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IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,269

H.C. HODGES CASH & CARRY, INC.,
a Florida Corporation,

Petitioner,

vs.

WALTON DODGE CHRYSLER-PLYMOUTH
JEEP AND EAGLE, a Florida
corporation,

Respondent.
---/

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

RESP ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent is in agreement with the Petitioner that this appeal concerns the scope of the jurisdiction vested in District Courts of Appeal by Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi), which permitted District Courts of Appeal to review Non-Final Orders of Trial Courts which determined "a party is not entitled to Workers' Compensation immunity as a matter of law.. ." Respondent herein (Third Party Defendant in the Circuit Court proceedings and Appellant in the District Court proceedings) will content that the rule permitted review of Orders denying Workers' Compensation immunity when there is no material dispute of fact and the Trial Court fails to grant immunity as a matter of law.

Respondent agrees with the statement regarding the pracedure which has brought this matter before this Court. Respondent further agrees that the Trial Court's Order denying Summary Judgment does not contain findings of fact. Respondent disagrees however that the record indicates that the denial was based upon the Trial Court's conclusion that there remained unresolved issues of fact as to the Respondent's entitlement to Workers' Compensation immunity. Respondent believes that there were no material disputes of fact regarding the Respondent's entitlement to Workers'

Compensation immunity. There was no dispute that the Plaintiff, CHARLIE DEPAUW, was an employee of the Respondent, WALTON DODGE, and was injured while working within the scope of his employment. CHARLIE DEPAUW applied for and received substantial Workers' Compensation benefits.[1]

It is respectfully submitted that the Trial Court's ruling was based on the Court's conclusion that the jury should determine whether the undisputed facts constituted an intentional tort or a virtual certainty of injury so as to breach the employer's immunity.[2] Consequently, the Trial Court either failed to rule as a matter of law that the Respondent/Employer was entitled to Workers' Compensation immunity pursuant to Section 440.11 Florida Statutes or, by implication, that the undisputed facts were sufficient that a jury could draw the conclusion that the employer committed an intentional tort so as to breach it's Workers' Compensation

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[1] The Employer/Carrier has filed a lien for Workers' Cornpensation benefits in this action pursuant to F.S.440.39 purportedly in the amount of $399,000.00.

[2] The following colloquy occurred at the Summary Judgment hearing.

The Court: What is Mr. Schuster saying is the question of law that I should grant the summary on?

Mr. Schuster: I'm saying that the question of law that you should grant the summary on is that the Employer is immuned (sic) from liability if they provide a Workers' Compensation coverage. The actions of a Employee that are grossly negligent are not sufficient grounds to pierce that immunity. The allegations in this Complaint of what Mr. Webb did, do not arise to the level of an intentional tort and additionally Mr. Webb as simply being an owner is not acting in a managerial or policy making function.

The Court: Aren't those questions of fact?

Mr. Schuster: I believe they are questions of law based on the agreed upon facts. (Petitioner's appendix C6-7)

immunity. In either instance, this is a ruling which is subject to review by the Appellant Court.

SUMMARY OF THE ARGUMENT

In Mandico v. Taos Construction, Inc., 605 So.2d 850 (Fla. 1992) this Court adapted Fla.R.App.P. 9.130(a)(3)(C)(vi) to provide appellate review of a narrow class of Non-Final Orders that determine a party is not entitled to Workers' Compensation immunity. This Court explained in Ramos v. Univision Holdinas, 655 So.2d 91 (Fla. 1995) that this review includes denials of Summary Judgment when it is evident that Workers' Compensation is the sole remedy available to the Plaintiff. A review of the transcript demonstrates that the Trial Court in denying the Motion for Summary Judgment believed that the conclusions of law as to whether the Employer's immunity had been breached were for the jury. This is the type of Non-Final Order Denying Summary Judgment that Ramos directs is appealable.

ARGUMENT

In 1935 the Florida Legislature enacted the first Florida Workers' Compensation Act which was a "system for compensating workmen accidentally injured and disabled as a direct result of their employment, regardless of the question of fault or negligence."[3] In exchange for the Employer providing benefits and giving up the right to claim that the accident was caused by the negligence of a fellow servant, or that the Employee assume the risk of his employment, or that the injury was due to the contributory negligence of the Employee, the Employer was granted immunity from suit by the Employee. Florida Chapter 17481, Sec. 11 (1935) (now codified in F.S.440.11(1)} stated: "the liability of an Employer prescribed in Section 10 shall be exclusive and in place of all other liability of such Employer to the Employee.. . and anyone otherwise entitled to recover damages from such Employer... ." This Court has noted that

> the concept of exclusiveness of remedy embodied in Fla. Stat. Sec. 440.11, F.S.A. appears to be a rationale mechanism for making the compensation system work in accordance with the purposes of the 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

[3] Chapter 17481, Florida 1935.

> 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 aparing him the costs, delay and uncertainty of a clad in litigation." Mullarkey v. Florida Feed Farms, 268 So.2d 363 at 366 (Fla. 1972)

Originally, a Trial Court's Non-Final Order denying an Employer the immunity provided by 440.11 could be appealed to the Appellate Courts through the process of a Writ for Prohibition. This procedure of review was criticized by this Court in Mandico v. Taos Construction, Inc., 605 So.2d 850 (Fla. 1992) where it noted that prohibition is an extraordinary Writ that is very narrow in scope and goes to the issue of whether an inferior Court is acting outside it's jurisdiction. Consequently, the Court held that the Writ of Prohibition to test the defense of Workers' Compensation immunity was inappropriate. Recognizing a need for the early resolution of the exclusivity of Workers' Compensation defense the Court went on to craft a new rule. They stated:

> we suspect that one reason the Court was willing to permit prohibition in Murphree[4] was to avoid the necessity of requiring the trial to proceed to it's conclusion when it was evident from a construction of the relevant statutes that Plaintiff's exclusive remedy was to obtain Workers' Compensation benefits. Because we are sensitive to the concerns for an early resolution of controlling issues, we amend Florida Rule of Appellate Procedure 9.130(a)(3) to read as follows:
>
> (3) review of Non-Final Orders of lower tribunals is limited to those which:
>
> (C) determine:

Winn-Lovett Tampa v. Murphree, 73 So.2d 287 (Fla. 1954)

(vi) that a party is not entitled to Workers' Compensation immunity as a matter of law."

There are pragmatic public policy reasons for permitting immediate review of entitlement to Workers' Compensation immunity since it is a controlling issue in the case which will conserve judicial effart. Such immediate review also supports the primary tenant of the Workers' Compensation compact between the Employer and the Employee in that the Employer will provide benefits to the Employee without regard to fault and in exchange the Employer is free of the expense and vexation of litigation. This review should be permitted in this narrow class of orders whenever the lower court rules that the Employer is not entitled to the defense of Workers' Compensation immunity or where the lower court denies the Motion for Summary Judgment when it should have been granted as matter of law.

In Ramos v. Univision Holdings, 655 So.2d 89 (Fla. 1995) this Court made clear that it's intent in amending the Appellate rules in Mandico was to provide for interlocutory review of Orders denying a Motion for Summary Judgment asserting Workers' Compensation immunity. In Ramos the Trial Court had denied the Employer's Motion for Summary Judgment asserting Workers' Compensation immunity and an interlocutory appeal was taken pursuant to Rule 9.130(a)(3)(C)(vi). The District Court reversed the Trial Court holding that the

Defendant, a property owner who had pulled the permit for the job, was entitled to immunity. This Court granted conflict review. The Defendant conceded that the District Court erred in finding he was entitled to Workers' Compensation immunity. However, he argued that he should be entitled to Summary Judgment since there was no evidence that he was negligent. In refusing to consider this argument this Court noted:

> a District Court is generally without jurisdiction to review a Non-Final Order denying a Motion for Summary Judgment. In Mandico v. Taos Construction, Inc., 605 So.2d 850 (Fla. 1992) we had 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 workers'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.

Thus, the Court has made clear that it's intention in amending the Appellate rule was to provide for reviewing Orders denying a Motion for Summary Judgment asserting Workers' Compensation immunity.

Petitioners suggest that the rule does not permit review of Orders denying Summary Judgment based on Workers' Compensation immunity unless the Order sought to be reviewed conclusively precluded the assertion of that defense. Ramos, Supra., belies that interpretation by referring in a footnote to three decisions where interlocutory review was

appropriately permitted for Orders denying a Motion for Summary Judgment.

In Holmes County School Board v. Duffell, 651 So.2d 1176 (Fla. 1995) the Plaintiff, Duffell, was injured by the negligence of a co-employee. He accepted Workers' Compensation benefits from the School Board. Because Section 768.28(9)(a), Florida Statutes immunized the co-employee from personal liability, a civil action was filed against the School Board. The School Board moved for Summary Judgment based on it's Workers' Compensation immunity. The Trial Court denied the Motion ruling that the School Board was not entitled to immunity since the action was in the nature of a third party claim and the School Board was being sued as a surrogate Defendant based on the negligence of a co-public Employee pursuant to 768.28(9)(a) and not in it's capacity as Duffell's Employer. The Appellate Court affirmed this ruling as did this Court on conflict review.

In General Motors Acceptance Corp., v. David, 632 So.2d 123 (Fla. 1st DCA 1994) an individual who had a deficiency with GMAC on a car loan went on a rampage killing nine GMAC Employees and wounding four others. The estate of two of the Employees filed suit against GMAC alleging that they knowingly and intentionally directed the decedents to work in an office collecting from individuals who had a history of crimes, violence and bad credit. They further alleged that the manager was grossly negligent in failing to install even

rudimentary security to protect them from the substantial certainty they would be exposed to armed felons. GMAC and the manager moved for Summary Judgment based on Workers' Compensation immunity. The Trial Court ruled, as a matter of law, that viewed in the light most favorable to the non-moving parties, the evidence could be sufficient for the jury to deny GMAC's Workers' Compensation immunity. On appeal the First District accepted the facts as described in the Trial Court's Order, but ruled that the Trial Court erred as a matter of law in permitting the action to go to the jury.

In Kennedy v. Moree 650 So.2d 1102 (Fla. 4th DCA 1995) the Employee was injured when he tripped over a television cable while carrying hot tar resulting in serious third degree burns. He received Workers' Compensation benefits and then sued the company's corporation officers. The Plaintiff acknowledged that he must establish culpable negligence to pursue a claim against the officers individually, but asserted that the issue of whether the facts arose to culpable negligence was one for the jury. The Trial Court denied the Defendant's Motion for Summary Judgment based on Workers' Compensation immunity without delineating the Court's reasons. An appeal was taken to the Fourth District which reviewed the record and found that the facts most favorable to the Plaintiff did not demonstrate the level of culpability necessary for overcoming the Workers' Compensation immunity and thus dismissed the suit.

Thus it would appear that there are two circumstances in which an appeal from a Non-Final Order determining that a party is not entitled to Workers' Compensation immunity as a matter of law is appropriate. Those circumstances such as Holmes County where the Trial Court ruled as a matter of law that the School Board was not entitled to Workers' Compensation immunity since they were not being sued as an Employer and the situations outlined in Kennedy and GMAC in which the Trial Court ruled as a matter of law that the evidence, viewed in the light most favorable to the non-moving parties, would be sufficient for the jury to reject Workers' Compensation immunity.

Petitioner relies on the Second District's decisions in Pizza Hut of America v. Miller, 674 So.2d 178 (Fla. 2d DCA 1996); American Television and Communication Corporation v. Florida Power Corporation, 679 So.2d 1190 (Fla. 2d DCA 1996); and Hastings v. Demming, 682 So.2d 1107 (Fla. 2d DCA 1996) for the proposition that Fla.R.App.P. 9.130(a)(3)(C)(vi) does not permit review of a Non-Final Order Denying Summary Judgment unless the Order Denying Summary Judgment specifically precludes the Defendant from asserting entitlement to Workers' Compensation immunity. This is based on the statement in Hastings that "the Order denying a Motion for Summary Judgment must essentially determine the non-existence of the Workers' Compensation defense, such that the party asserting the defense is precluded from having a jury decide the issue."

Hastings 682 So.2d at 1109. Such a restrictive interpretation would have prohibited review in GMAC, Kennedy and Mandico[5] since in each case the Trial Court would have permitted the matter to go to a jury.

The Hastings' Court failed to recognize that this Court has created an exception to the rule in that narrow area involving Workers' Compensation immunity that Orders denying a Motion for Summary Judgment are non-final, non-appealable Orders. Obviously, if there are material disputes of fact regarding the Workers' Compensation immunity which cannot be stipulated to for the purposes of Summary Judgment, a ruling by the Court would be premature. In this situation the appropriate response would be similar to the Trial Court in ACT Corporation v. Devane, 672 So.2d 611 (Fla. 5th DCA 1996) in which they denied Summary Judgment pending conclusion of discovery. However, when the record is fully developed by depositions and Affidavits and the Trial Court determines that the facts are such that the issue of immunity should be submitted to a jury, then the ruling should be subject to review to determine whether the Trial Court failed to grant the Motion as a matter of law on those facts.

This was the nature of the appeal in Walton Dodge v. Hodges, 679 So.2d 827 (Fla. 1st DCA 1996). Extensive discovery had been taken prior to the Motion for Summary

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[5] Taos Construction, Inc., v. Mandico, 566 So.2d 910 (Fla. 4th DCA 1990) (Dissent)

Judgment so that there was no dispute of material fact, only the conclusions of law to be drawn from those facts. When Hodges raised the issue as to the identify of one of the individuals involved in the accident, Walton Dodge stipulated solely for the purpose of the Summary Judgment hearing, that the individual was an owner of Walton Dodge. This was done so that there could be no viable argument that there were any disputed material facts. The First District reviewed the entire record and was also of the conclusion that there were no disputes of material fact. Consequently the trial Court was in error in apparently determining that the undisputed facts, viewed in the light most favorable to the non-moving party, was sufficient that a jury could deny Walton Dodge's Workers' Compensation immunity.

Consequently, jurisdiction was proper in the First District to review the denial of Walton Dodge's Motion for Summary Judgment under Rule 9.130(a)(3)(C)(vi) as it was described by this Court in Mandico and explained in Ramos. Whether the chances in the rule adopted by this Court on November 28, 1996, will now provide for an interlocutory appeal only when the Trial Court rules as a matter of law that the Defendant is not entitled to assert the defense of Workers' Compensation immunity remains to be seen. If so, it should be prospective in it's application. However, it would be better policy to permit interlocutory review of this narrow class of cases to maintain the quid pro quo of the Workers'

Compensation system. In virtually all cases a prima facia claim to Workers' Compensation immunity is established since the Employee has received Workers' Compensation benefits. This Court noted in Tucker v. Resha, 648 So.2d 1187 (Fla. 1994) in regard to the qualified immunity of public officials that immunity from suit is effectively lost if a case is erroneously permitted to go to trial. One of the consequences from erroneously lost immunity is the expense of litigation. Thus, in Tucker this Court created a special appellate rule to permit interlocutory review of an Order denying Summary Judgment based upon a claim of qualified immunity to the extent that the Order turns on an issue of law.

To delay the expeditious resolution of the Employer's Workers' Compensation immunity denies to the Employer the benefit of the bargain, to be free from litigation involving work place injuries. This would circumvent the express purpose of the Workers' Compensation statute. That purpose is to "assure the quick and efficient delivery of disability and medical benefits to an injured worker at reasonable cost to the Employer," based "on a mutual renunciation of common rights and defenses by Employers and Employees alike." Sec. 440.015, Fla. Stat. 1993. This Court should hold that the District Courts of Appeal had jurisdiction to hear the appeal herein.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court hold that the District Court in Walton Dodge Chrysler Plymouth Jeep & Eagle, Inc., v. H. C. Hodges Cash & Carry, Inc., 679 So.2d 827 (Fla. 1st DCA 1996) had jurisdiction to hear the appeal of the Trial Court's denial of the Respondent's Motion for Summary Judgment and remand this cause with instructions to comply with the Mandate of the District Court.

Respectfully Submitted,

CHARLES A. SCHUSTER, Esquire

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished to Alan Horky, Esquire, 700 South Palafox Street, Suite 300, Pensacola, Florida, Robert Crongeyer, Esquire, Beggs & Lane, Blount Building, Pensacola, Florida, and David Simpson, Esquire, 909 Mar Walt Drive, Suite 1024, Ft. Walton Beach, Florida, by hand delivery or U. S. Mail this 18th day of April, 1997.

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