IN THE SUPREME COURT OF FLORIDA

CASE NO.: 89,130

HERBERT HASTINGS and
AMERICAN SIGN COMPANY, INC., a
Florida Corporation,

Petitioners,

vs.

CHARLES DEMMING and **DIANE DEMMING,**
Husband and Wife,

Respondents.

BRIEF OF AMICUS CURIAE, FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS' POSITION

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Florida Defense Lawyers Association (hereinafter referred to as "FDLA") accepts and adopts the Statement of Case and Facts as presented in the Initial Brief of Petitioners, HERBERT HASTINGS and AMERICAN SIGN COMPANY, INC.

SUMMARY OF THE ARGUMENT

On July 9, 1992, this Court enacted Fla. R. App. P. 9.130(a)(3)(C)(vi) which provides that "[r]eview of non-final orders of lower tribunals is limited to those that determine that a party is not entitled to workers' compensation immunity as a matter of law." Mandico v. Taos Constr., Inc., 605 So. 2d 850 (Fla. 1992). Since the enactment of Fla. R. App. P. 9.130(a)(3)(C)(vi), the district courts of this State have routinely accepted jurisdiction of orders denying summary judgment without explanation and of orders denying summary judgment based upon a genuine issue of material fact. See, e.g., Breakers Palm Beach, Inc. v. Gloger, 646 So. 2d 237 (Fla. 4th DCA 1994); City of Lake Mary v. Franklin, 668 So. 2d 712 (Fla. 5th DCA 1996). By doing so, the district courts of this State have carried out this Court's intent in enacting Fla. R. App. P. 9.130(a)(3)(C)(vi) by ensuring that employers are afforded workers' compensation immunity when the facts demonstrate that the exclusivity provision of Section 440.11(1) applies.

However, in Hastings v. Demming, 21 Fla. L. Weekly D1757 (Fla. 2d DCA July 31, 1996), the Second District adopted a restrictive interpretation of Fla. R. App. P. 9.130(a)(3)(C)(vi) which prohibits reviews of orders denying summary judgment when the lower court finds that disputed issues of material fact exist. Most respectfully, while the Hasting decision provides a comprehensive analysis of this complex jurisdictional issue, the Second District has overlooked the implications of its decision.

Since 1992, Fla. R. App. P. 9.130(a)(3)(C)(vi) has been successfully and expeditiously applied to carry out the Legislature's intent by taking workplace accidents out of the tort system and ultimately affording the employee quick and efficient delivery of benefits under the Act.

See, e.g., Eller v. Shova, 630 So. 2d 537 (Fla. 1993). Adopting Hastings' strict construction of Fla. R. App. P. 9.130(a)(3)(C)(vi) will undermine the exclusivity provision of the Workers' Compensation Act. Employers will be forced to proceed to trial even though the exclusivity provision of the Workers' Compensation Act affords the employer immunity.

Specifically, the aftermath of the Hastings decision has been clearly defined in two recent decisions from the First District Court of Appeal. In H.C. Hodges Cash & Carry and Phiel the First District accepted jurisdiction of orders denying summary judgment without explanation. The First District attempted to harmonize its decision with Hastings by conducting a review of the record and concluding that there were no disputed issues of fact. Thus, the First District conducted a merits review, then accepted jurisdiction and ultimately issued opinions finding that the employer was entitled to workers' compensation immunity.

Put simply, had the First District truly followed the holding in Hastings, jurisdiction would have been denied and the employer would have been forced to proceed to trial even though the exclusivity provisions of the Workers' Compensation Act afforded immunity. It is precisely for this reason that the Hastings decision must be rejected. The instant action, had the Second District accepted jurisdiction, the record evidence, when viewed in a light most favorable to the non-moving party, would have demonstrated that there was no evidence to support the allegation that the Petitioners acted intentionally or with culpable negligence. Thus, the certified question should be answered in the affirmative and the Second District's decision in Hastings reversed and remanded with instructions to the Second District to accept jurisdiction and decide the case on the merits.

ARGUMENT

I. AN APPELLATE COURT SHOULD ACCEPT JURISDICTION UNDER FLORIDA RULE OF APPELLATE PROCEDURE 9.130(a)(3)(C)(vi) TO REVIEW A NON-FINAL ORDER DENYING A MOTION FOR SUMMARY JUDGMENT ASSERTING WORKERS' COMPENSATION IMMUNITY.

The Second District Court of Appeal has certified the following question to this Court:

> DOES AN APPELLATE COURT HAVE JURISDICTION UNDER FLORIDA RULE OF APPELLATE PROCEDURE 9.130(a)(3)(C)(vi) TO REVIEW A NON-FINAL ORDER DENYING A MOTION FOR SUMMARY JUDGMENT ASSERTING WORKERS' COMPENSATION IMMUNITY WHEN THE ORDER DOES NOT CONCLUSIVELY AND FINALLY DETERMINE A PARTY'S NON-ENTITLEMENT TO SUCH IMMUNITY, AS A MATTER OF LAW, BECAUSE OF THE EXISTENCE OF DISPUTED MATERIAL FACTS, SO THAT THE EFFECT OF THE ORDER IS TO LEAVE FOR A JURY'S DETERMINATION THE ISSUE OF WHETHER THE PLAINTIFF'S EXCLUSIVE REMEDY IS WORKERS' COMPENSATION BENEFITS?

Thus, the sole issue before this Court is whether Fla. R. App. P. 9.130(a)(3)(C)(vi) should be interpreted to limit jurisdiction under 9.130(a)(3)(C)(vi) to orders that conclusively and finally determine a party is not entitled to workers' compensation immunity.

The language of Fla. R. App. P. 9.130(a)(3)(C)(vi) provides that "[r]eview of non-final orders of lower tribunals is limited to those that determine that a party is not entitled to workers' compensation immunity as a matter of law." Fla. R. App. P. 9.130(a)(3)(C)(vi). In confronting the application of this rule, the district courts of appeal have routinely accepted jurisdiction of orders denying summary judgment without explanation and of orders denying summary judgment based upon a genuine issue of material fact.[1] See, e.g. Breakers Palm Beach, Inc. v. Gloger,

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[1] There does not appear to be any dispute that orders denying summary judgment finding that, as a matter of law, the evidence is sufficient to deny workers' compensation immunity is an appealable non-final order pursuant to Fla. R. App. P. 9.130(a)(3)(C)(vi). See, e.g., General Motors Corp. v. David, 632 So. 2d 123 (Fla. 1st DCA 1994).

646 So. 2d 237 (Fla. 4th DCA 1994) (order denying summary judgment based upon genuine issue of material fact was appealable under Fla. R. App. P. 9.130(a)(3)(C)(iv); City of Lake Mary v. Franklin, 668 So. 2d 712 (Fla. 5th DCA 1996) (order denying summary judgment by written order without explanation was appealable as a non-final order under Fla. R. App. P. 9.130(a)(3)(C)(vi); Ross v. Baker, 632 So. 2d 224 (Fla. 2d DCA 1994) (while order denied workers' compensation immunity as a matter of law, the court nevertheless noted that the Florida Supreme Court intended for orders denying summary judgment based upon factual questions to be appealable as non-final orders under Fla. R. App. P. 9.130(a)(3)(C)(vi)).

Accepting jurisdiction under these circumstances is clearly consistent with this Court's pronouncement in Mandico v. Taos Constr., Inc., 605 So. 2d 850 (Fla. 1992) and Ramos v. Univision Holdings, Inc., 655 So. 2d 89 (Fla. 1995). However, the Second District's decision in Hastings argues that Mandico and Ramos should be interpreted to limit review under Fla. R. App. P. 9.130(a)(3)(C)(vi) to orders finding that, based upon undisputed material facts, a party is not entitled to workers' compensation immunity as matter of law. Hastings v. Demming, 21 Fla. L. Weekly D1756, D1757 (Fla. 2d DCA July 31, 1996) (an order denying a motion for summary judgment asserting workers' compensation immunity must preclude the jury from determining whether the exclusive remedy is workers' compensation benefits.)

As a result of the Second District's restrictive interpretation of Fla. R. App. P. 9.130(a)(3)(C)(vi), Petitioners' appeal was dismissed for lack of jurisdiction, and the Second District certified conflict with Breakers Palm Beach v. Gloger, 646 So. 2d 237 (Fla. 4th DCA 1994) and City of Mary v. Franklin, 668 So. 2d 712 (Fla. 5th DCA 1996) and certified the issue to this Court as one of great public importance. Most respectfully, the FDLA suggests that the

Second District erred in interpreting Fla. R. App. P. 9.130(a)(3)(C)(vi) and dismissing the Petitioners' appeal for lack of jurisdiction. As will be demonstrated below, embracing the Second District's interpretation of Fla. R. App. P. 9.130(a)(3)(C)(vi) will undermine the exclusivity provision of § 440.11, Fla. Stat,, (1993) and expose employers in Florida to tort litigation when the circumstances of the case demonstrate that the employer should be afforded workers' compensation immunity.

A. Historical Overview of Fla. R. App. P. 9.130(a)(3)(C)(vi)

On July 9, 1992, this Court enacted Fla. R. App. P. 9.130.(a)(3)(C)(vi). Mandico v. Taos Constr., Inc., 605 So. 2d 850 (Fla. 1992). Prior to the enactment of this rule, this Court allowed the use of a writ of prohibition to review a lower tribunal's denial of an employer's motion to dismiss based upon workers' compensation immunity. Winn-Lovett Tampa v. Murphee, 73 So. 2d 287 (Fla. 1954), overruled, Mandico v. Taos Constr., Inc., 605 So. 2d 850 (Fla. 1992). However, in Mandico, this Court held that granting a writ of prohibition based upon a lower tribunal's denial of workers' compensation immunity was an unwarranted extension of the principles of prohibition. Mandico, 605 So. 2d at 854. Thus, this Court being "sensitive to the concern for early resolution of controlling issues" amended Rule 9.130 to permit review of non-final orders determining a party is not entitled to workers' compensation immunity as a matter of law. Mandico, 605 So. 2d at 854.

There is nothing in the Mandico opinion, or the more recent Ramos opinion, indicating that the enactment of Rule 9.130(a)(3)(C)(vi) limited review to orders that find the undisputed facts conclusively demonstrate that a party is not entitled to workers' compensation immunity. Rather, this Court expressly recognized in Mandico that trials should not be required to proceed

to conclusion when it is evident that the exclusive remedy is workers' compensation benefits. Id. In fact, in Ramos, this Court revisited its holding in Mandico and implicitly, if not expressly, approved of interlocutory review under Fla. R. App. P. 9.130(a)(3)(C)(vi) of orders denying summary judgment based upon disputed factual issues. Ramos, 655 So. 2d at 91, n.2 (approving of interlocutory review in Kennedy v. Moree, 650 So.2d 1102 (Fla. 4th DCA 1995) wherein summary judgment was denied based upon apparent disputed factual issues.)

Following the Mandico and Ramos decisions, the district courts of appeal have routinely embraced interlocutory review under Fla. R. App. P. 9.130(a)(3)(C)(vi). Breakers Palm Beach, Inc. v. Gloger, 646 So. 2d 237 (Fla. 4th DCA 1994); City of Lake Mary v. Franklin, 668 So. 2d 712 (Fla. 5th DCA 1996). Importantly, many of the orders reviewed by the district courts under Fla. R. App. P. 9.130 (a)(3)(C)(vi) address denials of summary judgment based upon disputed factual issues. Kennedy v. Moree, 650 So. 2d 1102 (Fla. 4th DCA 1995); Pinnacle Constr., Inc. v. Alderman, 639 So. 2d 1061 (Fla. 3d DCA 1994); Emergency One v. Keffer, 652 So. 2d 1233 (Fla. 1st DCA 1995); Mekamy Oaks, Inc. v. Snyder, 659 So. 2d 1290 (Fla. 5th DCA 1995).

However, recently the Fifth District in Integrity Homes of Central Florida. Inc. v. Goldy, 672 So. 2d 839 (Fla. 5th DCA 1996) commenced a judicial reversal of well established precedent by denying jurisdiction of an order denying summary judgment asserting workers' compensation immunity where the record failed to establish entitlement to workers' compensation immunity as a matter of law. See also, Pizza Hut of America, Inc. v. Miller, 674 So. 2d 178 (Fla. 2d DCA 1996) (denying jurisdiction); American Television and Communication Corp. v. Florida Power Corp., 21 Fla. L. Weekly D1668 (Fla. 2d DCA July 17, 1996) (denying

jurisdiction). Ultimately, the Second District decided Hastings v. Demming, 21 Fla. L. Weekly D1756 (Fla. 2d DCA July 31, 1996) and this instant appeal followed.

The Hastings decision also prompted the Appellate Rules Committee of the Florida Bar to file a Petition to Adopt on an Emergency Basis an Amendment to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi) and Florida Rule of Appellate Procedure Rule 9.100(c), Case No. 87,134. The Appellate Rules Committee has requested that this Court amend Rule 9.130(a)(3)(C)(vi) by moving the phrase "as a matter of law" from the end of the subdivision to the beginning. By doing so, jurisdiction would not be invoked if the lower tribunal denied a motion for summary judgment based on a genuine issue of material fact. The Petition remains pending in this Court.

B. An analysis of the Second District's Interpretation of Fla. R. App. P. 9.130(a)(3)(C) (vi) in Hastings v. Demming

The Second District in Hastings has provided this Court with a comprehensive analysis of this complex jurisdictional issue by setting forth various reasons to support its conclusion that review under rule 9.130(a)(3)(C)(vi) should be limited to orders finding that the employer is not entitled to workers' compensation immunity.

First, the Hastings decision asserts that this Court's use of the word "evident" in Mandico and Ramos was intended to limit jurisdiction to non-final orders finding that the undisputed facts demonstrate clearly and conclusively that a party is not entitled to workers' compensation immunity. Hastings, 21 Fla. L. Weekly at D1757.[2] Secondly, the Hastings decision stated that

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[2] As a basis for its conclusion, the Second District relies on this Court's definition of the term in Russell v. State, 71 So. 27, 28 (1916) wherein this Court noted that:

> "The word 'evident' is defined by Webster as 'clear to the understanding and satisfactory to the judgment.' Synonyms: 'manifest, plain, clear, obvious, conclusive.' The word 'manifest' is defined as follows: 'To put beyond questions of doubt.'"

its previous ruling in Ross v. Baker, 632 So. 2d 224 (Fla. 2d DCA 1994) allowing review of non-final orders based upon unresolved factual questions was merely dicta.

Thirdly, the Hastings decision notes that this Court in Tucker v. Resha, 648 So. 2d 1187 (Fla. 1994) specifically limited review of denials of summary judgment based upon qualified immunity under federal law to non-final orders that turn on an issue of law. Finally, the Hastings decision notes that to permit review of all non-final orders denying summary judgment based upon workers' compensation immunity would burden the courts and be contrary to the well-established principle that the thrust of rule 9.130 is to restrict the number of non-final appealable orders. See, e.g., Travelers Ins. Co. v. Bruns, 443 So. 2d 959 (Fla. 1984) (the theory underlying the more restrictive rule is that appellate review of non-final judgments serves to waste court resources and needlessly delay final judgment.)

Most respectfully, however, the Hastings decision fails to address the unique concerns facing the Court when Fla. R. App. P. 9.130(a)(3)(C)(vi) was enacted. Clearly, Fla. R. App. P. 9.130(a)(3)(C)(vi), was enacted due to the Court's recognition that the Workers' Compensation Act was created to provide both the exclusive remedy for the plaintiffs and the exclusive liability for the defendants who meet the criteria of the statute. See, Department of Education v. Roe, 21 Fla. L. Weekly S311 (Fla. July 18, 1996) (recognizing that the Mandico decision was enacted to ensure early resolution of controlling issues based upon the exclusivity provisions of the Workers' Compensation Law.) Forcing employers to defend tort actions where no legal basis exists for imposition of liability thwarts the intent behind the exclusivity provision of the Workers' Compensation Act.

Furthermore, the Hastings decision fails to adequately demonstrate that Fla. R. App. P.

9.130(a)(3)(C)(vi) is unworkable without a strict interpretation. Fla. R. App. P. 9.130(a)(3)(C)(vi) has been in existence in the courts of this State since 1992. As a result of the implementation of this rule, employers have successfully avoided the burden of tort litigation by appealing denials of summary judgment. Importantly, in many of these cases the district courts have reversed denials of summary judgments on the issue of workers' compensation immunity based upon the lower tribunal's erroneous finding that a genuine issue of material fact existed. See, e.g., Kennedy v. More, 650 So. 2d 1102 (Fla. 4th DCA 1995); Pinnacle Constr., v. Alderman, 639 So. 2d 1061 (Fla. 1st DCA 1994); Emergency One v. Keffer, 652 So. 2d 1233 (Fla. 1st DCA 1995); Mekamy Oaks, Inc. v. Snyder, 659 So. 2d 1290 (Fla. 5th DCA 1995).

Thus, while the Hastings decision advances numerous bases for adopting a restrictive approach in interpreting Fla. R. App. P. 9.130(a)(3)(C)(vi), the FDLA respectfully disagrees with the Second District's restrictive interpretation of Fla. R. App. P. 9.130(a)(C)(3)(vi). Ultimately, adopting the Second District's approach in Hastings will serve to confuse and disrupt a rule that has proven to be workable and sensitive to the underlying purpose of the Workers' Compensation Act .[3]

C. **The legislative intent behind the enactment of the Workers' Compensation statutory scheme must not be thwarted by a lower court's erroneous denial of workers' compensation hnmunity.**

Section 440.015 of the Florida Statutes provides as follows:

> **. ..The workers' compensation system in Florida is based on a mutual renunciation of common law rights and defenses by employers and employees alike...§ 440.015, Fla. Stat (1993).**

[3] The Petitioners have raised numerous additional arguments in their Initial Brief concerning the correctness of the Second District's decision in Hastings. F D L A incorporates the Petitioners' arguments into this Amicus Brief.

Thus, the fundamental purpose of the Workers' Compensation Act is to provide a system in which liability is limited and determinative and the remedy is expeditious and independent of proof of fault consistent with the right to undertake a reasonable investigation regarding liability, See Humana of Fla., Inc. v. McKaughan, 652 So. 2d 852 (Fla. 5th DCA 1995) aff'd., 668 So. 2d 974 (Fla. 1966). Section 440.11 of the Florida Statutes codifies the underlying purpose behind the Act by mandating that workers' compensation is the exclusive remedy available to an injured employee as to any negligence on the part of that employee's employer:

> . ..The concept of exclusiveness of remedy embodied in Fla. Stat., § 440.11, F.S. A., appears to be a rational mechanism for making the compensation system work in accord with the purposes of the [Workers' Compensation] Act. In return for accepting vicarious liability for all work-related injuries regardless of fault, and surrendering his traditional defenses and superior resources for litigation, the employer is allowed to treat compensation as a routine cost of doing business which can be budgeted for without fear of any substantial adverse tort judgments. Mullarkey v. Florida Feed Mills, 268 So. 2d 363 (Fla. 1972).

Therefore, once workers' compensation coverage is secured, employers are provided immunity from suit by their employees absent an intentional act designed to result in, or that is substantially certain to result in injury. Eller v. Shova, 630 So, 2d 537, 539 (Fla. 1993). The workers' compensation immunity extends to co-employees negligent acts that cause injury to a fellow employee. § 440.1 l(l), Fla. Stat., (1993). However, under the statute, immunity will not be afforded to a co-employee acting within his managerial or policy-making function if his actions rise to the level of culpable negligence.[4] Furthermore, under the statute, immunity will not be afforded to an employee acting outside the scope of a managerial or policy making function if he acts with "willful and wanton disregard or unprovoked physical aggression or with

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[4] Culpable negligence has been defined as a "reckless indifference" or "grossly careless disregard" of human life. Eller v. Shova, 630 So. 2d at 541, n. 3.

gross negligence" resulting in or proximately causing injury or death.' § 440.11(1), Fla. Stat., (1995); Eller v. Shova, 630 So. 2d 537 (Fla. 1993).

Since the enactment of Fla. R. App. P. 9.130(a)(3)(C)(vi), the appellate courts of this state have effectively enforced the exclusivity provision of the Workers' Compensation Act by reviewing denials of summary judgment on the issue of workers' compensation immunity when disputed issues of fact exist in the record. Specifically, in Mekamy Oaks, Inc. v. Snyder, 659 So. 2d 1290 (Fla. 5th DCA 1995), Snyder filed a suit for personal injuries alleging that the riding lawn mower he was operating flipped and ejected the plaintiff thereby causing injury. Summary judgment on the basis of workers workers' compensation immunity was denied and the Fifth District accepted jurisdiction despite factual disputes in the record. On appeal, the facts were viewed in a light most favorable to the Plaintiff. Thus, even though the supervisor knew that the lawn mower had a malfunctioning safety switch and apparently removed the safety switch, the court reversed the denial of summary judgment holding that there was no evidence the employer committed an intentional act, nor was there any evidence that the supervisor or corporate director's actions constituted culpable negligence.

Similarly, in Kline v. Rubio, 652 So. 2d 964 (Fla. 3d DCA 1995), an employee filed a tort suit for personal injuries alleging her hand was injured upon being caught in the tenderizing blades. The evidence, once again viewed in a light most favorable to the Plaintiff, demonstrated

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[5] "Gross negligence" has been defined as requiring: 1) circumstances which, together, constitute an imminent or clear and present danger amounting to more than the normal and usual peril; 2) chargeable knowledge or awareness of the imminent danger; and 3) the act must occur in a manner which evinces a "conscious disregard of the consequence." Kline v. Rubio, 652 So. 2d 964 (Fla. 3d DCA 1995).

that the machine had incorrectly been left freestanding on a tabletop, the hopper cover and manufacturer's warning had been removed, the emergency switch had been bypassed and the employee had never been trained on the machine. Once again, the appellate court reversed the denial of summary judgment, finding that there was no evidence of intentional tort or gross negligence. See also, J.B. Coxwell Contracting, Inc. v. Shafer, 663 So. 2d 659 (Fla. 5th DCA 1995) (despite lower court's finding that issues of fact existed, the appellate court reversed the order denying summary judgment on workers' compensation immunity.)

Importantly, since the Hastings decision, the First District has reversed denials of summary judgment on the issue of workers' compensation immunity despite factual disputes in the record. Walton Dodge Chrysler-Plymouth Jeep and Eagle, Inc. v. H.C. Hodges Cash and Carry, 21 Fla. L. Weekly D2004 (Fla. 1st DCA September 4, 1996) and Gustafson's Dairy, Inc, v. Phiel, 21 Fla. L. Weekly D2146 (Fla. 1st DCA September 30, 1996) In Walton Dodge, an employee was injured when a metal pole he was holding came into contact with, or nearly came into contact with, a high voltage power line. Based upon the evidence in the record, the court found that there was no indication of an "intentional act." Similarly, in Phiel, an employee was injured while trying to un-jam a trimmer machine that was used to cut up milk jugs. Like Walton Dodge, the court found that there was no evidence of an intentional act thereby mandating a reversal of the denial of summary judgment.

The Mekamy, Kline, Walton Dodge and Phiel decisions clearly demonstrate that an appellate court's review of lower court denials of summary judgment enforce the exclusivity provision of the Workers' Compensation Act and ensure that employers' are not needlessly subjected to tort litigation. Importantly, the Mekamy, Kline, Walton Dodge and Phiel cases

demonstrate that a lower tribunal's denial of summary judgment is often based upon a misapplication of the law to the facts in evidence. Typically, while there may be factual disputes in the record, the factual disputes taken in a light most favorable to the plaintiff do not rise to the level of an intentional act, gross negligence or culpable negligence under § 440.1 1(1) Fla. stat., (1993).

Thus, if this Court divests employers of the protection afforded by Fla. R. App. P. 9.130(a)(3)(C)(vi) by interpreting or amending the rule to preclude review of denials of summary judgments based upon factual disputes, the employers will be forced to engage in tort litigation and incur unwarranted liability expenses. By so doing, the exclusivity provision of the Workers' Compensation Act will be undermined and the'very "evil" which the immunity was supposed to avoid will quickly proliferate among the trial courts of this State. Thus, while the Second District in Hastings has obviously engaged in a thorough and well reasoned analysis of Fla. R. App. P. 9.130, the Second District appears to have overlooked the consequences of a narrow interpretation of Fla. R. App. P. 9.130(a)(3)(C)(vi).

D. The Aftermath of Hastings v. Demmings: A Procedural Quagmire

As discussed previously, since Hastings, the First District has accepted jurisdiction under Fla. R. App. P. 9.130(a)(3)(C)(vi) despite the fact the order did not conclusively and finally determine a non-entitlement to workers' compensation immunity. Walton Dodne Chrysler-Plymouth Jeep and Eagle. Inc. v. H.C. Hodges Cash & Carry, 21 Fla. L. Weekly D2004 (Fla. 1st DCA September 4, 1996); Gustafson's Dairv. Inc. v. Phiel, 21 Fla. L. Weekly D2146 (Fla. 1st DCA September 30, 1996).

Specifically, in Walton Dodge Chrysler-Plymouth Jeep and Eagle. Inc. v. H.C. Hodges

Cash & Carry, 21 **Fla. L. Weekly** D2004 (Fla. 1st DCA September 4, 1996), the lower court denied summary judgment on the issue of workers' compensation immunity without making findings of fact. The First District accepted jurisdiction, after reviewing the record on appeal, based upon a determination that there were clearly and conclusively no disputed issues of material fact and that the motion and order were based upon the exclusivity provision of § 440.11, Fla. Stat., (1993). Interestingly, the First District stated that a determination that no issues of material fact existed made jurisdiction appropriate under either Hastings or Breakers Palm Beach. Of course, this is inconsistent because Hastings is in direct conflict with Breakers Palm Beach.

Similarly, in Phiel, the lower court denied summary judgment without explanation. As a result, the Phiel court recognized that "we are unable to conclude solely from the order itself whether the trial court found that summary judgment was not appropriate because unresolved factual issues remained, or whether the trial court found that no issues of material fact existed and determined that Gustafson was not entitled to workers' compensation immunity as a matter of law." Phiel, 21 Fla. Weekly at D2146. The court requested that the parties submit a supplemental record and ultimately the court determined that the record demonstrated an absence of factual disputes precluding the employer's entitlement to workers' compensation immunity. Once again, the First District, harmonized its decision to accept jurisdiction with Hastings by stating that the facts in the record demonstrated entitlement to workers' compensation immunity.

The Hodges Cash & Carry and Phiel decisions amply demonstrate that Hastings has presented an unworkable interpretation of Fla. R. App. P. 9.130(a)(3)(C)(vi). In essence, had

the Hodges Cash & Carry and Phiel courts truly followed the holding in Hastings, jurisdiction would have been denied prior to a merits review because the order itself did not demonstrate conclusively, beyond doubt, that a party was not entitled to workers' compensation immunity. Clearly, had this occurred, the employer would have been forced to proceed to trial even though the exclusivity provision of the Workers' Compensation Act served as a bar to tort litigation. However, the First District apparently did not want to deprive the defendant of workers' compensation immunity if the facts in the record demonstrate entitlement. For this reason that the Hastings strict construction of Fla. R. App. P. 9.130(a)(3)(C)(vi) must be rejected.

Rejecting Hastings' strict construction of Fla. R. App. P. 9.130(a)(3)(C)(vi), will permit the appellate courts of this State to continue to effectively address lower court denials of summary judgments on the issue of workers' compensation immunity. By doing so, employers will be afforded workers' compensation immunity when the record evidence, viewed in the light most favorable to the non-moving party, demonstrates that the plaintiff has failed to adduce evidence necessary to overcome workers' compensation immunity. In this instant action, had the Second District accepted jurisdiction, the record evidence, when viewed in a light most favorable to the non-moving party, would have demonstrated that there was no evidence to support the allegations that Petitioners, HERBERT HASTINGS and AMERICAN SIGN COMPANY, INC., acted intentionally or with culpable negligence in failing to inspect and replace the ladder cable. Thus, the certified question should be answered in the affirmative and the Second District's decision in Hastings reversed and remanded with instructions to the Second District to accept jurisdiction and decide the case on the merits.

CONCLUSION

The Second District's ruling in the instant case is contrary to this Court's pronouncements on the intended application of Rule 9.130(a)(3)(C)(vi), is contrary to the weight of precedent from the District Courts, is contrary to the plain meaning of the Rule and is contrary to the policies and purposes of the Workers' Compensation Act. Thus, *Amicus Curiae*, Florida Defense Lawyers Association, respectfully requests that the certified question be answered in the affirmative and the Second District's decision in Hastings be reversed and remanded with instructions to the Second District to accept jurisdiction and decide the case on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to: Allyson Palmer, Esquire, 2014 4th Street, Sarasota, Florida 34237; Dan Carlton, Esquire, 2831 Ringling Boulevard, Building C, Suite 111, Sarasota, Florida 34237; Randy D. Witzke, Esquire, Edmonds, Cole, Hargrave, Givens & Witzke, One North Hudson, Suite 200, Oklahoma City, Oklahoma 73102; Doug Whight, Esquire, Post Office Box 3979, Sarasota, Florida 34230; James R. Hutchens, Esquire, 2015 Fruitville Road, Sarasota, Florida 34237; Eric Schultz, Esquire, Post Office Box 24317, Tampa, Florida 33623; and Jesse L. Skipper, Esquire, 2600 Ninth Street North, Suite 500, St. Petersburg, Florida, 33704, on this _____ day of November, 1996.

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