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IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

PIZZA HUT **OF** AMERICA, INC.,

Petitioner,

Case No.: 88,301
DCA Case No.: 95-03695

vs.

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.

PETITIONER, PIZZA HUT OF AMERICA, INC.'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Richard Miller, as personal representative of the Estate of Nancy Miller, brought a wrongful death action against Nancy Miller's employer, Pizza Hut of America, Inc.[1] alleging that PHA failed to employ adequate security measures at the Brandon Pizza Hut (where she worked) and failed to warn her of prior criminal activity in the vicinity. The allegations state that the Defendant was negligent in failing to protect Miller from the intentional acts of her criminal assailant. (App. 1)[2] In answering the complaint, PHA stated that it was immune from the alleged negligence on the basis of workers' compensation immunity. (App. 2) Consequently, PHA moved for summary judgment as a matter of law. (App. 3)

In support of its motion for summary judgment, PHA **also** filed its request for admissions to Richard Miller **and** his answers to the request for admissions. (App. 5) PHA also filed the affidavit of Randal W. Johnson, the area manager for PHA in the division that included the Brandon Pizza Hut. (App. 6) These documents demonstrate that on the evening of May 26, 1992, Nancy Miller (a waitress) was working the closing shift at the Pizza Hut restaurant located on Brandon Boulevard in Brandon, Florida. Miller's murdered body and that of the restaurant manager, Steven Snow, were

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[1] Plaintiff, Respondent, Richard Miller, will **be** referred to as "Richard Miller" or "the Respondent." The Defendant/Petitioner, Pizza Hut of America, Inc., will be referred to as "PHA" or "the Petitioner."

[2] All citations are to the appendix accompanying this Initial Brief, which was originally filed with the Second District.

found inside the Brandon Pizza Hut restaurant in the ear y hours of the morning of May 27, 1992. Their bodies were found near an open safe inside the Pizza Hut and $812 was missing from the safe, When her body was found, Nancy Miller was wearing a shirt with a Pizza Hut logo, was wearing a Pizza Hut name tag, and was still wearing an apron. (App. 5, 6)

Additional facts are disclosed by filings made by Richard Miller in response to the motion for summary judgment. The trial testimony of Michael Davis of ADT Security Systems, which took place at the criminal trial of Richard Miller,[3] states that the alarm at the Pizza Hut restaurant had been set at approximately 12:59 and 38 seconds a.m. on May 27, 1992, and then deactivated at 1:00 and 50 seconds a.m. In other words, a minute and twelve seconds after the alarm was turned on, it was turned back off. (App. 8, pp. 10-11)

The Plaintiff filed State's Exhibit #54 from Richard Miller's criminal trial, identified as a print out of the ADT records for Brandon Pizza Hut, which confirmed the times given by Michael Davis in his testimony. (App. 11) An additional filing consists of a copy of the time records for Nancy Miller at the Brandon Pizza Hut which indicate that she "clocked out" on the morning of May 27, 1992 at 12:54 a.m., just minutes before the alarm was first activated. (App. 12) Finally, the Plaintiff filed the deposition of Michael Davis, operations manager for ADT, taken pursuant to the

[3] Richard Miller was indicted, tried and acquitted of the murder of his wife, Nancy Miller, prior to bringing this lawsuit.

criminal prosecution. (App. 13) His testimony confirms that the alarm was set at 12:59 and 38 seconds on May 27, 1992, and deactivated one minute and twelve seconds later at 1:00 and 50 seconds. (App. 13, pp. 19-20)

The affidavit of Robyn Lynn Jordan, filed by the Plaintiff, demonstrates that Miller and the store manager, Steven Snow, may have been initially accosted by their assailant at the doorway of the restaurant. (App.7) According to Ms. Jordan, sometime before midnight on the eve of May 26, 1992, she left her home in Hillsborough County to get some food for herself and her sons. As she drove into the parking lot, toward the rear door of the Brandon Pizza Hut, she noticed two cars in the parking lot. Jordan attested that, in the doorway of the rear door of the Pizza Hut, she saw a white woman standing just outside of the door frame next to a white male. Both of them were facing a black male wearing a knit ski cap. When her car lights fell upon the three individuals, the black man placed his hand on the shoulder of the white male an pushed him toward the doorway. The white woman ran inside and the black male motioned for Jordan to leave. Upon hearing of the murders, Jordan later notifiedthe sheriff's department of what she had seen. (App. 7, pp. 1-2)

Richard Miller also filed additional exhibits in opposition to PHA's motion for summary judgment. The first item was the deposition of Dale Pugh, the security manager for the Florida Division of PHA. (App. 9) His deposition shows that it was taken in January, 1994, one month before Richard Miller's criminal trial

by the State, and that it was taken in an unrelated case where PHA was a defendant. In Pugh's deposition he was asked about the Brandon Pizza Hut murders. Pugh stated that the police always suspected and finally arrested the husband of one of the victims [Miller] for the murders -- and that the husband "made it look like a robbery" when it was not. (App. 9, pp. 171-172)[4]

In addition, Richard Miller filed Nancy Miller's employee agreement with PHA, along with his request for admissions on PHA and PHA's response.[5] (App. 14) Miller attached to his request for admissions a memorandum signed by Steven Snow in 1989 in which he acknowledges that "working off the clock" is a violation of company policy as well as state and federal laws and would not be condoned by Pizza Hut. (App. 14)[6] Finally, the Plaintiff filed a copy of State's Exhibit #7 from Richard Miller's criminal case, identified as a note found on Steven Snow's body on the morning of May 27, 1992, The note states: "I will keep killing till he's out. Front of Colombian Liberation. Viva Carlos Lehder." (App. 10)

On July 5, 1995, a hearing was held on the summary judgment motion. (App. 16) Both sides presented their cases. Richard

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[4] In his memorandum to the court, Richard Miller used the deposition to argue that Pugh had taken the position under oath that a real robbery had not occurred at the Brandon Pizza Hut. (App. 17, p. 3)

[5] The court will note that many of the admissions were denied on the basis of the wrong time being given in the admission question.

[6] These laws protect employees from working without being paid.

Miller's attorney asked the court to take judicial notice of the entire criminal court file in this case.[7] (App. **16, pp.** 24-25) PHA's trial attorney pointed out that the criminal trial lasted approximately two weeks and had almost 1,000 exhibits and thousands of pages of testimony. He also pointed out that judicial notice was not raised before the day of the hearing. (App. **16, p.** 38) In addition, there was no transcript made **to** date of the criminal trial. (App. **16,** p. 40) Per **the** court's inquiry, the parties acknowledged that there was nothing in the record to indicate the <u>exact</u> time of Miller's death. (App. 16, p. 31, 42) Nevertheless, the parties agreed that there was evidence that brought the death within a range of time. (App. 16, pp. 43-44) The Plaintiff's attorney acknowledged that the medical examiner gave a range of time for the death during the criminal trial. (App. 16, p. 43) The court permitted the attorneys to file supplemental memorandums of law. (App. 16, **pp.** *36-37)*

Following the summary judgment hearing, Richard Miller filed a memorandum of law in opposition to PHA's motion for summary judgment. (App. 17) His memorandum of **law** includes facts that were not entered into the record prior to the summary judgment motion -- that **tip** money from Nancy Miller's apron had not been taken, that **her** wedding ring remained on her finger, that Miller's purse was in her car in the parking lot, and that two pizza boxes and a large drink were found stacked near Miller's body. (App. 17,

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[7] The Plaintiff did not file a formal request for judicial notice, nor did the court ever formally rule on the request.

p. 3) His memorandum **also** attaches a portion of the deposition of Randal Johnson in which Johnson states that a closing task for a waitress would not **be** setting the alarm or locking the door, but would be cleaning up and restocking the dining area. (App. **16,** Exhibit A)

The Plaintiff's memorandum of law argues that Miller's death did not arise out of her employment because of ten possible "fact issues" remaining to be determined by the jury: (1) what Nancy Miller was doing after clocking out at 12:54 a.m.; (2) whether she was interacting socially with her co-worker; (3) how long a period elapsed after the time she clocked out until her murder; (4) whether she was confronted by her assailant on the premises or off premises; (5) whether the tasks she performed during the evening shift were incidental to her employment; (6) whether Miller had exited the restaurant and then returned later on a personal errand for something she had forgotten; (7) whether the attack was motivated by robbery or terrorism; (8) whether the robbery was genuine or staged; (9) whether the attack was a random act of violence; and (10) whether the attack was a risk inherent in her employment. (App. **17, p. 6**)

PHA responded with a supplemental memorandum of fact **and** law. (App. 18) The memorandum informs the court that Attorney Lazzara, who represented Richard Miller at his criminal trial, just as he is representing Richard Miller in this civil action, made an opening statement: to the jury in the criminal trial in which he summarized the evidence the defense would rely on at trial:

> "I expect the evidence to show that this is not a calculated, staged robbery, but a real robbery. One that **was** committed -- the robbery -- before the people were killed, not after.'"

(App. 18, p. 4) (verbatim quote from videotape of criminal trial).[8] Lazzara also told the jury that the evidence would show that blood splatters on the bottom of the safe led to the "inescapable conclusion" that the robbery occurred before the murders. (App. 18, p. 4; App. 19, pp. 29-30)

In addition, PHA's memorandum addressed the issue with which the trial court was concerned, i.e., the time of Nancy Miller's death. The memorandum states that in Mr. Lazzara's cross-examination of Robert Pfaltzgraf, the medical examiner at the criminal trial, he elicited testimony from the doctor that the time of death was consistent with the time of the alarm deactivation at approximately 1:01 a.m. Dr. Pfaltzgraf had arrived on the scene at approximately 8:00 or 9:00 in the morning, and fixed the range of time for the deaths at six to eight hours before his arrival, i.e., between 12:00 midnight and 3:00 a.m.[9]

PHA argued that it was entitled to summary judgment as a matter of law based on workers' compensation immunity on the grounds that: (1) Nancy Miller was at the Brandon Pizza Hut on

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[8] The opening statement was transcribed and provided to the District Court in App. 19. Lazzara's statement that **a** "real" robbery occurred is in App. 19, pp. 17-18.

[9] Miller did not dispute this testimony by the medical examiner. For the appellate court's review, the verbatim testimony of the medical examiner, was transcribed from the videotape of the criminal trial, and provided to the Court in App. 19.

the evening of May 26, and the morning of May 27, 1992. incidental to her employment in working the closing shift; (2) Nancy Miller's dead body (and that of her manager, Steven Snow), were found near the open, empty safe, demonstrating that a robbery took place; and (3) Nancy Miller was the victim of a violent crime that took place in her workplace, compensable through workers' compensation.

Richard Miller then filed a pleading objecting to certain statements in PHA's supplemental memorandum of law. (App. 22) Specifically, the Plaintiff objected to the statements made by Robyn Jordan in her affidavit, which were cited by PHA, because according to the Plaintiff, she had made a somewhat different statement at trial, (App. 8, p. 1) The Plaintiff also objected to the statement made by PHA that a robbery occurred at the scene of the murder, apparently on the basis that this was an inference rather than a fact. (App. 22, p. 2) He objected to the fact that "Colombian" was misspelled in PHA's memorandum. (App. 22, p. 2) He also objected to the inclusion of statements made by Mr. Lazzara in his opening at the criminal trial. (App. 22, p. 2) The Plaintiff also stated that there was sworn testimony at the trial (not filed with the court) that Miller had a habit of taking a soft drink and pizza home with her, and that the drink found nearby was her usual choice. (App. 22, p. 2)

PHA responded to the Plaintiff's objections by stating that Richard Miller could not impeach the affidavit of witness, Robyn Jordan that Richard Miller himself filed, and that the fact that a robbery occurred at the scene of the murder was a fact, not an

inference, based on hard evidence of an open safe (with blood spatters inside) and missing money. (App. 23, pp. 1-2) PHA also responded that the Pizza Hut manager, Steven Snow, also sometimes took home pizza, and that it was never known whose pizza boxes were on the floor near the dead bodies. (App. 23, p. 3)

On August 18, 1995, the trial court entered an order denying PHA's motion for summary judgment. (App. 24) The order simply states: "There are factual questions that must be submitted to the jury on the issue of workers' compensation immunity." Although trial counsel for PHA submitted a letter to the court asking that it do so (App. 24), the order does not specify the specific factual issues that are deemed necessary to go to a jury. (App. 25) PHA timely appealed this order.

On appeal, PHA took the position that there was a complete lack of record evidence demonstrating that either of the victims was at the Pizza Hut premises for purely personal reasons at the time of the attack and robbery. PHA presented case law to the court holding that cleaning up, closing up, and exiting the restaurant (even after "clocking out") are all considered part of employment activities. PHA also argued that robbery and its accompanying violence are always a risk inherent in a workplace that is open late with a cash register or safe on the premises, and that the jury could not be permitted to speculate about the contents of the note left behind. PHA also disputed Richard Miller's new argument made for the first time on appeal that because boxes of pizza were found near Nancy Miller's body, she had

placed them there, that she herself had baked the pizzas, and that she had done so during the time period between clocking out and being accosted. The bottom line of PHA's argument was that there were no genuine fact issues to go to the jury other than those advanced by counsel, not by evidence. PHA also argued that sending the Plaintiff's suggested fact issues to the jury would call for wild speculation or the impermissible pyramiding of inference upon inference on its part if the jury did indeed determine those issues in the Plaintiff's favor. Therefore, PHA concluded that it should have been granted a summary judgment as a matter of law.

In response, the Second District issued its decision in Pizza Hut of America, Inc. v. Miller, 674 So. 2d 178 (Fla. 2d DCA 1996), determining that it had no jurisdiction over the cause. The court looked only to the trial court's order stating that "factual questions must be submitted to the jury" and to the hearing transcript where (the District Court states) the trial court indicated was concerned as to whether Nancy Miller had ceased doing employment related activities and was acting in regard to purely personal matters when she was murdered. Id. at 179.[10] The Second District determined that such an order by the court did not fall within the ambit of Rule 9.130(a)(3)(vi), Fla. R. App. P. as an order determining "that a party is not entitled to workers' compensation immunity as a matter of law." Id. PHA timely filed a petition to this Court to accept jurisdiction due to a conflict

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[10] PHA disputes the accuracy of this observation in the argument portion of this brief.

among the district courts as to the interpretation of the above rule, This Court accepted jurisdiction over this matter by order dated October 25, 1996.

ISSUE ON APPEAL

WHETHER AN APPELLATE COURT HAS JURISDICTION UNDER RULE 9.130(a)(3)(C)(vi), FLORIDARULES OF APPELLATE PROCEDURE, TO REVIEW THE RECORD EVIDENCE ON APPEAL TO DETERMINE WHETHER A GENUINE ISSUE OF MATERIAL FACT EXISTS TO PRECLUDE SUMMARY JUDGMENT BASED ON AN EMPLOYER'S ENTITLEMENT TO WORKERS' COMPENSATION IMMUNITY AS A MATTER OF LAW.

SUMMARY OF ARGUMENT

The only correct interpretation of Rule 9.130(3)(C)(vi), Florida Rules of Appellate Procedure, is that appellate courts have jurisdiction to decide a non-final appeal of an order denying summary judgment if the basis for the motion for summary judgment was that the appellant was entitled to workers' compensation immunity as a matter of law. The Second District's position, that the order itself must conclusively and finally determine a party's non-entitlement to workers' compensation immunity as a matter of law is an incorrect interpretation of the statute, and violates public policy by failing to protect a statutory employer's freedom from spurious lawsuits that attempt to circumvent such immunity.

In determining that it had no jurisdiction over this cause, the Second District did not examine the record to determine whether a "material" (genuine) issue of fact remained to go to the jury. It merely relied upon the language in the trial court's order and a brief review of a hearing transcript to determine what a trial court may have been concerned about. In actuality, the trial court never revealed what "fact issue" remained to be presented to the jury, and never specifically stated any concern at the hearing other than whether there had ever been a fixed time of death. The Second District should have exercised its jurisdiction to determine whether a genuine, actual, material issue of fact existed -- not simply alleged issues that, if taken to a jury, would require the jury to engage in wild speculation and the pyramiding of inference

upon inference upon inference in order to reach the conclusion advanced by the Plaintiff.

It is contrary to public policy to interpret the appellate rules so as to require an employer to bear the burden of a trial without the opportunity to take a non-final appeal on the issue of his immunity from suit. Once he has to stand trial, his immunity from suit has been essentially stripped without recourse. If an order denying summary judgment based on workers' compensation immunity is not subject to an interlocutory appeal, it will also lead to a deluge of litigation because employees who are unsatisfied with a mere compensation remedy will now believe they have a greater chance of taking their claims to trial. Thus, the Second District's position should be rejected in favor of the Fourth District's reasoned decision.

ARGUMENT

AN APPELLATE COURT HAS JURISDICTION UNDER RULE 9.130(a)(3)(C)(vi), FLORIDA RULES OF APPELLATE PROCEDURE, TO REVIEW THE RECORD EVIDENCE ON APPEAL TO DETERMINE WHETHER A GENUINE ISSUE OF MATERIAL FACT EXISTS TO PRECLUDE SUMMARY JUDGMENT BASED ON AN EMPLOYER'S ENTITLEMENT TO WORKERS' COMPENSATION IMMUNITY AS A MATTER OF LAW.

The issue for this Court's consideration is the proper interpretation of this Court's amendment to Rule 9.130, Rules of Appellate Procedure, which states as follows:

> (3) Review of non-final orders of lower tribunals is limited to those that
>
> (C) determine
>
> (vi) that a party is not entitled to workers' compensation immunity as a matter of law.

Rule 9.130(a)(3)(C)(vi), Fla. R. App. P.

At present, there appear to be three different schools of thought among the district courts of appeal as to the interpretation of that amendment, which was first set out in Mandico v. Taos Construction, Inc., 605 So. 2d 850 (Fla. 1992). The three schools of thought are divided as follows: The Fourth District Court of Appeal and Fifth District Court of Appeal take the position that they have jurisdiction to decide a non-final appeal of an order denying summary judgment if the basis for the motion for summary judgment was that the appellant was entitled to workers' compensation immunity as a matter of law. The Second District Court of Appeal, which has recently certified the

question, takes the position that it is without jurisdiction to review such a non-final order unless the order itself conclusively and finally determines a party's non-entitlement to workers' compensation immunity as a matter of law. The First District Court of Appeal appears to have taken somewhat of a hybrid approach to the matter, permitting itself to go beyond the contents of the motion and the order to determine, by a review of the record, whether a "material" (genuine) issue of fact remains to preclude summary judgment as a matter of law, Each of these schools of thought will be examined, in turn.

First, in Breakers Palm Beach, Inc. v. Gloger, 646 So. 2d 237 (Fla. 4th DCA 1994), the trial court denied the defendant's motion for summary judgment, concluding that there were issues of fact remaining regarding the plaintiff's claim that the defendant failed to warn it employees of conditions which were substantially certain to result in injury. The court addressed the plaintiff/appellee's motion to dismiss for lack of jurisdiction, which was grounded on the argument that the court had not yet determined, as a matter of law, that the defendant would never be entitled to workers' compensation immunity. The appellate court disagreed with the Plaintiff, stating as follows:

> 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." We therefore deny the motion to dismiss.

Id. at 237-238. In so doing, the Fourth District also relied on Judge Altenbernd's observation in Ross v. Baker, 632 So. 2d 224, 225 (Fla. 2d DCA 1994), in which he concluded that the Supreme Court intended the appellate courts to review orders denying summary judgment on the basis of unresolved factual questions.

The jurisdictional question went unraised for two years. During this time, numerous lawsuits were brought by plaintiffs attempting to circumvent workers' compensation immunity by alleging that their injuries were caused by safety violations committed by their employers that were so egregious as to constitute an intentional tort. When summary judgments were denied to employers, based on those grounds, the appellate courts examined the facts in the record, and typically would reverse the trial court's order. See Mathew Corp. v. Peters, 610 So. 2d 111 (Fla. 3d DCA 1992); Dynoplast, Inc. v. Siria, 637 So. 2d 13 (Fla. 3d DCA 1994); Emergency One, Inc. v. Keffer, 652 So. 2d 1233 (Fla. 1st DCA 1995); Pinnacle Construction, Inc. v. Alderman, 639 So, 2d 1061 (Fla. 3d DCA 1994); Kline v. Rubio, 652 So. 2d 964 (Fla. 3d DCA), rev. denied, 660 So. 2d 714 (Fla. 1995); United Parcel Service v. Welsh, 659 So. 2d 1235 (Fla. 5th DCA 1995); Mekamy Oaks, Inc. V. Snyder,

659 So, 2d 1290 (Fla. 5th DCA 1995); J.B. Coxwell Contractins, Inc. v. Shafer, 20 Fla. L. Weekly D2359 (Fla. 5th DCA, Oct. 20, 1995).

In 1996 the jurisdictional issue was again brought to the fore in City of Lake Mary v. Franklin, 668 So. 2d 712 (Fla. 5th DCA 1996). In that decision, the Fifth District ruled that it would have had jurisdiction to entertain a non-final appeal based on the denial of the City's motion seeking entitlement to workers' compensation immunity as a matter of law. Id. at 714. The Fifth District rejected the argument that jurisdiction did not arise unless the order determined "once and for all" that there was no workers' compensation immunity or that the rule did not permit review of orders determining that the immunity issue rested on fact questions to go to the jury. Id. In so doing, the Fifth District expressly agreed with Judge Klein's reasoning in Breakers and Judge Altenbernd's observations in Ross. Id. See also ACT Corp. v. Devane, 672 So. 2d 611 (Fla. 5th DCA 1996).

An opposing school of thought emerged several months later when the Second District issued its decision in the instant case, Pizza Hut of America, Inc. v. Miller, 674 So. 2d 178 (Fla. 2d DCA 1996). The Second District determined below that it had no jurisdiction over the non-final appeal because the order denying PHA's motion for summary judgment as a matter of law specifically noted that there were factual questions (unspecified) to be submitted to the jury on the issue. Id. at 179. The Second District made no attempt to examine the record on appeal to determine whether a "material" (genuine) issue of fact remained to

be submitted to the jury. Instead, the court merely cited to the order denying PHA's motion and to the transcript of the summary judgment hearing. Id. The court states that the transcript revealed that the issue the court wished to submit to the jury concerned whether the Plaintiff's decedent was acting within the course and scope of her employment at the time of the murder or had begun activities that were purely personal. Id. However, **a** review of this summary judgment hearing transcript clearly shows that the only question of concern to the judge was whether there was any evidence in the record of the actual time of Nancy Miller's death. (See App. 16, pp. 31, 42-44) Other than that, the Judge makes no comment except to allow both parties to submit supplemental memoranda.

The Second District's opinion also acknowledges that the parties submitted disputed versions of the facts as to what Nancy Miller **was** doing at the time of her murder. Id. Again, however, the Second District does not profess to have examined the record to determine whether the Plaintiff's version of the facts is at **all** supportable, or whether there "issues" were indeed permissible jury questions. The Second District merely determined that, because the judge decided there were issues of fact, it was not permitted to go any further in its resolution of the matter because it lacked jurisdiction, Id.

Following the Miller decision, the Second District underscored its position in American Television and Communication Corp. v. Florida Power Corp., 21 Fla. L. Weekly D1668 (Fla. 2d DCA, July 17,

1996) and Hastings v. Demming, 21 Fla. L. Weekly D1756 (Fla. 2d DCA, July 31, 1996), wherein it certified the jurisdictional question to this Court, In Hastings, the Second District refused to examine the record to determine whether the defendant, an officer and director of the plaintiff's employer, had committed acts, as alleged, that rose to the level of "culpable negligence" in failing to maintain the work premises. Id.

In support of its holding in Hastings, the Second District cites to this Court's decision in Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994), which dealt with an appeal of a non-final order denying a motion for summary judgment based on the defense of qualified immunity. Id. at D1759. The Second District notes that this Court would permit an intermediate appellate court to review orders denying motions for summary judgment based on qualified immunity, "but only if there are no material facts in dispute , . " Id. (emphasis added). Yet, the Second District fails to explain how an appellate court could possibly know that a genuine, "material" issue of fact is in dispute without first examining the record evidence on appeal, which it refused to do in Miller, and apparently did not do in Hastinss, either.

A third approach has been taken by the First District which attempts to reconcile the Second District's position with the pre-existing case law from the other district courts of appeal. Specifically, in Walton Dodge Chrysler-Plymouth Jeep & Eagle, Inc. v. H.C. Hodses Cash & Carry, Inc., 21 Fla. L. Weekly D2004 (Fla. 1st DCA, Sept. 4, 1996), a third party tortfeasor attempted to

obtain contribution against the injured party's employer. The First District noted that such a claim existed "only if the third-party tort-feasor breeches the employer's immunity by showing a deliberate attempt to injure or conduct which is certain to lead to injury or death." Id. at 2005. The First District apparently examined the record evidence in the case before determining that "there was no indication that the employer took any affirmative acts which would increase the risk of harm, or that the employer actively concealed known dangers from its employees." Id. at D2006. Therefore, finding that there was "no evidence to support a finding that the employer engaged in an intentional act designed to result in, or that was substantially certain to result in, injury or death to the employee," the First District held that the trial court wrongfully denied the employer's motion for summary judgment. Id.

In a footnote, the First District determined that because its review of the record revealed no disputed issue of ~~material~~ fact, and because the motion and order were based on the exclusivity provisions of the workers' compensation statute, it had jurisdiction to review the matter under the appellate rules under both the Second District's and the Fourth District's tests. Id. at D2006, fn.1. Judge Benton dissented, noting (correctly) that the First District **was** not strictly following the Second District's test. However, even Judge Benton proceeded to examine the record on appeal to determine whether there was, indeed, a "genuine" issue of material fact outstanding for the jury to decide.

Similarly, in Gustafson's Dairy, Inc. v. Phiel, 21 Fla. L. Weekly D2146 (Fla. 1st DCA, Sept. 30, 1996) (wherein the trial court denied the employer's motion for summary judgment without explanation), the First District carefully examined the record on appeal, determined that there were no material (genuine) issues of fact, and then ruled that the order must have "necessarily" denied workers' compensation immunity "as a matter of law." In so doing, the First District paid lip service to the Second District's test, but in doing so, actually proved that an examination of the record is necessary to determine whether a genuine issue of fact remains for the jury. In a special concurrence by Judge Wolf, he takes the position that the only logical approach consistent with the intent of this Court in Mandico is the Fourth District's opinion in Breakers, which permits the appellate court to examine the record to determine whether a genuine issue exists to go to the jury. By so doing, it avoids an unnecessary trial and a second review of the record on full appeal. Id. at 2148.

It has long been the public policy in the State of Florida to protect the cloak of workers' compensation immunity surrounding the employer, which insulates him from unnecessary and costly litigation. This is the carefully balanced quid-pro-quo for payment of costly workers' compensation premiums in order to ensure benefits paid to employees regardless of fault. The system has not totally prevented injured employees from attempting to circumvent this immunity by bringing lawsuits alleging grounds that are unsupportable. Through Rule 9.130(3)(c)(vi), Florida Rules of

Appellate Procedure, this Court had carved out and fashioned a unique appellate rule that permits a non-final appeal when a lower court denies an employer's motion for summary judgment on the basis that it has workers' compensation immunity as a matter of law. Hence, the appellate courts have been able, until now, to save employers from costly litigation by nipping many of these lawsuits in the bud by deciding, through non-final appeals, that the suits cannot survive summary judgment. The opinions that have emerged have served the public by defining for the bar and the judiciary the parameters of an intentional tort on the part of an employee and the parameters of course and scope of employment.

If the Second District's position is adopted by this Court, there would no longer be an early resolution of these issues in workers' compensation cases. Instead, far more of these cases would go to trial first, with the workers' compensation question being decided post-trial on appeal because the issue erroneously went to a jury. The problem has its roots in the high standard which Florida courts have adopted with regard to granting summary judgments to defendants in negligence cases. Consequently, the trial courts are timid about granting summary judgments because workers' compensation cases are often (erroneously) thrown into the same category as a typical negligence action. Many times the lower courts appear not to realize that "immunity" should be examined under separated standards than liability at the summary judgment stage.

If the Second District's test is approved, there will be more lawsuits brought by injured employees who are unsatisfied with receiving only workers' compensation was a result of their injuries. The fact that the plaintiff will no longer be subject to an interlocutory appeal by an appellate court to determine whether there is indeed a basis for circumventing workers' compensation immunity will no doubt bring a deluge of such cases to the trial courts and ultimately to the appellate courts. Thus, the Second District's approach is shortsighted. The rule may lighten the appellate court's load in that there will be fewer interlocutory appeals in the short run, However, there will be more appeals from trials in the long run.

In the case at hand, it is admitted that the Plaintiff's counsel advanced numerous theories regarding what Nancy Miller may have been doing between the time that she clocked out and the time she was murdered. However, all of these theories are based on pure speculation and the pyramiding of inference upon inference upon inference. For example, the fact that boxes of pizzas were found near her body is used by the Plaintiff to advance the theory that (1) the pizzas were Nancy Miller's; (2) that she herself had baked them; (3) that she had done so after clocking out; and (4) that she was in the process of doing this "personal business" at the time she was murdered. If a jury were to draw such a conclusion solely from the fact that the pizza boxes were near her body (as the Plaintiff argues as proper), such a conclusion could never be

upheld on appeal post-trial because it would be based on pure speculation, surmise, and guesswork.

The additional theory advanced by the Plaintiffs, that the anonymous note left on the body should be submitted to the jury to examine its contents to determine whether it was a "true" robbery or an act of terror, is also unacceptable. The contents of the note cannot be accepted as "fact" by the jury, Furthermore, the jury cannot be asked to speculate on the motive of the killer/ robber, who supposedly left the note. The only evidentiary facts of consequence are that a robbery took place after Nancy Miller's closing shift and that her body was later found at the scene.

There is absolutely no evidence that Nancy Miller was doing anything of a personal nature at the time that she and the store manager was accosted. Thus, there is no "material" (genuine) issue of fact that remains to go to the jury in this case. It is inequitable and contrary to public policy regarding workers' compensation to require PHA to submit to a trial on this matter simply because the trial judge states in an order that there are (unspecified) contested issues of fact. It is also unjust that the Second District refused to examine the record evidence to determine whether there existed genuine jury questions, or merely illusory issues raised as an attempt to avoid summary judgment.

The instant case should not be permitted to go to a jury to speculate as to whether Nancy Miller was performing personal acts (baking pizza) at the time of her murder on the sole basis that two boxed pizzas and a soft drink were found near her body.

Furthermore, it is impermissible to allow a jury to decide whether a "real" robbery occurred at the Pizza Hut, on the basis of an anonymous note, when the safe was open, money was missing, and the victims' blood splatters were found inside the safe. So too, it would be impermissible to allow a jury to construe the meaning of the note supposedly left behind by the robber/murderer so as to determine his motives. It is also irrelevant as to whether the murder was committed. "in part" as an act of terrorism, in conjunction with the robbery, when it is uncontroverted that a robbery of the business took place, i.e., money was removed from the safe at the crime scene.

Perhaps the Second District should have more carefully examined its own decision in McGory v. Metcalf, 665 So. 2d 254 (Fla. 2d DCA 1995), which it cited in Hastings. In McGory, the trial court entered an order denying McGory, a St. Petersburg police officer, immunity from suit under 42 U.S.C. §1983. The plaintiffs contended that summary judgment was properly denied because there were "material facts in dispute." Id. at 257. The Second District disagreed, stating that there were no "disputed material facts." Id. at 258 (emphasis supplied by the court). The Second District went on to explain the following:

> A dispute about a material fact is genuine only if the evidence is such that a jury could return a verdict for the non-moving party.

Id. (emphasis added). It is readily apparent that the Second District examined the record in McGory to determine whether a genuine, actual, material issue of fact existed -- not simply

alleged issues. It should have done so in the instant case, as well, and should not have taken the position that it had no jurisdiction to do so simply because a trial judge determines that a factual issue (which it refused to identify) should go to a jury.

In both Mandico and Ramos v. Univision Holdings, Inc., 655 So. 2d 89 (Fla. 1995), this Court held that the purpose of the appellate rule was to promote early resolution of cases in which it is evident that the plaintiff's exclusive remedy is workers' compensation. This is indeed such a case. It is also necessary for an appellate court to examine the record carefully to determine whether it is evident that workers' compensation is the exclusive remedy. That is the purpose of the appellate rule at issue here. It is not logical that an appellate court would decide, simply on the basis of the language in a trial court's order, that it had no jurisdiction to do so.

In sum, it is contrary to public policy to interpret the appellate rule so as to require an employer to bear the burden of a trial without the opportunity to take a non-final appeal on the issue of his immunity from suit. Once he has to stand trial, his immunity has been stripped without recourse. As this Court stated in Tucker:

> If orders denying summary judgment based upon claims of qualified immunity are not subject to interlocutory review, the qualified immunity of public officials is illusory and the very policy that animates the decision to afford such immunity is thwarted.

Id. at 1190. so too, if an order denying summary judgment based on workers' compensation immunity is not subject to interlocutory

appeal, such immunity is also illusory, and violates the public policy in Florida for protecting employers from unwarranted litigation.

Finally, PHA is not unaware that the Florida Bar Appellate Rules Committee has petitioned this Court to amend the appellate rule to support the Second District's position. This position should be rejected for the same reasons that the Second District's opinion should be rejected: It is shortsighted and it fails to comport with Florida's stated public policy of removing workplace accidents from the tort system.

CONCLUSION

For all of the reasons cited in this brief, this Court should reverse and remand the decision of the Second District below, with instructions to review the record evidence on appeal to determine whether a genuine issue of material fact exists to preclude summary judgment based on Pizza Hut of America's entitlement to workers' compensation immunity as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished **on** November **22, 1996** by U.S. Mail to **Stuart C. Markman, Esquire,** Kynes, Markman & Felman, P.A., Post Office Box 3396, Tampa, FL 33601-3396, **Bennie Lazzara, Jr., Esquire,** Lazzara & Paul, P.A., 606 Madison Street, Suite 2001, Tampa, Florida 33602, and **Terrance A. Bostic, Esquire,** Akerman, Senterfitt & Eidson, P.A., P.O. Box 3273, Tampa, Florida 33601.

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