IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

CHARLES DEMMING and DIANA DEMMING, Husband and Wife,

Respondents.

CASE NO. 89,130

Second District Court of Appeal Case No. 96-00368

ON PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENTS' AMENDED ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE

At all times material hereto, Respondent, Charles Demming (hereinafter "Respondent"/"Appellee" or "Demming") was an employee of Petitioner, American Sign Company (hereinafter "ASC"). App. 11 ¶ 4, App. 12 ¶ 4. At all times material hereto, Petitioner Herbert Hastings (hereinafter "Hastings" or "Appellants") was an officer, director, stockholder and employee of ASC. App. 4 ¶ 2.

In 1986, ASC purchased an extension ladder from the manufacturer. App. 10 ¶ 4. There are two (2) cables on the extension ladder which support the ladder while it is extended. The manufacturer of the ladder mandates that the two (2) cables must be replaced after 4200 hundred hours of use or every two (2) years, whichever is sooner. App. 14. Further, the manufacturer mandates that the working parts on the ladder must be routinely maintained.

On or about January 20, 1993, Respondent was atop the above-referenced extension ladder installing a sign on behalf of ASC when both cables holding up the ladder broke. App. 11 and 12. In that the cables were the only things holding up the ladder, when both cables broke, Respondent fell from the ladder and was severely injured.

Neither cable had been replaced since ASC purchased the extension ladder from the manufacturer in 1986. App. IO. More than seven (7) years and an unknown number of hours of use had gone by during the time that the ladder was owned and operated by ASC, in spite of the fact that the manufacturer of the ladder mandates that the cables must be replaced after 4200 hundred hours of use or every two (2) years, whichever is sooner. Both cables upon visual inspection were obviously very dry, rusted and had a large number of broken strands. App. 10, 11 and 12.

Hastings, and therefore ASC, both knew or reasonably should have known: (1) of the manufacturer's maintenance and replacement requirements; App. 14 (2) that the cables had not been replaced in over (7) years; App. IO. and, (3) that the cables were very dry, rusted and had multiple broken strands. App. 10, 11, 12, and 14.

Hastings had the power and responsibility to order and pay for replacement cables, and to direct the installation of same as officer, director, owner and employee of ASC. Further, Hastings had the responsibility to follow up and ensure that the installation was performed. Hastings failed

to order and pay for replacement cables and to direct installation of same. App. 10. Although, Hastings had the power and responsibility to either replace the cables or take the extension ladder out of operation at ASC, he failed to do either. Hastings had the responsibility to ensure that no employee utilized that extension ladder due to the age and degree of wear on both cables which inevitably caused the cables to break while in use by the Respondent. It was inevitable if the ladder remained in use without cable replacement that the cables would break. The degree of wear and the age of the cables revealed that upon continued use, the employee operating the extension ladder would be in imminent danger of being seriously injured when the inevitable happened and the cables broke. App. 14 Hastings acted in flagrant and total reckless disregard of the safety of Respondent as a result of directing Respondent to use the ladder and ignoring the likely risk of serious injury or death to the Respondent.

Although Respondent became concerned for his safety upon visually inspecting the ladder cables, ASC employee, Ernie Bedwell who was under the direction of Hastings, actively deceived Respondent as to the true character and degree of risk with respect to the age and degree of wear on the cables. App. 11 and 12. Respondent was told by Ernie Bedwell that the dry, rusted cables with broken strands had been replaced routinely as mandated by the manufacturer and that the appearance of the cables should be disregarded by Respondent due to the fact that the cables had been replaced and that the ladder had been maintained per the manufacturer's specifications and therefore, posed no danger to Respondent. App. 11 and 12. Respondent has stated under oath that he relied upon the statements of Ernie Bedwell in agreeing to utilize the extension ladder on behalf of ASC, and that Respondent would not have utilized the ladder had he known the truth about the total failure to follow manufacturer's specifications with respect to maintenance and cable replacement. App. 11 and 12

A motion to dismiss the complaint for failure to state a cause of action which fit within an exception to Florida Statutes 5440.11, Workers' Compensation Exclusivity provision, was filed on behalf of Hastings on May 19, 1995. App. 1. The trial judge denied Hastings motion to dismiss and entered an order denying the motion on July 21, 1995. App. 2. That order was never appealed. Hastings then filed an answer and affirmative defenses on August 14, 1995. App. 3. ASC filed an

answer and affirmative defenses on August 18, 1995, but has not filed a motion to dismiss. App. 7. Hastings filed a motion for summary judgment on October 26, 1995. App. 4. ASC filed a motion for summary judgment on November 1, 1995, App. 9. The trial judge entered an order denying both summary judgment motions on December 27, 1995 App. 5. Hastings filed a Notice of Appeal of the order denying the summary judgment on January 25, 1996. ASC filed a Notice of Appeal of the order denying the motion for summary judgment on January 25, 1996. The Second District Court of Appeal dismissed the appeals for lack of jurisdiction on July 31, 1996. The Second District Court of Appeal denied Petitioners' Motion for Rehearing and Rehearing En Banc on September 30, 1996. The Petitioners filed their Petition to Invoke Discretionary Jurisdiction with the Florida Supreme Court on October 7, 1996.

SUMMARY OF ARGUMENT

The December 27, 1995, trial court order which denied ASC's and Hastings' motions for summary judgment is not directly appealable pursuant to Fla. R. App. P. 9.130(a)(3)(C)(vi), and these appeals must be dismissed for lack of jurisdiction. Fla. R. App. P. 9.130(a)(3)(C)(vi) permits direct appeals of non-final orders which determine that a party is not entitled to the defense of workers' compensation immunity **AS A MATTER OF LAW.** Orders which make determinations "as a matter of law" end the judicial labor of the lower court with respect to the issue therein decided. Further, the Florida Supreme Court in Mandico v. Taos Construction. Inc., 605 So.2d 850, (Fla. 1992) reasoned that due to strong public policy concerns orders that determine that a party is not entitled to workers' compensation immunitv as a matter of law should be made directly appealable and therein added subsection (vi) to Fla. R. App. P. 9.130(a)(3)(C).

Like orders which are "final" for appellate jurisdiction purposes, an order which determines that a party is not entitled to workers' compensation immunity as a matter of law end the judicial labor of the lower court with respect to the affirmative defense of workers' compensation immunity which is a separate and distinct major legal issue within the litigation, and is capable of being separated or severed in its entirety from other issues which may remain pending in the trial court, provided that the determination has been made "as a matter of law" and is not dependent on the resolution of remaining factual issues. The subject order does not determine that Hastings or ASC

is not entitled to the defense of workers' compensation immunity as a matter of law. Rather, the trial court merely determined that neither Hastings, nor ASC met the burden as the movant in their motions for summary judgment. Both Hastings and ASC may still raise the defense of workers' compensation immunity in the lower court. Neither have been prohibited from doing so based on the determination that they did not irrefutably prove the defense of workers' compensation immunity in their motions for summary judgment'. In that the subject order does not fit within the provisions of Fla. R. App. P. 9.130(a)(3)(C)(vi), it is not directly appealable.

In Florida, a defendant may not prevail on a summary judgment motion by identifying one or more necessary elements of plaintiffs cause of action then arguing in the summary judgment motion that the plaintiff has failed to support the element(s) with record evidence and therefore, in turn has failed to create a genuine issue of material fact, which thereby entitles the defendant to a judgment as a matter of law. A summary judgment motion based on same would be permissible under the federal rules pursuant to the decision of the U.S. Supreme Court in Celotex Corporation v. Myrtle Nell Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S.Ct. 2548 (1986); however, the standard of Celotex has not been adopted in the State of Florida, and in fact, is quite unreconcilable with the laws of the State of Florida with respect to the standards for prevailing on motions for summary judgment. See, Stewart v. Gore, 314 So.2d 10 (Fla. 2d DCA 1975); Green v. CSX Transwortation. Inc., 626 So.2d 974 (Fla. 1st DCA 1993); Graff v. McNeil, 322 So.2d 40 (Fla. 1st DCA 1975); Holl v. Talcott, 191 So.2d 40 (Fla. 1966); Henderson v. CSX Transwortation. Inc., 617 So.2d 770 (Fla. 1st DCA 1993); Wills v. Sears. Roebuck & Co., 351 So.2d 29 (Fla. 1977); 5G's Car Sales. Inc. v. Florida Dewt. of Law Enforcement, 581 So.2d 212 (Fla. 3d DCA 1991), Martin County v Edenfield, 609 So.2d 27 (Fla. 1992); see also, Figueroa v. U.S. Security Insurance Comwany, 1995 Westlaw 735914 (Fla. 3d DCA 1995).

'Hastings and ASC both raised motions for directed verdicts predicated on the affirmative defense of workers' compensation immunity in subsequent trial court proceedings. For purposes of this interlocutory appeal, the procedural history is argued as it had developed at the time the trial court's Order sub judice was issued. All references to subsequent proceedings are for purposes of clarification and emphasis of the procedural difficulties which inevitably will arise [and have arisen] from non-final appeals of orders, like the order sub judice, which do not decide the merits as a matter of law.

This is significant because both Hastings and ASC attempted to argue at hearing and in their brief, that the Respondent has failed to demonstrate with record evidence at least one element of a claim for culpable negligence in the first degree, and therefore, has failed to create a genuine issue of material fact which made ASC and Hastings entitled to a judgment as a matter of law. To the extent that either Hastings or ASC purport to have brought forth a motion for summary judgment on this basis, the denial of the summary judgment motions must be affirmed if jurisdiction to decide the merits is determined to exist because this is not a meritorious basis upon which to bring a motion for summary judgment in the State of Florida, nor is it an affirmative defense. As such, even if this Court were willing to remand these appeals to the Second District Court of Appeal for determination on the merits, the Second District would be required to affirm the lower court denial of the summary judgment motions, NOT because Hastings and ASC are not entitled to workers' compensation as a matter of law, but rather because neither Hastings nor ASC conclusively and irrefutably proved the necessary elements of a legally sufficient affirmative defense. As such, both Hastings and ASC could in theory again raise the defense and again invoke interlocutory appellate jurisdiction to review the lower court's denial of a subsequent defense motion predicated on workers' compensation immunity. Herein lies one of the most compelling reasons why the decision of the Second District must be affirmed.

Based on the foregoing reasons, the Second District's decision dismissing these appeals for lack of jurisdiction should be affirmed.

ARGUMENT

I.
THE SUBJECT ORDER IS NOT DIRECTLY APPEALABLE UNDER FLORIDA APPELLATE RULE OF CIVIL PROCEDURE 9.130(a)(3)(C)(vi).

On December 27, 1995, the lower court entered an order which denied ASC's and Hastings' motions for summary judgment (hereinafter "Order"). This Order is the subject of the appeals of Hastings and ASC. ASC and Hastings have cited Fla. R. App. P. 9.130(a)(3)(C)(vi) as the purported basis for the Second District Court of Appeal's jurisdiction to consider the appeals. In that the Order

is not appealable pursuant to Fla. R. App. P. 9.130(a)(3)(C)(vi), the Second District's dismissal of the appeals for lack of jurisdiction to consider the appeals should be affirmed.

A. Trial Court Orders Are "Final" For Purposes of Appellate Jurisdiction When The Subject Order: (1) Ends the Judicial Labor of The Trial Court; (2) Regarding Any Party or Any Cause of Action.

"Final" orders are directly appealable to the District Court of Appeals.

> The test to determine whether an order is final or interlocutory in nature is whether the case is disposed of by the order and whether a question remains open for judicial determination. In other words, a final decree marks the end of judicial labor. Prime Orlando Properties, Inc. v. Department of Business Reaulation. Division of Land Sales, Condominiums and Mobile Homes., 502 So.2d 456,459, (Fla. 1 st DCA 1986).

(1) An Order May Be "Final" For Purposes of Appellate Jurisdiction Even Though It Does Not Dispose of The Entire Case.

An order which disposes of an entire case is obviously "final" and directly appealable to the Appellate Court; however, an order need not dispose of the entire case in order to be deemed "final" for purposes of appellate jurisdiction.

> The general rule is that a judgment, order or degree [sic] to be appealable as final must dispose of all issues or causes in the case; [b]ut the rule is relaxed where the judgment, order or decree adjudicates a distinct and severable cause of action. Mendez v. West Flaaler Familv Association. Inc., 303 So.2d 1,4 (Fla. 1974).

(2) Once The Judicial Labor Of The Trial Court Ends With Respect To Any Party or Cause of Action, And A Complete Issue Which Can Not Be Affected By Future Rulings On Remaining Issues Pending In The Trial Court, If Any Exist, Has Been Finally Determined, The Resulting Order Is Deemed "Final" For Appellate Purposes Because The Order Ends The Judicial Labor of The Trial Court With Respect To A Severable Component of The Case.

> [W]hen it is obvious that a separate and distinct cause of action is pleaded which is not interdependent with other pleaded claims, it should be appealable if dismissed with finality at trial level and not delayed of appeal because of the pendency of other claims between the parties.
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> An impartial judicial handling would appear to dictate that trial court dismissal of a distinct cause of action between parties should proceed to appellate disposition without technical delay because of the pendency of other causes of action between them. Mendez v. West Flaqler Family Association. Inc., 303 So.2d 1, 5 (Fla. 1974).

> In courts of other jurisdictions, it appears to be generally held that, if a decree dismissing one or more of a larger number of defendants whose interests are not all connected with the others finally settles the cause as respects those defendants dismissed, such decree is final and appealable. [Citations omitted.] Hillsboro Plantation v. Plunkett, 55 So.2d 534, 535 (Fla. 1951).

This is a correct statement of the law in the Second District as well.

> An order terminating litigation between one party and another is final as to them notwithstanding that in the same case litigation continues between either of those parties and third persons. S.L.T. Warehouse Co. v. Webb, 304 So.2d 97, 100 (Fla. 1974). quoting Evin R. Welch & Co. v. Johnson, 138 So.2d 390 (Fla.App. 1962).

B. Florida Rule Of Appellate Procedure 9.130(a)(3)(C)(vi) Expanded Appellate Jurisdiction To Include Direct Appeals of Non-Final Orders Which Determine That A Partv Is Not Entitled To The Defense of Workers' Compensation Immunity As A Matter of Law.

In 1992, the Supreme Court of Florida handed down a decision in the case of Mandico v. Taos Construction, Inc., 605 So.2d 850 (Fla. 1992) in which the Supreme Court expanded the jurisdiction of the Appellate Court to permit direct appeals of non-final orders which determine that a party is not entitled to workers' compensation immunity as a matter of law, and therein amended Fla. R. App. P. 9.130(a)(3)(C) by adding subsection (vi).

In Mandico, the defendant sought a writ of prohibition to review an order denying its motion for summary judgment based upon the immunity provision of the Workers' Compensation Act, Fla. Stat. 3440.11. The defendant argued that as plaintiffs employer the defendant was entitled to workers' compensation immunity because workers' compensation benefits were the plaintiffs sole and exclusive remedy as a matter of law. The defendant further argued that as such, the trial court had no jurisdiction to hear plaintiffs claim to recover for injuries sustained on the job. In Mandico, the defendant relied upon Winn-Lovett Tampa v. Murphree, 73 So.2d 287 (Fla. 1954) in which the extraordinary writ of prohibition was granted, and it was determined that the plaintiffs sole and exclusive remedy to recover for injuries sustained on the job was workers' compensation benefits. Therefore, the Murphree Court concluded that the defendant-employer was immune from civil liability and the circuit court was without jurisdiction to hear the case.

Mandico, however, overruled the procedure, if not the end result, of Murphree. The Mandico Court ruled that workers' compensation immunity is not a question of jurisdiction and therefore, no

writ of prohibition may issue. The Mandico Court characterized workers' compensation immunity as an affirmative defense. Manclico, 605 So.2d 850, 854 (Fla. 1992.) Of course, the denial of a summary judgment motion based upon the affirmative defense of workers' compensation immunity is not a "Final Order" for purposes of appellate jurisdiction because it does not necessarily end the judicial labor with respect to any party or any severable cause of action. The Mandico Court stated:

> We suspect that one reason the court was willing to permit prohibition in Murahree was to avoid the necessity of requiring the trial to proceed to its conclusion when it was evident from a construction of the relevant statutes that the plaintiffs exclusive remedy was to obtain workers' compensation benefits. Because we are sensitive to the concern for an early resolution of controlling issues, we amend Florida Rule of Appellate Procedure 9.130(a)(3). . . Mandico v. Taos Construction Inc., 605 So. 2d 850 (Fla. 1992).

The Florida Supreme Court amended Fla. R. App. P. 9.130(a)(3)(C) to add subsection (iv) which provides for a direct right of appeal of a non-final order that determines that a party is not entitled to workers' compensation immunity as a matter of law. Mandico, 605 So.2d 850, 854 (Fla. 1992.)

Although an order denying a motion based on the affirmative defense of workers' compensation immunity is not "final" for the purposes of appellate jurisdiction, it is similar to a final order in two (2) significant ways. The affirmative defense of workers' compensation immunity is not dependent upon unresolved factual issues pending in the trial court if it has been determined as a matter of law: and, it is a separate, severable legal concept which if overturned on appeal would end judicial labor with respect to a party who is a defendant-employer, or with respect to a cause of action against a defendant-employer. And further, if not dependent on the resolution of factual issues, the affirmative defense of workers' compensation immunity is a single, severable major legal concept within the litigation. With respect to the affirmative defense of workers' compensation immunity, Fla. R. App. P. 9.130(a)(3)(C)(vi) requires that to be appealable the judicial labor of the lower court must have come to an end by virtue of the order denying relief based on the affirmative defense.

Subsection (vi) does not allow for the appeal of non-final orders which determine that a party is not entitled to workers' compensation immunity, PERIOD. But rather, subsection (vi) allows for the appeal of non-final orders which determine that a party is not entitled to workers' compensation immunity AS A MATTER **OF** LAW. The phrase "as a matter of law" was included to require the end

of judicial labor with respect to the affirmative defense of workers' compensation immunity before a non-final order that determines a party is not entitled to workers' compensation immunity may be directly appealed. Mandico v. Taos Construction. Inc., 605 So.2d 850 (Fla. 1992).

Although the Mandico decision did expand appellate jurisdiction to hear direct appeals of non-final orders, it did so in a very logical and limited manner in order to address the public policy concern of minimizing litigation costs to employers who carry sufficient workers' compensation coverage for its employees. It is significant that in both Murahree and Mandico the material facts upon which each court relied to make a decision as a matter of law were undisputed in the record. ("It is undisputed that Mandico applied for and received benefits under the workers' compensation policy procured on his behalf by Taos." Mandico. 605 So.2d 850, 851 (Fla. 1992); It was undisputed in Murphree that the Plaintiff was "an illegally employed minor who was injured in the course and scope of his employment," and the Murohree Court held that as a matter of law an illegally employed minor fits within the definition of employee for purposes of the Workers' Compensation Act. Winn-Lovett Tampa v. Murphree, 73 So.2d 287, 291 (Fla. 1954).)

A variety of district court decisions have all but ignored the phrase "as a matter of law" in Fla. R. App. P. 9.130(a)(3)(C)(vi); however, it is clear that the phrase "as a matter of law" was intended to be interpreted literally and considered substantive with respect to determining the character of a non-final order, to distinguish as not directly appealable those non-final orders denying motions to dismiss or motions for summary judgment based upon workers' compensation immunity which do not end the judicial labor of the trial court with respect to the affirmative defense. A non-final order which determines that a party has not met the burden of proving the affirmative defense so far but may be capable of doing so in further trial court proceedings has not ended the judicial labor Of the trial court with respect to the affirmative defense, nor determined anything **"as a matter of law."** Before setting out the amendment to Fla. R. App. P. 9.130(a)(3)(C) by adding subsection (vi), the Mandico Court stated:

> The assertion that the plaintiffs 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 [THE APPELLATE**

COURT] IS SOUGHT IS IN NO POSITION TO ASCERTAIN THE FACTS. Mandico, 605 So.2d 850, 854, (Fla. 1992).

The Mandico Court wisely recognized that the trial court must resolve all factual issues which are material to the determination of whether a defendant is entitled to workers' compensation immunity as a matter of law before a denial of that immunity will be directly appealable, and the Mandico Court incorporated this substantive concept into the amendment of the rule by adding the adverbial phrase "as a matter of law." Although the addition of subsection (vi) to Fla. R. App. P. 9.130(a)(3)(C) very definitely expanded appellate jurisdiction to hear appeals of non-final orders and did so for valid public policy reasons, the expansion of jurisdiction was succinctly limited to an order that in character was essentially "final" (ended the judicial labor of the trial court regarding the affirmative defense, and resolved a severable and distinct major legal issue) with respect to the affirmative defense of workers' compensation immunity. Furthermore, to interpret subsection (vi) of the rule in any other manner would be tantamount to expanding appellate jurisdiction to hear the affirmative defense of workers' compensation immunity by giving the appellate court oriainal jurisdiction to hear that issue thereby depriving Respondent of his constitutional right to a jury trial. In other words, if the appellate court rules on the issue of the affirmative defense of workers' compensation immunity before the trial court has made a ruling on that affirmative defense "as a matter of law" thereby ending the judicial labor of the lower court with respect to that affirmative defense, the appellate court would be usurping the trial court's original jurisdiction to decide the issue. The appellate court would be the first court to resolve the issue "as a matter of law." Obviously, such was not the intent behind the adoption of subsection (vi), nor would such an interpretation of the rule be consistent with the reasoning set forth in Mandico.

C. The Affirmative Defense of Workers' Compensation Immunity May Be Stated As: (a) Election of Remedies: (b) Estoppel; or. (c) Immunity To The Cause of Action.

As stated earlier, the Mandico court has determined that: "the assertion that the plaintiffs exclusive remedy is under the workers' compensation law is an affirmative defense ." Mandico v. Taos Construction. Inc., 605 So. 2d 850, 854 (Fla. 1992). The affirmative defense of workers' compensation immunity may be asserted by three (3) similar yet independent theories of defense. The exclusivity provision of the workers' compensation act (Fla. Stat. §440.11), may be the basis of

an affirmative defense setting out that the defendant is immune from liability under the exclusivity provision in that; the plaintiff has made an election of remedies under workers' compensation law and as such, the workers' compensation remedy is plaintiffs sole and exclusive remedy; therefore, defendant is immune from civil action; estoppel; or, immunitv per se to the cause of action.

(1) The Exclusivity Provision of The Workers' Compensation Act May Form The Basis For The Affirmative Defense of Election of Remedies.

A defendant-employer may assert the affirmative defense of election of remedies provided that the defendant is capable of proving the elements of that affirmative defense. "One who claims and receives workers' compensation benefits will be found to have elected such compensation as an exclusive remedy where there is evidence of a conscious choice of remedies." Mandico, 605 So.2d 850, 853 (Fla. 1992) citing Ferraro v. Marr, 490 So.2d 188 (Fla. 2d DCA), review denied, 496 So.2d 143 (1986); Ferraro v. Marr, 467 So.2d 809 (Fla. 2d DCA 1985) [other citations omitted].

(a) The Affirmative Defense of Election of Remedies Pursuant To Fla. Stat. 9440.11 Has Three Elements Which The Party Asserting The Defense Must Prove.

In order to plead and prove the affirmative defense of election of remedies pursuant to §440.11, Florida Statutes, the party asserting the defense must prove the following three (3) elements: (1) That the plaintiff applied for workers' compensation benefits; (2) That the plaintiff received workers' compensation benefits; and, (3) That the plaintiff made a conscious choice of remedies in applying for and accepting workers' compensation benefits; and therefore, pursuant to the statute, that remedy will be deemed a sole and exclusive remedy and the employer will be immune from liability in a civil action arising out of the same incident or occurrence which caused plaintiffs injuries for which plaintiff received workers' compensation benefits. Mandico, 605 So.2d 850 (Fla. 1992).

(b). In Order To Prevail On The Affirmative Defense of Election of Remedies Pursuant to 5440.11, The Defendant Must Establish The Elements of That Defense Irrefutablv.

> Under Florida law, a "defense" is any allegation raised by the defendant that, if true, would defeat or avoid the plaintiffs cause of action. [citations omitted] A defense is not a sufficient basis for granting a motion for summary judgment unless the evidence supporting that defense is so compelling as to establish that no issue of material fact actually exists. [citation omitted]. For example, our courts consistently have held that plaintiffs are not entitled to summary judgment unless they

> conclusively disprove the existence of a defense raised by the defendants or establish its legal insufficiency. [citations omitted] The reverse thus also must conclusively be true: Defendants moving for summary judgment must conclusively prove both the factual existence of the defense upon which they rely and its legal sufficiency. (citation omitted) Martin Countv v. Edenfield, 609 So.2d 27, 29 (Fla. 1992).

(2). The Theory of Estoppel May Also Be Asserted To Set Out The Affirmative Defense of Workers' Compensation Immunity.

The Mandico Court stated that election of remedies may be a theory upon which the affirmative defense of workers' compensation immunity may be based, provided that the defendant establishes that the plaintiff-employee applied for, received and consciously chose workers' compensation as its exclusive remedy. Mandico, 605 So.2d 850, 853 (Fla. 1992). The Mandico Court went on to say: "Likewise, such an individual is estopped from bringing civil suit against an employer where the elements necessary for an estoppel are present. [citations omitted]". Mandico, 605 So.2d 850, 853 (Fla. 1992).

> In order to demonstrate estoppel, the following elements must be shown: 1) a representation as to a material fact that is contrary to a later-asserted position; 2) reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. [citations omitted] State Dept. of Revenue v. Anderson, 403 So.2d 397, 400 (Fla. 1981).

(3). The Third Theory Which May Be Plead As An Affirmative Defense Under The Workers' Compensation Exclusivity Provision Is Immunity Per Se To The Cause of Action.

Pursuant to the workers' compensation exclusivity provision, Fla. Stat. §440.11, a defendant is immune per se from civil action, provided that the defendant is an employer or a policy making employee of the employer, and the employer has secured sufficient workers' compensation coverage for the injured employee and that the conduct of the employer or policy making employee does not constitute culpable negligence in the first degree (or conduct of an equal or greater culpability under the law). Fla. Stat. §440.11. A co-employee of the injured employee is immune from liability in a civil action pursuant to Fla. Stat. §440.11, provided that the conduct complained of is not grossly negligent (or conduct of equal or greater culpability under the law), Fla. Stat. 5440.11 provides immunity to employers, policy making employees, and non-policy making co-employees of the injured employee, provided that the employer has secured sufficient workers' compensation coverage and, provided that the conduct of the employer, policy making employee,

or non policy making co-employee does not fall within an exception to the immunity granted under the statute. As stated above, with respect to employers and policy making employees culpable negligence in the first degree and conduct of equal or greater culpability is not covered by the immunity provision of the Workers' Compensation Act. Further, for non-policy making co-employees gross negligence and conduct of equal or greater culpability is not covered by the immunity provision of the Workers' Compensation Act. In other words ,the exclusivity provision provides that if sufficient workers' compensation benefits are available to the injured employee (regardless of whether or not the injured employee applies for and receives the benefits so long as the benefits are available) the workers' compensation benefits are the exclusive and sole remedy of that injured employee; therefore, employers, policy making employees, and non-policy making co-employees are immune from civil action UNLESS the conduct of the employer, policy making employee, or non-policy making co-employee falls within the exception to the immunity provision, In cases of gross negligence on the part of a non-policy making co-employee, or culpable negligence in the first degree on the part of the employer or policy making employee, the affirmative defense of immunity per se pursuant to the exclusivity provision of the Workers' Compensation Act is not applicable and does not rightly form the basis of a legally sufficient affirmative defense based on workers' compensation immunity. Fla. Stat. 5440.11,; see also Cunninaham v. Anchor Hockinq Corp., 558 So. 2d 93 (Fla. 1st DCA 1990).

(a) Like Election of Remedies, The Affirmative Defense of Immunity Per Se Pursuant To The Exclusivity Provision of The Workers' Compensation Act May Be Brought Either As A Motion To Dismiss The Complaint Or A Motion For Summary Judgment On The Affirmative Defense.

The affirmative defense of the workers' compensation immunity provision when plead as either election of remedies or immunity per se may be brought in a preanswer motion to dismiss provided that the elements of the affirmative defense appear within the four (4) corners of the complaint attacked. "Florida Rule of Civil Procedure 1 .1 IO(d) permits a pleader to raise an affirmative defense appearing on the face of the complaint as a basis for a motion to dismiss for failure to state a cause of action. [citation omitted]. When considering a motion to dismiss, however, a trial court is confined to a review of the allegations of a complaint and may not consider defenses which do not appear on its face. [citations omitted]. Moreover, a compliant need not

anticipate affirmative defenses. [citations omitted]." Lowrey v. Lowrey, Fla. 1995 Westlaw 253626 (Fla. 2d DCA 1995). If the necessary elements of the affirmative defense of election of remedies based on the exclusivity provision of the workers' compensation act appear within the four (4) corners of the complaint, the affirmative defense may be brought as a motion to dismiss. In the event that the elements of the affirmative defense do not appear within the four (4) corners of the complaint attacked, the defendant may plead that affirmative defense in its answer and affirmative defenses and bring a motion for summary judgment on its affirmative defense of election of remedies by establishing the elements of its affirmative defense irrefutably through answers to interrogatories, deposition transcripts, affidavits and so forth. Provided that the opponent of the motion for summary judgment is unable to offer evidence to refute defendant's evidence in support of the motion and thereby, create a genuine issue of material fact, the defendant will prevail and the motion for summary judgment should be granted. Martin County v. Edenfield, 609 So. 2d 27 (Fla. 1992). In Hervey v. Alfonso, 650 So.2d 644 (Fla. 2d DCA 1995), this Court stated:

> The party moving for summary judgment has the burden of establishing irrefutably that the nonmoving party cannot prevail. [citation omitted] Furthermore, it is only after the moving party has met this heavy burden that the nonmoving party is called upon to show the existence of genuine issues of material fact. [citations omitted] Hervev at 645-46.

The affirmative defense of immunity per se under the workers' compensation exclusivity provision may be brought in a preanswer motion to dismiss by arguing in the motion that the complaint fails to state a cause of action which falls within the exception to the exclusivity provision of the Workers' Compensation Act and therefore, the defendant is immune per se to civil action based on the cause of action alleged in the compliant. In other words, if a plaintiff alleged regular negligence against an employer, the defendant-employer would be free to bring a motion to dismiss for failure to state a cause of action upon which relief can be granted, arguing that although the complaint states a cause of action, or may state a cause of action, for regular negligence, the sole and exclusive remedy for injuries resulting do to the regular negligence of an employer is workers' compensation benefits; therefore, the employer is immune to civil action based on this theory of recovery. It would be somewhat of a hybrid motion based upon the affirmative defense of the failure to state a cause of action as the basis for arguing immunity under the Workers' Compensation Act.

Note that the motion to dismiss may be granted with leave to amend **and** not until such time that the lower court denied a motion to dismiss with prejudice under this theory could the order be subject to appellate review pursuant to Fla. R. App. P. 9.130(a)(3)(C)(vi).

In the alternative, an employer-defendant (or policy making employee or non-policy making co-employee) has the option of bringing a summary judgment motion based on the hybrid motion for failure to state a cause of action upon which relief can be granted because the workers' compensation exclusivity provision provides that the sole and exclusive remedy of the plaintiff for the cause of action pled is workers' compensation benefits and the employer is immune from liability in a civil action. Fla. R. Civ. P. 1.1140(b) sets forth that the affirmative defense of failure to state a cause of action may be "asserted in a responsive pleading, if one is required, but may be made by motion at the option of the pleader." Further the committee notes following Fla. R. Civ. P. 1.1140(b) demonstrate conclusively that the rule is intended to permit the affirmative defense of failure to state a cause of action to be pled either in a motion to dismiss or as an affirmative defense in a responsive pleading, **but not both.** "The intent of the rule is to permit the defenses to be raised one time, either by motion or by the responsive pleading and thereafter only by motion for judgment on the pleadings or at the trial." Fla. R. Civ. P. 1.1140(b), Committee Notes.

The affirmative defense of failure to state a cause of action may form the basis for a motion to dismiss which may be granted without finality in that the plaintiff may be given leave to amend and restate the cause of action (provided that the plaintiff is capable of doing so in good faith); therefore, a motion to dismiss rather than for summary judgment which will ordinarily not lead to leave to amend is the more appropriate vehicle for this particular version of the defense of workers' compensation immunity.

> It is apparent therefore that the trial court improperly converted R. & A.'s motion to dismiss into a motion for summary judgment in dismissing this claim with prejudice [citations omitted], This was error requiring us to reverse and remand with directions to reinstate the breach of contract count. [citations omitted] Conti. v. R. & A. Food Service. Inc., 644 So. 2d 131, 134 (Fla. 2d DCA 1994).

> In reviewing an order to dismiss a complaint for failure to state a cause of action this court must look only to the four corners of the complaint, excepting the allegations of the complaint as true and resolving all reasonable inferences in favor of the plaintiff. [Citations omitted.] A motion to dismiss should not be granted on the basis of affirmative defenses unless the affirmative defenses appear on the face of the

pleading. [Citations omitted.] Metler. Inc. v. Ellen Tracy, Inc., 648 So.2d 253, 254 (Fla. 2d DCA 1994).

(4) Under Florida Law, Failure To Make A Showing Sufficient To Establish The Existence of An Element Essential To That Party's Case And Upon Which That Party Will Bear The Burden of Proof At Trial Does Not Properly form The Basis of A Motion For Summary Judgment.

In 1986, the U.S. Supreme Court case Celotex Corporation v. Myrtle Nell Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 106 S. Ct. 2548, set forth a standard for reviewing the sufficiency of motions for summary judgment under the Federal Rules of Civil Procedure. This Celotex Court concluded "that the plain language of Rule 56(e) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that parties case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. 317, 91 L.Ed. 2d 265, 270, 106 S.Ct. 2548, 1986. The Celotex Courts standard is not applicable in Florida.

> In defending the summary judgment, the appellee has attempted to rely upon Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); [citations omitted] and their progeny. Although the judgment before us was plainly erroneous under any standard, including Celotex, it should be emphasized that, to the extent that they tend to loosen the restrictions on the use of summary judgment, these cases are based upon language in the federal rule, Federal Rule of Civil Procedure 56, which is not contained in Florida Rule of Civil Procedure 1.510. Hence, Celotex and similar cases do not represent the law of Florida on the issue. Our law continues to be that expressed in Holl v. Talcott, 191 So. 2d at 40; [other citations omitted]. 5G's Car Sales. Inc.. v. Florida Dept. of Law Enforcement, 581 So.2d 212 (Fla. 3d DCA 1991).
>
> The Holl court additionally stated that the burden on parties moving for summary judgment is greater than the burden which the plaintiff must carry at trial, because the movant must prove a negative, non-existence of a genuine issue of material fact. [citations omitted] Movants burden is even more onerous in negligence actions where summary judgment procedures historically have been employed with special care. ... Unless a movant can show unequivocally that there is no negligence or that the plaintiffs negligence was the sole and proximate cause of the injury, courts will not be disposed to granting a summary judgment in his favor. Wills v. Sears, Roebuck & Co., 351 So.2d 29, 30 (Fla. 1977); see also, Green v. CSX Transportation. inc., 626 So.2d 974 (Fla. 1st DCA 1993).
>
> Celotex . . [is] a standard that has not been adopted by the Florida Supreme Court. Paragraph 4 of the summary judgment order indicates that the trial court placed the burden upon Green to produce evidence that the negligence of CSX contributed to producing the injury for which damages are sought. Under Florida law, however, the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. [citations omitted]. Id. at 975; Holl v. Talcott, 191 So.2d 40 (Fla. 1966).

In other words, a defendant may not prevail on a summary judgment motion in the State of Florida by identifying one or more necessary elements of the plaintiffs cause of action and arguing in the summary judgment motion that the plaintiff has failed to support the element(s) with record evidence and therefore, has failed to create a genuine issue of material fact which entitles the defendant to a judgment as a matter of law. See, Stewart v. Gore, 314 So.2d 10 (Fla. 2d DCA 1975); Green v. CSX Transportation, Inc., 626 So.2d 974 (Fla. 1st DCA 1993); Graff v. McNeil, 322 So.2d 40 (Fla. 1st DCA 1975); Holl v. Talcott, 191 So.2d 40 (Fla. 1966); Henderson v. CSX Transportation. Inc., 617 So.2d 770 (Fla. 1st DCA 1993); Wills v. Sears. Roebuck & Co., 351So.2d 29 (Fla. 1977); 5G's Car Sales. Inc. v. Florida Dept. of Law Enforcement, 581 So.2d 212 (Fla. 3d DCA 1991), Martin Countv v Edenfield, 609 So.2d 27 (Fla. 1992); see also, Figueroa v. U.S. Security Insurance Comoanv, 1995 Westlaw 735914 (Fla. 3d DCA 1995) "A defense is not a sufficient basis for granting a motion for summary judgment unless the evidence supporting that defense is so compelling as to establish that no issue of material fact actually exists." [citations omitted] Id at 1.

This is significant with respect to the affirmative defense of workers' compensation immunity because; although a defendant may assert the affirmative defense of failure to state a cause of action to which the defendant is not immune under the workers' compensation exclusivity provision, in either a motion to dismiss or a motion for summary judgment; a defendant may not for example, acknowledge that the exclusivity provision of the workers' compensation act does not provide immunity to the defendant for culpable negligence in the first degree; and go on to base its summary judgment motion on the failure of the plaintiff to support with record evidence one or more elements of culpable negligence in the first degree. In Florida it does not follow that plaintiff thereby failed to create a genuine issue of a material fact with respect to one or more elements of its claim entitling defendant to a judgment as a matter of law. Such an attempt would not constitute either any affirmative defense, nor a proper basis for a motion for summary judgment. A defendant must base the motion to dismiss or the motion for summary judgment on conclusive irrefutable proof of the elements of the affirmative defense of failure to state a cause of action for culpable negligence in the first degree which in turn renders the defendant immune from the cause of action pled under the exclusivity provision of the Workers' Compensation Act. Such a basis could only be used for a

motion for summary judgment if the defendant could conclusively and irrefutably disprove one of the elements of culpable negligence in the first degree, as well. Anything less would allow for plaintiff to amend the complaint and restate his claim. Martin County v. Edenfield, 609 So.2d 27, (Fla. 1992); Figueroa v. U.S. Security Insurance Company, 1995 Westlaw 735914 (Fla. 3d DCA 1995).

Again, to prevail on an affirmative defense, a defendant must demonstrate conclusively and irrefutably the elements of the purported affirmative defense or conclusively and irrefutably disprove at least one necessary element of plaintiffs claim, but can not prevail on a motion for summary judgment by identifying a necessary element of plaintiffs claim and arguing that the plaintiff has failed to present record evidence in support of that element and therefore, has failed to create a genuine issue of material fact entitling defendant to a judgment as a matter of law. Green v CSX Transportation, Inc., 626 So.2d 974 (Fla. 1st DCA 1993); Wills v. Sears & Roebuck. Co., 351 So.2d 29 (Fla. 1977); Holl v. Talcott, 191 So.2d 40 (Fla. 1966); 5G's Car Sales, Inc. v. Florida Dept. of Law Enforcement, 581 So.2d 212 (Fla. 3d DCA 1991). This point is legally significant because a motion for summary judgment may be denied due to the existence of a genuine issue of material fact or legal insufficiency of the argument presented; however, it would not foreclose the movant from raising the defense of workers' compensation immunity in a subsequent well taken motion. Before an order denying a motion for summary judgment baesd on the defense of workers' compensation immunity may be directly appealed, it must be decided by the trial court that the movant is NOT AS A MATTER OF LAW entitled to the defense of workers' compensation immunity.

(5). The Order Denying Hastings Motion For Summary Judgment Is Not Appealable Pursuant to Fla. R. App. P. 9.130(a)(3)(C)(iv).

Pursuant to Fla. R. App. P. 9.130(a)(3)(C)(iv), a non-final order is directly appealable provided that "the order determines that a party is not entitled to workers' compensation immunity as a matter of law." The Order denying Hastings' motion for summary judgment did not determine that Hastings was not entitled to the defense of workers' compensation immunity as a matter of law.

(a). The Subject Order Merely Determined That Factual Issues Must Be Resolved Before A Determination Can Be Made As A Matter of Law With Respect To Workers' Compensation Immunity.

Presently, at the trial level, the affirmative defense of workers' compensation immunity is alive and well with respect to Hastings in that the lower court has ruled that Hastings is immune from suit as a policy making employee except for conduct which is culpably negligent in the first degree or worse (see footnote 1). The court has ruled that factual issues exist which must be resolved before it can be determined whether or not the conduct of Hastings amounts to culpable negligence in the first degree, or some sort of less culpable conduct to which Hastings would be immune pursuant to the workers' compensation exclusivity provision. Therefore, Hastings may or may not be immune from the cause of action which Respondent will prove; however, that decision cannot now be made. No decision with respect to workers' compensation immunity has yet been made as a matter of law.

(b). To The Extent That Hastings Motion For Summary Judgment Or His Initial Brief Purport To Argue Failure To State A Cause of Action Upon Which Relief Can Be Granted Because Hastings Is Immune From The Cause of Action Pled Under The Workers'Compensation Exclusivity Provision, These Issues May Not Be Considered By The Appellate Court.

Hastings served a preanswer motion to dismiss based on the affirmative defense of failure to state a cause of action, on May 18, 1995. An order denying the motion was entered on July 21, 1995. More than thirty (30) days have past since the entry of the order denying the motion to dismiss and Hastings has failed to file a notice of appeal pursuant to that order. Under Fla. R. App. P. 9.130(b), Hastings has failed to invoke appellate review of that non-final order and may not now attempt to do so through the back door. Pursuant to Fla. R. Civ. P. 1.140(b), Hastings could not have raised the issue of failure to state a cause of action for a second time in a motion for summary judgment, after having had that affirmative defense denied pursuant to his motion to dismiss the complaint. Fla. R. Civ. P. 1 .140 (b) permits the pleader to bring the affirmative defense of failure to state a cause of action as a preanswer motion to dismiss or as an affirmative defense in the answer and affirmative defenses, which may be the subject of a summary judgment motion; but, the rule prohibits Hastings from bringing the same affirmative defense in both a motion to dismiss and a motion for summary judgment. For purposes of this appeal, the trial court order which denied Hastings' motion to dismiss the complaint for failure to state a cause of action for culpable negligence in the first degree (which is an exception to the workers' compensation exclusivity provision and to which Hastings is not immune) must stand as an interlocutory order with no right

to direct appeal because the lower court has made a final determination on the issue of the sufficiency of the complaint to state a cause of action to which Hastings is not immune under §440.11, and more than thirty (30) days have passed during which Hastings has failed to file a notice of appeal. Hastings has lost his right to a direct appeal of that determination. In that the only two (2) theories upon which Hastings attempted or purports to have attempted to base his motion for summary judgment are (1) failure to support a necessary element with record evidence, and (2) failure to state a cause of action for culpable negligence in the first degree, are not (or at least with respect to (2), no longer) appealable under Fla. R. App. P. 9.130(a)(3)(C)(vi), his appeal must be dismissed for lack of jurisdiction.

(6). The Order Denying ASC's Motion For Summary Judgment Is Not Appealable Under Fla. R. App. P. 9.130(a)(3)(C)(vi).

ASC did not file a motion to dismiss for failure to state a cause of action. ASC did raise failure to state a cause of action as an affirmative defense in its answer and affirmative defenses. However, ASC failed to notice the defense of failure to state a cause of action for hearing, and failed to file a motion for summary judgment based on a failure to state a cause of action. At the hearing on ASC's motion for summary judgment, counsel for ASC attempted to argue the affirmative defense of failure to state a cause of action but counsel for Respondent objected. ASC failed to notice that affirmative defense for hearing and it is better suited to a motion to dismiss because Respondent would be entitled to leave of court to amend. Counsel for ASC acknowledged in open court upon inquiry by the trial judge that he had not noticed the issue for hearing. Respondent's counsel argued that the question would be a threshold question in any event because even if the complaint does fail to state a cause of action, Respondent would have leave to amend because he has not abused the amendment process, nor has ASC put forth evidence that conclusively and irrefutably disproves any element of the claim for culpable negligence in the first degree; therefore, it would not be appropriate to enter summary judgment. Although counsel for ASC argued against that point in open court claiming it was not a threshold question, page 5 of ASC's initial brief filed in the Second District indicates that counsel for ASC has adopted the theory of Respondent's counsel in stating "This is a threshold question." The point herein raised is that the lower court has not yet ruled on the issue

of the sufficiency of the allegations against ASC to state a claim for culpable negligence in the first degree, therefore, the issue is not ripe for appeal pursuant to Fla. R. App. R. 9.1380(a)(3)(C)(vi). Further, like Hastings, ASC may not attempt to wrongfully shift onto Respondent the burden of establishing through record evidence support for each element of his cause of action by purporting to be entitled to a judgment as a matter of law because Respondent has failed to create a genuine issue of material fact. Such is not permissible under Florida law, nor does it constitute an affirmative defense and therefore, would not be appealable under 9.130(a)(3)(C)(vi) and further, the subject order made no determination as a matter of law, (even if the Court is willing to consider this improper basis for bringing a summary judgment motion) because the trial court merely ruled that questions of fact remain to be determined before a question of workers' compensation immunity may be decided as a matter of law.

In conclusion, neither the order denying ASC's motion for summary judgment, nor the order denying Hastings' motion for summary judgment makes any determination as a matter of law, nor does it determine that any party is not entitled to the defense of workers' compensation immunity as a matter of law. Neither Hastings, nor ASC are in a posture to raise the issue of the sufficiency of the allegations in the complaint to state a cause of action for culpable negligence in the first degree; therefore, this appeal could have been dismissed for lack of jurisdiction on this additional basis.

II.

PETITIONERS' ARGUMENT IS PREDICATED ON A MISAPPREHENSION OF THE LAW AS TO THE MERITS OF THE APPEAL WHICH. WHEN CORRECTED, WILL FURTHER DEMONSTRATE THE VALIDITY OF RESPONDENTS' INTERPRETATION OF RULE 9.130(a)(3)(C)(vi)

The Petitioners have argued the following points for consideration on the merits by the lower courts. The legal theory argued by Petitioners may fairly be summarized as follows:

> A significant number of Florida cases have considered whether or not certain conduct rises to the level of conduct which falls within the exception to § 440.1 l(l) employer immunity under the Workers' Compensation Act. The Appellees herein neither alleged an intentional tort on the part of the Appellants (Defendants below), nor made a prima facia showing in their case-in-chief at trial of an intentional tort on the part of the Appellants. The reported cases which have considered the Appellate Court's jurisdiction to accept interlocutory appeals pursuant to Rule 9.130(a)(3)(C)(vi) have consistently dispensed with substantive analysis of procedural law in Florida and have simply cut-to-the-chase, evaluated the allegations and/or proofs to determine whether or not the employee's claim passes muster under the intentional tort

> standard for triggering the § 440.1 1(1) exception, supposedly set forth in Fisher v. Shenandoah General Construction Company, 498 So. 2d 882 (Fla. 1986). As such, Appellants should be entitled to this same leap of procedural and substantive review and be freed from the potential liability of Appellees' claim, in the same speedy fashion as those litigants who came before Appellants based upon the many reported decisions on the issue of workers' compensation immunity and the exceptions thereto.[2]

The only way to demonstrate the multi-tiered legal error of Petitioners' argument and, moreover, demonstrate the correctness of the Second District's decision to dismiss the interlocutory appeal for lack of jurisdiction, is to trace the origin of the legal error which underlies the entire body of case law relied upon by Petitioners throughout the appeal sub judice. In Fisher v. Shenandoah General Construction Company, 498 So. 2d 882 (Fla. 1986), the Supreme Court of Florida established the following precedent:

> In order for an employer's actions to amount to an intentional tort, the employer must either exhibit a deliberate intent to injure or engage in conduct which is substantially certain to result in injury or death.

Id. at 883. At the time the Florida Supreme Court decided the case of Fisher v. Shenandoah General Construction Companv, Florida Statute § 440.1 l(l) of Florida's Workers' Compensation Act did not contain either, (a) explicit language recognizing an exception to the statutory affirmative defense therein created for employers, nor (b) explicit language establishing that the immunity therein created existed without exception. In other words, at the time Fisher was decided, § 440.1 1(1) was silent as to whether or not the law recognized any exception to the immunity from liability of an employer that was created in § 440.1 l(l).

As such a public policy position with respect thereto had begun to take shape within the districts below which gave rise in the districts to the consideration of judicially recognizing an exception to employer immunity under § 440.1 1(1) for conduct which rose to the level of intentional tort. The argument for such a judicially recognized exception was, essentially, that as a matter of public policy, employers should not be immune from civil liability for harm to employees which the employers purposefully caused. The Fisher Court specifically rejected any consideration of the

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[2] In fact, in Hastings' initial brief to the Second District and motion to stay, Hastings went so far as to characterize the process for final resolution advocated by the Appellants as a "fast track" disposition of an employee's claim which has become "a trend among the districts".

validity of such a judicially recognized exception to § 440.1 1(1) employer immunity for intentional tort. In Fisher, the Florida Supreme Court restated the certified question as follows:

> **WHETHER AN EMPLOYER COMMITS AN INTENTIONAL TORT WHEN HE ORDERS HIS EMPLOYEE TO WORK INSIDE A PIPE WHICH THE EMPLOYER KNOWS TO BE FILLED WITH DANGEROUS GAS THAT WILL IN ALL PROBABILITY RESULT IN INJURY TO THE EMPLOYEE.**

Fisher at 883. The Fisher Court went on to say, "[t]herefore, we need not answer the question framed by the District Court and, instead we answer the restated question in the negative." Fisher, 498 So. 2d 882, 884 (Fla. 1986). In other words, the Fisher Court never considered nor determined whether or not it was appropriate for Florida courts to recognize an exception to employer immunity in cases where the conduct of the employer which proximately caused the injury constituted an intentional tort. (See also, Lawton v. Aloine Engineered Products. Inc., 498 So. 2d 879 (Fla. 1986).) Rather, the Fisher Court considered the necessary elements for asserting a claim sounding in intentional tort. Fisher, relying on the Restatement, determined that the complaint under review therein did not allege the necessary elements of an intentional tort. Beginning with the final three words on Page 883 of Volume 498 So.2d whereat the Fisher decision is reported, the Fisher Court cited to the Restatement (Second) of Torts, § 500 f, and stated, "a strong probability is different from substantial certainty and cannot constitute intentional wrongdoing. Restatement (Second) of Torts § 500 f (1965)." The preceding quote constituted an effort on the part of the Fisher Court to contrast the necessary elements of "intentional tort" with the necessary elements of "recklessness", in order to emphasize a point of law, to-wit: substantial certainty that harm will result from defendant's course of conduct must be alleged in order to state a cause of action sounding in "intentional tort"; whereas, a strong probability that harm will so result, is enough to state a claim for "recklessness": however, it is not sufficient to state a claim for "intentional tort". The use by the Fisher Court of this method of contrasting the "intentional tort" standard with the "recklessness" standard is a matter of **great significance** and, as will be explained below, by 1993, once taken out of context and misapprehended by the court in Eller v. Shova, 630 So. 2d 537 (Fla. 1993), it can be identified as **the precise legal error** by which all the subsequent wrongly decided cases in this area of law were forced off course.

Three (3) years after Fisher, the Florida Supreme Court decided the case of Streator v. Sullivan, 509 So.2d 268 (Fla. 1987). The Streator v. Sullivan case addressed a related, yet distinguishable, issue, to-wit: does the exception to immunity under § 440.1 1(1) for grossly negligent conduct extend to the conduct of co-employees who are sole proprietors, officers, directors of a corporation, and other types of managerial/supervisory personnel. The Streator Court determined that the gross negligence exception did, in fact, extend to such managerial-type co-employees, As a result, in 1988 the Florida Legislature amended § 440.1 1(1) by adding the following language: **"The same immunity provisions enjoyed by an employer shall also apply to any sole proprietor, partner, corporate officer or director, supervisor, or other person who in the course and scope of his duties acts in a managerial or policy making capacity, and the conduct which caused the alleged injury arose within the course and scope of said managerial or policy making duties and was not a violation of law, whether or not a violation was charged, for which the maximum penalty which may be imposed exceeds 60 days imprisonment as set forth in** § 775.082." (Florida Statutes § 440.1 l(l); see also, Streator v. Sullivan, 509 So. 2d 268 (Fla. 1987); and, Eller v. Shova, 630 So.2d 537 (Fla. 1993).)

By virtue of the 1988 Amendment to § 440.1 1(1), the question as to whether or not **"intentional tort"** constituted **an exception to employer immunity** under § 440.1 1(1) (which was soecificallv left undecided by both the Bisher and Lawton decisions[3]) **became moot.** 3 , **"intentional tort"** was no longer a possibly viable threshold for triggering a judicially recognized exception to employer immunity under § 440.1 l(l) as a matter of public policy, in that, in 1988 the Florida Legislature had explicitly set forth that the employer/managerial type-employee immunity created under § 440.1 1(1) was indeed not absolute, and moreover, specifically set out the threshold for triggering the exception, to-wit: **conduct which rises to the level of a first degree misdemeanor under Florida criminal law.** (Florida Statutes § 440.11 (l).) (See also Eller v.

[3] In *Eller v.* Shova, it was erroneously asserted in dicta that Fisher and *Lawton* stand for the proposition that "intentional tort" was recognized as the exception to § 440.1 1(1) employer immunity (*Eller* v. *Shova,* 630 So. 2d 537, 539 (Fla. 1993)); although, neither *Fisher* nor *Lawton* reached that question.

Shova, 630 So.2d 537, 542 (Fla. 1993), ("The amendment makes it clear that it is the unlawful conduct of the managerial type employees that triggers the exception to the exclusivity doctrine and that the immunity is the same which is enjoyed by employers.").)

The constitutionality of the 1988 Amendment to § 440.1 1(1) was decided by the Florida Supreme Court in Eller v. Shova, 630 So. 2d 537 (Fla. 1993). In Eller v. Shova, the Florida Supreme Court concluded that the 1988 Amendment was not unconstitutional and was enforceable as enacted. The Eller Court stated, "[w]e find that the Amendment was enacted to clarify that all policy makers, regardless of their positions as either employers or co-employees, are treated equally. Consequently, we agree with appellant's contention that the Amendment is merely a clarification regarding the immunity afforded managerial employees, . . As we explained in Kluaer and Iglesia, raising the degree of negligence required to successfully maintain a tort action does not limit an existing right of access. We disagree with the District Court's finding that the Amendment abolished all civil causes of action in negligence. Culpable nealiaence is still a form of nealiaence and is actionable as a civil action under § 440.1 l(l) regardless of whether or not criminal charges have been filed against a co-employee. Because the Amendment at issue merely raises the degree of negligence required to sue a policy-making co-employee, we find that the Amendment has not abolished **a** right of access." [Emphasis supplied]. Eller v. Shova, 630 So. 2d 537, 542 (Fla. 1993).

The Eller v. Shova precedent may be summarized as follows:

> A statute does not unconstitutionally abolish a pre-1968 common law right or statutory cause of action provided that the new or amended statute does not abolish all civil causes of action in negligence in that the new or amended statute merely raises the degree of negligence required to establish liability on the part of a defendant.

Quite unfortunately for the people of the State of Florida, certain dicta contained in the Eller v. Shova decision has given rise to an erroneous interpretation of the law as to what constitutes "culpable negligence in the first degree" under Florida law. Moreover, the offending dicta has given rise to a situation in which, paradoxically, an unconstitutional interpretation of § 440.1 1(1) prevails throughout the various districts in Florida.

The analysis must now return to the Restatement (Second) Torts, Division 2, Negligence, Ch. 19, Reckless Disregard of Safety, **§ 500, comment f,** which reads:

> Intentional Misconduct and Recklessness Contrasted. Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.

This brings the analysis back to Fisher v. Shenandoah General Construction Companv, 498 So. 2d 882 (Fla. 1986). Recall that the Fisher Court, relying on the Restatement (Second) of Torts, § 500, **comment f** (which is set forth above), emphasized the necessary element of **"substantial certainty"** to state a cause of action sounding in intentional tort **by contrasting** that high standard of **"substantial certainty** that harm **will** result" with the lesser standard required to state a claim for recklessness, to-wit: merely a **strona probability** that harm will result which is "different from substantial certainty and cannot constitute intentional wrongdoing." -Fisher at 884. The following misapprehension as set forth in dicta imbedded within the Eller v. Shova decision, is unquestionably the source of the legal error which permeates appellate court decisions on the issue of the exception to employer immunity under § 440.1 l(l):

> Under the Act, workers' compensation is the exclusive remedy available to an injured employee as to any negligence on the part of that employee's employer. § 440.1 l(l). When employers properly secure workers' compensation coverage for their employees, employers are provided with immunity from suit by their employees so long as the employer has not engaged in any **INTENTIONAL ACT DESIGNED TO RESULT IN OR THAT IS SUBSTANTIALLY CERTAIN TO RESULT IN INJURY OR DEATH TO THE EMPLOYEE.** Fisher v. Shenandoah General Construction Company, 498 So. 2d 882 (Fla. 1986); Lawton v. Alpine Enaineered Products. Inc., 498 So. 2d 879 (Fla. 1986).

Eller v. Shova, 630 So. 2d 537, 539 (Fla. 1993). [Emphasis supplied.] The precedent of Eller v. Shova rested on the observation that the 1988 Amendment to § 440.1 1(1) merely "raised the degree of negligence required to sue a policy-making employee . . . [and, therefore] the Amendment has not abolished a right of access;" as such, the Amendment is not unconstitutional. Id. at 542. Apparently, however, the Eller Court misapprehended the context in which the "substantial certainty" language had been quoted by the Fisher and Lawton Courts. Remember, Fisher and Lawton were considering what constitutes an intentional tort, and emphasized the necessity of alleging that the defendant's **conduct was "substantially certain to or desianed to result in injury or death"**, by contrasting **that**

with the mere **"probability of such consequences"** as is required to **state** a cause of action for recklessness. The section of the Restatement quoted by Fisher, Lawton and eventually, Eller, irrefutably contrasts "substantial certainty" with "mere probability" as established by the name of the section itself, to-wit: Reckless Disregard of Safety; and further, in **comment f of §** 500, the language "substantially certain" is used merely for the purpose of contrasting the "strong probability" element of recklessness with the significantly higher standard of "substantial certainty" required to allege intentional tort.

By virtue of the Eller v. Shova dicta, courts considering the question of what conduct constitutes "culpable negligence in the first degree" under Florida law, have persistently determined that is was necessary to allege and prove "that the employer engaged in an intentional act designed to result in or that was substantially certain to result in injury or death to the employee", in order to trigger the exception, thereby incorporating the inapplicable standard of "intentional tort", and erroneously failing to consider the legally correct and constitutionally viable standard of recklessness which requires merely "that the employer engaged in a course of conduct that was **'likely'** to result in injury or death to the employee."

The definition of "first degree culpable negligence" under Florida law must next be considered. As previously stated, the 1988 Amendment to § 440.1 1(1) set forth the threshold for triggering the exception to employer immunity as conduct, whether or not a violation was charged, which constitutes a violation of law for which the maximum penalty that may be imposed exceeds 60 days' imprisonment pursuant to Florida Statute § 775.082. Turning to Florida Statute § 784.05, Culpable Negligence, the statute sets forth in pertinent part: "[w]hoever, through culpable negligence, inflicts actual personal injury on another commits a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083."

In the 1991 case of State v. Schuck, 573 So. 2d 335 (Fla. 1991), the Florida Supreme Court defined culpable negligence in the first degree as follows:

> I now define 'culpable negligence' for you. Each of us has a duty to act reasonably towards others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care for others. For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for

> the safety of others. Culpable negligence is consciously doing an act or following a course of conduct the defendant must have known, or reasonably should have known, was **likely** to cause death or great bodily injury.

Id. at 337, footnote 1. [Emphasis supplied]. In defining "culpable negligence", the Schuck Court used the language of the Standard Jury Instructions in Criminal Cases (93-1), 636 So. 2d 502 (Fla. 1994).

In State v. Smith, 624 So. 2d 355 (Fla. 2d DCA 1993), the Second District defined "culpable negligence" as follows:

> 'Culpable negligence' is conduct of a gross and flagrant character, evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects. Getsie v. State, 193 So, 2d 679 (Fla. 4th DCA 1966), cert. denied, 201 So. 2d 464 (Fla. 1967).

State v. Smith, 624 So. 2d 355, 356 (Fla. 2d DCA 1993). Black's Law Dictionary defines culpable negligence at page 1033 as:

> Failure to exercise that degree of care rendered appropriate by the particular circumstances, and which a man of ordinary prudence in the same situation and with equal experience would not have omitted.

Black's Law Dictionary (1991 Edition), p. 1033.

The definition of recklessness found in Black's Law Dictionary at page 1271 confirms that culpable negligence under Florida criminal law is the equivalent of civil recklessness:

> The state of mind accompanying an act which either pays no regard to its probable or possible injurious consequences, or which, foreseeing such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such as to evince disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although no harm was intended.

Black's Law Dictionary (1991 Edition) at page 1271. (See also, Rojas v. State, 552 So. 2d 914 (Fla. 1989), ("Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known or reasonably should have known was **LIKELY** to cause death or great bodily injury"). [Emphasis supplied]. Id. at 915; and, Spaziano v. State, 522 So. 2d 525 (Fla. 2d DCA 1988), ("Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was **LIKELY** to cause death or great bodily injury.") [Emphasis supplied]. Id. at 526.)

First degree culpable negligence is not comparable to an "intentional tort". "Culpable negligence" and "intentional tort" are mutually exclusive categories of conduct. The Restatement (Second) of Torts, § 870, Comment b (1977), states:

> Intentionally causing harm. An intentional tort is one in which the actor intends to produce the harm that ensues; it is not enough that he intends to perform the act. He intends to produce the harm when he desires to bring about that consequence by performing the act. As indicated in § 8A, he also is treated as intending that consequence if he knows or believes that the consequence is certain, or substantially certain, to result from his act. In some cases in which the claim may be entirely novel the court may decide to limit the liability to the situation in which the defendant acted for the purpose of producing the harm involved.

It is clear from the foregoing passage that there is **a** very important substantive distinction between **"intentional act"** and **"intentional tort".** Notice that the adjective **"intentional",** in the former, modifies the noun **"act"**, whereas the adjective **"intentional",** as used in the latter, modifies the noun **"tort"**. An **"intentional act"** is merely an act voluntarily undertaken by the actor, whereas an **"intentional tort"** is the sum of the tortious conduct undertaken for the purpose of causing the harm. This extremely important substantive distinction has been greatly misapprehended and misconstrued throughout the body of law developed by the district court decisions in this State which have considered the issue of the exception to employer immunity under § 440.1 1(1) following the 1988 Amendment thereto. (See also, Restatement (Second) Torts, Division 1, Intentional Harms to Persons, Land, and Chattels, Chap. 1, Meaning of Terms Used Throughout the Restatement of Torts, § 8A Intent, "The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it. Comment: a. 'Intent', as it is used throughout the Restatement of Torts, has reference to the consequences of an act rather than the act itself. When an actor fires a gun in the midst of the Mojave Desert, he 'intends' to pull the trigger; but when the bullet hits a person who is present in the desert without the actor's knowledge, he does not 'intend' that result. 'Intent' is limited, wherever it is used, to the consequences of the act. Comment: b. All consequences which the actor desires to bring about are 'intended', as the word is used in this Restatement. 'Intent' is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes

ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantially certain, the actor's conduct loses the character of 'intent', and becomes mere recklessness, as defined in § 500. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282. All three have their important place in the law of torts, but the liability attached to them will differ.") The very same dicta previously analyzed herein from Eller v. Shova, upon further scrutiny demonstrates this additional point of confusion which added to the flurry of subsequent erroneous decisions. At page 539 of Eller, the Court stated, "employers are provided with immunity from suit by their employees so long as the employer has not engaged in **ANY INTENTIONAL ACT designed to result in or that is substantially certain to result in injury or death to the employee.** The terms **"intentional act"** and **"intentional** tort" thereafter were used erroneously, virtually interchangeably, based on the afore-referenced quote from Eller. Relying first on Eller, many district courts have gone back directly to Fisher, quoting, "nearly every accident, injury, and sickness results from someone **intentionally engaging in some triggering action."** [Emphasis supplied.] Fisher, 498 So. 2d 882, 884. Again, the Court's equivocal use of the term "intentional" further fueled the fires of prejudicial error.

Turning the analysis once again to the meaning of "culpable negligence" under Florida criminal law, it is simple to crystalize the distinction between intentional misconduct and culpably negligent misconduct. In Tavlor v. State, 440 So. 2d 931 (Fla. 1983), the Florida Supreme Court made unequivocally clear the correct legal interpretation, to-wit: that culpable negligence does not involve intentional misconduct, when it stated, "[t]here can be no intent to commit an unlawful act when the underlying conduct constitutes culpable negligence." Id. at 934. In Brown v. State, 455 So. 2d 382 (Fla. 1984), the Court stated, "[a] verdict for attempted manslaughter can be rendered only if there is proof that the defendant had the requisite intent to commit an unlawful act. This holding necessitates that a distinction be made between the crimes of manslaughter by act or procurement and manslaughter by culpable negligence. For the latter, there can be no corresponding attempt crime. This conclusion is mandated by the fact that there can be no intent to commit an unlawful act when the underlying conduct constitutes culpable negligence." Taylor v.

State, 440 So. 2d 931, 934 (Fla. 1983). " Brown v. State at 382. Further, in Tyson v. State, 646 So. 2nd 816 (Fla. 1st DCA 1994), the Court stated, "[l]ikewise, one cannot be guilty of attempted culpable negligence. . because one cannot **INTEND** to be culpably negligent." [Emphasis supplied] Id. at 816.

With this insight as to the appropriate legal interpretation of § 440.11(1) regarding the exception to employer immunity created by the language added pursuant to the 1988 Amendment, it becomes mere child's play to identify the error (or at least one aspect of substantive legal error) which has contaminated virtually every decision cited by Petitioners in connection with the appeal sub judice, including, but not limited to: Mekamv Oaks, Inc. v. Snvder, 659 So. 2d 1290 (Fla. 5th DCA 1995); Emergency One. Inc. v. Keffer, 652 So. 2d 1233 (Fla 1st DCA 1995); Klein v. Rubio, 652 So. 2d 964 (Fla. 3d. DCA), review denied, 660 So. 2d 714 (Fla. 1995); Kennedy v. Moree, 650 So. 2d 1102 (Fla. 4th DCA 1995); General Motors Acceptance Corp. v. David, 632 So. 2d 123 (Fla. 1st DCA 1994), review dismissed, 639 So. 2d 979 (Fla. 1994); Pinnacle Construction, Inc. v. Alderman, 639 So. 2d 1061 (Fla. 3d DCA 1994); Eller v. Shova, 630 So. 2d 537 (Fla. 1993); Eisher v. Shenandoah General Construction Companv, 498 So. 2d 882 (Fla. 1986), which is not inherently erroneous, but is cited to in support of legal error as applied by Eller and its progeny.

The decision in Kennedy v. Moree, 650 So. 2d 1102 (Fla. 4th DCA 1995), is particularly interesting for purposes of analysis, in that, the Kennedy Court attempted to distinguish first degree from second degree culpable negligence by adopting a novel theory, to-wit: first degree culpable negligence is "active", whereas, second degree culpable negligence is "passive". The active/passive distinction originated by Kennedv adds an additional layer of erroneous interpretation to this body of case law. Under Florida law, a first degree misdemeanor for culpable negligence is conduct of a gross and flagrant character evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects which results in actual personal injury or death; whereas, second degree culpable negligence is conduct of an identical character which merely exposes persons to the same degree of risk but carries with it a lesser degree of criminal liability in that no actual personal injury or death in fact is inflicted. The second degree misdemeanor for culpable negligence is imposed for merely exposing others to that degree of risk which constitutes culpable negligence

in spite of the fact that no one exposed to the risk was actually inflicted with serious personal injury or death. (See, State v. Simone, 431 So. 2d 718, 722 (Fla. 4th DCA 1983); Smith v. State, 642 So. 2d 355 (Fla. 2nd DCA 1993); Getsie v. State, 193 So. 2d 679 (Fla. 4th DCA 1966), cert. denied, 201 So. 2d 464 (Fla. 1967).)

In 1991, the Second istrict Court of Appeal decided the case of Leet v. State, 595 So. 2d 959 (Fla. 2d DCA 1991). In Leet, the Second District Court of Appeal considered a situation not unlike the case sub judice in certain significant particulars. The Leet case involved a defendant who was convicted of a felony by culpable negligence for failing to take his girlfriend's [Ms. Collins'] abused son [Joshua] for medical treatment. The Leet Court upheld the defendant's conviction for felony culpable negligence and stated:

> Culpable negligence. Each of us has a duty to act reasonably towards others. If there is a violation of that duty without conscious intention to harm, that violation is negligence, but culpable negligence is more than a failure to use ordinary case for others.
>
> * • *
>
> For negligence to be called culpable negligence, it must be gross and flagrant. The negligence must be committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.
>
> * * *
>
> [T]he issue in this case is whether Mr. Leet followed a course of conduct between Monday and Thursday of the week of Joshua's death that he reasonably should have known was likely to cause death or great bodily injury to Joshua.
>
> * * *
>
> Mr. Leet knew. . . He could easily have. . He did not. Admittedly, he was faced with a dilemma. If he reported Ms. Collins [Mr. Leet's girlfriend and Joshua's mother], he knew there could be new criminal charges. . . If he did not report the problem, Joshua might be severely injured. He chose to leave Joshua at risk. THE LAW DOES NOT PROTECT THAT CHOICE MERELY BECAUSE HE DID NOT WISH TO JEOPARDIZE MS. COLLINS. [Emphasis supplied]
>
> * * *
>
> Mr. Leet can be equally negligent for taking no action to protect the child from its mother in his household. Section 827.04 applies to acts of omission as well as acts of commission. [citations omitted]
>
> * * *

Leet at 963, 964. This case is troublesome, in part, because the State did not prove beyond a reasonable doubt that Mr. Leet had any legal malice or traditional criminal intent to harm Joshua. Culpable negligence is not a common law theory of criminal intent. It is an objective standard [citations omitted]. Thus, it was not essential for the State to prove that Mr. Leet had actual, personal knowledge that his omission would lead to death or great bodily harm. So long as his conduct would be gross and flagrant, evincing a reckless disregard for human life if committed by the ordinary reasonable man, the issue of guilt must be submitted to a jury. This is true, even though Mr. Leet may be more timid or less intelligent than the ordinary reasonable man described in the objective standard. We share the concern of the special concurrence that the culpable negligence standard for this type of omission may sometimes seem harsh and may well punish a defendant for a crime lacking a mens rea. Nevertheless, it was the legislature's prerogative to select this objective standard . .." Leet v. State, 595 So. 2d 959 (Fla. 2d DCA 1991).

Not unlike Mr. Leet, Petitioner Hastings was presented with a choice under the facts of the case on review sub judice. As officer, director and operations manager of Petitioner American Sign Company, approximately six (6) months prior to Respondent Deming's injury, which occurred due to the failure of a truck-mounted extension ladder, Hastings considered expending the funds to perform necessary repair and maintenance on said truck mounted extension ladder, or to do nothing. As such, Hastings was confronted with a choice. Hastings' choice was either to expend the $10,000.00 as quoted by the truck mounted extension ladder's manufacturer, Wilkie Mfg., Inc. (defendant below) in order to make the ladder safe for use by employees, or in the alternative, to do nothing. Hastings chose to save the money, and directed employees to continue using the ladder while the ladder remained in its dramatically dangerous condition. [Transcript of Darrell F. Wilkerson, Jr., (attached hereto as Exhibit A), pp. 9 (line 5) through 13 (line 25).] Hastings chose to leave Mr. Deming at risk. The law does not protect that choice merely because Hastinss did not wish to expend $10.000.00 of American Sign Co.'s (ASC) money to overhaul the ladder and make it safe for use by ASC's employees.

The legal issue in this matter that will be addressed upon plenary appeal may be stated succinctly as follows: Did the trial court commit prejudicial, reversible error in granting Defendant's,

Herbert Hastings, and Defendants, American Sign Company, motions for directed verdict based upon the trial court's interpretation of Fla. Stat. § 440.1 l(l). In reliance upon Fisher v. Shenandoah Gen. Const. Co., 498 So. 2d 882 (Fla. 1986), and its progeny, the trial court stated:

> Before an employer loses statutory immunity under the Workers' Compensation Statutes, it must commit an intentional tort; that is, it must either exhibit a deliberate intent to injure or engage in conduct which is substantially certain to result in injury or death. The standard requires more than a strong probability of injury, it requires virtual certainty.

[Trial Excerpts (attached hereto as Exhibit B); p. 5, lines 18-25.]

The trial court granted Hastings' and ASC's motions for directed verdict based on its' conclusion that the evidence presented by Demings at trial did not demonstrate that Hastings and ASC committed an intentional tort: and therefore, Hastings and ASC were entitled as a matter of law to employer/policymaking employee immunity pursuant to § 440.1 l(l). [Exhibit B, Trial Excerpts, pp. 3 (line 1) through 6 (line 2).]

It is clear that the trial judge in the case sub judice utilized an improper prejudicial, erroneous legal standard in deciding Petitioners' directed verdict motions. It is also clear that the facts of this case demonstrate that the evidence as offered by the Demings at trial, against Hastings and American Sign Company was sufficient to make a prima facia showing of first degree culpable negligence on the part of both Hastings and ASC.

Based upon compound legal error, as analyzed above, a significant number of district courts have disregarded the formal requisites of substantive and procedural law with respect to appellate jurisdiction under Rule 9.130(a)(3)(C)(vii) in order to "cut-to-the-chase" and expediently, although erroneously, dismiss valid claims of culpable negligence brought by employees as against their employers. It is the position of the Respondent that the district courts have erroneously accepted jurisdiciton under Rule 9.130(a)(3)(C)(vi) in order to create a shortcut for dismissing cases which did not involve intentional tort. It appears that procedural requirements were all but disregarded because the end result appeared to be so obviously clear cut. The philosophy of the districts seems to have been "the ends justify the means". The premature dismissals of many similarly situated cases pursuant to R. 9.130(a)(3)(C)(vi) in haste has created significant legal waste. The Demmings have alleged and proved at trial culpable negligence in the first degree against both Hastings and

ASC; however, due to the compound legal error permeating the interpretation of 5440.11 (1), the Demmings are a long way from a final resolution. Affirming the Second District's dismissal of the appeals sub judice is the first step towards clarifying the law of the Workers' Compensation Exclusivity provision.

Finally, the error is being corrected. With a clear understanding of an accurate interpretation of the law under Florida Statute § 440.11 (l), the substantive import of the Second District's decision to dismiss the interlocutory appeal sub judice for lack of jurisdiction under Rule 9.130(a)(3)(C)(vi) can be fully appreciated. ACT Corporation v. Devane, ___ So.2d ___ (Fla. 5th DCA 1996), 21 Fla. L. Weekly D996, 1996 WL 199600; Intearitv Homes of Central Florida, Inc. v. GoldySo.2d ___ (Fla. 5th DCA 1996), 21 Fla. L. Weekly D559; Pizza Hut of America. Inc. v. Miller, ___ So.2d ___ (Fla. 2d DCA 1996), 21 Fla. L. Weekly D1237; Walton Dodae Chrysler-Plymouth Jeep and Eaale v. H.C. Hodaes Cash & Carry, 21 Fla. L. Weekly 2004 (Fla. 1st Dist. September 4, 1996).

The erroneous interpretation of R. 9.130(a)(3)(C)(vi) as advocated by the Appellants has assisted in rapidly spreading an unconstitutional interpretation of § 440.1 l(l), and further, has created procedural "mass confusion". (See App. 15 attached, Transcript of August 16, 1996, hearing on Post-Trial motions in the case sub judice). Appellants have been avoiding the determination of the underlying merits based on an erroneous legal argument in this case for years, to-wit:

1. Hastings' motion to dismiss complaint based on workers' compensation immunity:
2. Hastings' and ASC's motions for summary judgment based on workers' compensation immunity;
3. Hastings' and ASC's interlocutory appeal sub judice based on workers' compensation immunity;
4. Hastings' and ASC's directed verdict motion based on workers' compensation immunity [through which Appellants proved they could beat a dead horse back to life]; and
5. Appellants' Motion for Rehearing and Rehearing En Banc.

All this, in addition to the fact that Appellants herein currently are seeking review by the Florida Supreme Court on the matter sub judice, and, moreover, Deming must bring a plenary appeal (which may also reach Florida's Supreme Court) and prevail at the end of a second trial before the Petitioners are subject to paying interest on any future jury verdict and award in favor of Demmings.

The Demmings are committed to following through, as far as the process will permit, to ensure that the law, which is fair as written, will be hereafter fairly interpreted.

BRIEF CONCLUSION

The order denying ASC's and Hastings' motion for summary judgment did not "determine that a party is NOT entitled to workers' compensation immunity AS A MATTER OF LAW', and therefore is not directly appealable pursuant to Fla.R.App.P. 9.130(a)(3)(C)(vi).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **December** 16, 1996, a true and correct copy of the foregoing Amended Answer Brief of Respondents has been furnished by U.S. Mail, **to: RANDY D. WITZKE, ESQ.,** Edmonds, Cole, Hargrave, Givens, & Witzke, One North Hudson, Suite 200, Oklahoma City, OK, 73102; **RALPH MARCHBANK, ESQ.,** P. 0. Box 3979, Sarasota, FL 34230; **JAMES R. HUTCHENS, ESQ.,** 2015 Fruitville Road, Sarasota, **FL 34237; CHESTER L. SKIPPER, ESQ.,** 2600 Ninth Street North, Ste 500, St. Petersburg, FL **33704; ERIC A. SCHULTZ, ESQ.,** P.O. Box 24317, Tampa FL **33623; KIM STAFFA, ESQ.,** 360 Central Ave., 11 th Floor, St. Petersburg, FL 33701; and **DAN CARLTON, ESQ.,** 2831 Ringling Blvd., Bldg. C., Suite 111, Sarasota, FL.

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