' compensation immunity *as* a *matter of law.* Comment of Appellate Court Rules Committee on Proposed Amendment to Fla. R. App. P. 9.130(a) (3) at 3; MApp. 20-23. The Committee was especially concerned that the rule could be erroneously construed to authorize non-final review of orders like the instant one, in which the trial court has determined only that the workers' compensation immunity defense is a fact question for the jury. MApp. *21-22.* To avoid this overbroad interpretation and the proliferation of non-final appeals that would result from it, the Committee proposed the Supreme Court add words of limitation — the phrase "as a matter of law" — to the end of the Mandico amendment:

> As presently written [without the words 'as a matter of law"], the proposed amendment would permit review of any order denying worker's compensation immunity, regardless of the manner in which such issue was determined. This would include review of an order which denied summary judgment on the ground that the worker's compensation immunity issue was a fact question for the jury. In other words, the rule would permit review of a ruling which determined nothing more than whether there was a genuine issue of material fact in the

> record. Respectfully, the Committee suggests that, at the least, the proposed amendment be altered to limit review to orders which determine worker's compensation immunity as a matter of law, as follows:
>
> . . .
>
> (vi) That a party is not entitled to workers' compensation immunity as a matter.

MApp. 20-21 (underlining in original).

The final version of Mandico that appears in the official reporter incorporated the Committee's recommendation verbatim. Exactly as the Committee proposed, the words "as a matter of law" were added to the end of the subdivision. Mandico v. Taos Constr., Inc., 605 So.2d 850, 855 (Fla. 1992).

Two years after the Supreme Court of Florida decided Mandico, the Fourth District issued its opinion in the case on which Pizza Hut's interpretation of the rule hinges, Breakers Palm Reach, Inc. v. Closer, 646 So.2d 237 (Fla. 4th DCA 1994). Evidently unaware of the process by which the words "as a matter of law" were added to Rule 9.130(a)(3)(C)(vi) or the reason for their addition, Gloger interpreted the phrase in a way that is the exact opposite of the meaning it was intended to have. According to Gloaer, because the words "as a matter of law" appear at the end of the subdivision, Rule 9.103(a)(3)(C)(vi) authorizes a non-final appeal even if the trial court has done no more than deny a motion for summary judgment based on the existence of disputed issues of fact. 646 So.2d at 237-38. Pizza Hut's briefs on jurisdiction and on the merits both quote and rely on the following passage from Gloger:

> If the words "as a matter of law" had been placed at the beginning of the amendment, rather than at the end, appellees' argument would be persuasive. Under that scenario the rule would permit review of non-final orders which determine "as a matter of **law** that a party is not entitled to workers' compensation immunity." The key words, when placed at the beginning, modify "determine."
>
> By putting the key words at the end, however, the court gave the amendment a broader meaning. They modify "entitled." The denial of defendant's motion for summary judgment, because there were issues of fact, is an order determining that the defendant is "not entitled to workers' compensation immunity **as** a matter of law."

Br. on Juris. at 7; Init. Br. on Merits at 16-17 (citing Gloger, 646 So.2d at 237-38). As Pizza Hut acknowledges, the other case on which its conflict claim is based, City of Lake Mary v. Franklin, 668 So.2d 712 (Fla. 5th DCA 1996), also rests on Gloger's word placement theory. Br. on Juris. at 7-8; Init. Br. on Merits at 18.

Approximately four years after the Fourth District decided Gloger and two months after the Fifth District decided Citv of Lake Mary, the Second District issued its opinion in the case on review, Pizza Hut of America, Inc. v. Miller, 674 So.2d 178 (Fla. 2d DCA 1996). The Miller Court read Rule 9.130(a)(C)(3)(vi) as the Supreme Court intended when it added the words "as a matter of law" in Mandico.

Miller agrees with the trial court's conclusion that the instant case involves an "underlying factual dispute" as to whether Mrs. Miller was "acting within the scope of her employment at the time of her murder or . . . acting in regard to purely personal matters." Id. at 179. For this reason and consistent with the

purpose of adding the words "as a matter of law" to the subdivision in 1992, the Second District dismissed Pizza Hut's appeal for lack of jurisdiction. Id. Because the resolution of the legal question of the application of the workers' compensation immunity defense "depends first on the determination of the parties' disputed version of the facts as to what Mrs. Miller was doing at the time of her murder," the Second District correctly held it cannot be said that the trial court denied summary judgment "as a matter of law." Id. That legal question will not be "ripe for determination until the underlying factual dispute is resolved." Id.

During the time this case has been on review, steps have been taken to correct the Fourth and Fifth Districts' misreading of Rule 9.130(a)(3)(C)(vi) in Glover and City of Lake Mary. Month the Supreme Court accepted jurisdiction in this case, The Florida Bar Appellate Rules Committee filed an emergency petition to amend Rule 9.130(a)(3)(C)(vi) to move the words "as a matter of law" from the end to the beginning of the subdivision. MApp. 24-32. As Pizza Hut concedes, Init. Br. on Merits at 28; Resp. to Miller's Mot. to Dismiss at 1, the Committee's proposed amendment endorses the Second District's holding here and refutes Pizza Hut's interpretation.[6]

The Committee's petition points out that the reason the 1992 amendment to Rule 9.130(a)(3)(C)(vi) was proposed in the first

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[6] "Pizza Hut's counterpart in the other pending Supreme Court case presenting the instant issue, Hastings v. Demming, 682 So.2d 1107 (Fla. 2d DCA 1996), rev. granted, No. 89,130 (Fla. Feb. 11, 1997), also concedes the amendment proposed by the Committee "comports with the Second District's ruling." Pet. Hastings' Init. Br. on Merits at 22.

place was to prevent the subdivision from being misconstrued to authorize a non-final appeal in the precise situation at bar. MApp. 24-25. Referring specifically to the 'confusion" generated by the Fourth and Fifth Districts' decisions in Gloger and City of Lake Mary, the Committee recommended moving the phrase "as a matter of law" from the end of the subdivision to its beginning. MApp. 24-25. As the petition and the proposed committee note both state, this change corrects the erroneous word placement analysis in Gloger and clarifies "that this subdivision **was** not intended to grant a right of non-final review if the lower tribunal denies a motion for summary judgment based on the existence of a material fact dispute." MApp. 25, 32.

The same day Pizza Hut served its initial brief on the merits, the Supreme Court adopted verbatim the amendment the Committee proposed. Amendments to the Florida Rules of Appellate Procedure, 685 So.2d at 796. The Supreme Court also adopted verbatim the explanatory committee note accompanying the amendment. Id. at 799. Echoing the text of the emergency petition, the committee note states the reason for moving the words "as a matter of law" from the end to the beginning of the subdivision is to correct the very misinterpretation of the rule that underpins Pizza Hut's entire appeal — Gloger's erroneous word placement theory:

> The amendment to subdivision **(a)** (3) (C) (vi) moves the phrase "**as** a matter of law" from the end of the subdivision to its beginning. This is to resolve the confusion evidenced in [Gloger], and [City of Lake Mary], and their progeny by clarifying that this subdivision *was not intended* to grant a right of non-final review if the lower tribunal denies a motion

> for summary judgment based on the existence of a material fact dispute.

Id. at 799 (emphasis added).

Against this background, Pizza Hut cannot seriously contest that the Second District should be affirmed. The recent amendment of Rule 9.130(a) (3)(C)(vi) did nothing more than clarify the subsection's original intent. Pizza Hut and its counterpart in the other pending case presenting this issue, Hastings v. Demming, 682 So.2d 1107 (Fla. 2d DCA 1996), rev, granted, No. 89,130 (Fla. Feb. 11, 1997), both concede the amendment to Rule 9.130(a) (3) (C) (vi) adopts the same reading of the rule the Second District applied here. Init. Br. on Merits at 28. As the Florida Supreme Court's responses to the Appellate Court Rules Committee's original 1992 comment and recent emergency petition vividly illustrate, Gloger's reasoning is erroneous. Mandico and subdivision (a) (3) (C) (vi) were never intended to grant a right of non-final review in cases like the instant one.'

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[7]Indeed, Gloger's vitality now appears seriously in doubt in the very district court that decided it. In its recent decision in Wausau Ins. Co. v. Haynes 683 So.2d 1123 (Fla. 4th DCA 1996), the Fourth District cited with approval the Second District's decision in Hastings which follows the same rule applied here. Id. at 1125. In addition, the special concurrence in Haynes specifically rejects the word placement analysis on which Gloser and Pizza Hut's appeal are based. Id. at 1126 & nn.2-3 (Farmer, J., concurring). Similarly, the Fifth District has recently characterized the relevant language in Citv of Lake Mary **as** dicta, ACT Corp. v. Devane, 672 So.2d 611, 613 (Fla. 5th DCA 1996), and dismissed another non-final appeal for lack of jurisdiction where the record did not demonstrate the trial court had ruled the defendant was not entitled to immunity as a *matter of law.* Integrity Homes of Cent. Fla., Inc. v. Goldy, 672 So.2d 839, 840 (Fla. 5th DCA 1996) (emphasis in original). The First District has also endorsed the Second District's reasoning in Hastings. Gustafson's Dairy, Inc. (continued...)

Because the amendment clarifies but does not change the intention of subdivision (a)(3)(C)(vi), Respondent Miller's entitlement to dismissal is unaffected by the fact that all of the recently adopted amendment is "effective January 1, 1997, at 12:01 a.m." Amendments to the Florida Rules of Appellate Procedure, 685 So.2d at 777. As noted, by moving the phrase "as a matter of law" from the end to the beginning of the subdivision, the amendment corrects the erroneous analysis in the decisions relied on by Pizza Hut and restates the original intent of the rule. APP. 6, 7, 9, 10, 17. Because the meaning of the subdivision has never changed, no issue concerning its prospective or retrospective application arises.

Although the recent clarification of subsection (a)(3)(C)(vi) renders them immaterial, it should be noted that Pizza Hut's "public policy" arguments cannot withstand scrutiny. According to Pizza Hut, the rule should be construed broadly to protect employers from unscrupulous injured employees who 'attempt [] to circumvent [workers' compensation] immunity" by bringing "lawsuits alleging grounds that are unsupportable" and instituting 'unwarranted litigation." Init. Br. on Merits at 22, 23, 28. If the Supreme Court does not authorize non-final appeals like the instant one, Pizza Hut's parade of horribles continues, there will be a "deluge" of personal injury claims by employees unsatisfied

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[7](...continued)
v. Phiel, 681 So.2d 786, 790 (Fla. 1st DCA 1996) (agreeing with Hastings and certifying conflict with Gloger and City of Lake Mary).

with workers' compensation. Init. Br. on Merits at 14, 24. Pizza Hut concludes by arguing that **while it is true the Second** District's interpretation of the rule will cause a decrease in non-final appeals, more plenary appeals will be instituted "in the long run' by employers who lose the coverage issue at trial. Init. Br. on Merits at 24.

Pizza Hut's rationale for its overbroad reading of subsection (a)(3)(C)(vi) is not just illogical. It is also founded on a cynical view of the justice system that cannot possibly be the basis for a fair and efficient rule.

First, there is no empirical basis for Pizza Hut's bald assertion that most or perhaps even all lawsuits to which Rule 9.130(a)(3)(C)(vi) might apply are "unsupportable" and "unwarranted." Pizza Hut's suggestion that unscrupulous employees routinely institute baseless suits makes no more sense than the suggestion that unscrupulous employers routinely institute baseless non-final appeals in which they utilize their superior resources to wear down their out-matched employee adversaries.

The second alarm Pizza Hut sounds — that affirmance of the Second District will spawn more plenary appeals by employers — is equally cynical. Taken at face value, Pizza Hut is saying that even after an injured employee has survived summary judgment and won a verdict on the disputed facts presented to the jury, employers will still routinely attack the immunity verdict on appeal, without regard to the quantum of evidence adduced at trial or the degree of difficulty in winning a reversal. Experience and common sense suggest that responsible defendants will decide

whether to appeal based on the merits. If they do so, the net result of the Second District's holding will be a decrease in the number of appeals taken, non-final[8] and final alike.

The Second District correctly held it lacks jurisdiction to entertain Pizza Hut's non-final appeal. It should be affirmed.

II. EVEN IF PIZZA HUT'S NON-FINAL APPEAL IS AUTHORIZED, THE OUTCOME OF THIS CASE WILL BE THE SAME BECAUSE THERE EXIST DISPUTED ISSUES OF MATERIAL FACT ON THE APPLICABILITY OF THE WORKERS' COMPENSATION IMMUNITY DEFENSE.

In the District Court, Pizza Hut acknowledged that to prevail on summary judgment, it had to establish that there were no material disputed facts going to the two applicable legal prerequisites for workers' compensation immunity — that Miller's murder was both "incidental to" and a "risk inherent" in her job as a Pizza Hut waitress, MApp. 50, 55, 56, 59, 60, 62, 64, 65, 66. In the Supreme Court, however, Pizza Hut's strategy has shifted. While it has not discarded its factual arguments, it mentions them only briefly and in conclusory terms, focusing instead on its assertion that whatever the facts, the Second District erred because it 'refused" to examine the record to ferret them out. Init. Br. on Merits at 20, 25, 27.

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[8] Affirmance will not, as Pizza Hut seems to suggest, eliminate all non-final appeals under Rule 9.130(a)(3)(C)(vi). Init. Br. on Merits at 27-28. It will, however, eliminate the waste of court resources and unnecessary delays caused by *unauthorized* non-final appeals. This is consistent with "[t]he thrust of Rule 9.130 [which] is to restrict the number of non-final appealable orders." Travelers Ins. Co. v. Bruns, 443 So.2d 959, 961 (Fla. 1984).

Pizza Hut's new approach fails for at least three reasons. First and foremost, it is rejected by the recent amendment clarifying the original meaning of Rule 9.130(a)(3)(C)(vi). As noted, under this subdivision, a trial court's non-final order which determines only that the existence of factual issues precludes summary judgment on the workers' compensation immunity defense is not appealable. Because the Second District was without jurisdiction to consider Pizza Hut's appeal in the first place, it could not be faulted even if Pizza Hut were correct in its assertion that the Court "refused" to review the record.

Second, even if some requirement existed that compelled the Second District to examine the record in this case, Pizza Hut's criticism that the Court "refused" to do so is utterly without basis in fact. There is nothing in the District Court's decision to indicate it did not consider the entire record presented in the parties' appendices. That the Second District's opinion specifically mentions certain portions of the record does not mean it declined to review others. The suggestion that it can be assumed a reviewing court did not review the entire record unless it specifically recites each item has no basis in law or logic.[9] Cf. Florida Hosp. Corp. v. McCrea, 118 So.2d 25, 31 (Fla. 1960) (affirmed without opinion necessarily means the appellate court has

[9] In an attempt to gloss over fact disputes in the record, Pizza Hut asserts "the only question of concern to the judge" was the time of Miller's death. Init. Br. on Merits at 19. Pizza Hut's characterization ignores the fact that the trial court allowed both sides to submit post-hearing memoranda which recite numerous other material fact disputes. App. 16 at 34, 36, 37; App. 17; App. 18.

carefully examined all points raised by all appealing parties and found them to be without merit).

Third and finally, even if Pizza Hut's interpretation of Rule 9.130(a) (3) (C) (vi) were correct *and* even if it could be said the Second District "refused" to review the record, the outcome of this case would be unaffected. The Second District is to be affirmed for any reason that appears in the record, even if it reached the correct result but gave the wrong reason for doing so. Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150, 1152 (Fla. 1979); Martin v. Town of Palm Beach, 643 So.2d 112, 113 n.2 (Fla. 4th DCA 1994). Review of the record in this case shows that whether Miller's murder arose out of or occurred in the course and scope of her employment turns on disputed material fact issues and conflicting inferences.[10] The upshot is that the trial and district courts correctly ruled against Pizza Hut because the applicability of the workers' compensation immunity defense in this case must be resolved by a jury at trial, not summarily in an appeal from a **non-final order.**

This conclusion follows from an application of the facts at bar to the substantive legal principles that control this appeal."

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[10]Even Pizza Hut acknowledged in the trial court that its theory as to how Miller and Snow met their fates was based on what in Pizza Hut's view "*appear[ed] . . . may* have been" the case. App. 15 at 2 (emphasis added).

[11]In the event the Supreme Court does not affirm the Second District on the issue presented in Argument I, the goals of judicial efficiency and economy will be advanced if the Court decides the merits of Pizza Hut's summary judgment motion. The Supreme Court has before it the parties' appendices, which contain

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For an employee's injury to be covered by workers' compensation and render the employer immune from a negligence suit, "the injury must occur within the period of the employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling the duties of his employment or engaged in doing something incidental to it." Fidelity & Casualty Co. of N.Y. v. Moore, 143 Fla. 103, 196 So. 495, 496 (Fla. 1940) (en banc). An injury is not covered and the employer is not immune if the employee is engaged in a personal matter not connected with employment or not beneficial to the employer. Foxworth v. Florida Indus. Comm'n, 86 So.2d 147, 152 (Fla. 1955) (en banc); American Legion Post #SO v. Gailey, 498 So.2d 1321 (Fla. 1st DCA 1986), rev. denied, 508 So.2d 13 (Fla. 1987); Aloff v. Neff-Harmon, Inc., 463 So.2d 291, 294-95 (Fla. 1st DCA 1984); Grady v. Humana, Inc., 449 So.2d 984 (Fla. 1st DCA 1984). The issue of whether an employee's injury arose out of and in the scope of employment is ordinarily a question of fact to be decided by the trier of fact. Holder v. Waldrop, 654 So.2d 1059, 1062 (Fla. 1st DCA 1995); Aloff, 463 So.2d at 293 (quoting Grady v. Humana, Inc., 449 So.2d 984, 985 (Fla. 1st DCA 1984)).

Because this is a non-final appeal from an order denying summary judgment, the facts relevant to the above rules must be measured against the summary judgment standard of review. A motion for summary judgment should not be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as

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[11] (...continued)
the same record the District Court considered.

to any material fact and the moving party is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.510(c). The party moving for summary judgment has the burden of establishing irrefutably that the nonmoving party cannot prevail. Almand Constr. Co. v. Evans, 547 So.2d 626, 628 (Fla. 1989); Holl v. Talcott, 191 So.2d 40, 43 (Fla. 1966). It is only *after* the moving party has met this heavy burden that the nonmoving party is called upon to show the existence of genuine issues of material fact. *547* So.2d at *628;* 191 So.2d at 43-44.

"If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it." Moore v. Morris, *475* So.2d *666, 668* (Fla. 1985) (citations omitted). See also Carroll v. Moxley, 241 So.2d 681, 683 (Fla. 1970) . Additionally, even when the facts are uncontroverted, the proof submitted by the movant must overcome all reasonable inferences in favor of the opponent, or summary judgment must be denied. Wills v. Sears, Roebuck & Co., 351 So.2d 29, 32 (Fla. 1977); Holl, 191 So.2d at 43. Relatedly, the appellate court must draw every possible inference in favor of the party opposing summary judgment. Moore, *475* So.2d at 668; Aloff, 463 So.2d at 293-94 ("[W]here the evidence before the trial court is susceptible of more than one inference, one of which will support the plaintiff's view of the facts, a summary judgment for the defendant should not be entered."). In sum, to be entitled to a summary judgment, the movant must sustain the heavy

burden of conclusively demonstrating the complete absence of any genuine issue of material fact, and the facts must be so crystallized that nothing remains but questions of law. Moore, 475 So.2d at 668.

A. Pizza Hut cannot meet its heavy burden of establishing there is not even the slightest doubt that a fact issue or a conflicting inference might exist going to the question of whether Miller's murder was incidental to employment.

As noted, Pizza Hut cannot establish workers' compensation immunity under the summary judgment test unless it can first prove irrefutably that Miller's injury was sustained not only at the *place* of employment but also at the time she was engaged in the reasonable fulfillment of her job duties. Foxworth, 86 So.2d at 152; American Lesion Post #30, 498 So.2d at 1323; Aloff, 463 So.2d at 295. Pizza Hut does not attempt to establish the time and place requirement by undertaking the detailed review of the record the summary judgment rule demands. Instead it offers only its conclusory assertions that "there is absolutely no evidence" Miller had personal or non-work related reasons for being on the restaurant's premises at the time she was attacked. Init. Br. on Merits at 25. Pizza Hut's argument is factually and legally flawed and cannot withstand scrutiny under the summary judgment standard of review.

Miller's duties before leaving for the evening were to clean and restock the dining area and to put her time records in order. App. 6 at 3; App. 17, Ex. A at 11; MApp. 4-9. It is undisputed

that her duties did not include assembling, baking, boxing, or taking any other steps to prepare or collect food to take home for herself or her family, a purely personal pursuit that was not for the benefit of her employer. Yet it is also undisputed that two pizzas, boxed and ready to take home, were found at the murder scene next to Miller's body along with a large container of Miller's favorite soft drink. App. 17 at 3; App. 18 at 3, 8; App. 22 at 2; App. 23 at 3. Miller was in the habit of taking home pizzas and a large soft drink at the end of her shift. App. 22 at 2; App. 23 at 3. In the trial court and in the Second District, Pizza Hut conceded the inference that the food was Miller's and that she intended to take it home with her. App. 23 at 3; MApp. 74.[12]

These facts give rise to the "reasonable inference" if not the compelling probability that once she had completed her job duties, Miller turned her attention to the purely personal task of preparing to take food home for herself and her family. Having conceded the reasonableness of the inference that the food at the murder scene was Miller's, Pizza Hut cannot now be heard to argue that there is not even the slightest doubt Miller spent time at the end of her work day attending to this personal matter. It also

[12]Pizza Hut acknowledged "[f]rom the facts, one could 'infer' that [the food] belong[ed] to Nancy Miller" and that "one could even 'infer' that Nancy Miller intended to take these items home with her." App. 23 at 3; MApp. 74.

follows that Miller's departure from the restaurant was delayed by the amount of time the completion of this personal task required.[13]

Significantly, the conclusion that Miller was engaged in a personal task just before she tried to leave the restaurant is consistent with Pizza Hut's own company rules, Under Pizza Hut's strict company policy, employees are forbidden to work after clocking out. App. 17 at 2; MApp. 6, 7, 8-10, 13-15. This means that for at least the period of time she remained in the restaurant after she had clocked out, it is reasonable to infer Miller's status as an employee had ended, her presence was not authorized, and any activity she engaged in — such as preparing food to take home — was a purely personal matter.

Pizza Hut does not dispute that if Miller was preparing or assembling food to take home just before she was attacked, she was engaged in a purely personal matter and that workers' compensation immunity would not attach. Instead, without offering any other

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[13]Based on security system records, a time clock printout, and the testimony of a witness who stated she saw a confrontation outside the restaurant door, the inference on which Pizza Hut's summary judgment theory rests is that Miller must have tried to leave the premises five minutes after she clocked out. MApp. 73. Because Pizza Hut took the instant non-final appeal while discovery was still in its infancy, it is not known whether it is even physically possible for Miller to have prepared her food in the five-minute interval between the time she clocked out and the time Pizza Hut says she was accosted. Similarly, at this stage it is not known whether it was Miller's practice to clock out before or after she began to prepare food to take home. In the event Miller prepared pizzas for herself before clocking out, even under Pizza Hut's version of events she would have been engaged in purely personal matters longer than the five-minute interval. In any event, the very existence of such uncertainties weighs heavily against Pizza Hut because courts are generally reluctant to grant motions for summary judgment before discovery has been conducted. Spra ev v. tick, 622 So.2d 610, 613 (Fla. 1st DCA 1993).

explanation of any kind for the presence of the boxed pizzas and soft drink near Miller's body, Pizza Hut characterizes the inference that the food was Miller's and that she intended to take it home as "pure speculation" and "pyramiding of inferences." Init. Br. on Merits at 24.

Pizza Hut's characterization fails for at least two reasons. First, it is grossly inconsistent with Pizza Hut's concession in the trial court and Second District that one could infer the food found at the scene was Miller's and that she intended to take it home with her. App. 23 at 3; MApp. 74. It is also inconsistent with the undisputed testimony of Miller's coworkers, which was that Miller had a habit of taking home pizzas and a large soft drink at the end of the workday.[14] App. 22 at 2; App. 23 at 3.

Second, Pizza Hut's argument is rooted in the flawed premise that virtually any misfortune which befalls an employee on the employer's premises, "even after clocking out," is "considered part of employment activities." Init. Br. on Merits at 9. This approach is contrary to the law. It erroneously focuses solely on the place in which the employee is injured and ignores the conjunctive requirement that the *time* of the injury must also relate to the fulfillment of employment duties. Foxworth, 86 So.2d at 152; American Legion Post #30, 498 So.2d at 1323; Aloff, 463 So.2d at 295. Every restaurant employee who works a closing shift

[14]In the Supreme Court, Pizza Hut ignores the testimony of Miller's habit and erroneously states the "sole basis" for the conclusion that Miller was engaged in personal acts before she was murdered was the presence of the food at the murder scene. Init. Br. on Merits at 25.

must, to use Pizza Hut's words, ultimately "exit" the premises when the restaurant is "closed up." Init. Br. on Merits at 9. It does not follow, however, that each such employee must automatically be deemed engaged in an act incidental to employment when, as in this case, there is evidence the employee's departure was preceded by involvement in a personal matter.

In fact, the law is that the opposite is true, as established by the only case on all fours with this one, Aloff v. Neff-Harmon, Inc., 463 So.2d 291 (Fla. 1st DCA 1984). Exactly like the instant case, Aloff — which Pizza Hut's brief does not mention — involves an employer's motion for summary judgment against a claim of negligent security by an off-the-clock waitress who was accosted while exiting her workplace after hours in the company of her manager. Id. at 293. Aloff reversed a summary judgment in favor of the employer for the same reason the trial court denied Pizza Hut's motion — the presence of issues of material fact and conflicting reasonable inferences. Id. at 294.

In Aloff as in this case, the plaintiff waitress remained on the business premises after clocking out for the day. Id. at 292-93. Like Miller, the Aloff waitress was forbidden to work after clocking out. Id. at 294; App. 17 at 2; MApp. 6, 7, 8-10, 13-15. In both cases, the waitresses' departures were delayed for personal reasons. As noted, in the instant case Miller's exit was delayed by the time she spent engaged in the personal task of preparing food to take home for herself and her family. In Aloff, the waitress' exit was delayed by the time she spent talking with her

manager about business and about the manager's own personal problems. 463 So.2d at 294.

Mirroring Pizza Hut's theory of how and when Miller and Snow were accosted in this case, the waitress and manager in Aloff were surprised by armed intruders just as they were attempting to exit the premises after closing up. Id. at 293. The one material distinction between the two cases is that although the waitress in Aloff was robbed, assaulted, raped, and seriously injured, she survived. Id. Miller did not.

The employer in Aloff made the same argument Pizza Hut makes here — that the waitress' actions at the time of closing and exiting were incidental to her employment. In support of its summary judgment motion, the Aloff employer pointed to evidence indicating the waitress in that case had been assisting the manager by discussing business with him and by "actually closing the business establishment." Id. at 294.

The Aloff court reversed the summary judgment the trial court had granted the employer. While there was evidence in Aloff that the waitress spent her off-the-clock time performing the job-related functions of discussing business and helping to close up, there was also evidence that the focal point of her after-hours activities was a discussion of the manager's own personal problems. Id. It could be inferred the Aloff waitress was assisting her employer at the moment she **was** attacked, but it could **also** be inferred that she had been engaged in the personal matter of

accommodating her friend.[15] Id. That the Aloff plaintiff was attacked at her place of employment did not establish the employer's affirmative defense because workers' compensation coverage does not exist unless the requirements of ***both*** time ***and*** place relate to the fulfillment of job duties. Id. at 295.

The necessity for jury resolution of the conflicting facts and inferences in this case is even more compelling than it **was** in Aloff. Because there were no eyewitnesses, both sides rely on inferences drawn from circumstantial evidence. Yet it is undisputed that boxed pizzas and a soft drink intended for personal use were found at the murder scene, and that Miller routinely took such food items home with her. Pizza Hut has conceded it is reasonable to infer this food was Miller's. In this context, it certainly does not require "wild speculation" or "pyramiding of inferences" to reach the logical if not unavoidable conclusion that Miller spent pre-departure time preparing or assembling the food found near her body. Significantly, Pizza Hut has never offered any other explanation for the presence of the food and drink at the murder scene,[16] undoubtedly because it understands that to do so is

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'"For this reason, it does not matter whether the pizzas that were prepared in the instant case were Miller's or Snow's, If the pizzas were Snow's, Miller's departure was delayed as an accommodation of a matter personal to her manager. Aloff holds this is enough to create a fact issue precluding summary judgment. 463 So.2d at 294. In any event, if the ownership of the pizzas actually did make a legal difference, the issue of whether the pizzas were Miller's or Snow's would furnish yet another reason why this case cannot be disposed of on summary judgment.

[16]The most that Pizza Hut will say is that the food could have belonged to Snow, the restaurant manager. App. 18 at 3, 8; App. 23 (continued...)

to state aloud an unspoken conflicting inference that defeats summary judgment.

In addition, in Aloff the employer's position was strengthened by evidence indicating there was at least a partial business purpose for the waitress in that case to remain after hours. Id. at 294. By contrast, Miller's preparation of food for herself and her family **was** not even arguably business-related.

Further, in Aloff the record indicated the waitress actually played an active role in the business-related function of closing the restaurant by attempting to insert the key in the exit door while the manager set the alarm. Id. at 293-94. In the instant case, however, there is no evidence Miller played any part at all in the actual closing and securing of the restaurant. To the contrary, the record shows Pizza Hut does not permit waitresses like Miller to activate the alarm or lock up, and waitresses are not given the code to the alarm or the key to the restaurant door. App. 17 at 2, Ex. A at 11; MApp. 4.

A final reason the instant case is an even poorer candidate for summary judgment than Aloff has to do with company policy. The conclusion that the waitress in Aloff was not performing job duties when she was attacked rested in part on the inference that her employer had an unwritten policy which required waitresses to leave the premises immediately after clocking out. 463 So.2d at 294. In

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[16] (...continued)
at 3; MApp. 73-74. As noted, even if this were true, workers' compensation immunity would still be inapplicable. Accommodating **a** matter personal to one's manager is not "incidental to employment." Aloff, 463 So.2d at 294.

the instant case it is undisputed that Pizza Hut has a strict company rule against working off the clock, the violation of which could result in termination. App. 17 at 2; MApp. 6, 7, 8-10, 13-15. For this reason, the inference that Miller was required to depart immediately after clocking out is even stronger here than it was in Aloff.

The bottom line is that Aloff is in all material respects indistinguishable. In both cases, the question of whether an off duty waitress' injuries were incurred incidental to employment turns on a variety of conflicting inferences that must be resolved by a jury. Contrary to the assumption implicit in Pizza Hut's argument, "the fact that the attack occurred at plaintiff's *place* of employment is not sufficient to establish as a matter of law that plaintiff was in the course of her employment at that time." Aloff, 463 So.2d at 295 (emphasis in original). Aloff and the well settled rules it applies establish that the disputed facts and conflicting inferences in the instant case cannot be resolved on summary judgment.

B. Pizza Hut cannot meet its heavy burden of establishing there is not even the slightest doubt that a fact issue or a conflicting inference might exist going to the question of whether murder was a risk inherent in Miller's job as a pizza waitress.

If the Court should adopt Pizza Hut's construction of subdivision (a)(3)(C)(vi) but also agree with the courts below that Pizza Hut cannot establish irrefutably that there does not exist at least one competing reasonable inference on the threshold question

of whether Miller's murder **was** incidental to her employment, it is unnecessary to reach the second question of law — whether Miller's murder was a "risk inherent" in her employment. Should the Court consider this point, summary judgment is still inappropriate. Pizza Hut's "inherent risk" argument is bound up in a swirl of competing facts and conflicting inferences that cannot possibly be decided summarily.

Byrd v. Richardson-Greenshields Sec., Inc., 552 So.2d 1099 (Fla. 1989), a case relied on by Pizza Hut in the Second District, states the established rule. An injury does not arise out of employment for workers' compensation purposes unless it was "caused by a risk inherent in the nature of the work in question." Id. at 1104 n.7. This means that an injury is not covered by workers' compensation unless there is an increased risk of injury peculiar to the employment in issue. Leon County Sch. Bd. v. Grimes, 548 So.2d 205, 207 (Fla. 1989); Southern Bell Tel. & Tel. Co. v. McCook, 355 So.2d 1166, 1168 (Fla. 1977); Grenon v. City of Palm Harbor Fire Dist., 634 So.2d 697, 699 (Fla. 1st DCA), rev. denied, 649 So.2d 233 (Fla. 1994).

It is telling that in the Supreme Court Pizza Hut does not attempt to resurrect the inherent risk argument it relied on in the Second District.[17] Indeed, the argument section of Pizza Hut's brief does not specifically argue the inherent risk test at all, much less attempt to do what it must do to prevail on summary judgment — establish affirmatively and irrefutably that there is

[17]As noted, Pizza Hut's statistics refuted rather than supported its "inherent risk of crime in the workplace" theory.

a complete absence of any genuine issue of material fact on the point. Instead, to the limited extent that Pizza Hut discusses the point, it does so in a purely defensive way. It attempts to explain away the note found at the murder scene, which states "I will keep killing til he's out. Viva Carlos Lehder." App. 10. On its face the note indicates Miller's murder was prompted by politics or terrorism, risks undeniably not inherent in a waitress' employment.[18]

There are several reasons why Pizza Hut cannot **establish for** summary judgment purposes the requisite absence of even the "slightest doubt" Miller's murder was not an inherent risk. First, on virtually identical circumstances — an after-hours attack and robbery of an off-the-clock waitress in a restaurant and lounge where cash was kept — Aloff declined to hold the attack was a risk inherent in the waitress' employment. To the contrary, it reversed the summary judgment the trial court had entered in favor of the employer. 463 So.2d at 295.

Second, the notion that the risk of robbery and murder was inherent in Miller's employment as a Pizza Hut waitress is directly refuted by Pizza Hut's own corporate experience. According to Pizza Hut's security manager, the murder of a waitress under the instant circumstances is literally "unheard of." App. 9 at 29; App. 17 at 3. Similarly, Pizza Hut's area manager testified that

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[18]Carlos Lehder-Rivas, the person identified in the note, is an admirer of Adolf Hitler and Che Guevara. United States v. Lehder-Rivas, 955 F.2d 1510, 1518 (11th Cir.), cert. denied 506 U.S. ___, 113 S.Ct. 347, 121 L.Ed.2d 262 (1992). He engaged in cocaine importation at least in part to achieve his political goal of undermining the United States. Id.

in his eight years with the company, the instant murders were the only ones he had ever heard of. MApp. 11, 12. The undeniable conflict between Pizza Hut's assertion that the instant risk was inherent in Miller's job and the direct evidence of its own experience is, standing alone, enough to create a dispute that cannot be resolved on summary judgment.

The note left at the murder scene furnishes a third important reason why the "inherent risk" question cannot be decided summarily. The plain *meaning* of the note is that the attack on Miller and Snow **was** motivated by a political or terrorist purpose, which not even Pizza Hut contends is a "risk inherent" in a waitress' job. No case has been cited by Pizza Hut or found by the undersigned to suggest the after-hours murder of an off-the-clock waitress in the course of a political or terrorist act, *even if* combined with what Pizza Hut calls a “true" robbery, constitutes a risk inherent in employment as a waitress."

Pizza Hut's insurmountable problem is that the very existence of the note makes summary judgment under the "inherent risk" test impossible. It is presumably for this reason that with respect to this piece of evidence, Pizza Hut has not only abandoned the factual arguments it made below but has also resorted to the indefensibly self-serving contention that the note should be

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[19]Similarly, the self-refuting crime statistics Pizza Hut discarded in the Supreme Court did not even attempt to address percentages of workplace crime prompted by politics or terrorism. App. 21.

ignored because no jury could or should believe it.[20] Init. Br. on Merits at 25-26.

There is no basis in law or logic for Pizza Hut's assertion this Court must treat as an undisputed fact its jury argument that the note cannot be taken to mean what it says on its face. But Pizza Hut must take this extreme position. It knows that the existence of evidence indicating Miller's murder was due even in part to politics or terrorism rules out summary judgment under the "inherent risk" test. Given the existence of the note and the fact that other valuable items were not taken,[21] it cannot be said there does not exist the slightest doubt as to whether the instant attack was motivated in part for reasons other than theft. The "inherent risk" issue in this case poses a classic jury question.

C. Pizza Hut cannot overcome its inability to meet the summary judgment standard of review by ignoring the conflicting facts and inferences in the record.

Pizza Hut's brief virtually ignores the procedure and standard of review applicable to motions for summary judgment. Rather than do what the law requires and conduct a detailed analysis of the entire record to determine whether there exist any material fact

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[20]Although the note was received into evidence as a State exhibit in the criminal trial, Init. Br. on Merits at 4, Pizza Hut now insists it must be ignored. Without offering any authority for its assertion, it states "[t]he contents of the note cannot be accepted as 'fact' by the jury." Init. Br. on Merits at 25.

[21]Miller's killer or killers did not take her wedding ring or the tips that were in her apron. App. 16 at 35, 42; App. 17 at 3; App. 18 at 3. Miller's purse was left inside her car, which was parked in the restaurant parking lot. App. 17 at 3; App. 18 at 3.

issues or conflicting inferences, Moore, 475 So.2d at 668, Pizza Hut resorts to sweeping assertions that there are no "material issues of fact" and that to urge otherwise is to engage in "wild speculation" and "stacking inferences." Init. Br. on Merits at 24-25.

Broad generalizations and handy labels are easy to articulate, but neither can substitute for the precise analysis the summary judgment rule demands. Pizza Hut must meet its heavy burden of establishing irrefutably that the record contains no genuine issue of any material fact and that it is entitled to a judgment as a matter of law. Until Pizza Hut accomplishes this, Miller is not even called upon to counter Pizza Hut's theories. Almand Constr. Co., 547 So.2d at 628.

On this record, Pizza Hut cannot possibly sustain its legal burden. As established above, the inferences upon which Pizza Hut relies are met at every turn by competing inferences of equal or greater reasonableness and persuasiveness. This is a fact-intensive case in which the circumstantial evidence yields conflicting reasonable inferences. It is not suited for disposition on a motion for summary judgment.**

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[22] In fact, Pizza Hut's version of events cannot possibly survive its own view of what constitutes "pyramiding inferences" and "wild speculation." Init. Br. on Merits at 24. Given Miller's undisputed habit of taking home the same food and drink found at the murder scene, Pizza Hut engages in "wild speculation" and "pyramiding inferences" when it asserts (1) the boxed pizzas and soft drink did not belong to Miller (or even to Snow) and (2) no time was spent by Miller (or Snow) preparing the food, although (3) there is no other explanation for the presence of the food found at the murder scene.

CONCLUSION

For the foregoing reasons, the Second District's dismissal of this appeal should be affirmed. Alternatively, should the Supreme Court adopt the construction of Rule 9.130(a)(3)(C)(vi) promoted by Pizza Hut, the Court should reverse and remand to the District Court with instructions to affirm the trial court based on the existence of genuine issues of disputed material facts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing RESPONDENT MILLER'S ANSWER BRIEF ON THE MERITS, along with Appendix, has been furnished by U.S. Mail on March 10, 1997, to:

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