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.

______________________________/

BRIEF OF RESPONDENT MILLER ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

This is a wrongful death action by the surviving husband and children of Nancy Miller ("Miller") against Pizza Hut of America, Inc. ("Pizza Hut"). Pizza Hut filed a motion for summary judgment in which it contended that it was entitled to workers' compensation immunity as a matter of law. The trial court denied the motion and held: "There are factual questions that must be submitted to the jury on the issue of the workers' compensation immunity." Pizza Hut of America, Inc. v. Miller, 674 So.2d 178, 179 (Fla. 2d DCA 1996).[1]

The Second District agreed with the trial court's conclusion that this case involves an "underlying factual dispute." Id. Instead of affirming on that basis, however, it dismissed the appeal for lack of jurisdiction. Id. Dismissal was appropriate, the District Court reasoned, because the trial court never made the determination it had to make for jurisdiction to exist 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. The Second District held that until the disputed facts are resolved, the legal issue "is not ripe for determination." Id.

In reaching its decision, the Second District addressed all of the District Court decisions Pizza Hut has used to construct its conflict argument -- Ross v. Baker, 632 So.2d 224 (Fla. 2d DCA 1994), City of Lake Mary v. Franklin, 668 So.2d 712 (Fla. 5th DCA

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[1] For convenience, a copy of the Second District's decision as it appears in the official reporter is attached. Pizza Hut's appendix contains the Florida Law Weekly version.

1996), and Breakers Palm Beach, Inc. v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994). Id. The Second District's opinion distinguishes the facts in Ross, Franklin, and Gloger, and harmonizes the result in each case with the result here. Id. In a new opinion that was not available to Pizza Hut at the time it filed its brief, the Second District reconfirms that its decision in this case "took great care to *factually* distinguish our case in Ross, the Fifth District's case in Franklin, and the Fourth District's case in Gloger." Hastings v. Demming, 21 Fla. L. Weekly D1756, D1759 (Fla. 2d DCA July 31, 1996) (emphasis in original).

ISSUE

WHETHER THE SECOND DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER REPORTED DECISIONS ON THE SAME QUESTION OF LAW?

SUMMARY OF THE ARGUMENT

Pizza Hut's contention that the Second District's decision announces a rule of law which conflicts with decisions of other district courts is defeated not only by the express language of the instant case, which distinguishes the other district court decisions, but also by the Second District's new and comprehensive decision in Hastings. Hastings holds the instant case did not announce the rule of law Pizza Hut attributes to it. It also agrees that the decisions from the Fourth and Fifth Districts on which Pizza Hut's conflict argument is based are completely distinguishable on their facts.

Pizza Hut's other argument -- that it "appears" the Second District's decision "may" conflict with the Supreme Court's decision in Mandico v. Taos Constr., Inc., 605 So.2d 850 (Fla.

1992) -- fares no better. A conflict that is only tentative and inferential does not satisfy the constitutional requirement that the conflict be direct and express. In addition, Pizza Hut's argument is not based on anything said about Mandico in the case at bar but instead comes from a source that cannot possibly give rise to a jurisdictional conflict -- dicta in a two-year-old Second District case that is not on review.

Review should be denied for the additional reason that granting it will make no difference in the outcome of this case. The Second District expressly agreed with the trial court that summary judgment is precluded by material fact disputes which must be resolved by a jury. Should Pizza Hut prevail in this appeal, the most it can hope for on remand is the same thing that will happen if review is denied -- a trial on the question of workers' compensation immunity.

ARGUMENT

THE SECOND DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH OTHER REPORTED FLORIDA APPELLATE DECISIONS ON THE SAME QUESTION OF LAW.

I. The Second District's decision does not conflict with decisions of other District Courts.

Pizza Hut urges the Supreme Court has jurisdiction over this case on the theory that it "announces a rule of law which conflicts with the rule previously announced by another appellate court." Br. at 4. Significantly, Pizza Hut's brief on jurisdiction never quotes language from the case at bar that articulates any rule of law, much less a conflicting one. Instead, Pizza Hut's entire conflict argument springs from its reading of a two-year-old Second

District case, Ross v. Baker, 632 So.2d 224 (Fla. 2d DCA 1994). Br. at 3, 5-9.

According to Pizza Hut, language which "could be regarded as dicta" in **Ross** supports the proposition that the denial of a defendant's workers' compensation immunity summary judgment motion due to the existence of a material fact dispute *is* an order determining the defendant is not entitled *to* workers' compensation immunity as a matter of law and therefore immediately appealable under Rule 9.130(a)(3)(C)(vi). Br. at 3, *6*, *7*, 9. That the instant decision did not **follow** Ross is not a mere nonjurisdictional intradistrict conflict, Pizza Hut's argument runs, because the Fifth and Fourth Districts' decisions in Gloger and Franklin are based on Ross' reasoning. Br. at **3**, 5, 6, 7, 9.

Pizza Hut's jurisdictional argument is defeated by a fundamental principle of conflict jurisdiction. It is **well** settled that if two cases are factually distinguishable, no jurisdictional conflict arises. Department **of** Revenue **v.** Johnston, 442 So.2d 950, 950 (Fla. 1983) ("Becausewe find this cause distinguishable on its facts from those cited in conflict, we discharge jurisdiction."); Kyle v. Kyle, 139 So.2d 885, *887* (Fla. 1962) ("If **the** two cases are distinguishable in controlling factual elements . . . then no conflict can arise.") Under this rule, it **is** enough to **deny** Pizza Hut's application for discretionary review that the instant decision correctly declares it is factually distinguishable from

Franklin and Gloger, Miller, 674 So.2d at 179, a point Pizza Hut never seriously contests.[2]

But there is much more. After Pizza Hut filed its brief the Second District issued a new decision which directly refutes the very theory on which Pizza Hut's argument depends. In Hastinss, which was issued only three weeks ago, the Second District conducts an exhaustive and scholarly review of the case law involving the legal issue Pizza Hut raises, including the instant decision and the decisions Pizza Hut asserts conflict with it. Hastinss holds the decision in the case at bar did not announce or apply a rule of law that conflicts with the Second District's earlier decision in Ross or, more importantly for present purposes, with the decisions of the Fifth and Fourth Districts in Franklin and Gloger. Instead, Hastings holds the instant decision did precisely what it says it did -- it distinguished all three cases on their facts. Id. at D1759.

That the instant decision does not announce a rule of law that conflicts with Gloger or Franklin is at the very core of both Hastings' holding and its certification of *that* case for discretionary review. Hastinss expressly declares the Second

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[2] Except for its conclusory characterization of the Second District's analysis as a "struggle," Br. at 8, Pizza Hut does not even address, much less disagree with, the distinctions the instant decision draws between its facts and the facts in Franklin and Gloger. Franklin is distinguished because the trial court in that case denied the defense's summary judgment motion without explanation, while in the instant case "it is quite clear on what basis the court denied the motion for summary judgment." Miller, 674 So.2d at 179. Gloger is distinguished because in contrast to this case, it was undisputed that the Gloger employee was within the scope of employment. Id.

District is *adopting for the very first time* the rule Pizza Hut claims the court announced here -- that an order determining a defendant is not entitled to workers' compensation immunity as a matter of law due to the existence of factual issues is not appealable under Rule 9.130(a)(3)(C)(vi). Id. at D1757-59. In articulating this rule of law and certifying its conflict with Franklin and Gloger, Hastings takes great pains to point out that the instant case is not a part of the conflict:

> **We** pause at this juncture to acknowledge that in Miller we took great care to *factually* distinguish our case in Ross, the Fifth District's case in Franklin, and the Fourth District's case in Gloger. We do not perceive, however, that such an approach prohibits us from declining to follow Ross on the basis of the *legal* doctrine of obiter dicta and from certifying conflict with Franklin and Gloser because they are at odds with the *legal* holding in this case.

Id. at D1759 (emphasis in original).

Hastings confirms and reemphasizes what is already known **from** the face of the instant opinion -- that in this case the Second District factually distinguished Franklin and Gloser but never adopted a rule that conflicts with them. **If** the Supreme Court should decide to review the legal controversy Pizza Hut describes, the correct vehicle for doing so is Hastings, the case actually presenting the conflict.

II. The Second District's decision does not conflict with the Supreme Court's decision in Mandico.

Little need be said about Pizza Hut's sheepish assertion that it "*appears* that there ***may be*** a conflict between the underlying opinion and this Court's decision in Mandico" (emphasis added).

Br. at 8. For the Supreme Court to exercise its conflict jurisdiction, the conflict between decisions must be "express" and "direct" -- that is, the conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would effectively overrule the earlier one. Kyle, 139 So.2d at 887; Ansin v. Thurston, 101 So.2d 808, 811 (Fla. 1958). When the most a petitioner can do is rely on inferences or implications as Pizza Hut does in its suggestion that it "*appears* that there *may* be a conflict," no real jurisdictional conflict exists. Department of Health & Rehabilitative Servs. v. National Adoption Counselins Serv., Inc., 498 So.2d 888, 889 (Fla. 1986) ("inferential" or "implied" conflict is not a basis for jurisdiction).

That Pizza Hut must go to such lengths to construct its half-hearted assertion is telling. Contrary to the requirement that an assertedly conflicting decision at least address the legal principle in issue, see Ford Motor Co. v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981), Mandico does not even discuss, much less decide, the legal question Pizza Hut claims has received conflicting treatment -- whether a nonfinal order denying a defendant's workers' compensation immunity summary judgment motion based on the existence of factual disputes is appealable under Rule 9.130(a)(3)(C)(vi).[3] In an attempt to sidestep this insurmountable obstacle, Pizza Hut resorts to reliance on dicta in the Second District's

[3] In its attempt to claim conflict between the Second District's decision and Mandico, Pizza Hut points to a passage in Mandico. Br. at 9. But Pizza Hut's passage does not mention the legal question in issue here, even in the sentence fragments Pizza Hut selectively underlines. Id.

earlier decision in Ross[4] as the source of conflict rather than the case at bar. Pizza Hut treats the interpretation of Mandico found in Ross' dicta as Mandico's holding although it also acknowledges that Ross' dicta may have been "influenced" by a separate opinion in Mandico which concurs in part and dissents in part. Br. at 3, 6, a, 9.

To recite Pizza Hut's argument is to refute it. Pizza Hut's claim that the instant decision conflicts with Mandico cannot rest on an interpretation of Mandico found in the dicta of a Second District case that is not even on review. And if Ross were on review it would not present a jurisdictional conflict, especially in view of Pizza Hut's admission that the interpretation of Mandico in Ross' dicta may be based on a partial concurrence/ partial dissent and not the Supreme Court's actual decision. Because the constitution literally requires a conflicting *decision,* Fla. Const. art. V, § 3(b)(3), conflict cannot arise from a concurrence or a dissent. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). The same requirement -- the existence of a conflicting decision -- also means conflict cannot arise from dicta.

Finally, the above assumes Pizza Hut is correct in its assertion that Mandico can be read to authorize a nonfinal appeal in the instant situation. In Hastings, the Second District explains in detail why this reading is incorrect. 21 Fla. L. Weekly at D1756-57, D1759.

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[4] After Pizza Hut made its qualified concession that the language in Ross on which it relies "could be regarded as dicta," Br. at 3, Hastings declared unequivocally that the language *is* in fact mere dicta. 21 Fla. L. Weekly at D1758.

III. Even if the Second District's decision did conflict with other decisions, discretionary review should still be denied because granting review will not affect the outcome of this case.

Assuming for the sake of argument that this case actually presents a jurisdictional conflict, it is significant that Pizza Hut never explains ***why*** this case ***should*** be accepted for review. Whether the Supreme Court has discretionary jurisdiction in a particular case and whether it will choose to exercise it are two different questions. See The Florida Star v. B.J.F., 530 So.2d 286, 288-89 (Fla. 1988) (constitution's broad grant of discretionary subject-matter jurisdiction is separate from narrow constitutional command as to how discretion may be exercised). Even if jurisdiction exists, it is appropriate for the Supreme Court to deny discretionary review when the record establishes that accepting the case will not affect its outcome. Wainwright v. Taylor, 476 So.2d 669, 670 (Fla. 1985).

Under this principle, the Supreme Court should decline to review this case even if Pizza Hut could establish conflict jurisdiction. Pizza Hut wants the Supreme Court to hold that a defendant is authorized to take an immediate nonfinal appeal when the trial court rules a material fact dispute precludes summary judgment in the defense's favor on the basis of workers' compensation immunity. But if Pizza Hut's position becomes law, the result in this case will not change.

The Second District's decision expressly agreed with the trial court's conclusion that the existence of "underlying factual disputes" precludes summary judgment in favor of Pizza Hut on its workers' compensation immunity defense. Miller, 674 So.2d at 179.

This means that if Pizza Hut prevails in the Supreme Court, its relief will be limited to a remand order which instructs the Second District to affirm the trial court rather than dismiss the nonfinal appeal. Either way, the result is the same -- the workers' compensation immunity issue is left for the jury to decide. That review of this case will make no practical difference is an additional reason to deny Pizza Hut's application.[5] Taylor, 476 So.2d at 670.

CONCLUSION

For the foregoing reasons, the Court should decline to review the decision of the Second District Court of Appeal.

Respectfully submitted,

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[5] This further distinguishes this case from Franklin and Gloger. In Franklin and Gloger, the Fifth and Fourth Districts never addressed the merits of whether the trial courts' decisions regarding the existence or non-existence of fact disputes were correct. Franklin, 668 So.2d at 713-14; Gloger, 646 So.2d at 237-38. Instead, both cases indicated only that the type of nonfinal appeal Pizza Hut seeks to prosecute here is authorized. Franklin, 668 So.2d at 714; Gloger, 646 So.2d at 238.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing BRIEF OF RESPONDENT MILLER ON JURISDICTION has been furnished by U.S. mail on August 21, 1996, to:

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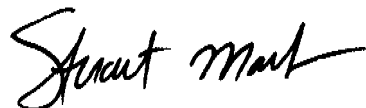

STUART C. MARKMAN

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.
____/

APPENDIX TO
BRIEF OF RESPONDENT MILLER ON JURISDICTION

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Pizza Hut of America, Inc. v. Miller,
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rented a room. He argues that the trial court erred in submitting the second degree murder charge to the jury since, at most, the evidence proved only the crime of manslaughter. We agree and reverse based on *McDaniel v. State*, 620 So.2d 1308 (Fla. 4th DCA 1993), and the cases cited therein,

[2] The evidence adduced at trial showed that, the victim, Doolin, was belligerently drunk the day in question and started the fight with the appellant. The appellant was recuperating from an operation on his arm several weeks before to repair serious damage from a previous auto accident,, The entire incident began in the backyard of the Doolin home with Doolin's behavior necessitating that the police be called to subdue him. After the police left the second time, Doolin continued to press the fight with the appellant, moving it inside, to both the appellant's room and the hallway outside it. After using their fists on each other for some time, the appellant pulled his knife from its holder on his belt and stabbed Doolin in the abdomen, fatally wounding him. It is undisputed that at all times the victim used no weapon before the appellant stabbed him. Like McDaniel, we find that the appellant's use of a knife to end the fight or ward off further attack from Doolin can be considered excessive; especially since Doolin was unarmed. It was this evidence which allowed the jury to reject the appellant's theory of self-defense. However, the appellant's acts did not, evince a depraved mind, and the state presented no evidence showing that the appellant acted out of ill will, hatred, spite, or an evil intent, thus failing to present a prima facie case of second degree murder. We, therefore, reverse the appellant's conviction and remand with instructions that the trial court adjudicate him guilty of manslaughter and resentence him accordingly.

We find no error in the remaining points the appellant raised. Reversed and remanded for further proceedings.

SCHOONOVER and QUINCE, JJ., concur.

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.

No. 95-03695.

District Court of Appeal of Florida, Second District.

May 22, 1996.

Personal representative of employee's estate brought action against employer arising out of employee's murder. The Circuit Court, Hillsborough County, Robert H. Bonanno, J., denied employer's motion for summary judgment on basis of workers' compensation immunity. Employer appealed. The District Court of Appeal, Campbell, Acting C.J., held that nonfinal order denying summary judgment was not appealable.

Appeal dismissed.

Appeal and Error ⚿70(8)

In entering a nonfinal order denying employer's motion for summary judgment on basis of workers' compensation immunity, trial court did not find that employer was not entitled to workers' compensation immunity as a matter of law but, rather, specifically made no determination as to entitlement to such immunity given that factual applicability of such immunity to case had not been established; therefore, order was not appealable. West's F.S.A. R.App.P.Rule § 9.130(a)(3)(vi).

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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 de termination 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 8s 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 *City of Lake Mary v. Franklin*, 668 So.2d 712 (Fla. 6th DCA 1996) since, in that ease, 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.