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

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

Petitioner,

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.

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

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The Petitioner, Pizza Hut of America, Inc.,[1] adopts by reference the case and facts contained in the decision of the Second District Court of Appeal in this matter, without adopting the legal conclusions therein. (App. 1)[2] PHA supplements that decision with the trial court's order which formed the basis for the appeal. (App. 2)[3]

As the opinion of the Second District states, the order entered by the trial court was in response to a motion by PHA requesting entry of summary judgment in its favor on the grounds that it was entitled to workers' compensation immunity as a matter of law. In denying PHA's motion, the trial court ruled as follows:

> ORDERED AND ADJUDGED that the Defendant, Pizza Hut of America, Inc.'s motion for summary judgment on the claim of Richard Miller, as Personal Representative of the Estate of Nancy Miller, deceased, DENIED. There are factual questions that must be submitted to the jury on the issue of the workers' compensation immunity.

(App. 2) The Second District opinion recites that the transcript of the summary judgment hearing reveals that the issue of fact the court wished to submit to the jury concerned whether the worker,

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

[2] All references to the appendix attached hereto will be referred to as "App." followed by the number assigned to the appendaged document.

[3] A conformed copy of the trial court's order pursuant to Rule 9.120, Fla. R. App. P. and its committee notes are attached to assist the Court's determination of jurisdiction.

Nancy Miller, **was** acting within the course of her employment at the time that she was murdered, or whether she had ceased her employment activities and had begun acting in regard to purely personal matters, PHA's position was that there was no genuine issue of fact on this matter and appealed the trial court's decision to the Second District Court of Appeal.

The Second District held that because the trial court determined that there was an issue of fact to be determined, it "did not deny the summary judgment on the basis of workers' compensation immunity as a matter of law." Consequently, the Second District dismissed the appeal for lack of jurisdiction, stating that the issue of whether workers' compensation immunity was available as a matter of law was not ripe for determination until the underlying factual dispute was resolved.

ISSUE ON APPEAL

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER REPORTED DECISIONS FROM THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

SUMMARY OF ARGUMENT

This petition addresses a conflict among the district courts of appeal in Florida as to the interpretation of Rule 9.130(a)(3)(C)(vi), Fla. R. App. P., which permits an immediate appeal of a non-final order of **a** lower tribunal which determines "that a party is not entitled to workers' compensation immunity as a matter of law." In the opinion below, the Second District has

held that this provision of the rule does not apply to cases, such as the instant case, where a court denies a defendant summary judgment as a matter of law based on workers' compensation immunity when the court concludes that there is a factual issue that must be determined by a jury. In reaching this result, the lower court distinguished its earlier decision of Ross v. Baker, 632 So. 2d 224 (Fla. 2d DCA 1994), and ignored the language in that opinion that reached a contrary conclusion, but could be regarded as dicta.

Nevertheless, the Fourth and Fifth District Courts of Appeal agreed with the conclusion in Ross when they each held that a denial of a defendant's motion for summary judgment on the grounds that there are issues of fact is, indeed, an order determining that the defendant is "not entitled to workers' compensation immunity as a matter of law." See Breakers Palm Beach, Inc. v. Gloger, 646 So. 2d 237 (Fla. 4th DCA 1994); City of Lake Marv v. Franklin, 668 So. 2d 712 (Fla. 5th DCA 1996). Furthermore, the conclusion in Ross *is* specifically premised on that panel's reading of this Court's decision in Mandico v. Taos Construction, Inc., 605 *So.* 2d 850 (Fla. 1992).

Consequently, we are now left with the result that, at this time, one cannot take a non-final appeal to the Second District when summary judgment on workers' compensation immunity is denied because the court determines that there is a factual issue presented. On the other hand, one may take such an appeal to the Fourth and Fifth District Courts of Appeal under existing law. It

is imperative that this Court accept jurisdiction in this case to resolve the conflict among the district courts of Florida.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER REPORTED DECISIONS FROM THIS COURT AND OTHER DISTRICT COURTS OF APPEAL.

Under Article V, § 3(b), (3), Florida Constitution (1980), this Court may exercise its discretionary jurisdiction when an appellate decision expressly and directly conflicts with a decision from another appellate court. This Court has recognized conflict jurisdiction when a decision announces a rule of law which conflicts with the rule previously announced by another appellate court. Nielson v. City of Sarasota, 117 So. 2d 731, 735 (Fla. 1960). That conflict must be express and contained within the written rule announced by the Court. Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Dodi Publishing Co. v. Editorial America, S.A., 385 So. 2d 1369 (Fla. 1980). This Court has jurisdiction in this case.

In Mandico v. Taos Construction, Inc., 605 So. 2d 850 (Fla. 1992), this Court determined that "because we are sensitive to the concern for an early resolution of controlling issues," Rule 9.130(a)(3)(C), Fla. R. App. P., would be amended to include the right to an immediate appeal of a non-final order of a lower tribunal which determines:

> (vi) That a party is not entitled to workers' compensation immunity as a matter of law.

Id. at **855.**

The issue that is presented to this Court within this jurisdictional brief involves a conflict that has arisen among the district courts of appeal on the reading of that provision. The district courts disagree as to whether a non-final appeal lies only if a court has ruled, as a matter of law, that a party is not entitled to workers' compensation immunity or whether an appeal also lies where a party has moved for summary judgment on those grounds but the motion is denied because the court believes a factual issue precludes summary judgment as a matter of law. Despite the Second District's attempt to distinguish its decision in the instant case from one of its own earlier decisions, as well as decisions from the Fifth District and Fourth District, it is obvious in reading those decisions that **a** conflict exists among the courts on this issue.

First, the court below made an attempt **to** distinguish its opinion in the instant case from its own earlier decision of Ross v. Baker, 632 So. **2d 224** (Fla. 2d DCA 1994). However, there is language in the Ross case which contradicts the conclusion *of* the Second District in the instant case. The opinion below appears to have relegated the language in Ross to dicta, and thus has ignored it. Consequently, PHA has chosen not to file a motion for rehearing en banc with the Second District, and has chosen instead to take this matter up before this Court based on conflict with the Fifth District, the Fourth District, and this Court's own earlier decision in Mandico. Nevertheless, the language in the Ross

opinion is significant because both the Fifth District and Fourth District have agreed with (and cited to) that language in reaching a result contrary to the Second District's decision in the instant case.

Specifically, the Ross case involved a lawsuit brought by an employee who alleged that his employer had committed acts involving inadequate job site safety that "rose to the level of conduct that overrides workers' compensation immunity." Id. at 225. Although the Ross case involved the constitutionality of certain workers' compensation statutory provisions, Judge Altenbernd included the following relevant language in the opinion:

> It [Rule 9.130(a)(3)(C)(vi)] permits review of non-final orders which "determine" that a party is "not entitled to workers' compensation immunity as a matter of law." In Mandico, the order reviewed was an order denying summary judgment. [citations omitted] It seems somewhat unusual to treat an order denying a motion as an order "determining" an issue. At least in some instances, such orders may merely establish that the trial court currently views the issue of immunity to involve unresolved factual questions as well as legal questions. Nevertheless, we conclude that the supreme court intends for this Court to review this type of order.

Id. at 225 (emphasis added).

Based on the above language in Ross, the Fourth District Court of Appeal, in Breakers Palm Beach, Inc. v. Gloger, 646 So. 2d 237 (Fla. 4th DCA 1994), determined that it had jurisdiction under the rule to review non-final orders that concluded that there were issues of fact that precluded summary judgment as a matter of law.

In an opinion written by Judge Klein on a motion to dismiss, the Fourth District stated:

> Appellees argue that [Rule 9.130(a)(3)(C)(vi)] permits review only of orders determining once and for all that there is no workers' compensation immunity, and does not permit review of orders merely determining, as this order did, that the issue of workers' compensation immunity is an issue of fact. We conclude that the Appellees' interpretation of the amendment is too narrow.
>
> 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. Our view is supported by Ross v. Baker, 632 So. 2d 224 (Fla. 2d DCA 1994) (the amendment authorizes review of orders denying summary judgment because of factual issues as well as because of legal questions."

Id. at 237-238 (emphasis added).

More recently, in City of Lake Mary v. Franklin, 668 So. 2d 712 (Fla. 5th DCA 1996), the Fifth District Court of Appeal agreed with the holdings in Ross and Gloger by specifically stating:

> In the instant case, the trial court's denial of the summary judgment determined that the City was not entitled to the workers' compensation immunity defense as a matter of law. The City argues that Rule 9.130 permits

> interlocutory review only of orders determining once and for all that there is no workers' compensation immunity and that the rule does not permit review of orders merely determining that the applicability of workers' compensation immunity as an issue of fact. However, the court in Breakers Palm Beach, Inc. v. Gloger, 646 So. 2d 237 (Fla. 4th DCA 1994), specifically rejected this argument. In Breakers, the fourth district determined that an order denying a motion for summary judgment because there were issues of fact concerning immunity is an order determining that the defendant is not entitled to workers' compensation immunity as a matter of law and, therefore, such an order is appealable under Rule 9.130(a)(3)(C)(vi). Id. at 237. We agree with this conclusion.

Id. at **714,**

Although, in its opinion below, the Second District struggles to distinguish its earlier decision in Ross, as well as the decisions of the Fifth District and Fourth District in Franklin and Gloger, it is obvious from the facts of the latter two opinions that those decisions conflict with the decision of the Second District in the instant case. We are now left with the result that, at this time, one cannot take a non-final appeal to the Second District when summary judgment on workers' compensation immunity is denied because the court determines that there is a factual issue presented. On the other hand, one may take such an appeal to the Fourth and Fifth District Courts of Appeal under existing law.

Clearly, there is a conflict among the district courts of appeal, It also appears that there may be a conflict between the underlying opinion and this Court's decision in Mandico. Specifically, in concluding that a writ of prohibition is an

inappropriate remedy for reviewing a decision on workers' compensation immunity, this Court noted:

> The assertion that the plaintiff's exclusive remedy is under the workers' compensation law is an affirmative defense and its validity can only be determined in the course of litigation. The court has jurisdiction to decide the question even if it is wrong. Moreover, the decision will often turn upon the facts and the court from which the writ of prohibition is sought is in no position to ascertain the facts. At the same time, it is incongruous to say that while the circuit court has jurisdiction to make findings of fact, depending upon the nature of the findings, it may thereupon lose jurisdiction.

Id. at 854 (emphasis added).

As noted earlier, the Second District panel in Ross read Mandico as intending that the new appellate rule included appeals from denials of summary judgments concerning workers' compensation immunity when the denial concerned "unresolved factual questions as well as legal questions." Ross, 632 So. 2d at 225.[4] Both the Fourth and Fifth District Courts of Appeal have expressly agreed with this conclusion in accepting jurisdiction over such appeals, Consequently, there is now an unresolved conflict among the district courts of Florida that confers jurisdiction on this Court to establish harmony among the courts of Florida.

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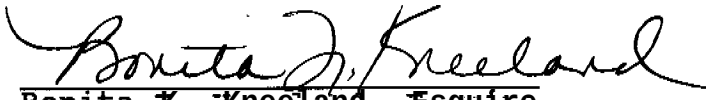
[4] The Ross panel may also have been influenced by Judge Kogan's concurrence/dissent which pointed out that whether Mandico's exclusive remedy was workers' compensation was not clear "from a simple reading of the controlling statutes," indicating that a fact question was involved. Mandico, 605 So. 2d at 855.

CONCLUSION

For all of the reasons stated in this brief, this Court has jurisdiction under the Florida Constitution to review the opinion below which directly and expressly conflicts with other reported decisions from this Court and other District Courts of Appeal. It is urged that this Court except jurisdiction to resolve the conflict.

Respectfully submitted,



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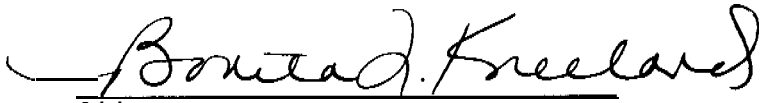
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on June 26, 1996, by U.S. Mail to Stuart C. Markman, Esquire, Kyrnes, Markman & Felman, P.A., Post Office Box 3396, Tampa, Florida 33601-3396, Bennie Lazzara, Jr., Esquire, 606 E. Madison Street, Suite 2001, Tampa, Florida 33602; and Terranca A. Bostia, Esquire, 100 South Ashley Drive, Suite 1500, Tampa, Florida 33602.



Attorney

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

PIZZA HUT OF AMERICA, INC., Petitioner, 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.	Case No.:	88,301
	DCA Case No.:	95-03695

APPENDIX TO PETITTONER'S BRIEF ON JURISDICTION

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INDEX

App. 1 Opinion of Second District Court of Appeal

App. 2 Order on Pizza Hut of America, Inc.'s Motion for Summary Judgment on the Claim of Richard Miller, as Personal Representative of the Estate of Nancy Miller, Deceased dated August 18, 1995

Appendix Part 1

sentenced, it was essential to know the date upon which he was released from prison for that offense. The state urges the notion that habitual offender sentencing was appropriate because Reynolds was on parole within the five-year window period. The trial court agreed with that contention. The state's argument, and the trial court's sentencing of Reynolds as a habitual offender, were grounded upon a misinterpretation of the statute. The prison release date, not the parole release date, triggers commencement of the five-year window period. See ***Stephenson v. State, 666*** So. 2d 573 (Fla. 2d DCA 1996). Although one might assume that Reynolds remained incarcerated for his 1985 conviction in September of 1986, five years prior to the commission of his new crimes, the record does not disclose support for that assumption. Thus, the trial court erred in sentencing Reynolds as a habitual offender on an inadequate record. ***Bunion v. State, 636 So.*** 2d 873 (Fla. 2d DCA 1994).

At sentencing Reynolds' attorney objected that the state had presented no evidence of a prior offense having been committed within five years of the current offense. Hence, this case is distinguishable from those in which the record was inadequate for habitual offender sentencing but the defendant failed to object. In those instances, such as ***Davis*** v. ***State,*** 588 So. 2d 289 (Fla. 2d DCA 1991), and ***Frazier*** v. ***State,*** 595 So. 2d 131 (Fla. 2d DCA 1992), our court allowed the state a second chance to prove that the defendant met rhe requirements of the statute. In this case, however, the state had a sufficient opportunity to develop the record at the initial hearing but failed to do so.

Accordingly, we affirm Reynolds' convictions but reverse his sentences and remand for resentencing within the guidelines. (RYDER, A.C.J., and CAMPBELL, J., Concur.)

* * *

Appeals-Torts-Workers' compensation immunity-Appellate court lacked jurisdiction to review nonfinal order which denied summary judgment on basis of workers' compensation immunity because factual issue existed as to whether decedent was acting within scope of her employment at time of murder or whether she had ceased employment and begun acting in regard to purely personal matters

PIZZA HUT OF AMERICA. INC., Appellant, v. 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., Appellees. 2nd District. Case No. 9503695. Opinion filed May 22. 19%. Appeal fmm nonfinal order of the Circuit Court for Hillsborough County; Robert H. Bonanno, Judge. Counsel: Bonita L. Kneeland of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, for Appellant. Stuart C. Markman, James E. Felman and Susan H. Freemon of Kynes, Markman & Felman, P.A., Tampa, for Appellec Richard Miller.

(CAMPBELL, Acting Chief Judge.) Having reviewed the applicable law concerning the order on appeal, which is the denial of appellant's motion for summary judgment on the basis of workers' compensation immunity, it appears that this court is without jurisdiction to consider this appeal.

Florida Rule of Appellate Procedure 9.130(a)(3)(vi) will allow an appeal from such a nonfinal order where the order finds "that a party is not entitled to workers' compensation immunity as a matter of law." The court here did not find that appellant was not entitled to workers' compensation immunity as a matter of law. Rather, the court here very specifically made no determination as to entitlement to workers' compensation immunity. This was because the factual applicability of workers' compensation immunity to the case had not been established.

The order here, in denying appellant's motion for summary judgment on this issue, stated specifically: "There are factual questions that must be submitted to the jury on the issue of the workers' compensation immunity." The transcript of the summary judgment hearing reveals that the issues the court wished to submit to the jury concerned whether the worker, Nancy Miller, was, in fact, acting within the scope of her employment at the time of her murder or had she ceased her employment activities and begun acting in regard to purely personal matters. Her actions are disputed, not their import. It is clear that in denying the motion for summary judgment, the court was attempting to determine whether the doctrine of workers' compensation immunity applied to the case at all.

The resolution of the question of law of the application of the doctrine of workers' compensation immunity 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 parties do not dispute the application of the doctrine once that dispute is resolved. Given these circumstances, we conclude that the court certainly did not deny the summary judgment on the basis of workers' compensation immunity as a matter of law.

This case may be distinguished from ***Ross v. Baker, 632 So.*** 2d 224 (Fla. 2d DCA 1994). where the trial court had effectively determined, as a matter of law, that appellants were not entitled to workers' compensation immunity because this court had found that immunity unconstitutional.

The instant case is also distinguishable from ***Ciry*** *of Lake* ***Mary v. Franklin,*** 668 So. 2d 712 (Fla. 5th DCA 1996) since, in that case, the trial court order denying the motion for summary judgment was entered without any explanation, thus leaving a question as to the basis for its entry. Here, however, it is quite clear on what basis the court denied the motion for summary judgment.

Finally, ***we also*** find ***Breakers Palm Beach v. Gloger, 646 So.*** 2d 237 (Fla. 1994) distinguishable from the instant case since the nature of the factual issues to be determined in that case revealed that the applicability of the doctrine of workers' compensation immunity had been decided. The only matters left for determination involved the employer's failure to warn the employee. The employer did not dispute that the employee was acting within the scope of employment.

Having concluded that the order on appeal did not determine "that a party is not entitled to workers' compensation immunity as a matter of law," we dismiss this appeal for lack of jurisdiction. The issue of whether workers' compensation immunity is available as a matter of law is not ripe for determination until the underlying factual dispute is resolved. The parties do not dispute the legal import of agreed-upon facts. They dispute the facts upon which a legal conclusion can be made. (PATTERSON and QUINCE, JJ., Concur.)

* * *

Criminal law-Search and seizure-Suppression order which was granted after jury had been sworn is appealable--Encounter between officers and defendant in which uniformed officers got out of unmarked car without blocking path of defendant, who was walking in their direction, stated in conversational tone that they had information that defendant had been selling drugs, and asked defendant whether be had been selling drugs was consensual in nature-Defendant's voluntary display of a tube containing what he claimed were fake cocaine rocks was not product of unlawful stop

STATE OF FLORIDA, Appellant, v. RONALD LIVINGSTON, Appellee. 2nd District. Case No. 94-02597. Opinion filed May 22. 1996. Appeal from tbe Circuit Court for Sarasota County; Robert B. Bennett, Jr., Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee. and Tonja R. Vickers, Assistant Attorney General, Tampa, for Appellant. James Marion Moorman, Public Defender. and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellec.

(PER CURIAM.) The state appeals the trial court's order granting the appellee's, Ronald Livingston, motions to suppress. We reverse.

The appellee was charged with possession of cocaine, in violation of section 893.13, Florida Statutes (1993). Immediately prior to jury selection, the parties apparently informed the trial court that the appellee had filed a motion to suppress the evidence that was allegedly unlawfully seized from the appellee and a motion to suppress the statements made by the appellee that were

Appendix Part 2

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY
CIVIL DIVISION

RICHARD MILLER, as personal representative of the Estate of NANCY MILLER, deceased,

Plaintiff,

vs.

PIZZA HUT OF AMERICA, INC., PIZZA HUT, INC., an unknown Pizza Hut entity, An Unknown Landowner or Tenant and ADT SECURITY SYSTEMS, MID-SOUTH, INC., a/k/a ADT SECURITY SYSTEMS, INC.

Defendants.
_____/

Case No.: 94-03618

Division: F

ORDER ON PIZZA HUT OF AMERICA, INC.'S MOTION FOR SUMMARY TUDGMENT ON THE CLAIM OF RICHARD MILLER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NANCY MILLER. DECEASED

This cause having come before the Court on the Defendant, Pizza Hut of America, Inc.'s Motion for Summary Judgment on the Claim of Richard Miller, as Personal Representative of the Estate of Nancy Miller, Deceased, The Court, having considered the Motion, heard argument of counsel, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the Defendant, Pizza Hut of America, Inc.'s Motion for Summary Judgment on the Claim of Richard Miller, as Personal Representative of the Estate of Nancy Miller, Deceased, DENIED. There are factual questions that must be submitted to the jury on the issue of the workers' compensation immunity.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida this _____ day of August, 1995.

ORIGINAL SIGNED

AUG 18 1995

ROBERT H. BONANNO, CIRCUIT JUDGE

ROBERT H. BONANNO
CIRCUIT JUDGE

Copies furnished to:

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