IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

CHARLES DEMMING and
DIANA DEMMING, Husband
and Wife,

Respondents.
_____/

Case No: -89,130

District Court of Appeal
2nd District No. 96-00368

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

PETITIONERS' INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Because no record has been prepared at the time of serving this brief, Petitioner will refer to each record document by its title or an abbreviation of its title, and will refer to a page and/or paragraph within each document if necessary.

The lower tribunal's opinion at issue in this proceeding will be referred to as "Opin.", with page number references. Trial court orders will be referred to as "T.C.Ord." with the date of the order; District Court orders will be referred to as "D.C.Ord.", with the date of the order.

The petitioner American Sign Company is sometimes referred to as "ASC". The lower tribunal is soemtimes referred to as "the Second District" or "the District Court."

Served and filed herewith is a short appendix, containing documents from Second District Court of Appeal case number 96-02667, which was an aborted second appeal in the instant case that the lower court referred to in its opinion. The documents in the appendix will also be referred to as above and in the form "App.Doc. A" and "App.Doc. B".

TABLE OF CITATIONS

Florida Statutes

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STATEMENT OF THE CASE AND FACTS

On January 20, 1993, Plaintiff/Respondent Richard Demming was injured in an accident when the truck-mounted ladder he was standing on collapsed due to sudden breakage of steel cables supporting it. Am.Compl. ¶ 13. He initially filed a products liability suit against the ladder manufacturer, and joined Petitioners as defendants in May 1995. Am.Compl. Petitioner American Sign Co. was Plaintiff's employer at the time of the accident. Am.Compl. ¶ 9. Petitioner Hastings was a shareholder, director, and officer of American Sign Company. Am.Compl. ¶ 7. In order to overcome workers' compensation immunity pursuant to the exclusive remedy provisions of § 440.11, Florida Statutes, Plaintiffs alleged that Petitioners were guilty of culpable negligence, gross negligence, and intentional tort for failing to properly maintain the ladder. Am.Compl. ¶ 65. Plaintiffs' pleadings also admitted that the accident occurred within the course and scope of Mr. Demming's employment. Am.Compl. ¶ 11.

After taking discovery, both Petitioners moved for summary judgment on the grounds that, based on the facts developed in discovery, there was no genuine dispute that Petitioners were entitled to workers' compensation immunity as a matter of law. See, Motion for Summary Judgment, 10/25/95. The trial court denied both motions, without findings or other elaboration. T.C.Ord. 12/27/95.

Petitioners timely sought interlocutory review under Rule 9.130(a)(3)(C)(vi), Fla.R.App.P. Respondents first raised the jurisdictional issue in their Answer Brief, arguing that the order

denying Petitioners' motions for summary judgment was not appealable because it did not finally determine as a matter of law that Petitioners were not entitled to workers' compensation immunity. Appellees' Answer Brief, pages 3 - 12. Respondents thereafter moved to dismiss the appeal on the same grounds, and Petitioners filed a response. The District Court denied Respondents' motion to dismiss the appeal by order dated April 2, 1996.

The case was fully briefed and ready for resolution upon Petitioners' serving their reply briefs on March 19 and March 21, 1996.

Petitioners moved for to stay the action pending appeal, which the trial court denied. Petitioners filed a motion in the District Court under Rule 9.310(f), Fla.R.App.P. seeking review of the denial of their motion for stay. The District Court denied that motion in its April 2, 1996 order.

The case went to trial on June 10, 1996. On June 13, at the close of Respondents' case-in-chief, Petitioners moved for directed verdict on grounds of workers' compensation immunity, and the trial court granted the motions. Thereafter, the trial court entered judgment for Petitioners on the directed verdicts. This was error, because Petitioners' interlocutory appeals were still pending, so the trial court did not have jurisdiction to enter a final order, pursuant to Rule 9.130(f), Fla.R.App.P.[1] Respondents filed a

[1]The judgments were submitted by and entered at the instance of Petitioners' counsel.

notice of appeal from the erroneously entered judgments. Case No. 96-2667, Notice of Appeal, 7/1/96, App.Doc. A. Petitioners, recognizing the judgments should not have been entered, moved to dismiss the appeals and vacate the erroneously entered judgments. BY order dated July 19, 1996, the District Court granted Petitioners' motions, dismissed the second appeals and vacated the erroneously entered final judgments. Case No. 96-2667, D.C.Ord. 7/19/96, App.Doc. B.

The District Court issued its opinion dismissing the interlocutory appeal on July 31, 1996, and denied rehearing and rehearing en banc on September 30, 1996. Petitioners thereafter timely filed a Notice for Discretionary Review.

The Second District's opinion certified conflict with Breakers Palm Beach, Inc. v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994) and City of Lake Mary v. Franklin, 668 So.2d 712 (Fla. 5th DCA 1996), and certified the issue in this case to be a question of great public importance and one affecting the efficient administration of justice. Opin. page 26.

The gravamen of Plaintiff's action is that Petitioner Hastings, and through him ASC, were allegedly guilty of culpable negligence and intentional tort for not replacing the ladder cables which failed. Am.Compl. ¶ 65. However, the appendices to the parties' briefs before the District Court show a total lack of evidence to support the allegation of culpable negligence. There was no evidence of willful concealment of a known dangerous condition. There was no evidence of any disabling or removal of

safety features. There was no evidence of an intent to harm Respondent Charles Demming. There was no evidence that any Defendant had knowledge of any hazardous condition in the cable prior to its failure. There was no evidence that Petitioner Hastings had anything to do with the sign erection side of the business, of which the ladder trucks and their drivers were a part.

STATEMENT OF THE ISSUE

WHETHER AN APPELLATE COURT HAS JURISDICTION UNDER 9.130(a)(3)(C)(vi), FLA.R.APP.P. TO REVIEW A NON-FINAL ORDER DENYING A DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ASSERTING WORKERS' COMPENSATION IMMUNITY, WHEN THE ORDER DOES NOT FINALLY FORECLOSE THE DEFENDANT FROM PRESENTING THE DEFENSE AT TRIAL.

SUMMARY OF ARGUMENT

Petitioners seek review of a decision of the Second District Court of Appeal holding that an order which merely denies a motion for summary judgment asserting workers' compensation immunity is not reviewable under Rule 9.130(a)(3)(C)(vi), Fla.R.App.P. ("the Rule"). According to the Second District, only an order which finally precludes a defendant from asserting workers' compensation immunity at trial is appealable. Petitioners disagree and urge that the Rule allows for interlocutory appeal of any order denying a duly filed motion for summary judgment asserting entitlement to workers' compensation immunity. Petitioners urge that the District Court's construction of the rule is erroneous and that the District Court therefore erred in dismissing Petitioners' appeal.

The District Court's construction is erroneous as a matter of syntax. The Rule provides for appeal of orders "that determine that a party is not entitled to workers' compensation immunity as a matter of law." The position of the phrase "as a matter of law" indicates that it modifies "entitled," not "determine." If the intent of the Rule were for the phrase "as a matter of law" to modify "determine," then it would have provided for appeal of orders "that determine as a matter of law that a party is not entitled to workers' compensation immunity." It does not.

The Second District's ruling cannot be reconciled with this Court's statements of the intended application of the Rule. This Court has made it clear that the purpose of the Rule is to allow for interlocutory appeal of orders denying a motion for summary

judgment asserting workers' compensation immunity. Thus the Court intended for the phrase "as a matter of law" to have the same meaning it has in Fla.R.Civ.P. 1.510, governing summary judgment. The Second District's holding, that "as a matter of law" means that non-entitlement to immunity must be "finally determined" so that the defense cannot be presented at trial, attempts to give the phrase a different meaning.

Furthermore, an order denying summary judgment will rarely - if ever - finally preclude presentation of the defense at trial, so as to be appealable under the Second District's construction of the Rule. Thus, the Second District's construction of the Rule is inconsistent with that of this Court. Particularly in cases like the instant case, where prima facie entitlement to immunity is undisputed and the plaintiff is attempting to overcome it by proving culpable negligence, the Second District's decision renders the Rule a virtual dead letter.

The Second District's holding is also inconsistent with the overwhelming weight of precedent from this state's district courts, including the Second District in a prior decision. Since its promulgation in 1992, the district courts have easily, clearly, and frequently applied the Rule to review and reverse exactly the sort of case the Second District dismissed in the instant case. The Rule works well, and based on the frequency of its use, is apparently needed to assure the timely and proper enforcement of employers' entitlement to workers' compensation immunity. The District Court should have followed the colloquial maxim "if it

ain't broke, don't fix it", and declined to break with well-established precedent.

The Second District and Respondents explicitly argue the proposition that "finality" is required for an order to be appealable under the Rule. This proposition is a fallacy: by definition, an appealable non-final order need not be final to be appealable.

The Second District's construction of the Rule is contrary to the policy and purpose of the workers' compensation statutory scheme. The crystal clear intent of the Legislature in creating the workers' compensation system, and enacting workers' compensation immunity, was to take work-place accidents out of the tort system. The aim of the legislative policy is to provide fast, no-fault compensation for injured workers, and relieve workers, employers, and society at large of the litigation costs associated with civil litigation. To deny an employer the prospect of obtaining relief from the costs of litigation resulting from a trial court's erroneous denial of summary judgment is unjust and contrary to public policy.

While it appears that the crux of the District Court's jurisdictional test is whether the defendant has been precluded from asserting workers' compensation immunity at trial, the District Court's jurisdictional analysis also turns on: 1) whether the non-existence of a material fact issue is "evident" from the record; 2) whether the record shows the trial court has, in an interlocutory order, "finally determined" the immunity issue; and

3) whether the trial court's determination was "as a matter of law." As a result of these related but not co-extensive formulations of the requisites for appellate jurisdiction, the Second District's test is subject to a wide range of interpretations, is impractical to apply, and does not provide a reasoned, principled and discernible basis for determining which orders are appealable and which are not.

In particular, the Second District's jurisdictional test can be, and has been, interpreted to mean that the non-existence of material fact issues is a requisite for appellate jurisdiction. However, the existence or non-existence of material fact issues, under a summary judgment analysis, is also the issue on the merits, not only in this case and but in nearly all reported cases under the Rule. Thus, by making appealability turn on whether summary judgment was denied because material fact issues exist, the Second District's test begs the question on the merits. It makes a simple and clear rule into 'a virtual non-rule: the merits determine jurisdiction, and jurisdiction the merits.

Likewise, the Second District's requirement that an order have been decided "as a matter of law" relies on the distinction between a summary judgment motion denied on the basis of "issues of fact" and one denied on the basis of "issues of law." This will inevitably result in wasteful, hair-splitting argument by parties and inconsistent, confusing precedents from the appellate courts.

Procedural confusion has already resulted from the Second District's excessively malleable jurisdictional test in the three

months since the court's decision. The First District has issued two opinions which purport to be consistent with or follow the District Court's opinion in the instant case, but which nevertheless reach the opposite result on indistinguishable facts.

The Second District raised the possibility of multiple interlocutory appeals as one rationale for its erroneous construction of the Rule. Of course, that is not at issue in the instant case. The Second District dismissed Petitioners first and only interlocutory appeal. Also, the District Court ignores the distinction, recognized in ACT Corp. v. Devane, 672 So.2d 611 (Fla. 5th DCA 1996), between a motion for summary judgment denied after completion of all appropriate discovery on the grounds that the trial court feels fact issues remain for the jury, and one denied because it is premature, in that discovery remains to be taken. The former is appealable, and this Court should rule in accordance with Devane that the latter is not. In the alternative, the problem could be simply and clearly solved by ruling that a party is entitled to only one interlocutory appeal under the Rule.

The Second District erred in dismissing Petitioner's interlocutory appeal, based on an erroneous construction of Rule 9.130(a)(3)(C)(vi), Fla.R.App.P. The District Court's ruling should be reversed and the instant case remanded for consideration of Petitioners' appeal on the merits.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION UNDER FLA.R.APP.P. 9.130(a)(3)(C)(vi) TO REVIEW THE TRIAL COURT'S ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT ASSERTING WORKERS' COMPENSATION IMMUNITY, AND THEREFORE ERRED IN DISMISSING PETITIONER'S APPEAL.

A. The Basis for Supreme Court Jurisdiction, the Certified Question and the Parties' Basic Arguments.

Hastings petitions this court for discretionary review pursuant to Rules 9.030(a)(2)(A)(v), 9.030(a)(2)(A)(vi), and 9.030(a)(2)(B), Fla.R.App.P. The Second District certified conflict with decisions of the Fourth and Fifth Districts, and certified the following question to be of great public importance and to affect the efficient administration of justice:

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

Opin. page 26.

As the District Court's certified question indicates, the issue in this case is the proper construction of Rule 9.130(a)(3)(C)(vi), Fla.R.App.P. The Rule provides:

> (3) Review of non-final orders of lower tribunals is limitedtothosethat...(C) determine... that a party is not entitled to workers' compensation immunity as a matter of law.

Petitioners urge that the Rule allows for interlocutory appeal of an order denying a defendant's duly filed motion for summary judgment asserting the exclusivity provisions of §440.11, Florida

Statutes, commonly referred to as workers' compensation immunity. Petitioners urge that such an order is appealable even if the Trial Court has denied the motion on the grounds that the trial court found that issues of fact remain for determination by the jury, or if, as here, the basis for the trial court's ruling cannot be discerned either from the order or from the record.

Respondents have argued, and the District Court has agreed, that this rule authorizes an interlocutory appeal only when the trial court has finally determined that an employer is not entitled to workers' compensation immunity, so that the employer/defendant is precluded from presenting a workers' compensation immunity defense at trial. Or, to state it in the converse, Respondents have argued that where the trial court merely denies summary judgment on a finding that issues of fact remain for the jury, such an order is not appealable. The District Court also bases jurisdiction on whether the defendant's entitlement to workers' compensation immunity is "evident" from the record, on whether the trial court's determination was "as a matter of law" or not, and on whether the record shows the "facts . . . were so fixed and definite that the court was in a position to determine [the immunity issue] clearly and conclusively, beyond doubt". Opin. pages 5 - 9.

Moreover, according to the District Court, if the basis for the order is not apparent on its face, an appeals court should review the record to discern the basis of the trial court's decision, in order to determine appealability. Opin. page 8.

B. The Second District's Construction of the Rule is Erroneous as a Matter of Syntax.

The Second District and Respondents have simply mis-construed the wording of the Rule. As Judge Klein pointed out in Breakers Palm Beach, Inc. v. Gloqer, if the intent of the rule was as urged by the Second District and Respondents, an alternative, unambiguous word order was available. In Gloqer the court reasoned:

> If the words "as a matter of law" had been placed at the beginning of the amendment, rather than at the end, appellees' argument would be persuasive. Under that scenario the rule would permit review of non-final orders which determine "as a matter of law that a party is not entitled to workers' compensation immunity". The key words, when placed at the beginning, modify "determine".
>
> By placing the words at the end, however, the court gave the amendment a broader meaning. They modify "entitled". The denial of defendant's motion for summary judgment, because there were issues of fact, is an order determining that the defendant is "not entitled to workers' compensation immunity as a matter of law". We therefore deny the motion to dismiss.

646 So.2d at 238.

Judge Klein's reasoning is still the most cogent on this issue. This Court should approve Gloqer and adopt Judge Klein's reasoning as the proper construction of the Rule.

C. This Court Has Ruled That the Rule Allows Interlocutory Review of Orders Denying Summary Judgment on Workers' Compensation Immunity, Including in Cases Indistinguishable From the Instant Case, and the Second District's Decision is Contrary to Such Ruling.

Decisions of this Court establish that the purpose of the Rule is to allow for interlocutory appeal of orders denying a motion for summary judgment asserting workers' compensation immunity. The Second District's ruling in the instant case is contrary to such intent and therefore contrary to the law as announced by this Court.

1. This Court Has Held that the Rule Allows Interlocutory Review of Orders Denying Summary Judgment on Workers' Compensation Immunity, Including in Cases Indistinguishable From the Instant Case.

This Court promulgated the Rule in 1992 in Mandico v. Taos Construction, 605 So.2d 850 (Fla. 1992). Prior to Mandico, there was authority for the proposition that interlocutory review of an order denying workers' compensation immunity was available by way of writ of prohibition, under Winn-Lovett Tampa v. Murphree, 78 So.2d 287 (Fla. 1954). In Mandico, the Fourth District reviewed by writ of prohibition the trial court's denial of the defendant's motion for summary judgment asserting workers' compensation immunity, and reversed. 605 So.2d at 852. This Court affirmed the District Court's decision. Id. at 855. However, the Court held that prohibition was not the proper vehicle for obtaining such review, and instead amended Rule 9.130 to add the provision at issue in the instant case. Id. at 854-855. Thus Mandico implicitly and by definition stands for the proposition that the Rule is intended to allow interlocutory review of orders denying summary judgment on workers' compensation immunity.

Even more clear is this Court's ruling in Ramos v. Univision Holdings, 655 So.2d 89 (Fla. 1995). In Ramos, as in the instant case, the trial court denied the defendant's motion for summary judgment asserting worker's compensation immunity, and the defendant took an interlocutory appeal under the Rule. Id. at 90-91. The district court reversed the trial court, holding that the defendant, a property owner, was entitled to immunity in a suit by the employee of a sub-contractor. Id. at 90. On conflict review

before this Court, the defendant/property owner conceded that the district court had erred in holding that immunity applied, but urged this Court to affirm on the grounds that the owner had been entitled to summary judgment anyway under general negligence principles. Id. at 90-91. This Court declined to consider such arguments, because the general negligence issue "did not present the basis for the district court's jurisdiction of this interlocutory appeal." Id. at 91. The Court reasoned that:

> A district court is generally without jurisdiction to review a nonfinal order denying a motion for summary judgment. In Mandico v. Taos Construction, Inc., 605 So.2d 850 (Fla. 1992), we provided a limited exception to that rule by amending Florida Rule of Appellate Procedure 9.130. The rule was intended to promote early resolution of cases in which it is evident that the worker's exclusive remedy is workers' compensation. We decline to extend the limits of the rule to permit consideration of the merits of Univision's motion for summary judgment on grounds other than workers' compensation immunity. Nor should district courts permit rule 9.130(a)(3)(C)(vi) to be used as a conduit through which to seek interlocutory appeals of denials of motions for summary judgment on grounds other than workers' compensation immunity.

Id.

Thus, Ramos expressly and repeatedly makes clear that the intent of the Rule is to provide for review of orders denying a motion for summary judgment asserting workers' compensation immunity.

Any attempt to restrict the generality of the Court's statements in Ramos to the facts of that case must fail. First, there is not the slightest hint of qualification in the language of Ramos. Furthermore, in a footnote, this Court specifically cited three additional cases as instances in which interlocutory review

under the Rule is appropriate. Id., note 2, citing Holmes County School Bd. v. Duffell, 651 So.2d 1176 (Fla. 1995), Kennedy v. Moree, 650 So.2d 1102 (Fla. 4th DCA 1995), and General Motors Acceptance Corp. v. David, 632 So.2d 123 (Fla. 1st DCA), review dismissed, 639 So.2d 976 (Fla. 1994).

Kennedy v. Moree, supra, is indistinguishable from the instant case. In Kennedy, as in the instant case, an employee sued his employer's officers and directors for workplace injuries. 650 So.2d at 1105. In that case the injuries resulted from a cable having been left on the roof where the plaintiff was working. Id. The defendants moved for summary judgment asserting that they were entitled to workers' compensation immunity unless they had acted with culpable negligence. Id. The employee/plaintiff agreed that culpable negligence was the applicable standard, but contended numerous issues of material fact remained for the jury. Id. Principally, the plaintiff asserted facts from which a jury could have inferred that the defendants had actual knowledge of the dangerous condition, and asserted that the conscious decision to leave the cable on the roof constituted an OSHA violation. Id. The trial court denied the motion for summary judgment without stating its reasons. Id. The Fourth District accepted jurisdiction and reversed, holding that the facts, even viewed in the light most favorable to the plaintiff, did not demonstrate the level of culpability sufficient to overcome workers' compensation immunity. Id. at 1104.

The issue in the instant case is identical; i.e., whether

there is any genuine issue of fact that Petitioners committed culpable negligence or intentional tort. Petitioners urged in the trial court that, based on the facts developed in discovery, and viewing such facts most favorably to the plaintiffs, no material fact issue existed, so that Petitioners were entitled to judgment as a matter of law. Respondents argued to the contrary. The trial court denied Petitioners' motions without stating its reasons.

Thus, the Court has already expressly approved interlocutory review in a case on all fours with the instant case. If interlocutory review was appropriate under the facts of Kennedy, it is appropriate in the instant case. Furthermore, Ramos makes it indisputably clear that the purpose of the Rule is to allow interlocutory appeal of an order denying a motion for summary judgment asserting workers' compensation immunity. The order appealed from in the instant case is such an order.

2. The Second District's Holding Erroneously Gives the Phrase "as a Matter of Law" a Meaning Different From its Meaning in Fla.R.Civ.P. 1.510.

A logical corollary of the Court's intent to allow review of orders denying summary judgment is that the phrase "as a matter of law" in the Rule refers to Fla.R.Civ.P. 1.510 and has the same meaning as it does in that rule. Rule 1.510 governs summary judgment proceedings and provides that summary judgment shall be rendered if "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."

Petitioners submit that, for purposes of summary judgment, it is fundamental that the application of a legal doctrine to a set of

facts is a question of law. For example, in the instant case, the application of the doctrine of culpable negligence to the facts of the instant case is a question of law.

However, the Second District holds that "as a matter of law" means that non-entitlement to immunity must be "finally determined" so that the defense cannot be presented at trial. The Second District's apparent intent is to restrict interlocutory appeals to those very few cases where resolution of the immunity issue depends on the resolution of some abstract, free-standing "question of law". Thus the Second District attempts to give the phrase, and thereby the Rule, a meaning different from that intended by this Court.

3. The Second District's Ruling Cannot be Reconciled with the Intent of the Rule Because Few If Any Orders Denying Summary Judgment Would be Appealable Under the Second District's Ruling.

The District Court's construction of the Rule cannot be squared with the Supreme Court's intent as announced in Mandico and Ramos. The Second District would require an order which finally forecloses the defendant/employer from presenting a workers' compensation immunity defense. As the Second District admitted in footnote 4 of its opinion, an order merely denying a defendant's motion for summary judgment could only rarely, if ever, foreclose an immunity defense. Since it is precisely such an order which this Court has stated it intended to make appealable, the Second District's ruling is in error.

The Second District's test makes even less sense in cases like the instant case where the plaintiff concedes that the injury

occurred in the course of employment with the defendant, so that workers' compensation immunity is not really a defense that the defendant must prove, but instead operates to raise the standard of negligence or fault that the plaintiff must prove. See, Fisher v. Shenandoah Gen. Constr. Co., 498 So.2d 882 (Fla. 1986), Lawton v. Alpine Engineered Prods., 498 So.2d 879 (Fla. 1986), Eller v. Shova, 630 So.2d 537 (Fla. 1993)(amendment to § 440.11, Fla. Stat. "raised the degree of negligence necessary to maintain a civil tort action against policymaking employee..."). In such cases there is no "defense" to be "finally determined", in the sense of being excluded as an issue at trial. The plaintiff will still have to prove culpable negligence. Therefore, under the Second District's test, in cases like the instant case there will never be a right to an interlocutory appeal under the Rule.

In cases in which workers' compensation immunity is presented as a defense, the Second District apparently foresees that in some instances the parties may understand from the oral or written arguments presented to the trial court, or from the trial court's comments at the summary judgment hearing, what the basis for the trial court's ruling is. The Second District apparently intends that the parties present such apocrypha to the appellate court as the basis for determining jurisdiction. However, such fragmentary and indirect evidence hardly seems a suitable basis for determining appellate jurisdiction.

In most instances, an immunity defense will not be finally foreclosed, in the sense that the court has taken some concrete

action excising the issue from the case, until the trial court has rejected the defendant's proposed jury instructions on immunity at trial. It is hard to imagine a more inopportune time for an interlocutory appeal. An appeal so late in the game could serve only to impede the orderly and logical progress of a case from complaint to trial.

This was essentially the situation in City of Lake Mary v. Franklin, 668 So.2d 712 (Fla. 5th DCA 1996). In Franklin the trial court denied the defendant's summary judgment motion asserting workers' compensation immunity without comment, and nine months later denied the defendant's requested jury instruction on the same issue. 668 So.2d at 713. In that case, the defendant attempted to appeal after the jury instruction order, albeit seeking review of both orders. Id. The Fifth District correctly dismissed the entire appeal because (1) it was untimely as to the summary judgment order, which was otherwise appealable, and (2) the jury instruction order was not appealable under the Rule. Id. Since the order denying summary judgment had been the appealable order under the Rule, the court concluded that the defendant had missed its chance for an interlocutory appeal. Id.

There is no discussion in Franklin of the proceedings in the trial court pending the appeal, but the original appellate opinion was dated December 22, 1995, 11 months after the order appealed from. Therefore it can be fairly deduced that either the trial had to be continued or the case went to trial while the appeal was pending. Either outcome is undesirable as a matter of judicial

economy and the efficient administration of justice.

Adoption of the Second District's jurisdictional test would make the defendant's error in Franklin the standard procedure. Orders denying jury instructions on workers' compensation immunity would be appealable, instead of orders denying motions for summary judgment as this Court has stated was the Rule's intended application. This will cause more, not less, delay, procedural confusion and waste of judicial resources.

Other orders which could conceivably meet the Second District's jurisdictional test are orders granting a plaintiff's motion to strike, or for partial summary judgment on, a defendant's immunity defense. However, these orders are rare and are not orders denying a motion for summary judgment, as the Court has stated is the Rule's intended application.

The foregoing shows that very few orders could meet the Second District's requirements for appealability, rendering the Rule a virtual dead letter. However, it appears that rendering the Rule a dead letter may be precisely the Second District's intention, based on the court's quotation from Traveler's Ins. Co. v. Bruns, 443 So.2d 959 (Fla. 1984), that "the thrust of rule 9.130 is to restrict the number of appealable final orders." The Second District cites this statement from Bruns apparently as authority for the proposition that the Rule was meant to decrease interlocutory appeals, not increase them. However, Bruns, and the intent behind the adoption of Rule 9.130 in 1977, could hardly be less applicable. First, the clear meaning of this Court's

statement in Bruns was that **Rule** 9.130 was meant to restrict the number of interlocutory appeals as compared to practice under the prior rules of appellate procedure. However, there was no rule analogous to the Rule in question here under the prior rules of procedure. Bruns concerned a different rule, and was decided in 1984, before the Rule in question here was even a gleam in the judicial eye. It should also be noted that, as a practical matter, the Supreme Court overruled Bruns in Canal Ins. Co. v. Reed, 666 So.2d 888 (Fla. 1996). Therefore, Bruns, and its statements regarding the history of Rule 9.130, have no bearing on the instant case. To the contrary, as Respondents admitted in their Answer Brief in the District Court, when this Court amended Rule 9.130 in Mandico, by definition it intended to expand appellate jurisdiction over interlocutory orders. Appellee Answer Brief, page 8.

Finally, the Appellate Rules Committee of the Florida Bar has also contributed to the discussion of the intent of the Rule. It would have this Court amend the Rule to comport with the Second District's ruling, "to more clearly reflect the committee's intent when it first proposed the adoption of the rule." (emphasis added)' However, the Court, not the Committee, initiated the adoption of the Rule in Mandico. Furthermore, regardless of any role the Committee **may** have had in the Rule's adoption, the "intent" behind the Rule is ultimately the Court's, not the Committee's. The

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[2]Petition **to** Adopt on an Emergency Basis an Amendment to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi) and Florida Rule of Appellate Procedure Rule [sic] 9.100(c), Original Proceeding case number 87,134, page 1.

Court's pronouncements on what it meant in adopting the Rule are unqualified: the purpose of the Rule is to allow interlocutory appeals from orders on summary judgment motions.

D. The Lower Court's Ruling is Contrary to the Overwhelming Weight of Precedent, in That the District Courts Have Uniformly Construed the Rule to Allow Interlocutory Appeals in Cases Indistinguishable from the Instant Case.

The Florida Supreme Court is not the only Florida court to have construed the Rule to allow for interlocutory appeal in cases like the instant case, without the added element of finality that would be required under the Second District's construction. Prior to the Second District's jurisdictional experiment, Florida's district courts had clearly and easily applied the Rule in numerous cases. The Second District's ruling in the instant case breaks with the overwhelming weight of precedent from the other district courts, and prior precedent from the Second District, and should be reversed.

In the instant case the lower court certified conflict with Breakers Palm Beach, Inc. v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994), and City of Lake Mary v. Franklin, 668 So.2d 712 (Fla. 5th DCA 1996). The courts in both these cases expressly considered the argument advanced by Respondents and the lower court in the instant case, and concluded that an order need not finally determine there is no workers' compensation immunity in order to be appealable under the Rule. 646 So.2d at 237, 668 So.2d at 714. These cases adopt the correct construction of the Rule, and should be approved.

Likewise, in Ross v. Baker, 632 So.2d 224 (Fla. 2d DCA 1994), the Second District itself stated that "we conclude that the

supreme court intends for us to review" an order denying summary judgment on workers' compensation immunity, even where "such orders may merely establish that the trial court currently views the issue of immunity to involve unresolved factual questions as well as legal questions." 632 So.2d at 225. The court below attempted to distinguish Ross by characterizing the foregoing discussion as dicta. Opin. pages 13-14. The Ross court, as well, was correct in its construction of the Rule.

Furthermore, in a host of other cases indistinguishable from the instant case, the district courts have held that an order denying a motion for summary judgment asserting workers' compensation immunity was an appealable non-final order under the rule. Kennedy v. Moree, 650 So.2d 1102 (Fla. 4th DCA 1995), Pinnacle Constr. Co. v. Alderman, 639 So.2d 1061 (Fla. 1st DCA 1994), Emergency One v. Keffer, 652 So.2d 1233 (Fla. 3rd DCA 1995) Mekamy Oaks, Inc. v. Snyder, 659 So.2d 1290 (Fla. 5th DCA 1995). Every one of these cases turned on the existence of an issue of material fact as to the defendant's alleged culpable negligence. In each case, the appellate opinion revealed that the trial court had denied summary judgment in the belief that material fact issues remained. In no case had the trial court finally precluded the defendant from presenting the immunity defense at trial. In each case the district court accepted jurisdiction and reversed. No conceivable basis exists for distinguishing these cases from the instant case.

In particular, the foregoing cases undermine the Second

District's holding that review is appropriate only when the record shows the pertinent facts were "fixed and definite". Opin. page 8. In each case, the court made a point of basing its holding for the defendant/employer on the factual record viewed "in the light most favorable" to the plaintiff. Mekamy Oaks, 659 So.2d at 1291 ("The facts are in dispute, but those most favorable to [the plaintiff] are the following"), Kennedy, 650 So.2d at 1104, ("even if we view the facts in the light most favorable to the plaintiff"), Pinnacle Constr., 639 So.2d at 1062 ("the factual record is construed in the light most favorable to plaintiffs"; "for present purposes we assume, but do not decide, that the [defendant] had the obligations outlined by plaintiffs"), Emergency One, 652 So.2d at 1233, ("When all facts are viewed in the light most favorable to the plaintiffs, they do not demonstrate the level of culpability necessary to overcome defendants' entitlement to workers' compensation immunity").

Clearly, the facts in the cases just discussed were no more settled than those in the instant case. Facts which are "crystallized" and "fixed and definite" need not be viewed or construed in a light more or less favorable to either party to determine their legal effect. Instead the foregoing cases are examples of typical summary judgment analysis. The issue is whether there is a genuine issue of material fact. If the non-moving party cannot sustain its position even when factual disputes are resolved in its favor, then those disputes are not "material" and should not preclude summary judgment.

The Second District's ruling in the instant case is contrary to the foregoing cases. It would overturn their common-sense, everyday application of well-tested summary judgment principles to the merits of cases like the instant case, and instead require a more restrictive, more difficult to apply, hair-splitting test merely to determine jurisdiction. The foregoing cases show clearly how the Rule should work, and that it does work. As it did in Ramos, this Court should again approve the construction of the Rule which Florida's appellate courts have followed and applied in the majority of cases.

In contrast to the precedent supporting Petitioners, the Second District's construction of the Rule has a very short ancestry. Respondents' argument first saw the light of day in a dissenting opinion by Judge Sharp in J.B. Coxwell Contracting, Inc. v. Shafer, 663 So.2d 659 (Fla. 5th DCA 1995). On March 1 of this year the Fifth District issued two conflicting opinions, Citv of Lake Mary v. Franklin, 668 So.2d 712 (Fla. 5th DCA 1996) and Integrity Homes of Central Florida v. Goldy, 672 So.2d 839 (Fla. 5th DCA 1996). As discussed elsewhere herein, Franklin follows Gloger and Ross in rejecting the Second District's "finality" test. However, in that case Judge Harris concurred specially to say that he disagreed with Ross and Gloger, and that "Mandico only permits appeals of orders denying summary judgment when the judge, based on uncontroverted facts, finds that workers' compensation immunity does not exist." 668 So.2d at 714. In Goldy, in a very short opinion, the Fifth District dismissed an appeal under the Rule on

the rationale that "there is nothing in the instant record demonstrating that the trial court found that Integrity Homes was not entitled to the immunity defense as a matter of law." 672 So.2d at 839 (emphasis in original). Thereafter, the Second District picked up the ball, and in fairly rapid succession decided Pizza Hut of America v. Miller, 674 So.2d 178 (Fla. 2d DCA 1996), American Television and Communication Corp. v. Florida Power Corp., 21 Fla.L.Weekly D1668 (Fla. 2d DCA July 17, 1996), and the instant case on July 31.

Petitioners urge that this brief jurisdictional experiment be terminated decisively and soon. The Second District's construction of the Rule is contrary to overwhelming precedent. Precedent shows that the courts have been applying the Rule easily, consistently and often. The Second District's change in the law should not be approved.

E. The Second District's Construction of the Rule and the Appellate Rules Committee's Proposed Amendment Violate the Legislative Intent of the Workers' Compensation Statutory Scheme.

The Second District's construction of the present Rule, and the Appellate Rules Committee's proposed change to the Rule, violate the spirit and intent of the workers' compensation statutory scheme. The intent of the legislature in creating the workers' compensation system, and enacting workers' compensation immunity, was to take work-place accidents out of the tort system, to provide fast, no-fault compensation for injured workers, and to relieve workers, employers, and society at large of the litigation costs associated with civil litigation arising out of work-place

injuries. Requiring an employer to bear the costs of litigation after a trial court's erroneous denial of summary judgment is contrary to the intent of the statutory system, unjust, and bad public policy.

The intent of the Workers' Compensation Act, and the central role the exclusivity provisions of §440.11 play in that system, are well documented. First, 5440.015, Fla. Stat. (1995) makes a formal statement of legislative intent for the Act as a whole. It provides, inter alia, that the "workers' compensation system in Florida is based on a mutual renunciation of common-law rights and defenses by employers and employees alike," indicating the intention that workers' compensation benefits displace tort remedies. Furthermore, the statute refers to "quick and efficient delivery of .*. benefits . . . at a reasonable cost to the employer," and an "efficient and self-executing system" as goals of the workers' compensation statutes. § 440.015, Fla. Stat. (1995).

Similarly, in Mullarkey v. Florida Feed Mills, 268 So.2d 363 (Fla. 1972), this Court stated:

> Third, the concept of exclusiveness of remedy embodied in Fla.Stat. § 440.11, F.S.A. appears to be a rational mechanism for making the compensation system work in accord with the purposes of the [Workers' Compensation] Act. In return for accepting vicarious liability for all work-related injuries regardless of fault, and surrendering his traditional defenses and superior resources for litigation, the employer is allowed to treat compensation as a routine cost of doing business which can be budgeted for without fear of any substantial adverse tort judgments. Similarly, the employee trades his tort remedies for a system of compensation without contest, thus sparing him the cost, delay and uncertainty of a claim in litigation."

268 So.2d at 366.

Likewise, Judge Altenbernd, dissenting in Shova v. Eller, 606 So.2d 400 (Fla. 2d DCA), reversed, 630 So.2d 537 (Fla. 1993), reasoned that "in exchange for ... [a] difficult, expensive, and time-consuming lawsuit concerning the safety of her workplace, the workers' compensation statute gives [the injured employee] the ability to quickly recover a significant portion of her damages without regard to fault." 606 So.2d at 408 (Altenbernd, J., dissenting).

The Legislature's use of the word "immunity" in § 440.11 is not intended merely to provide another arrow in an employer's quiver of tort litigation defenses. It expresses the Legislature's intent that the employer not be sued in the first place. In Eller v. Shova, 630 So.2d 537 (Fla. 1993), this Court quoted from the legislative history of the 1988 amendment to § 440.11, stating the intent of the statute to be that:

> Management personnel will no longer incur costs associated with tort suits for certain acts which they commit in their managerial capacity. This should serve to reduce their liability expenses.

630 So.2d at 541.

The Supreme Court's decision in Mandico, to give parties asserting workers' compensation immunity a right to appeal a trial court's erroneous refusal to give effect to such immunity, helps to implement a central goal of the workers' compensation system, the avoidance of litigation costs. Early resolution of the immunity issue serves to protect the employer from the expenses and disruptions of unwarranted tort litigation. Denial of the right to an interlocutory appeal weakens a central part of the "bargain" of

the workers' compensation system: the employers' freedom from vexatious lawsuits in return for no-fault responsibility for all work-related injuries.

The record before the District Court showed that the trial court erred in denying Petitioners' motions for summary judgment. As argued in Petitioners' Brief below, and as the record shows, there was simply no evidence of the extreme level of wrongdoing necessary to overcome workers' compensation immunity. The case law requires a level of conscious wrongdoing many orders of magnitude beyond what the evidence in this case could possibly show in order to overcome workers' compensation immunity. Fisher v. Shenandoah Gen. Constr. Co., 498 So.2d 882 (Fla. 1986), Lawton v. Alpine Engineered Prods., 498 So.2d 879 (Fla. 1986), Eller v. Shova, 630 So.2d 537 (Fla. 1993), Emergency One, Inc. v. Keffer, 652 So.2d 1233 (Fla. 1st DCA 1995), J.B. Coxwell Contracting, Inc. v.Shafer, 663 So.2d 659 (Fla. 5th DCA 1995), Kennedy v. Moree, 650 So.2d 1102 (Fla. 4th DCA 1995), Mekamy Oaks, Inc. v. Snyder, 659 So.2d 1290 (Fla. 5th DCA 1995).

Petitioners were entitled to immunity as a matter of law. There was no genuine issue of fact remaining for the trier of fact. If the basis for the trial court's denial of summary judgment was that fact issues remained, the trial court erred on that point. Forcing Petitioners to stand trial due to such an error violates the policy and purpose of the workers' compensation system. The Florida Rules of Appellate Procedure should, and do, provide an immediate appellate remedy for such an error. The Second District

erred in refusing to follow that rule and relieve Petitioners of the burdens of this unwarranted lawsuit.

F. The Second District's Ruling Provides No Clear and Principled Test For Determining Appealability Under the Rule, and Therefore Will Result in Procedural Confusion and the Wasteful Expenditure of Judicial Resources in Determining Appealability.

Ironically, the Second District takes what should be a clear, easy-to-apply rule, and propounds a jurisdictional test that is certain to confound forever after. The Second District's holding requires the reviewing court to inquire whether entitlement to immunity is "evident" from the record, and whether the motion was denied because the trial court found fact issues remaining for the jury. The Second District's jurisdictional test begs the question: whether the record shows that the defendant is entitled to workers' compensation immunity is the issue on the merits. Making it the jurisdictional test turns logic on its head.

To a 100% probability, the Second District's jurisdictional test will turn into a determination of whether the reviewing court feels there are remaining factual issues, so that the issue on the merits will determine jurisdiction. Petitioners are so certain in this prediction because it has already come to pass in the three months since the District Court's decision in the instant case. Both Walton Dodge Chrysler-Plymouth Jeep and Eagle v. H.C. Hodges Cash & Carry, 21 Fla.L.Weekly D2004 (Fla. 1st DCA September 4, 1996), and Gustafson's Dairy v. Phiel, 21 Fla.L.Weekly D2146 (Fla. 1st DCA September 30, 1996), while purporting to follow or be consistent with the District Court's opinion in the instant case, reach the opposite result on facts indistinguishable from those of

the instant case.

In Walton Dodge, the plaintiff was injured while trying to replace a flagpole on the employer's premises. Some of the employer's employees had first attempted to borrow a scissors truck from the local power company to aid in erecting the flagpole. The power company declined, and warned the employees, including the plaintiff, that such a maneuver would be dangerous due to the existence of high voltage lines nearby. The employees then borrowed a truck from someone else, and attempted the erection, resulting in the plaintiff's injury when the pole came into contact with the power lines.

The issue in Walton-Dodge, as in the instant case, was whether the employer's conduct was so egregious that it was not entitled to workers' compensation immunity, which otherwise applied.[3]

The court in Walton-Dodge accepted jurisdiction and reversed, holding that "there is no evidence to support a finding 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." Id. at 2006. In the instant case, Petitioners asserted the same grounds for summary judgment to the trial court, got the same result, and made the same argument for reversal in the district court. The cases are indistinguishable for purposes of the jurisdiction issue.

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[3]In Walton-Dodge the employer was sued on a third-party claim by the party that had lent the truck, whom the plaintiff had initially sued. The court in Walton-Dodge held that the same standards applied as would have if the plaintiff had sued the employer directly. 21 Fla.L.Weekly at D2004.

On that issue, in a footnote, the Walton-Dodge court stated:

> In light of our determination that clearly and conclusively there were no disputed issues of fact and that the motion and order were based on the exclusivity provisions of §440.11, Fla. Stat. (1993), we have jurisdiction to review the matter under rule 9.130(a)(3)(C)(vi), Fla.R.App.P., under either the test promulgated in Hastings v. Demming, 21 Fla. L. Weekly D1756 (Fla. 2d DCA July 31, 1996), or the test promulgated in Breakers Palm Beach, Inc. v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994).

21 Fla.L.Weekly at D2006. (Emphasis added).

Thus, the Walton-Dodge court clearly and expressly determined appealability based on the district court's finding that there was no genuine issue of fact. Just as clearly, the trial court in Walton-Dodge felt there was an issue of fact. Walton-Dodge and the instant case absolutely cannot be reconciled, yet the Walton-Dodge court purports to be deciding the issue consistently with the Second District's ruling in the instant case.

The dissent in Walton-Dodge, while urging the First District to follow the Second District, was likewise unable to separate the trial court's determination that fact issues remained from the dissenting judge's opinion that the record showed a disputed issue of fact. The dissent baldly states: "I would dismiss this appeal because 'there are unresolved issues of fact as to whether or not the appellant was entitled to immunity"', and goes on the point in the record to fact issues precluding summary judgment. Id. at D2006. The author of the dissent spends hardly one word bothering to argue the trial court's basis for denial of the summary judgment motion.

The point could not be more clearly made: the Second

District's construction of the Rule makes jurisdiction turn on the merits; if the appellate court agrees with the trial court's determination that a fact issue existed, the result is dismissal instead of affirmance.

This is topsy-turvy. Whether the trial court was correct or not is the merits of an appeal, not jurisdiction. In an appeal under the Rule in question here, the issue on the merits should be whether an issue of material fact existed precluding summary judgment. If so, the trial court was correct, the order should be affirmed, and the case should be remanded without prejudice to the defendant to assert the immunity issue at trial. If, on the other hand, the district court determines there was no genuine issue of material fact, the trial court erred and the order should be reversed with judgment entered for the defendant. Under the Second District's test, every appeal under the Rule will be effectively decided on a motion to dismiss, instead of on the briefs.

The opinion in Gustafson's Dairy v. Phiel, 21 Fla. L. Weekly D2146 (Fla. 1st DCA September 30, 1996), exhibits the same inconsistency as Walton-Dodge. In Phiel, the plaintiff was injured in the course of employment when he reached his hand into a machine used for trimming plastic milk jugs at a dairy. 21 Fla. L. Weekly at 2146. He initially sued the machine's manufacturer, and later sued his employer on the basis that certain safety devices were installed but inoperable at the time of the accident. Id.

Like the instant case, the employer moved for summary judgment asserting workers' compensation immunity. Id. As in the instant

case, "[t]he trial court denied the motion without explanation." Id. The substantive issue was the same as in the instant case: whether the evidence showed conduct sufficiently egregious to amount to an "intentional act," so as to overcome workers' compensation immunity. Id. at 2147. Thus, like Walton-Dodge, Phiel is procedurally and substantively indistinguishable from the instant case. And, like Walton-Dodse, but contrary to the result in the instant case, the Phiel court accepted jurisdiction and reversed on the grounds that there was no genuine issue of fact precluding the employer's entitlement to workers' compensation immunity.

In analyzing the jurisdictional issue, the First District in Phiel acknowledged the disagreement among the courts as to the correct jurisdictional test, and announced it would follow the Second District in the instant case. Id. In stating its conclusion as to what that test is, the court stated:

> As in Hastings, we conclude that Rule 9.130(a)(3)(C)(vi) is intended "to apply only when an appellate court is presented with a record with facts so manifest it can readily conclude that a plaintiff's exclusive remedy is in fact workers' compensation..." Id. Thus, if the trial court denies a motion for summary judgment because questions of material fact remained relating to the issue of workers' compensation immunity, then the rule does not confer jurisdiction to review such a non-final order.

Id. (Emphasis supplied).

Thus, in the space of two sentences, the First District states the test set forth by the Second District in two contradictory formulae, one relying on the District Court's view of the record, the other on the trial court's. More to the point, the First

District applies the test to a case indistinguishable from the instant case and reaches the opposite conclusion. The cause of this confusion does not lie with the First District. It is inherent in the jurisdictional test asserted by the Second District in the instant case. The First District has not misconstrued the Second District's ruling; instead the First District has applied the test consistently with the test's own internal inconsistency. The Second District's jurisdictional test superficially purports to turn on the nature of the order appealed from, but in the end necessarily turns on the appellate court's view of the merits of the case. Thus, the Second District's ruling makes a simple and clear rule into a virtual non-rule: the merits determine jurisdiction and jurisdiction, the merits.

As the special concurrence in Phiel recognizes, the uncertainty engendered by the District Court's jurisdictional non-test "may lead to a plethora of motions to dismiss." Id. at 2148. Unless the trial courts were to start writing opinions in this class of cases, which is unlikely, virtually no order would be facially appealable under the Rule. Every case would require a review of the record and a de facto determination of the merits in order to determine appealability, leading to precisely the waste of judicial resources the Second District purportedly seeks to avoid.

The Second District's test is not only contrary to the intent of the Rule to allow review of orders denying a motion for summary judgment, it is simply too malleable to be workable in practice. Whether entitlement to workers' compensation immunity is "evident"

is in the eye of the judicial beholder. "As a matter of law" can refer to some construction of the immunity statute, or it can refer to the application of law to a given set of facts. The Second District's requirement that the facts be "crystallized" and "fixed and definite" can mean either that there really is no dispute as to the facts, or that factual disputes have been resolved in favor of the non-moving party. The element of "finality" can mean that the defendant cannot present the issue at trial, or that it has been finally decided the defendant will have to go to trial.

In the end, the Walton-Dodge and Phiel cases show that the Second District's search for "finality" in interlocutory appeals is illusory. "Final determination of entitlement to workers' compensation immunity as a matter of law" means different things to different courts, even when they profess to agree. The Second District's jurisdictional test does merely deconstruct, it self-destructs. It is not susceptible to consistent application, and will result in chaos and confusion. It should be rejected.

G. An Appealable Nonfinal Order Need Not Be Final -to Be Appealable.

Petitioners would submit that the ultimate source of the Second District's error lies somewhere deeper than the realm of mere mis-construction of a rule of procedure. A current running throughout the Second District's opinion and Respondent's arguments is the proposition that some element of finality is necessary for appealability, even for an interlocutory order under Rule 9.130 of the Rules of Appellate Procedure. This proposition has welled up and exerted its influence in cases under other sub-divisions of

Rule 9.130. See, Bravo Elec. Co. v. Carter Elec. Co., 522 So.2d 480 (Fla. 5th DCA 1988)(order merely granting plaintiff's motion for partial summary judgment on liability not appealable under Rule 9.130(a)(3)(C)(iv), because it did not actually enter judgment).

However, the proposition is fundamentally fallacious. By definition, an appealable nonfinal order need not be final to be appealable. The attributes of finality by which ostensibly final orders are tested should not be required of nonfinal orders specifically identified as being appealable under Rule 9.130. A nonfinal order appealable under the Rule should not have to meet arbitrary standards of "finality" extraneous to the wording of the Rule.

This oxymoronic requirement of nonfinal "finality" has been rejected in the area of criminal appeals under Rule 9.140, Fla.R.App.P. In a line of cases beginning with State v. Saufley, 574 So.2d 1207 (Fla. 5th DCA 1991), the district courts have rejected the distinction between an order merely granting a motion, on one hand, and an order actually granting the relief sought, on the other, for purposes of determining appealability of orders suppressing evidence and dismissing counts of indictments under Rule 9.140. Thus, in Saufley, the Fifth District ruled that an order merely granting a motion to suppress evidence was appealable even though it did not expressly state that the evidence was suppressed. And see, State v. Feagle, 604 So.2d 824 (Fla. 1st DCA 1991), State v. Nessim, 587 So.2d 1343 (Fla. 4th DCA 1991), State v. Moody, 578 So.2d 481 (Fla. 5th DCA 1991), State v. Smith, 578

So.2d 826 (Fla. 5th DCA 1991). The underlying rationale of Saufley and its progeny should be applied to the instant case: an appealable non-final order need not be final to be appealable; it need only meet the requirements of the particular rule authorizing interlocutory review. The distinctions and tests used to determine whether an ostensibly final order is appealable do not apply to appealable nonfinal orders. The Second District's and Respondents' attempt to impose the requirement of finality on an appealable nonfinal order should be rejected as the fish-out-of-water that it is.

H. Procedural Problems in the Instant Case Did Not Result From Petitioners Filing an "Unwarranted Appeal."

The Second District attempted to bolster its ruling by pointing to supposed "pitfalls" allegedly resulting from what it characterized as Petitioners' "unwarranted appeal."

As set forth in the Statement of Case and Facts, the case went to trial during the pendency of the appeal, resulting in a directed verdict for Petitioners. The trial court entered judgment and Respondents attempted to take a plenary appeal. Petitioners successfully moved to dismiss the appeal on the grounds that the final judgments were prematurely entered, because the trial court did not have jurisdiction during the pendency of the appeal to enter a final order pursuant to Rule 9.130(f). Respondents also filed motions to consolidate the two appeals, which the Second District denied as moot when the appeal was dismissed.

Petitioners take issue with the characterization of their appeal as "unwarranted." When Petitioners filed their notice of

appeal in January, the district courts were unanimous in their construction of the Rule. The arguments advanced by Respondents and accepted by the Second District in the instant case had been expressly rejected by two district courts, including the Second District, and no district court had accepted them.[4] As argued above in part D., there was and is a substantial body of case law in which the district courts have not only taken jurisdiction of but also reversed orders under facts indistinguishable from, and if anything more favorable to the plaintiffs than, those in the instant case. Petitioners' appeal was far from "unwarranted."

Furthermore, the record shows the problems in question did not result from the appeal, per se, but from the fact that the case went to trial while the appeal was pending. This could have been avoided by either a slightly faster decision from the District Court or by a short stay in the trial court, neither of which was within Petitioners' power to provide.

As stated in the Statement of Case and Facts, Petitioner's notice of appeal was filed January 23, 1996. Petitioners served their initial briefs February 5. Neither party needed extensions of time, and the case was fully briefed and ready for resolution in mid-March. The case went to trial the week of June 10 through 15. Petitioners' appeal was on the District Court's July docket, and the District Court dismissed the appeal by order dated July 31.

While Petitioners are not in a position to comment on the

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[4]The first deviation from the weight of precedent on this point appears to have been Judge Sharp, dissenting in J.B. Coxwell v. Shafer, 663 So.2d 659 (Fla. 5th DCA 1995).

workload of the lower court, if the District Court could have decided the appeal in the two and a half months between mid-March and the trial, the problems resulting from the overlap of the trial and the appeal would have been avoided. Likewise, if the trial court or District Court had granted a stay of the proceedings for the month and a half between the trial and when the District Court rendered its decision, the problems in question would not have arisen.

I* The Issue of Multiple Interlocutory Appeals is Irrelevant to the Resolution of the Instant Case.

The Second District's opinion raises the specter of the possibility of multiple interlocutory appeals in a single action as a further rationale for its ruling. That factor is not present in the instant case. Petitioners' appeal was their first and only interlocutory appeal.

In any event Petitioners agree that multiple interlocutory appeals should not be permitted. The Court could easily remedy this potential problem. First, the Court could adopt the reasoning of the Fifth District in ACT Corp. v. Devane, 672 So.2d 611 (Fla. 5th DCA 1996). In Devane, the trial court had denied the defendant's motion for summary judgment without prejudice to the defendant's renewing the motion after the plaintiff had an opportunity to conduct discovery. The defendant appealed under the Rule, and the Fifth District dismissed the appeal based on the distinction between a motion for summary judgment denied because it was premature, in that further discovery is necessary, and a motion for summary judgment denied on the grounds that, after completion

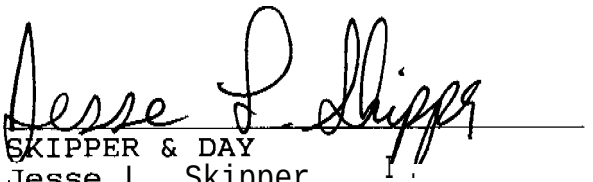
of all appropriate discovery, the trial court finds there are unresolved issues of fact. Under the Fifth District's ruling in Devane, the former is not appealable, the latter is.

The distinction, between a motion denied as premature to allow further discovery, and one denied because the trial court finds that material issues of fact remain after discovery is completed, would address the Second District's concerns about multiple appeals, while remaining true to this Court's intent that orders denying summary judgment on workers' compensation immunity be appealable. Under the holding of Devane, there will be only one properly appealable order under the Rule, such being an order rendered after all pertinent discovery has been completed. As in Devane, where the trial court declines to grant summary judgment because the trial court deems that further discovery is appropriate, whether the motion is denied or ruling deferred, an appeal would not be available.

On the other hand, a simpler solution is available. The Court could simply rule that a party is entitled to only one interlocutory appeal under the Rule. That would put the burden on the party, not the trial court or the district court, to determine when a case is ripe for summary judgment, and if denied, for interlocutory appeal. It would provide a bright-line test that could not conceivably lead to the jurisdictional labyrinth in which Petitioners have found themselves in this case. A party asserting workers' compensation immunity would always be entitled to one, and only one, interlocutory appeal.

CONCLUSION

The Second District's ruling in the instant case is contrary to this Court's pronouncements on the intended application of Rule 9.130(a)(3)(C)(vi), is contrary to the weight of precedent from the district courts, is contrary to the plain meaning of the rule, and is contrary to the policies and purposes of the Workers' Compensation Act. The Second District's jurisdictional test is impractical to apply, making jurisdiction depend on the merits of the case and vice-versa. It will result in confusion among practitioners, and the needless expenditure of judicial resources in determining jurisdiction on a case-by-case basis. The Second District erred, and this Court should accept jurisdiction of this case and reverse, remanding to the District Court for consideration of Petitioners' appeal on the merits.



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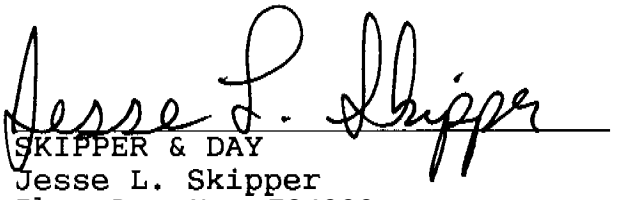
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioners' Initial Brief on the Merits has been furnished by U.S. Mail on this 22nd day of November, 1996 to Allyson Palmer, Esq., 2014 4th Street, Sarasota, FL 34237, Dan Carlton, Esq., 2831 Ringling Blvd., Bldg. C., Suite 111, Sarasota, FL 34237, Randy D. Witzke, Esq., Edmonds, Cole, Hargrave, Givens & Witzke, One North Hudson, Suite 200, Oklahoma City, OK, 73102, Douglas Wight, Esq., P.O. Box 3979, Sarasota, FL 34230, James R. Hutchens, Esq., 2015 Fruitville Road, Sarasota, FL 34237, Eric Schultz, Esq., P.O. Box 24317, Tampa, **FL** 33623, and **Kim** Staffa, Esq., Fox, Grove, Abbey, et al, 360 Central Avenue, 11th Floor, St. Petersburg, FL 33701.



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