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

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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 Petitioner, Pizza Hut of America, Inc., hereby replies to argument made in Respondent's answer brief, including argument within his statement of the case and facts. In addition, Miller invites this Court to decide the merits of Pizza Hut's summary judgment motion. (Ans. Br., p. 24, fn. 11) Consequently, Pizza Hut will also discuss the case law supporting its motion for summary judgment below.

Miller makes a bold assertion that "it is known" that at some point Nancy Miller or the Pizza Hut manager, Steven **Snow,** or both, "turned from their employment duties to the **personal** matter of preparing food to take home for themselves and perhaps their families." (Ans. Br., **p. *6)*** Miller then notes that Pizza Hut conceded the inference that the food (two boxed pizzas and a soft drink) found at the murder scene could have been intended to **be** taken home by either Nancy or Snow. With these statements, Miller makes Pizza Hut's case for it. (Id.)

First, Miller would have the jury speculate as to whether Nancy (a waitress) actually **baked, or** even boxed, those **pizzas,** as **opposed** to their being baked and/or **boxed** by one **of** the cooks employed to bake pizza. Further, Miller would have the jury speculate as to whether these were pizzas specifically prepared for

or by Nancy, or whether they were simply leftovers. (There is no evidence that Nancy ever baked pizzas.) Still further, assuming they were even baked or boxed by Nancy, Miller would have the jury further speculate as to when these pizzas were prepared -- whether during a break in Nancy's work day; whether prior to or during her performance of her duties -- cleaning up the restaurant for the evening and putting her paperwork in order -- or whether it was done after, but prior to clocking out, or after clocking out, ad infinitum. It is blatantly obvious that a jury could never decide who prepared the pizza or when.

The only "fact" is that two boxed pizzas and (according to Miller's memos and briefs) a soft drink favored by Nancy were found near the bodies. Miller argues that the presence of the soft drink implies that the pizzas, too, were Nancy's. Even if one could infer that Nancy intended to take home the pizzas, one cannot pyramid a second inference -- that she prepared them herself -- onto the first inference. Nor can a jury then pyramid a third inference onto the first and second -- that she had departed from her Job duties and was preparing this food to be taken home (and was, thus, not within the "course and scope of her employment,") at the time she was accosted by her assailant. Miller's conclusion -- that a jury could find that Nancy was at the Pizza Hut engaging in the "purely personal task of preparing food to take home" when accosted -- is not supportable. (Ans. Br., pp. 11-12)

The pizza found could have been prepared by a pizza baker at the restaurant -- whether for Nancy or not -- at any time during

the evening, not necessarily by Nancy, and not necessarily while she should have been **working** or should have gone home. To pinpoint the identity of the pizza baker, boxer, and then the time when the pizzas were so prepared, would require a jury to engage **in** pure guesswork, which it cannot do. Accordingly, Miller has no material issue of fact that could be decided by **a** jury (absent guesswork) to dispute Pizza Hut's contention that Nancy was in the course and scope of employment when murdered while on the Pizza Hut premises after closing hours.

Similarly, Miller asserts that **Pizza** Hut must show that the murders were a "by-product of a garden variety robbery" in order to demonstrate that this was a "risk inherent" in the workplace. (Ans. **Br.,** p. 8) Miller argues that -- although $812 was **missing** from the blood-spattered safe -- Nancy's wedding ring, the tips **in** her apron pocket, and other personal items, were not taken. Those facts do not **make** the subject occurrence any less a robbery. *So,* too, the fact that Nancy's duties did not include handling the safe does not negate the fact that she was in the company of the store manager at the time of the robbery/murders, and that it was his duty. Although Miller points out that **$812** is a relatively small sum, it was all the money in the safe, and the robber had no way of knowing how much was there until he committed the robbery. Miller also asserts that the note left on the bodies attributes the motive for the killing **to** an act of terrorism.[1] This, **too,** does not

[1] Miller takes issue with Pizza Hut's statement that the jury cannot accept, as "fact" the note's contents: "I will keep **killing** till he's out. Front of Colombian Liberation. Viva Carlos

negate the fact that a robbery took **place** during the murders, and that the opportunity offered to the assailant to rob and kill without being caught was far greater because it was late at night after all customers had departed from the restaurant.

The last witness to see the victims alive was a customer who arrived late that evening. Robyn Lynn Jordan attested that she left her home sometime before midnight and drove to the Brandon Pizza Hut, where she noticed two cars in the parking lot. In the doorway of the *rear* door *of the* Pizza Hut, she saw a white woman standing just outside the door frame next to a white male. Both of them were facing a black male wearing **a** knit ski cap. The witness stated that, when her car lights fell upon the three individuals, the black man placed his hand on the shoulder of the white male and pushed him toward the doorway, while the white woman ran inside. The black male then motioned the witness to leave. She did not notify the Sheriff's department, however, until after she heard of the murders. (App. 7)

Jordan's testimony effectively demonstrates the inherent risk *of* cleaning up **and** closing after working the late shift when the restaurant area is deserted. Additionally, Attorney Lazzara's[2/] opening statement in Richard Miller's criminal trial demonstrates what he intended the evidence to show and what he apparently proved

Lehder." Even if this note withstood a hearsay objection, it is simply a threat of future events. It cannot be accepted as "fact."

[2] The same attorney represented Richard Miller at both the criminal trial and in this civil suit.

at trial. In that excerpt, Miller's attorney repeatedly argued that a real robbery had occurred, and presented evidence to support his theory. (App. **19)** He later asked the trial court in the instant case to take judicial notice of the (un-transcribed) criminal trial, hence the excerpts. (App.16, pp. 24-25; **38-40).** Pizza Hut also takes issue with Miller's argument (Ans. Br., p. 38) that Pizza Hut has "abandoned" its argument that Miller's death during the robbery was a risk inherent in the workplace. (See Pizza Hut's argument at pp. 25-26 of initial brief). Furthermore, in view of the fact that the Second District's decision concluded that "course and scope" was the factual issue the judge intended to take to the jury, it is a more logical conclusion that the Second District did not find that "inherent risk" was even an operative issue *of* fact.

Nevertheless, the transcript shows that course and **scope** was a fact issue raised by Miller's counsel at the summary judgment hearing, but the trial judge himself expressed no viewpoint (except an interest in the time of death)[3] and simply permitted both parties to file supplemental memorandums. (App. **16,** pp. 36-37) In fact, when he learned that the court intended to deny Pizza Hut's motion, trial counsel for Pizza Hut sent a letter to the court requesting that the judge's order include what issues **of** fact would go to the jury. (App. 24) However, the judge instead signed a generic order submitted by Miller. (App. 25)

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[3] Testimony of the medical examiner in the criminal trial of Richard Miller fixes the range for time of death as anywhere between midnight and 3:00 a.m. (App. **19)**

Florida law demonstrates that the trial court's decision was incorrect. In Strother v. Morrison Cafeteria, 383 So, 2d 623 (Fla. 1980) , this court found that the injury sustained as the result of the assault arose out of employment when the assailants, who had been "casing out" a cafeteria, followed the night cashier home after work and demanded "money or deposits" from her, thinking she was carrying the cafeteria's money. Id. at 623-24. In Strother, this Court adopted the "work connectedness" test, stating that in order for an injury to be compensable under the Workers' Compensation Act, it "must arise out of employment in the sense of causation and be in the course of employment in the sense of continuity of time, space, and circumstances." Id. at 628.[4/]

In Winn-Dixie Stores, Inc. v. Parks, 620 So. 2d 798 (Fla. 4th DCA 1993) , a grocery store manager was kidnapped while driving home after work by an assailant who forced him to return to the store and open the safe before stabbing him to death. The trial court granted summary judgment to the store based on workers compensation

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[4] Following this Court's mandate in Strother, Florida courts consistently held that workers' compensation is the exclusive remedy for employees injured in attacks by robbers or other assailants on the employer's premises. See e.g., Eller v. Shova, 630 So. 2d 537 (Fla. 1993) (murder during robbery in convenience store); General Motors Acc. Corp. v. David, 632 So. 2d 123 (Fla. 1st DCA 1994) (employees of financial services company shot by customer following repossession of customer's automobile); Folk v. Rite-Aid of Florida, Inc., 611 So. 2d 35 (Fla. 4th DCA 1992) (security guard shot by perpetrator of an armed robbery); Gerentine v. McComb, 586 So. 2d 94 (Fla. 5th DCA 1991) (employee of convenience store killed during robbery); Sullivan v. Atlantic Federal Savings & Loan Ass'n., 454 So. 2d 52 (Fla. 4th DCA 1984), rev, denied, 461 So. 2d 116 (Fla. 1985) (bank manager fatally injured during armed robbery) .

immunity, reasoning that the manager was attacked because he had the keys to the store, the combination to the safe, and could turn off the alarm. (Likewise, Steven Snow, who was Nancy Miller's restaurant manager, was able to turn off the safety alarm and open the safe for the assailant in this case. Unfortunately, at the time, Nancy was in the Snow's company, as a result of her employment with Pizza Hut, as they proceeded to close up the restaurant together on the evening of their murders.)

The Parks court affirmed summary judgment because the employee's acts at the time he was accosted were "incidental" to his employment. Acknowledging this Court's decision in Strother, the court determined that it was not necessary to prove that the injury occurred within the time and space limits of employment, so long as its origin was within those limits and so long as the origin and the injury were connected parts of a single work-related incident, Id. See also Winn-Dixie Stores, Inc. v. Akin, 533 So. 2d 829 (Fla. 4th DCA 1988), rev. denied 542 So. 2d 988 (Fla. 1989) (employee is within the course and scope of his employment when he is arriving to work or departing from work, even if he has not "clocked in" or has already "clocked out," despite strict company rules against working off the clock) .[5/]

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[5] The Akin decision also comports with decisions in states outside of Florida that have addressed the issue of an employee's compensable "off the clock" injury on the premises. See Massey v. United States Steel Corporation, 86 so. 2d 375 (Ala. 1955) (employee clocked out, but fell while showering on the premises); Peters v. Industrial Commission of Arizona, 473 P. 2d 480 (Ariz. 1970) (claimant stubbed his toe while entering the clock shed to clock in for the day); Pearce v. Industrial Commission of Arizona, 476 p. 2d 901 (Ariz. 1970) (claimant hit her head while in route to

Thus, it is immaterial whether or not Miller was actually performing work-related tasks on the clock at the very moment that the assailant accosted her. As long as she was performing any action incidentalto her employment when the assault was initiated, even if it happened at the time she was gathering her belongings -- or even a soft drink and pizza -- while exiting the premises late at night, worker's compensation is her exclusive remedy. See Bechtel Construction Co. v. Lehning, 684 So. 2d 334 (Fla. 4th DCA 1996) and Security Bureau v. Alvarez, 654 So. 2d 1024 (Fla. 1st DCA 1995) (worker injured while going to or coming from work is in course and scope for workers' compensation purposes if injury occurred on premises under "premises rule.")

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punching in); Thiellen v. Graves, 530 N.E. 2d 765 (Ind. App. 1988) (worker had just clocked out, gotten on to his motorcycle, and was in an accident while still on employer's property); Mundv v. Dept. of Health and Human Resources, 580 So. 2d 493 (La, App. 1991) (nurse stabbed by an unknown man while in elevator at work prior to clocking in); P.A.M. v. Quad L. Assoc., 380 N.W. 2d 243 (Neb. 1986) (workers' compensation exclusivity applied where two employees of Wendy's punched out at the end of the closing shift shortly after 1:00 a.m., were accosted in the parking lot and forced to unlock the door, turn off the alarm, and open the safe, after which each were sexually assaulted); Greenway v. National Gypsum Co., 296 P. 2d 971 (Okla. 1956) (worker was changing his clothes after punching out the time clock); Motion Control Industries v. Workmans' Compensation Appeal Board, 603 A. 2d 675 (Pa. Cmwlth. 1992) (worker punched clock, began walking to his car, and was shot by a unknown third person); Carter v. Volunteer Apparel, 833 S. W. 2d 492 (Tenn. 1992) (20 minutes before clocking in worker slipped and fell on her employer's premises); Copeland v. Leaf, Inc., 829 S. W. 2d 140 (Tenn. 1992) (after clocking out, worker crossed the street approaching her car and was accidentally hit by a third person running); State ex. rel. Workers' Comp. v. Miller, 787 P. 2d 89 (Wyo. 1990) (employee completed shift, punched out, and fell in parking lot); Archuletta v. Carbon County School District No. 1, 787 P. 2d 91 (Wyo. 1990) (employee punched out and then had a car accident in the parking lot).

In Jenkins v. Wilson, 397 So. 2d 773 (Fla. 1st DCA), rev. denied, 402 So. 2d 610 (Fla. 1981), a secretary who was working late left her place of employment after working hours and was assaulted in the parking lot. Significantly, the motive for the assailant's assault on the employee was never known and that was not the criteria on which the court based its decision. Id. at 774. Instead, the appellate court agreed with the reasoning below:

> . . . that if the appellee had not been employed by employer on the date in question, appellee would not have been on the premises [parking lot] at the time the incident occurred and, therefore, the assault and rape would not have occurred; that, therefore, the assault and rape occurred as a direct result of appellee's employment and, therefore, all of the injuries sustained by appellee as a result of the assault and rape did arise out of and were in the course of her employment.

Id. The appellate court affirmed the finding of the deputy commission that, because the claimant was "more susceptible to attack" because she staved late and was alone in the parking lot at a late hour, she was entitled to workers' compensation benefits. Id. (emphasis added) The court agreed that she **was** within the course and scope of her employment because the injury occurred due to the conditions under which she was required to perform the work. Id. at 775. Thus, the decision took into consideration the increased risk to the employee that arose due to the conditions under which she was required to perform her work.

Similar to the victim in Jenkins, the conditions of Miller's employment at Pizza Hut -- working until late at night in **a** fast-food restaurant where there would be cash on the premises --

subjected her to the risk of a criminal assault. In fact, Miller's own complaint alleges that the store was located in an area of substantial criminal activity, prone to robberies and assaults. He alleges that these facts should have put Pizza Hut on notice of the dangerous condition, the need for greater security, and the need to warn Nancy. (App. 1, pp. 3-4)

There is no doubt that, had it been contested, a court would have found that Nancy's estate was entitled to workers' compensation benefits for her murder at the Pizza Hut. Miller is asking this Court to make a ruling that would have prevented Nancy's estate from receiving these benefits, The statute goes both ways: the scope of compensability also defines the scope of immunity. The statute does not permit a broad application of compensability and, conversely, a narrow application of immunity. As long as this Court is satisfied that Nancy's murder was compensable, it can be assured that it is correct in granting the concurrent immunity.

Miller's brief, as did his argument at the hearing below, relies heavily on Aloff v. Neff-Harmon, Inc., 463 So. 2d 291 (Fla. 1st DCA 1984). In Aloff, a waitress who was normally through closing out, cleaning and doing her accounting by 2:30 a.m., proceeded to do so and then "punched out" at that time. However, the waitress elected, for purely personal reasons, by her own testimony, to stay at the bar and socialize with her personal friend, the manager, until 4:00 a.m., discussing his problems on the job and his problems with his girlfriend. Id. at 293. As they

were leaving the bar, they were surprised by armed robbers who robbed the bar of $1.50, and assaulted and raped the plaintiff. Aloff sued her employer, arguing that she was not in the course and scope of her employment at the time of the injury, but her employer was granted a summary judgment based on workers' compensation immunity. The appellate court noted that the attack did not take place at a time related to the "reasonable fulfillment" of her duties, but simply happened to be at the place where she worked. Id. at 295. Aloff is not applicable here.

This Defendant has met its burden entitling it to summary judgment. The evidence, and all reasonable, permissible inferences drawn from the evidence, entitle Pizza Hut to workers' compensation immunity as a matter of law. The only "fact issues" raised by Richard Miller would require pure speculation from the jury and cannot be determined by a jury because it would result in an impermissible verdict."[6] In Neilsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960), this Court approved a summary judgment entered on behalf of the defendant when the plaintiff's case was established by the impermissible pyramiding of circumstantial evidence. Significantly, this Court noted:

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[6] The law in Florida is well established that a jury verdict cannot rest on guess work. Louisville and Nashville Railroad Co. v. Holland, 79 so. 2d 691 (Fla. 1955) (en banc); Golden v. Morris, 55 So. 2d 714 (Fla. 1951) (en banc). See also Hemisphere Condominium Assoc., Inc. v. Corbin, 357 So. 2d 1074 (Fla. 3d DCA), cert. denied, 364 So. 2d 883 (Fla. 1978) (stating that "a jury verdict may not be based solely upon conjecture and speculation"); Tranter v. Wible, 191 so. 2d 595 (Fla. 4th DCA 1966), cert. denied, 200 So. 2d 815 (Fla. 1967) (stating that a jury's decision cannot rest on guess work or suspicion).

> If a party to a civil action depends upon the inferences to be drawn from circumstantial evidence as proof of one fact, it cannot construct a further inference upon the initial inference in order to establish a further fact unless it can be found that the original, basic inference was established to the exclusion of all other reasonable inferences.

Id. at 733 (emphasis added). Similarly, in Food Fair Stores, Inc. v. Trussell, 131 So. 2d 730 (Fla. 1961), this Court affirmed a summary judgment on behalf of a supermarket, stating:

> It is apparent that a jury could not reach a conclusion imposing liability on the petitioner without indulging in the prohibited mental gymnastics of constructing one inference upon another inference in a situation where, admittedly, the initial inference was not justified to the exclusion of all other reasonable inferences.

Id. at 733 (emphasis added). At no time has this Court ever relaxed or modified its stance on this rule.

Miller accuses Pizza Hut of having a "cynical" view of the justice system when Pizza Hut asserts that there will be a deluge of personal injury claims brought by employees unsatisfied with a mere workers' compensation remedy if employers are not permitted to take a non-final appeal of orders denying their motions for entitlement to this remedy as a matter of law.[7] History, however, confirms this conclusion. Before the legislature realized

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[7] Pizza Hut takes issue with Miller's repeated assertion that Pizza Hut suggests that plaintiffs who file liability suits against employers, on unsupportable grounds, are "unscrupulous." (Answer brief at p. 20-21) In fact, Miller uses this word three times in those two pages to describe Pizza Hut's argument. Pizza Hut did not use such an inflammatory word in its briefs, but does suggest that society has become litigious.

the loophole in the Workers' Compensation Statute and amended the wording, there was an onslaught of suits instituted against management and supervisory personnel following this Court's earlier decision in Streeter v. Sullivan, 509 So. 2d 268 (Fla. 1987), (finding that corporate officers, executives and supervisors were held only to a gross negligence standard as "co-employees" under the statute). Indeed, this Court later recognized that the amendment was a direct result of the Streeter decision, as evidenced by the Florida House of Representatives, Final Staff Analysis. Eller v. Shova, 630 So. 2d 537, 542 (Fla. 1993). This report states that, with the amendment, management personnel would no longer have to incur costs associated with these tort suits, which would serve to reduce their liability insurance expenses. In Eller at 542, this Court acknowledged the wisdom of the amendment, stating:

> [T]he amendment is consistent with the overall workers' compensation scheme of providing employees with compensation for on-the-job injuries regardless of fault in exchange for providing employers with immunity from suit.

Finally, it is strong public policy in the State of Florida, as witnessed by both legislative enactments and judicial decisions, to protect the balancing factors found in a workers' compensation scheme. In return for paying substantial workers' compensation premiums, a worker in Florida will be given quick and efficient redress against injuries in the workplace. In case of death, the same applies to the decedent's dependents. In return, an employer will not be forced to litigate a case before a jury unless there

exists a genuine, material issue of fact regarding course and scope of employment (or other relevant issues) to go to a jury. That is why the judiciary, at all levels, should carefully screen tort suits brought against employers to determine whether a truly genuine, material issue of fact presents a jury question, particularly in cases where the tort suit is brought by widows or widowers and their children, who are highly sympathetic plaintiffs to a jury.

When an appellate court, such as the Second District below, does not determine whether a genuine, material issue of fact exists to go to a jury because it believes there is no jurisdiction to do so under Rule 9.130, Fla. R. App. P., employers will be subject to trials where not only the immunity issue, but also the issue of the employer's negligence, will be tried. If the issue of immunity must wait until final resolution of the case, the employer has been effectively stripped of the benefits of that immunity because the burden of bearing an expensive lawsuit has already taken place, It makes far more sense to screen these cases at the appellate level beforehand.[8]

Thus, Rule 9.130, Fla. R. App. P. must be construed broadly enough to permit a non-final appeal in cases of this type.

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[8] Compare Lovin Mood, Inc. v. Bush, 687 So. 2d 61 (Fla. 1st DCA 1997) ("This court has jurisdiction to review the order appealed, as no material facts are in dispute . . .," evincing a review of the record for a genuine issue of fact for a jury) with Sam's Crane & Equipment Co., Inc. v. Tolar, 688 So. 2d 418 (Fla. 2d DCA 1997) ("The record reveals that the trial court **was** concerned with unresolved factual issues . . ." evincing only that (as in this case) the trial judge concluded that a factual issue existed).

Employers are already heavily financially burdened because the legislature has established a presumption that workplace accidents are compensable. Allowing a case like this to survive summary judgment, particularly without an immediate appellate remedy, converts nearly every unwitnessed workplace death into a civil jury trial and substantially eviscerates the very broad immunity afforded employers in exchange for the liberal application of workers' compensation benefits for survivors.

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 April 11, 1997 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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