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' REPLY BRIEF

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PRELIMINARY STATEMENT

The record in this proceeding is the record before the Second District Court of Appeal. Because the proceeding in the Second District was an interlocutory appeal under Rule 9.130, Fla.R.App.P., the parties prepared appendices to their briefs for purposes of making a record for the district court, instead of the record from the trial court being transmitted, as required by Rule 9.130(d) and (e).

In this proceeding, Petitioners have not prepared appendices for documents which appear in the record before the district court, although Respondents have. The only documents in Petitioners' appendices before this Court are documents from the second appeal, number 96-02667, which was dismissed and which was referred to in the Second District's opinion. Briefly, that appeal was an attempted appeal by Respondents from the trial court's granting of Petitioners' motions for directed verdicts at trial. The Second District dismissed that appeal due to the pendency of the first appeal, which is at issue in this proceeding.

TABLE OF CITATIONS

Florida Statutes

Florida Court Rules

STATEMENT OF THE CASE AND FACTS

Petitioners respond to the Statement of the Case set forth in Respondents' amended answer brief.

The gravamen of Respondents' action is that Petitioner Hastings was allegedly guilty of culpable negligence and intentional tort for not replacing ladder cables which failed, resulting in Respondent Deming's[1] injury. Am.Compl. ¶ 65. ASC's liability is premised on ASC's alleged negligent supervision of Hastings. Am.Compl. ¶ 93. Petitioners have argued that the foregoing at best shows simple negligence and a breach of the duty to provide a safe workplace, so that Petitioners have met their burden of showing undisputed entitlement to workers' compensation immunity, under Florida summary judgment standards.

Respondents have attempted to show various aggravating circumstances allegedly amounting to culpable negligence and intentional tort, in order to demonstrate an issue of material fact. As a result of such attempt, the following factual points have arisen.

First, Respondents assert that:

> 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. 10 and, (3) that the cables were very dry, rusted and had multiple broken strands. App. 10, 11, 12, and 14.

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[1] There seems to be confusion as to the spelling of Respondents' name. It appears in Respondents' pleadings and the case captions as "Demming", but in his affidavits, documents 11 and 12 in Respondents' appendix, he signed it "Deming". Petitioners, proceeding on the assumption that Mr. Deming spelled his own name correctly, have by and large adopted the latter spelling.

Respondents* amended answer brief, Page 1.

There is no support in the record for the foregoing assertions, in particular the assertion that Hastings knew or should have known anything about the alleged deteriorated condition of the cables.' The appendix citations Respondent provides do not support Respondents' assertions and provide no information relevant to this issue.

Appendix Document 10, the affidavit of Darrel Wilkerson, Sr., recounts Mr. Wilkerson's post-accident inspection of a portion of the broken cables, and concludes that the cables were the original cables. It contains no discussion pertinent to who might have known of the cables' condition.

Appendix documents 11 and 12 are affidavits of the Respondent/Plaintiff, Charles Deming. These affidavits describe an alleged incident in which Ernie Bedwell, a lower level supervisor at ASC, allegedly assured Charles Deming that the cables had been routinely replaced in accordance with the manufacturer's instructions, and that Deming need not be concerned about the "dry

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[2]Petitioners' responses to Respondents' unsupported assertions of fact are problematic. Where Respondents have cited to a deposition, affidavit or other document in the record to support an assertion, but the document does not support that assertion, Petitioners will discuss the document cited. Where Respondents have provided no record citation, there is nothing Petitioners can do but point out the lack of a citation and inform the Court that there is no evidence in the record to support Respondents' assertion, unless there is other evidence pertinent to the issue, which Petitioners will provide a citation for and discuss. It is not Petitioners' intention to be argumentative. It is merely that, if there is no evidence supporting one of Respondents' assertions, there is little more Petitioners can say than that there is no evidence on that issue.

appearance" of the ladder cables. Neither of these affidavits contain any information pertinent to Mr. Hastings, much less what Hastings' knowledge might have been pertaining to the condition of the ladder cables.

Appendix document 14 is the 139 page deposition of Darrel Wilkerson, Sr. Respondents cite to the entire deposition without any page numbers. For that reason alone this statement of fact may be disregarded. Furthermore, in any case, that deposition contains no evidence that could support the assertion that Hastings knew anything about the condition of the cable.

The other two factual assertions set out above, that Hastings knew of the manufacturer's replacement requirements and knew that the cables had never been replaced, likewise have no factual support in the appendix documents cited or anywhere else in the record.

Second, Respondent's repeated assertions, in the first paragraph of page 2 of Respondents' amended answer brief, that Hastings had "responsibility" for making sure the ladder was properly equipped and maintained, are not supported by citations to the record and should be disregarded.

In fact, contrary to Respondents' unsupported assertions, the only evidence on this issue is that the ladders, and their maintenance, were not within Petitioner Hastings' area of responsibility at ASC.

In his September 15, 1994, deposition, when asked about whether ladder trucks other than the ladder truck involved in the instant case had safety catches, Mr. Hastings responded:

> A. Yes, they do.
>
> Q. Do they have them on all sections?
>
> A. I'm quite confident they do, but this is not my department.
>
> Q. Okay.
>
> A. This is not the area of my endeavor.

Deposition of Herbert Hastings, September 15, 1994, pages 5-6."

Later in the same deposition, on page 8, Petitioner Hastings described the division of responsibilities at ASC as follows:

> Q. What other responsibilities did Mr. Schmith have other than participation in purchasing?
>
> A. Essentially he was operations and I was sales and management, so whatever.

Deposition of Herbert Hastings, September 15, 1994, Page 8.

Finally, on page 12 of the same deposition, when asked about the sale by ASC of a similar ladder truck, the following exchange occurred:

> Q. When was the first ladders [sic] sold?
>
> A. I don't know.
>
> Q. Was it sold...

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[3]Pages 5, 6, 8 and 12 of Hastings' September 15, 1994 deposition are attached to Appellant Hastings' Reply Brief in the District Court as Appendix Document 2.

> A. My memory isn't as great as it ought to be, maybe of these other fellows, they might have a better recollection, because I was not involved in that part of the business.

Deposition of Herbert Hastings, September 15, 1994, Page 12.

Thus, the evidence on the issue of Petitioner Hastings' "responsibility" with respect to the ladder trucks is undisputed in showing that he had none.

Third, on page 2 of Respondents' Amended Answer Brief, Respondents state that Hastings "direct[ed] Respondent to use the ladder..." There is not, and never has been, any allegation, testimony or evidence of any sort that Hastings ever directly supervised Mr. Deming, much less "directed" him to use the ladder truck in question.

Fourth, Respondents' characterization of the "Ernie Bedwell" incident is misleading as to what the evidence before the Court is. Basically, Mr. Demings' affidavits say that he asked Mr. Bedwell about the cables, and Mr. Bedwell assured him the ladder truck had been properly serviced and the cables were fine because they were replaced every two years in accordance with the manufacturer's instructions. From this record evidence, Respondents assert, with no indication of any sort that it is an inference, that Bedwell "actively deceived" Mr. Deming as to the condition of the cables.

Such characterization is misleading because the concept of deception implies not merely that Mr. X said "A" when "B" was true, but that he said "A" knowing "B" was true. In the instant case, Respondents have pointed to no evidence, and there is none, to indicate that Mr. Bedwell had any belief or any reason to believe

contrary to what he may have told Mr. Deming. Respondents have pointed to no evidence, and there is none, to indicate that Mr. Bedwell's statement, if in fact he said it, was anything other than a mistake, if in fact it was a mistake.[4]

Fifth, the phrasing of Respondents' sentence, that "...Bedwell, **who was under** the direction of Hastings, actively deceived Respondent...", suggests that Bedwell deceived Respondent at the express direction of Hastings. Respondent's affidavits, to which Respondents cite for support, contain no evidence supporting such an assertion, or even arguably relevant to such an assertion.

Finally, on page 33, Respondents make the assertion for the first time in their brief that "Hastings considered expending the funds to perform necessary repair on said...ladder...in order to make the ladder safe for use by employees." This materially misstates the facts of this case. By stating that Hastings' purpose in considering the repairs was to make the ladder safe, Respondents' necessarily imply that Hastings knew of the alleged deteriorated condition of the cables. However, as discussed above, there is no evidence anywhere in the record to support this crucial fact.

The deposition of Darrel Wilkerson Jr., to which Respondents cite, makes clear that the deponent's reference to making repairs

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'Petitioners dispute that Bedwell said what Mr. Deming says he did, and dispute that the cables had never been replaced. However, for purposes of this proceeding those disputes must be resolved in favor of Respondents. What Petitioners object to here is Respondents' taking this an unwarranted step further by asserting that Bedwell "actively deceived" Mr. Deming.

is to the truck, not the ladder.[5] Without the implied allegation that Hastings' knew of the alleged deteriorated condition of the ladder cables, Respondents' accusation that Hastings "chose to save the money, and directed employees to continue using the ladder while the ladder remained in its dramatically dangerous condition", and "chose to leave Mr. Deming at risk", are without factual support and not valid inferences or argument on the facts of the record.[6]

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[5] Deposition of Darrel Wilkerson, Jr., pages 8-14. Contrary to the statement in Respondents' brief, this deposition is not attached to Respondents' answer brief, nor is it included in the appendix. In fact this deposition was not even before the trial court at the time of the summary judgment hearing at issue, and was not a part of the record before the Second District. It was before the Second District in the other attempted appeal in this case, number 96-02667, as an attachment to "Appellants' Consolidated Response to Appellee, American Sign Company's Motion to relinquish Jurisdiction and Appellee, Herbert Hastings' Motion to Dismiss Appeal", served by Respondents on July 15, 1996. Thus, Petitioners would urge that Respondents' argument based on this deposition be disregarded. In the event the Court deems it appropriate to consider this deposition, Petitioners have provided the relevant portions in an appendix to this brief, as Appendix Document A.

[6] Likewise, there is in fact no evidence Hastings ever directed any employee to use the ladder in question here, or any of the ladder trucks.

SUMMARY OF ARGUMENT

The Court has amended the rule of appellate procedure at issue in this case, Rule 9.130(a)(3)(C)(vi), Fla.R.App.P. (hereinafter referred to as "the Rule"), apparently to comport with Respondents' and the Second District's arguments as to the Rule's proper application. However, the amended Rule should not apply to Petitioners, and the necessity of amendment makes clear that the prior Rule did allow for appeal as Petitioners have argued. Therefore Petitioners were and are entitled to an interlocutory appeal, and the Second District should be reversed for this case, regardless of the prospective application of the amended Rule.

If the amended Rule is to be applied in accordance with the Second District's ruling in the instant case, litigants in this State, even including employer/defendants asserting workers' compensation immunity, would probably be just as well off with no Rule at all. The number of orders appealable under the amended Rule will be very small, perhaps zero, because denial of a defendant's motion for summary judgment will rarely, if ever, finally preclude the defendant from presenting the immunity issue at trial. And, the excessive malleability of the standards for appealability - an order which "finally determines" a party is "not entitled" to immunity "as a matter of law" - will result in a motion to dismiss in most, if not all, attempted appeals under the Rule and will also result in materially inconsistent rulings from the district courts. Such bickering in non-dispositive satellite litigation will be a waste of the litigants' and the courts'

resources. It is better that a rule of such limited use and vexatious application not be on the books in the first place.

The interpretation of the Rule advanced by Petitioners would be preferable on all counts. Petitioners urge the interpretation set forth in Breakers Palm Beach v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994), with clarification from this Court that the Rule only allows appeal from orders denying summary judgment motions, and only allows one appeal per case. Such an interpretation would not be susceptible to misconstruction and would vindicate the important policies of the workers' compensation immunity statute.

Ultimately, whether cases like the instant case should be subject to interlocutory appeal is a question of procedural policy which is entirely for the Court to decide. Workers' compensation is one of the great public policy trade-offs in Florida legislation. Immunity from tort suits is the quid pro quo small businesses such as ASC expect in exchange for no-fault liability and the resulting extremely high workers' compensation insurance premiums. The considerable body of case law which has sprung up around this issue in the last 4 years shows that appellate supervision on workers' compensation immunity is greatly needed. In case after case, the district courts have found it necessary to reverse the state's trial courts when they have refused to grant summary judgment in cases in which it was evident the defendant's conduct did not exceed the immunity threshold. Thus, the need for appellate interlocutory review to protect workers' compensation

immunity has been demonstrated. The loss of the right to such review in cases like the instant case will eventually diminish employers' ability to rely on immunity, and thereby undermine the consensus supporting the workers' compensation quid pro quo. Workers' compensation immunity is important enough to warrant this protection. The better policy would be to allow interlocutory appellate review of cases such as the instant case.

Finally, the Court's decision in the instant case to some extent turns on the merits of the case, inasmuch as the question before the Court may be viewed as whether the instant case is the type of case which should or should not receive interlocutory appellate review. Thus some limited argument of the facts of the instant case is appropriate. However, Respondents have gone overboard in terms of both quantity and stridency.

In arguing the facts of the case, Respondents make factual statements unsupported by or contrary to the evidence and draw unsupported inferences with considerable regularity. Respondents have made statement after statement without citation or clear reference to anything in the record. These points are individually addressed in the preceding Statement of the Case and Facts.

Viewing the record before the District Court as a whole, two facts stand out. First, it was undisputed that Hastings and ASC were entitled to prima facie workers' compensation immunity, so that the burden to show facts sufficient to overcome such immunity shifted to Respondents. Second, the instant case boils down to nothing more than the alleged negligent maintenance of a piece of

equipment; i.e. that, allegedly, Hastings, solely by virtue of his position as president of ASC, and ASC itself, as Respondent Demings' employer, had a legal duty to provide a safe workplace and make sure that all equipment at ASC was properly and safely maintained, and failed to do so.

Petitioners submit that such a case cannot overcome the workers' compensation immunity threshold. The duty to provide a safe workplace is at the very heart of the duties included in and displaced by workers' compensation. The mere breach of such duties, without evidence of reckless disregard of a known danger, cannot amount to culpable negligence, much less intentional tort. Thus, because there is absolutely no evidence that Hastings knew of the alleged corroded condition of the ladder cables, Respondents cannot even begin to argue that Hastings' alleged disregard of such conditions was reckless or flagrant. The instant case simply is not a culpable negligence/intentional tort case. Petitioners simply should not have been sued. The trial court erred in denying summary judgment. Petitioners should be allowed to seek review of this error on interlocutory appeal under the Rule, in order to vindicate the important policy underlying the workers' compensation immunity statute.

ARGUMENT

I. THE RECENT AMENDMENT TO RULE 9.130(a)(3)(C)(vi) DOES NOT APPLY TO THIS PROCEEDING, AND PETITIONERS' HAD A RIGHT TO INTERLOCUTORY APPEAL UNDER THE PRIOR VERSION OF THE RULE.

The Court has recently amended the rule at issue in this proceeding, Rule 9.130(a)(3)(C)(vi), Fla.R.App.P. The amendment moves the phrase "as a matter of law" from the end of the Rule to immediately after the word "determines", so that the Rule now allows interlocutory appeal of "orders that determine as a matter of law that a party is not entitled to workers' compensation immunity." In adopting this amendment, the Court appears to have adopted Respondents' and the Second District's view of which orders should be appealable under the Rule.

The Court's adoption of this amendment also shows, however, that prior to the amendment, the Rule meant what Petitioners said it meant, otherwise it would not have needed amending.

The prior version of the Rule applies to the instant case because that version was in effect when Petitioners commenced their appellate proceeding. Changing the rules in the middle of Petitioners appeal would be fundamentally unfair. Petitioners relied on the Rule when they filed this appeal. At that time, there was no conflict in the case law from the district courts, and it was clear that the order in the instant case was appealable. Since then, Petitioners have found themselves in a procedural game in which the rules keep changing with every step in the proceedings. This has resulted in excessive litigation costs expended in order to resolve an extraneous, non-dispositive issue

which did not even exist until after Petitioners filed their appeal.

Petitioners are being whipsawed in the middle of what is apparently a struggle between the district court and the Supreme Court over interlocutory appeals. To dismiss Petitioners' appeal now on the basis that the Court has just changed the rules, after months of expensive appellate litigation, would be patently unfair. Whatever the future of this issue for others, Petitioners were entitled to an interlocutory appeal when they filed for one, their appeal was erroneously dismissed, and this Court should correct that error and reverse the Second District's dismissal with orders to consider the merits of Petitioners' appeal.

11. THE SECOND DISTRICT'S TEST FOR DETERMINING APPELLATE JURISDICTION IS UNWORKABLE, CONTRARY TO THE EFFICIENT AND PREDICTABLE ADMINISTRATION OF JUSTICE, AND CONTRARY TO THE PUBLIC POLICY EMBODIED IN THE WORKERS' COMPENSATION STATUTES.

The construction of the Rule set forth in Breakers Palm Beach, Inc. v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994), is not only the better construction of the Rule as a matter of syntax and grammar, but is also the best as a matter of policy, in terms of both the orderly, predictable and efficient administration of justice and the vindication of the policies of the workers' compensation statutes.

The Court's amended Rule, and the Second District's construction of the prior Rule, suggest two primary criteria for determining when an order is appealable. These are 1) whether the order determines immunity "as a matter of law", and 2) whether it finally determines the defendant is "not entitled" to immunity. Presumably both will be required. There are problems with both that make them impractical to apply.

The problem with "as a matter of law" is that it can mean two subtly different things. On one hand, an order on a summary judgment motion is always "as a matter of law", because even if there are factual disputes, those disputes can be resolved in favor of the non-movant and the law applied to those facts. Therefore, on summary judgment, every case boils down to a question of whether a certain set of facts have a given effect under the law. For example, in the instant case, the question of law is whether the facts, with all disputes resolved and all permissible inferences drawn in favor of Respondents, could amount to culpable negligence

and intentional tort. Such a question is by definition a question of law. On the other hand, "a matter of law" can mean a broad and abstract question of law divorced from specific factual circumstances.

The problem arises not only because there are two possible meanings, but even more because the difference between them is a matter of degree, not of kind or category. Whether a given summary judgment proceeding presents "a matter of law" or a matter of fact will come down to the degree of breadth of the legal proposition that the court perceives to be determinative of the case, and where on the continuum between the two extremes described above, between the most fact-specific issues of law to the most general, that the court feels a given issue becomes a question of law. The point is not that trial and appellate courts will always reach wrong decisions, but that they will inevitably reach materially inconsistent decisions. The amended Rule will result in endless hair-splitting on whether a certain case involves "a matter of law" or not, in turn resulting in continued confusion on this issue and more wasteful satellite litigation to determine appealability.

The second criterion is whether the order determines a defendant is <u>not entitled</u> to workers' compensation immunity. The problem is that a defendant's motion for summary judgment, asking the court to rule that the defendant <u>is</u> entitled to immunity as a matter of law, will never, or almost never, result in a ruling that the defendant <u>is not</u> entitled to immunity. A ruling that the defendant <u>is not</u> entitled to immunity will only result when the

plaintiff has successfully moved to strike the defense of workers' compensation immunity, whether as a motion for partial summary judgment or a motion to strike under Rule 1.140(b).[7] Petitioner submits that such motions and orders never, or all but never, occur. Thus, requiring such an order which strip away any possibility of interlocutory review under the Rule, and render the Rule a dead letter. If Florida employers are going to be entitled to interlocutory appeal only in the rare instances when an order denying summary judgment completely excises the workers' compensation immunity defense from the case, there is little point in allowing interlocutory appeals at all.

Another problem is that little of the reasoning and discussion on this issue so far makes sense in the context of the issue in the instant case, in which the "defense" of workers' compensation immunity is not really a defense. In the instant case, the prima facie applicability of workers' compensation immunity is undisputed, because there is no dispute that Deming was an employee of ASC and was injured in the course and scope of his employment. Instead, in the instant case immunity operates to raise the degree of fault the plaintiff must prove, from simple negligence to culpable negligence (for managerial employees, such as Hastings) or intentional tort (for the corporate employer). Thus, in cases such as the instant case, the "defense" of workers' compensation immunity will never be finally precluded, unless the plaintiff

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'Rule 1.140(b)., Fla.R.Civ.P., allows for a motion to strike a defense on the grounds that it fails to state a legal defense.

successfully moves for summary judgment on liability. Such a **phenomenon never,** or all but never, occurs. Thus, whatever the Court intends the Rule to cover, it will never again cover a case like the instant case, or any of the many cases on this issue. See e.g, J.B. Coxwell Contracting, Inc. v.Shafer, 663 So.2d 659 (Fla. 5th DCA 1995), Mekamy Oaks, Inc. v. Snyder, 659 So.2d 1290 (Fla. 5th DCA 1995), Emergency One, Inc. v. Keffer, 652 So.2d 1233 (Fla. 1st DCA 1995), Kennedy v. Moree, 650 So.2d 1102 (Fla. 4th DCA 1995), Breakers Palm Beach, Inc. v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994), Pinnacle Constr. Co. v. Alderman, 639 So.2d 1061 (Fla. 1st DCA 1994), Ross v. Baker, 632 So.2d 224 (Fla. 2d DCA 1994).

A point argued in Petitioners' initial brief before this Court is that the Second District's test authorized, and in many cases would require, a review of the record in order to determine jurisdiction. Those arguments apply equally under the amended Rule. The fact that well over 2/3 of Respondents' answer brief before this Court argues the substantive merits of the appeal below, despite the fact that only the jurisdictional issue is before the Court, makes the point better than Petitioners ever could that the Second District's and the amended Rule's jurisdictional tests require, or will be construed to require, an extensive inquiry into the merits of the case. The necessity of such inquiry will lead to wasteful and time-consuming satellite litigation in virtually every attempted appeal under the Rule.

In their initial brief Petitioners argued for a simple and

clear test: a party may appeal one order denying a motion for summary judgment asserting workers' compensation immunity. Such a ruling would make clear that only orders on summary judgment motions would be appealable; not orders denying motions to dismiss, and not orders refusing jury instructions on immunity, and not any other orders. Such a ruling would make clear that a party is not permitted multiple interlocutory appeals in a single civil action, the bogeyman raised by Respondents, the Second District, and other courts. A district court would merely have to determine whether the defendant's motion for summary judgment asserted workers' compensation immunity, and whether the defendant had taken a prior interlocutory appeal under the rule. If the answers were "yes" and "no" respectively, the order would be appealable. There would be no room for ambiguity, no fine distinctions to draw, no extensive record to review, no vague terms to construe. Such a test would be simple to apply and not conceivably susceptible to the confusion that has surrounded this issue since the beginning of 1996, and especially following the Second District's ruling in the instant case.

Another example of that confusion has appeared in the period of time between service of Petitioners' initial brief and preparation of their reply brief. In Wausau Ins. Co. v. Haynes, 21 Fla.L.Weekly D2605 (Fla. 4th DCA December 11, 1996), the Fourth District cited Breakers Palm Beach, Inc. v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994), for the proposition that it had jurisdiction to review an order denying a motion to dismiss asserting workers'

compensation immunity. However, the court's conclusion is contrary to the Fourth District's reasoning in Gloger, in which the court reasoned that:

> 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".

646 So.2d at 238.

The import of the above reasoning of the Fourth District in Gloger is that the phrase "as a matter of law" referred to summary judgment proceedings, in which the court must determine whether the movant is "entitled to judgment as a matter of law." Rule 1.510, Fla.R.Civ.P.

In Haynes, the Fourth District then went on to decide that, even though it felt it had jurisdiction under Gloger, the court would not exercise that jurisdiction because the issue was not sufficiently "ripe" for meaningful appellate review. Thus, the court reached the right result on the wrong reasoning and dismissed the appeal.

In a special concurrence, Judge Farmer stated that, but for Gloger, he would dismiss the case for lack of jurisdiction. Judge Farmer stated his disagreement with the reasoning of Gloger on the basis that the words "as a matter of law" are an adverbial phrase, that an adverbial phrase cannot modify a noun, and that the word "entitlement" in the Rule is a noun. Therefore, according to Judge Farmer, "as a matter of law" should have been held to modify "determine", a verb, and not "entitlement", a noun. The flaw in this reasoning is that the Rule does not use the word

"entitlement"; it says "entitled". Apparently Judge Farmer neglected to read the Rule.

Judge Farmer also asserts his agreement with the Second District's analysis of the intent of the Rule, stating:

> Rule 9.130(a)(3)(C)(vi) did not come from the ordinary processes of the Florida Bar Committee on Appellate Rules. Like the goddess Athena emerging full-grown from the head of Zeus, it suddenly appeared one day wholly formed from the mind of the supreme court in Mandico v. Taos Construction, 605 So.2d 850 (Fla. 1992).

Id. at D2606.

Judge Farmer analyzes Mandico, and concludes that the intent of the Rule is "to allow immediate appellate review of orders denying summary judgment on account of workers' compensation immunity only when 'it [i]s evident from a construction of the relevant statutes that the plaintiff's exclusive remedy was to obtain workers' compensation benefits.'" Id. (Emphasis in original). He also concludes that "the court intended to permit nonfinal review only at that stage when the pleadings are final and closed, and when the nature and extent of the evidence affecting the immunity is a matter of record." Id. at D2607.

The Havnes case is another example of the confusion surrounding this issue. Under the amended Rule, Petitioners predict the confusion will continue, due to vagueness and ambiguity in the operative terms of the amended Rule. The prior Rule, as construed by the Fourth District in Gloger, and clarified by this Court to make clear that the Rule only applies to orders denying summary iudgment motions and that a party gets only one interlocutory appeal in a case, would better serve the policies of judicial efficiency and upholding workers' compensation immunity.

111. AN APPEALABLE NON-FINAL ORDER NEED NOT BE FINAL TO BE APPEALABLE.

On page 6 of Respondents' amended answer brief, Respondents provide extensive argument on the requirement of finality in appellate jurisdiction. In response, Petitioners would repeat their assertion that the requirement of finality, and the various doctrines that have grown up around it, by definition apply only to final orders. By definition, appealable non-final orders need not be final to be appealable. See, State v. Sauflev, 574 So.2d 1207 (Fla. 5th DCA 1991). Respondents' arguments on this issue provide no basis for dismissing Petitioners' appeal.

IV. THE INSTANT CASE IS APPEALABLE UNDER THE AMENDED RULE.

Petitioners argue above that the Court's amendment to the Rule does not apply retroactively to the instant case. In the event the Court determines to the contrary, the application of the amended Rule to the instant case is at issue.

Based on the Committee Notes to the amended Rule, it appears that the Court, by adopting the amendment, intends to some extent to adopt for the amended Rule the Second District's view of the application of the prior Rule to the instant case. To the extent that is not so, Petitioners offer the following argument.

The amended Rule provides for interlocutory appeal of orders "which determine as a matter of law that a party is not entitled to workers' compensation immunity." Thus, there are two elements which must be shown for appealability. First, the order must make a determination "as a matter of law", that, second, the party is "not entitled" to immunity.

The order in the instant case was a determination "as a matter of law." Petitioners moved for summary judgment, asking the Court to determine whether the undisputed facts, drawing all inferences and resolving all doubts in favor of the non-moving party, could, as a matter of law, amount to culpable negligence or intentional tort. The Court determined that they could. This is just as much a question of law as any other. Any distinction between the question of law in the instant case and any other case is artificial, and at best one of degree and not of kind. Therefore the instant case meets the first criterion for appealability under the amended Rule.

Second, the order in the instant case denied Petitioners immunity, inasmuch as it required Petitioners to stand trial. Petitioners submit that once it was finally decided they had to stand trial, they lost their immunity. 5440.11, Fla.Stat. does not refer to immunity from judgment, it refers to immunity from suit. While the legal process must be given a reasonable time to sort out through orderly procedures which cases are entitled to such immunity and which are not, trial before a jury is too late. The best, most reasonable, time for making that decision is before trial on a motion for summary judgment. Denying summary judgment and thereby deciding that the defendant/employer must stand trial is a final determination that the defendant is not entitled to workers' compensation immunity. Therefore, Petitioners meet the second element of the jurisdictional test under the amended Rule, and should be permitted to pursue their appeal.

V. LARGE SECTIONS OF RESPONDENTS' ANSWER BRIEF ARE OF TENUOUS RELEVANCE TO THE ISSUE UNDER CONSIDERATION.

Respondents have offered lengthy discussion on several issues only tangentially related to the issue before the Court. Petitioners will briefly address those issues.

A. Respondents' Argument that Federal Summary Judgment Standards Under the Celotex Case Are Not the Law in Florida is Irrelevant Because Petitioners Have Never Asserted the Celotex Standard as a Basis for Summary Judgment or Reversal at any Point in the Instant Case.

Respondents have repeatedly argued the proposition that the federal summary judgment standards under Celotex v. Catrett are not the same as summary judgment standards under Florida law, which are applicable to this case. Respondents' obsessive repetition of this irrelevant argument is mystifying. Petitioners have repeatedly made it clear that they recognize the difference in the Florida and federal summary judgment standards, agree the Florida standard is more favorable to the non-movant, realize this case is governed by the Florida standard, understand the burdens imposed by the Florida standard, and nevertheless submit they were entitled to summary judgment, under the Florida standard. Whatever may have been said or written to give Respondents' counsel any erroneous, contrary impression has been long since clarified.

B. Respondents' Argument that the District Court Had No Jurisdiction to Consider the Defense of Failure to State a Cause of Action Because Petitioner Hastings Did Not Attempt to Appeal the Trial Court's Denial of Hastings Motion to Dismiss is Legally Erroneous and is Irrelevant, Because Hastings Does Not Assert Such Defense.

Respondents again make the argument that the trial court's early denial of Hastings' motion to dismiss, which asserted that Respondents' complaint did not plead allegations sufficient to overcome workers' compensation immunity, has some bearing on the instant proceeding.

Apparently, Respondents argue that, after denial of a defendant's motion to dismiss for failure to state a cause of action, that defendant may not argue the sufficiency of the pleadings, or for that matter even the elements of the cause of action (because that would be implicitly arguing the sufficiency of the pleadings), on a motion for summary judgment. Respondents further argue that Hastings' motion for summary judgment secretly, implicitly asserted the "defense" of failure to state a cause of action (even though nothing of the kind is set forth in the motion itself), which was improper under Respondents' conception of the law as set forth above. Respondents further suggest that the trial court's denial of Hastings' motion to dismiss was appealable under the rule, because it finally determined the legal sufficiency of the complaint for purposes of workers' compensation immunity. Based on this, Respondents argue that Hastings waived his right to appeal the sufficiency of the pleadings, was not permitted to raise the "defense" of failure to state a cause of action in the trial court, and was not permitted to raise such arguments in the

interlocutory appeal before the District Court. Therefore, Respondents appear to argue, because Hastings' motion and appeal are really, covertly based on the defense of failure to state a cause of action, the District Court did not have jurisdiction over the appeal. This analysis is wrong in several respects.

First, the argument is irrelevant because the basis for Hastings' motion for summary judgment and appeal was not "failure to state a **cause** of action." It has been clear all along that Hastings moved for summary judgment asserting entitlement to workers' compensation immunity as a matter of law, based on the record evidence construed most favorably to the non-movants, Respondents. No one but Respondents' counsel has ever suggested to the contrary.

Second, the proposition that a defendant may not address the legal sufficiency of a plaintiff's cause of action on a motion for summary judgment is erroneous. Rule 1.140 makes it clear that the issue of whether the plaintiff's allegations amount to a legally cognizable claim is virtually never waived, inasmuch as it may be raised at trial.[8]

Respondents' assertion that the order denying Hastings' motion to dismiss was appealable is also erroneous. Such an order would not be appealable under any of the tests or criteria advanced by any party to this proceeding.'

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[8]Of course, technical deficiencies in pleading may be waived, and **may** be settled by the court's ruling on a motion to dismiss.

[9]But see, Wausau Ins. Co. v. Haynes, 21 Fla.L.Weekly D2605 (Fla. 4th DCA December 11, 1996), discussed above.

Respondents and the Second District assert that only an order finally determining the workers' compensation issue, so that the defendant is precluded from presenting the issue at trial, is appealable. This standard cannot be met by an order denying a motion to dismiss filed by the defendant, and certainly was not met in the instant case.

Petitioners have consistently argued throughout the appellate proceedings in this case that only orders denying motions for summary judgment based on workers' compensation immunity are appealable under the Rule.[10] Petitioners have maintained, consistent with the Fourth District's reasoning in Breakers Palm Beach v. Gloger, 646 So.2d 237 (Fla. 4th DCA 1994), that the phrase "as a matter of law" in the Rule was intended as a reference to summary judgment procedure. Therefore, the assertion that an order denying a motion to dismiss is appealable under the Rule is directly contrary to Petitioners' position, as well as Respondents and the Second District's.

Respondents' arguments raise irrelevant issues and are based on demonstrably erroneous legal propositions. Such argument should have no bearing on the Court's analysis of the instant case.

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[10] See, Appellant's Response to Motion to Dismiss Appeal, served March 15, 1996.

C. **Respondents' Argument Pertaining to Whether Petitioner ASC May Assert a Failure to State a Cause of Action is Largely Irrelevant and Incorrect in Several Particulars.**

Respondents' counsel, by relying on her recollection of her perception of what occurred at the hearing on the summary judgment motions in December 1995, is attempting to invent an issue where none exists by improperly relying on matters not of record. The simple fact is that ASC's motion for summary judgment asserted that ASC was entitled to workers' compensation immunity based on the record. As Rule 1.510(c) unambiguously states, the record the trial judge is to consider on summary judgment includes the pleadings. Rule 1.510(c), Fla.R.Civ.P. Respondents' implied proposition, that Respondents' counsel was unfairly surprised at the hearing because Petitioner's counsel referred to Respondents' own complaint in his argument, is facially absurd. ASC's motion for summary judgment gave Respondents more than sufficient notice of the matters to be argued at the hearing.

D. **Respondents' Statements of the Elements of Election of Remedies and** Estoppel **are Irrelevant Because Those Defenses Are Not Directly at Issue in This Appeal.**

Respondents spend several pages establishing the elements of election of remedies and estoppel. Those defenses are not directly at issue in this proceeding. Therefore such argument is irrelevant and should be disregarded.

E. Respondents! Attempt to Have the Court Revisit the Entire Body of Case Law on the Exceptions to Workers' Compensation Immunity is Inappropriate Because Such Issue is Not Before the Court.

The entire section II of Respondent's brief, over 12 pages, is devoted to arguing the obvious proposition that the intentional harm standard, applicable to an employer such as ASC, is a different, and higher standard than the culpable negligence standard applicable to a managerial employee such as Hastings. Based on this single insight, Respondents urge that the entire body of law in this area is somehow in error, but fail to specify precisely what that error is.

Petitioners have at all times made clear the distinction between the two parties, Hastings and ASC, and the legal standards applicable to them.[11] Only Respondents seem to have had difficulty treating Hastings and ASC separately. The parties may have disagreed on the precise contours of the legal doctrines applicable to the instant case, and have certainly disagreed mightily as to their application to the facts of the instant case, but they have not substantially disagreed on the basic, substantive law governing

[11]Petitioners object to Respondents' attempt "summarize" their arguments, on pages 21 and 22 of Respondents' amended answer brief. First, the layout of the so-called "summary" makes it appear to be a quotation from Petitioners' briefs, complete with a footnote referring to Hastings' initial brief before the District Court. Petitioners wish to state unambiguously that the words in that single-spaced, indented paragraph are Respondents', not Petitioners'. Second, Respondents mischaracterize Petitioners' arguments, mostly by implying that Petitioners have taken the position that the "intentional tort" standard applies to Hastings as well as ASC. Petitioner Hastings has never taken such a position, and to do so would be ridiculous, inasmuch as the statute, 5440.11, Fla.Stat., expressly provides for culpable negligence as the applicable standard.

this case. Therefore, Respondent's Quixotic attempt to lure the Court into ruling on issues not before the Court is not only improper but seems almost pointless.

VI. RESPONDENTS' ARGUMENTS ON THE MERITS OF THE CASE ARE ERRONEOUS AND UNSUPPORTED BY THE RECORD.

As noted above, Respondents have extensively argued the merits of the case. While Petitioners believe Respondents have gone beyond what is appropriate, the merits of the case are at least partially relevant to the jurisdictional issue before the Court. Therefore, Petitioners will respond to Respondents and briefly address the merits of the case.

The gravamen of the instant case is that Respondent Charles Deming and his wife sued his employer, ASC, and Herbert Hastings, an officer and director of ASC, for injuries incurred in the course and scope of his employment. Respondents alleged that Petitioner Hastings was guilty of culpable negligence and intentional tort for not replacing the cables on a truck extension ladder, which failed, resulting in Respondent Deming's injury. ASC's liability is premised on ASC's alleged negligent supervision of Hastings. In short, Hastings and ASC are accused of not maintaining a piece of equipment in a sufficiently safe condition, resulting in Respondent's injuries.

At most, the foregoing allegations and the record evidence in the instant case amount to an alleged breach of the duty to maintain a safe workplace; i.e., simple negligence, so that Hastings and ASC are entitled to workers' compensation immunity. See, Fisher v. Shenandoah Gen. Constr. Co., 498 So.2d 882 (Fla.

1986), Clark v. Gumby's Pizza Systems, 674 So.2d 902 (Fla. 1st DCA 1996), J.B. Coxwell Contracting, Inc. v.Shafer, 663 So.2d 659 (Fla. 5th DCA 1995), Mekamy Oaks, Inc. v. Snyder, 659 So.2d 1290 (Fla. 5th DCA 1995), Emergency One, Inc. v. Keffer, 652 So.2d 1233 (Fla. 1st DCA 1995), Kline v. Rubio, 652 So.2d 964 (Fla. 3d DCA 1995), Kennedy v. Moree, 650 So.2d 1102 (Fla. 4th DCA 1995), Pinnacle Constr. Co. v. Alderman, 639 So.2d 1061 (Fla. 1st DCA 1994). Thus, Hastings and Schmith met their burden of showing they were entitled to judgment as a matter of law. Carbonell v. Bellsouth Communications, 675 So.2d 705 (Fla. 3d DCA 1996), Woodruff v. Government Employees Insurance Co., 669 So.2d 1114 (Fla. 1st DCA 1996).

In attempting to raise issues of fact, Respondents have made factual assertions which are unsupported by the evidence of record. The most important assertions Respondents have made are that Hastings knew of the alleged deteriorated condition of the ladder cables and that Bedwell "actively deceived" Respondent as to the maintenance of the cables.

The first point is the most crucial because without knowledge of the alleged deteriorated condition of the cables, Respondents cannot even begin to address at trial whether Hastings "recklessly or flagrantly" disregarded such condition. By definition, one cannot willfully disregard something of which one has no knowledge. Knowledge of the hazard is a *sine qua non* of culpable negligence. Mekamy Oaks, Inc. v. Snyder, 659 So.2d 1290 (Fla. 5th DCA 1995). As set forth above in the Statement of the Case, the record

evidence cited to support the contention that Hastings knew of the condition of the ladder cables shows nothing of the kind, and in fact provides no evidence even relevant to that point. There is simply no evidence supporting this contention.

The second assertion, that Ernie Bedwell "actively deceived" the Respondent as to the condition and frequency of replacement of the ladder cables, is also important because willful concealment of the (known) hazard is a primary factor in overcoming immunity, under Cunningham v. Anchor Hocking Corp., 558 So.2d 93 (Fla. 1st DCA), rev. denied, 574 So.2d 239 (Fla. 1990), and Connelly v. Arrow Air, Inc., 568 So.2d 448 (Fla. 3d DCA 1990), rev. denied, 581 So.2d 1307 (Fla. 1991).

The first error in Respondents' argument is that they accuse Ernie Bedwell. Ernie Bedwell is not a defendant in this case, and Respondents have not alleged liability of either Hastings or ASC for any action of Bedwell's.

The second error, as set forth above in the Statement of the Case, is that the evidence cited to does not show in any way that Bedwell "actively deceived" Respondent. There is simply no evidence that Bedwell knew his statements were false, assuming for purposes of summary judgment that the statements were false, and assuming that he in fact made them.

Regardless of which side is deemed to have the "burden of proof" on a particular point, Petitioners should have carried the day in the trial court and been granted summary judgment. Even with all disputes resolved and all reasonable inferences drawn in

favor of Respondents, the evidence is simply not capable of supporting the extreme level egregious and willful behavior required under the extensive case law from this Court and the district courts on this issue.

Petitioners should not have been sued. Once sued, they should have been granted summary judgment back in December 1995. Once denied summary judgment they should have obtained a reversal of through interlocutory appeal before the case went to trial in June 1996. They should not have been dragged through the financially exhausting procedural quagmire that has come about through Respondents' desire to avoid a decisive resolution of the immunity issue and the Second District's sudden decision to break with clear precedent and stop hearing these cases.

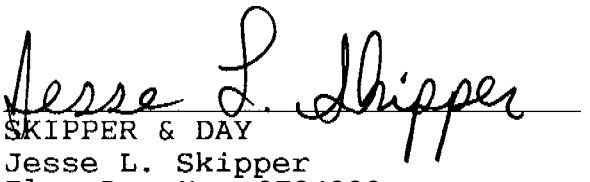
CONCLUSION

The Second District erred in dismissing Petitioners' appeal. The Second District's construction of Rule 9.130(a)(3)(C)(vi), and the presumed construction of the amended Rule, are contrary to the Court's original intent in enacting the Rule, will result in no or at most a very few appeals under the Rule, will result in further procedural confusion, and are contrary to policies underlying workers' compensation immunity.

The better construction, as a matter of construction and as a matter of judicial and statutory policy, would be the construction advanced by the Fourth District in Breakers Palm Beach v. Gloqer, clarified by this Court to make clear that the Rule only applies to summary judgment motions and only allows one appeal per case. Such

a construction would not be susceptible to the confusion that has arisen around this issue, and would vindicate the policies of the workers' compensation statutes. The number of cases reversing the trial courts on precisely the issue in the instant case attests to the need for interlocutory appellate review in this area. Workers' compensation immunity is the linchpin of the workers' compensation system. It is important enough to merit the extra protection which interlocutory review provides.

Respectfully submitted,



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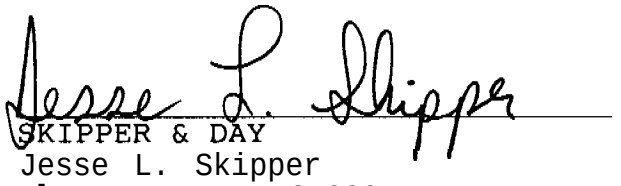
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioners' Reply Brief has been furnished by U.S. Mail on this 9th day of January, 1997 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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