ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. **89,269**

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

Petitioner,

v.

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

Respondent.

_______________________________________/

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

PETITIONER'S INITIAL BRIEF

ALAN R. HORKY
Florida Bar No. : 765104
Fuller, Johnson & Farrell, **P.A.**
Post Office **Box** 12219
Pensacola, Florida 32581
(904) 434-8845
Counsel **for** Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND **FACTS** 1

SUMMARY OF ARGUMENT 4

ISSUES **5**

I. WHETHER FLA.R.APP.P. 9.130(a)(3)(C)(vi), AS DRAFTED AT THE TIME OF THE PROCEEDINGS BELOW, PERMITTED DISTRICT COURTS OF APPEAL TO REVIEW ORDERS DENYING SUMMARY JUDGMENT ON THE BASIS OF WORKERS' COMPENSATION IMMUNITY, IN CASES IN WHICH THE DENIAL WAS BASED UPON THE TRIAL COURT'S CONCLUSION THAT THERE EXISTED UNRESOLVED ISSUES OF MATERIAL FACT

CONCLUSION 15

CERTIFICATE OF SERVICE 15

APPENDIX 16

TABLE OF AUTHORITIES

CASES:

ACT Corporation v. *Devane,* 672 So.2d 611
(Fla. 5th DCA 1996) 8

American Television and Communication Corp. v. Florida Power Corporation, 679 So.2d 1190
(Fla. 2d DCA 1996) 2, 8

Barns v. Dawkins, 624 So.2d 349
(Fla. 1st DCA 1993) 11

Breakers Palm Beach v. *Gloger,* 646 So.2d 237
(Fla. 4th DCA 1994) 7, 8, 10, 11

City of Lake Mary v. Franklin, 668 So.2d 712
(Fla. 5th DCA 1996) 8, 10, 11

Eller v. Shova, 630 So.2d 537 (Fla. 1993) 7

English v. McCrary, 348 So.2d 293,298 (Fla. 1977) 6

Gustafson's Dairy, Inc. v. Thiel, 681 So.2d 786
(Fla. 1st DCA 1996) 9

Hart v. Hart, 629 So.2d 1073 (Fla. 2d DCA 1994) 11

Hustings v. Demming, 682 So.2d 1107
(Fla. 2d DCA 1996) 2, 4, 8, 9, 10, 11, 12

Integrity Homes of Central Florida, Inc. v. Goldy, 672 So.2d 839 (Fla, 5th DCA 1996) 8

Johnson v. *Jones,* 515 *U.S.* ____, 132 L.Ed.2d 238,
115 S.Ct. 2151 (1995) 12, 13, 14

Mandico v. *Taos Construction, Inc.,*
605 So.2d 850,854 (Fla. 1992) 3, 5, 6, 7, 9, 10, 11, 12

Pizza Hut of America v. *Miller,* 674 So.2d 178
(Fla. 2d DCA 1996) 2, 8

Ross v. Baker, 632 So.2d 224 (Fla. 2d DCA 1994) 7, 8

Russel *v. State,* 71 Fla, 236, 71 So. 27 (Fla. 1916) 10

Shova v. Eller, 606 So.2d 400 (Fla. 2d DCA 1992). 7

Sullivan v. Liberty Mutual Ins. Co., 367 So.2d 658
(Fla. 4th DCA) *cert. denied,* 378 So.2d 350 (Fla. 1979) 12

Travelers Ins. Co. *v. Bruns,* 443 So.2d 959,
961 (Fla. 1984) 5, 12

Tucker v. *Resha,* 648 So.2d 1187 (Fla. 1994) 12

Walton Dodge Chrysler-Plymouth Jeep and
Eagle, Inc. v. H.C. Hodges Cash & Carry, Inc.,
679 So.2d 827, 830-831 (Fla. 1st DCA 1996) 2, 9

Wausau Insurance Company v. Haynes,
683 So.2d 1123 (Fla. 4th DCA 1996) 8

Winn-Lovett, Tampa v. *Murpree,* 73 So.2d 287
(Fla. 1954) 5, 6

OTHER AUTHORITIES:

Amendments to Florida Rules
of Appellate Procedure, 21 F.L.W.
S-507, App. S6-7 (Fla. Nov. 22, 1996) 4, 10, 12

15-A Wright and Miller, § 3914.10 14

Fla.R.App.P. 4.2. 5

Fla.R.App.P. 9.130. .... 5, 6, 7, 12

Fla.R.App.P. 9.130(a)(3) 6

Fla.R.App.P. 9.130(a)(3)(C)(vi) 1, 2, 3, 8, 9, 10

Fla.R.App.P. 9.130(a)(3)(C)(viii) 12

Fla.R.App.P. 9.030(a)(2)(A)(iv) 2

STATUTES:

§ 440.11, Fla. Stat. 2, 7

28 U.S.C. § 1291 13

STATEMENT OF THE CASE AND FACTS

This appeal concerns the scope of the jurisdiction vested in district courts of appeal by Fla.R.App.P. 9.130(a)(3)(C)(vi), which, as drafted at the time of the proceedings below[1], permitted District Courts of Appeal to review non-final orders of trial courts which determine "a party is not entitled to workers' compensation immunity as a matter of law . . ." Petitioner herein (Defendant and Third Party Plaintiff in the Circuit Court proceedings, and Appellee in the District Court proceedings) will contend that the rule as formerly drafted did not permit review of orders denying workers' compensation immunity, unless the order sought to be reviewed conclusively precluded the assertion of the defense.

The relevant facts are that in Walton County Circuit Court Case No. 94-0733-CA, the Plaintiff, Charlie DePauw, and his spouse brought an action against Petitioner herein, for the catastrophic personal injuries which he sustained during the course and scope of his employment with Walton Dodge Chrysler Plymouth Jeep and Eagle, Inc., the Respondent herein. Petitioner filed a third party claim against the Respondent, alleging that the Respondent through its management and employees had engaged in culpable negligence resulting in injury to the Plaintiff, Charlie DePauw.

---

[1] The present version of the rule now reads:

> (a) Applicability.
>
> . . .
>
> (3) Review of non-final orders of lower tribunals is limited to those that
>
> . . .
>
> (C) determine
>
> . . .
>
> (vi) that, as a matter of law, a party is not entitled to workers' compensation immunity; ~~as a matter of law; or~~

Following discovery, the Respondent moved for summary judgment on the basis of its entitlement to workers' compensation immunity under § 440.11, Fla. Stat. (App. A, p.2, B). The trial court entered an order denying summary judgment. The order does not contain findings of fact, however, the record indicates that the denial was based upon the trial court's conclusion that there remained unresolved issues of material fact as to the Respondent's entitlement to workers' compensation immunity (A, p.2, 6, B, Cl-9).

Respondent brought an appeal, relying upon § 9.130(a)(3)(C)(vi), Fla.R.App.P., as grounds for the District **Court's** exercise of jurisdiction.[2] The District Court of Appeal, in ***Walton Dodge Chtysler-Plymouth** Jeep **and Eagle, Inc.** v. **H.C. Hodges Cash** & **Carry, Inc.***, 679 So.2d 827, **830-83**1 (Fla. 1st DCA 1996) held:

> . . . 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.

The District Court of Appeal reversed and remanded with instructions that the trial court enter a summary judgment in favor of Walton Dodge,

Petitioner filed a motion requesting that the District Court of Appeal certify that its exercise of jurisdiction expressly and directly conflicted with the opinion of the Second District Court of Appeal in ***Hustings* v. *Demming,*** 682 So.2d 1107 (Fla. 2d DCA 1996). This was denied. Petitioner thereafter requested that this Court exercise its discretionary jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv), which provides that the discretionary jurisdiction of the Supreme Court may be

---

[2] Respondent did not challenge the District Court's exercise of jurisdiction, in that briefing and oral argument took place prior to the rendition by the District Court of Appeal, Second District, of its opinions in ***Pizza Hut of America v. Miller,*** 674 So.2d 178 (Fla. 2d DCA 1996); ***American Television and Communication Corp. v. Florida Power Corp.,*** **679** So.2d 1190, (Fla. 2d DCA 1996); and ***Hustings* v. *Demming***, 682 So.2d 1107 (Fla. 2d DCA 1996).

sought to review decisions of district courts of appeal based upon express and direct conflict with decisions of other district courts of appeal.

This Court entered an order granting the petition (D).

SUMMARY OF THE ARGUMENT

This Court in adopting Fla.R.App.P. 9.130(a)(3)(C)(vi) in *Mandico v. Taos Construction, Inc.*, 605 So.2d 850,854 (Fla. 1992), as evinced by the language employed in that opinion, and as evinced by the text of the rule it adopted, intended to permit review of a narrow class of non-final orders in which a trial court determines as a matter of law that a party is not entitled to workers' compensation immunity. Subsequent decisions of the District Courts of Appeal, which permitted review of orders denying workers' compensation immunity on the basis of unresolved factual issues were wrongly decided. This Court's intent and rationale in adopting the amendment were fully explained in ***Hustings v. Demming,*** 682 So.2d 1107 (Fla. 2d **DCA** 1996). The Court removed any remaining doubt as to its intent in adopting the ***Amendments to the Florida Rules of Appellate Procedure,*** **21** F.L.W. **S-507,** App.S6-7 (Fla. Nov. **22,** 1996).

ARGUMENT

I. THE DISTRICT COURT OF APPEAL WAS WITHOUT JURISDICTION TO REVIEW THE ORDER OF THE CIRCUIT COURT BELOW, DENYING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE **BASIS** OF WORKERS' COMPENSATION IMMUNITY, BECAUSE THE CIRCUIT COURT DID NOT RULE AS A MATTER OF LAW THAT THE RESPONDENT WAS NOT ENTITLED TO WORKERS' COMPENSATION IMMUNITY,

Florida Rule of Appellate Procedure 9.130 is the successor of Rule 4.2, which was adopted in **1962,** and which formerly governed interlocutory appeals, Rule 9.130 **was** intended to reduce the number of appealable non-final orders, from what had been permissible under the former rule. The theory underlying adoption of the more restrictive rule was that appellate review of non-final judgments wastes judicial resources, and needlessly delays final judgment. ***Travelers Ins.*** Co. ***v. Bruns***, 443 So.2d 959,961 (Fla. 1984). Rule 9,130 as originally adopted did not provide for review of non-final orders denying workers' compensation immunity, as a matter of law, or otherwise. Formerly, a party which had been denied dismissal or *summary* judgment on the basis of workers' compensation immunity, had the option of seeking prohibition from an appellate court, as was permitted in ***Winn-Lovett, Tampa* v. *Murphree***, 73 So.2d 287 (Fla. 1954), or seeking plenary review after entry of final judgment.

This Court however, in ***Mandico v. Taos Construction, Inc.,*** 605 So.2d 850, 854 (Fla. 1992), expressly receded from ***Murphree,*** characterizing the holding in that case as an unwarranted extension of the principle of prohibition, The **court's** rationale was that prohibition is an extraordinary writ by which a superior court may prevent an inferior court, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction. The writ is narrow in

scope and must be employed with caution and utilized only in emergency situations to prevent an impending injury where there is no other appropriate legal remedy. Prohibition may not be used to divest a lower tribunal of jurisdiction to determine its own jurisdiction, nor may it be used to test the correctness of a lower court's determination of its jurisdiction "where the existence of jurisdiction depends on controverted facts that (the lower court) has jurisdiction to determine." ***Mandico,* 605** So.2d at 854, citing ***English* v. *McCrary*, 348** So.2d 293, 298 (Fla. 1977). In so ruling, the court stated (605 So.2d at 854-855), that

> We suspect that one reason the court was willing to permit prohibition in *Murphree* was to avoid the necessity of requiring the trial to proceed to its conclusions when it was evident from a construction of the relevant statutes that the plaintiffs exclusive remedy was to obtain workers' compensation benefits. Because we are sensitive to the concern for an early resolution of controlling issues, we amend Florida Rule of Appellate Procedure 9.130(a)(3) to read as follows:
>
> **(3)** Review of non-final orders **of** lower tribunals is limited to those which:
>
> . . .
>
> (C) determine:
>
> . . .
>
> (vi) that a party is not entitled to workers' compensation immunitv *us a matter of law,*
> (Emphasis supplied by the Petitioner)

This **Court's** amendment of the rule in ***Mandico*** was intended to permit immediate review of a narrow class of orders - those in which the lower tribunal precluded the defendant from asserting the defense of workers' compensation immunity.

Following the amendment of Rule 9.130 in ***Mandico*** however, the district courts of appeal interpreted the amendment with virtually unanimity, as permitting review of non-final orders denying dismissal or *summary* judgment on the basis of workers' compensation immunity, even if the denial

was based upon the trial court's determination that there existed unresolved factual issues. This interpretation of the *Mandico* amendment appears to have had its origin in *Ross v. Baker*, 632 So.2d 224 (Fla. 2d DCA 1994). In *Ross*, the trial court initially granted, but subsequently denied, summary judgment, holding that the defendants were not entitled to assert the defense of workers' compensation immunity.[3] Because the precedent on which the trial court relied was subsequently overruled, the Second District Court in *Ross* reversed the trial court's denial of summary judgment, and remanded with instructions to enter summary judgment for the defendants. The court went on to state however, in what is purely dicta, that (632 So.2d at 255)

> It seems somewhat unusual to treat an order denying (emphasis added by the court) a motion as an order 'determining' an issue. At least in some instances, 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. Nevertheless, we conclude that the Supreme Court intends for this court to review this type of order.

Subsequently, relying in part upon the dicta set forth in *Ross*, the Fourth District Court of Appeal in *Breakers Palm Beach v. Gloger*, 646 So.2d 237 (Fla. 4th DCA 1994), in response to a motion to dismiss an appeal from an order denying summary judgment based upon unresolved issues of fact, held that the amendment adopted in *Mandico* permitted review of that type of order. The court's reasoning was as follows (646 So.2d at 247, 248)

> 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

---

[3] In *Ross*, the trial court's denial of summary judgment was based upon the holding of the Second District Court in *Shova v. Eller,* 606 So.2d 400 (Fla. 2d DCA 1992), in which that court held that certain provisions of § 440.11, Fla. Stat., which granted immunity to corporate officers and supervisors, were unconstitutional. That decision was reversed by this Court in *Eller v. Shova*, 630 So.2d 537 (Fla. 1993).

> entitled to workers' compensation immunity'. The key words, when placed at the beginning, modify 'determine'.
>
> By putting the key 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'.[4]

The dicta in *Ross* and the holding in *Breakers* was thereafter adopted by the Fifth District Court of Appeal. *City of Lake Mary v. Franklin*, 668 So.2d 712 (Fla. 5th DCA 1996); Contra *Integrity Homes of Central Florida, Inc. v. Goldy*, 672 So.2d 839 (Fla. 5th DCA 1996); *ACT Corporation v. Devane*, 672 So.2d 611 (Fla. 5th DCA 1996) (adopting the *Ross, Breakers* and *Franklin* courts' interpretation of the rule).

Subsequent to briefing and oral argument in this case, but before rendition by the First District Court of Appeal of its opinion, the Second District Court of Appeal rendered its opinions 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). In each of these cases, the Second District Court of Appeal squarely held that Fla.R.App.P. 9.130(a)(3)(C)(vi) does not permit review of a non-final order denying summary judgment or dismissal on the basis of workers' compensation immunity, unless the order denying summary judgment specifically precludes the defendant from asserting entitlement to workers' compensation immunity.[5] Petitioner contends that the *Hastings*

---

[4] This reasoning has been criticized as a failure to follow the rules of grammar. *Wausau Insurance Company v. Haynes*, 683 So.2d 1123 (Fla. 4th DCA 1996) (concurring opinion of Judge Farmer).

[5] The majority of the district court below appears to have read *Hastings* as allowing the appellate court to review the motion, the trial court's order, and the record to determine if,

decision is in accord with this Court's intent as expressed in *Mandico* and the rule.

In declining to follow the Fifth and Fourth District Courts of Appeal in their interpretation of the rule, the Second District Court of Appeal in *Hastings*, 682 So.2d at 1109 relied upon the language employed by this court in its *Mandico* decision. The court in *Mandico* stated that the rule was intended to permit appellate review of non-final orders holding that a party is not entitled to workers' compensation immunity, in cases in which it is "evident" that workers' compensation is the sole remedy available to the plaintiff. The court in *Hastings* noted that in an earlier decision,

---

regardless of the trial court's basis for entry of the order sought to be reviewed, there are material disputed facts. *Walton Dodge*, 679 So.2d at 831 n.1; *see also Gustafson's Dairy, Inc. v. Thiel*, 681 So.2d 786 (Fla. 1st DCA 1996) (concurring opinion of Judge Wolf). Petitioner herein respectfully contends that this reading of *Hastings* is simply incorrect. The *Hastings* court stated its holding (682 So.2d at 1109) as follows:

> . . . the supreme court intended rule 9.130(a)(3)(C)(vi) 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, thereby promoting an early resolution of the case at the appellate level. We conclude, therefore, that in amending the rule the supreme court's clear intent was to confer jurisdiction to review only that type of nonfinal order in which a lower tribunal, based on undisputed material facts, has determined clearly and conclusively, *beyond doubt*, that a party is not entitled to workers' compensation immunity as a matter of law (emphasis added by Petitioner). Accordingly, to be appealable under rule 9.130(a)(3)(C)(vi), an order denying a motion for summary judgment asserting workers' compensation immunity must essentially determine the nonexistence of that defense such that it effectively precludes a party from having a jury decide whether a plaintiff's exclusive remedy is workers' compensation benefits.

The court in *Hastings* clearly took the position that the rule conferred jurisdiction only in cases in which the lower court determined conclusively, that the defendant is not entitled to assert the defense of workers' compensation immunity. Thus, under *Hastings*, the appellate court in determining the jurisdiction over an appeal under rule 9.130(a)(3)(C)(vi) is authorized to look no further into the record than is necessary to determine the trial court's basis for entry of the order sought to be reviewed.

Russel v. State, 71 Fla. 236, 71 So. 27 (Fla. 1916), this court had defined the term as synonymous with "manifest, plain, clear, obvious (and) conclusive." The *Hastings* court reasoned that this Court in using the word "evident" in its *Mandico* decision, must have been aware of its previous initial construction of the term. The *Hastings* court concluded that it was intended by this Court in *Mandico*, that in order to be appealable, "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 1107.

Any doubt as to the scope of the jurisdiction which this Court intended to vest in the District Courts of Appeal, by its adoption of the *Mandico* amendment, should be laid to rest by this Court's most recent amendment to Rule 9.130(a)(3)(C)(vi), which appears in *Amendments to the Florida Rules of Appellate Procedure*, 21 F.L.W. S-507, App.S6-7 (Fla. Nov. 22, 1996) as follows:

> (a) Applicability.
>
> . . .
>
> (3) Review of non-final orders of lower tribunals is limited to those that
>
> . . .
>
> (C) determine
>
> . . .
>
> (vi) that, as a matter of law, a party is not entitled to workers' compensation immunity; ~~as a matter of law; or~~

The Committee Notes to the Amendment, in pertinent part, provide (*id*)

> 1996 Amendment. The amendment to subdivision (a)(3)(C)(vi) moves the phrase "as a matter of law" from the end of the subdivision to its beginning. This is to resolve the confusion evidenced in *Breakers Palm Beach v. Gloger*, 646 So.2d 237 (Fla. 4th DCA 1994), *City of Lake Mary v. Franklin*, 668 So.2d 712 (Fla. 5th DCA 1996), and their progeny by clarifying that this subdivision was not intended to grant a right of nonfinal review if the lower tribunal denies a motion for summary judgment based on the existence of a material fact dispute.

The Committee Note in particular, strongly suggests that this Court in amending the rule adopted in *Mandico*, did so, not for the purpose of narrowing the scope of the jurisdiction conferred by the rule, but to correct what is viewed to be an erroneous interpretation of the rule in *Breakers, Franklin,* and the cases following those decisions.

The *Hastings* court offered further reasons to support its interpretation of the former version of the rule. The court suggested that the interpretation of the rule by the Fourth and Fifth District Courts of Appeal was inconsistent with the longstanding jurisprudence of this state regarding the disposition by a trial court of motions to dismiss or motions for judgment on the pleadings. The court explained that in deciding such motions, a trial court is constrained from resolving factual disputes. *Hastings*, 682 So.2d at 1113, citing *Barns v. Dawkins*, 624 So.2d 349 (Fla. 1st DCA 1993) (in ruling on a motion to dismiss the trial court must accept material allegations of the complaint as true and may not consider affirmative defenses, or evidence likely to be adduced); *Hart v. Hart*, 629 So.2d 1073 (Fla. 2d DCA 1994) (in ruling on a motion for judgment on the pleadings, the trial court must confine its determination to the pleadings and may not enter judgment where factual questions remain.) Accordingly, even though a trial court could be eminently correct in denying such a motion because it is not evident from the complaint or pleadings that the plaintiff's exclusive remedy is workers' compensation, and that there are unresolved factual issues concerning workers' compensation immunity, such an order would be subject to review under the interpretation of the rule adopted by the Fourth and Fifth Districts. The court in *Hastings* stated that it could not conceive that this Court in adopting the rule in *Mandico*, intended to burden the appellate courts of this state with the task of reviewing orders which do nothing more than deny a motion without finally determining

a factual issue, particularly in view of the restrictive philosophy espoused by this Court in cases such as *Mandico* and *Bruns*, *Hastings*, 682 So.2d at 1113-1114.

The *Hastings* court also concluded that the jurisdictional test it adopted was consistent with the decision of this court in *Tucker v. Resha*, 648 So.2d 1187 (Fla. 1994). This court in *Tucker* held that an order denying a motion for summary judgment on the basis of qualified immunity by a public official, was subject to interlocutory review to the extent that the order turns on an "issue of law (emphasis added by the court)" *id.* at 1190. One of the reasons stated by this court in *Tucker* for permitting such review (the then current version of Rule 9.130 did not provide for such review) was that the defense provides for immunity from suit rather than just a defense to liability. In order to prevent such a defense from becoming illusory, appellate courts should review orders denying motions for summary judgment based upon qualified immunity, but only if there are no material facts in dispute and the decisive issue involves only a question of law. *Id.* at 1189.[6] The *Hastings* court suggested that same rationale should apply to the defense of workers' compensation immunity, because such defense provides for immunity from suit. *Hastings*, 682 So.2d at 1113, citing *Sullivan v. Liberty Mutual Ins. Co.*, 367 So.2d 658 (Fla. 4th DCA) *cert. denied*, 378 So.2d 350 (Fla. 1979).

Finally, the interpretation of the rule adopted by the Second District Court in *Hastings*, is further consistent with the approach taken by the United States Supreme Court, in determining the scope of the federal statute which permits interlocutory review of orders denying summary judgment on the basis of qualified immunity. In *Johnson v. Jones*, 515 U.S. ____, 132 L.Ed.2d 238, 115 S.Ct.

---

[6] The *Tucker* court's holding is presently set forth in Fla.R.App.P. 9.130(a)(3)(C)(viii) which permits review of non-final orders which determine "that, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law." *Amendments to the Florida Rules of Appellate Procedure*, 21 F.L.W. S-507, App. S6-7 (Fla. Nov. 22, 1996).

2151 (1995), several police officers were sued for violation of the plaintiff's civil rights. They moved for summary judgment on the basis of their entitlement to qualified immunity. The District Court denied summary judgment, because it concluded that there remained unresolved issues of material fact. The court's ruling was as follows (132 L.Ed.2d at 246-247):

> (T)he District Court's determination that the summary judgment record in this case raised a genuine issue of fact . . . was not a 'final decision' within the meaning of the relevant statute.[7]

The pertinent part of the court's rationale, equally applicable to the class of appeals which is the subject of this case, was as follows: First, the existence or non-existence of a triable issue of fact is the kind of issue that trial judges, not appellate judges, confront almost daily. Appellate judges enjoy no comparative expertise in such matters. In contrast, appellate judges enjoy special expertise assessing the relative force of applications of legal norms. Accordingly, interlocutory appeals generally are less likely to bring about important error correcting benefits when they involve factual issues, than in cases in which only legal matters are at issue. *Id.* at 249; Second, determining whether or not a record demonstrates a genuine issue of material fact could consume inordinate amounts of appellate time, resulting in greater delay. *Id.*; Third, due to the close connection between the kind of issue likely to be raised in an appeal from the denial of a motion for summary judgment, and the kind of issue which would likely be presented at trial, the appellate court in many instances in which it upholds the trial court's denial of summary judgment, may well be faced with approximately the same factual issue again, after trial, with just enough change (brought about the

---

[7] The relevant statute, 28 U.S.C. § 1291 grants federal appellate courts jurisdiction to hear appeals from "final decisions." The statute had previously been interpreted to include within the definition of "final decisions" orders which "conclusively determine a disputed question." *Johnson*, 115 S.Ct. at 2155.

trial testimony) to require it once again to canvas the record. Interlocutory appeal on this type of issue makes unwise use of an appellate court's time by forcing the court to decide in the context of a less developed record, an issue very similar to one it may well have to decide later, on what would presumably be better developed record. *Id.* citing 15-A Wright and Miller, § 3914.10 at 664.

The Court's reasoning in *Johnson* is equally applicable to the class of orders with which the present appeal is concerned. This Court should hold that the District Court of Appeal was without jurisdiction to hear the appeal herein.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court quash the opinion of the District Court in *Walton Dodge Chrysler Plymouth Jeep and Eagle, Inc. v. H.C. Hodges Cash & Carry, Inc.*, 679 So.2d 827 (Fla. 1st DCA 1996), and remand with instructions to dismiss the appeal.

Respectfully submitted,

FULLER, JOHNSON & FARRELL, P.A.

Alan R. Horky
Florida Bar No.: 765104
700 South Palafox Street, Suite 170
Post Office Box 12219
Pensacola, Florida 32581
(904) 434-8845
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Charles L. Schuster, Esq., Post Office Box 12564, Pensacola, Florida 32573-2564, Robert Crongeyer, Esq., 3 West Garden Street, Seventh Floor, Pensacola, Florida 32501 and David A. Simpson, Esq., 909 Mar Walt Drive, Suite 1024, Fort Walton Beach, Florida 32547, by regular U.S. Mail, this 7th day of April, 1997.

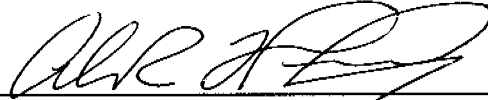
Alan R. Horky

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court quash the opinion of the District Court in *Walton Dodge Chrysler Plymouth Jeep and Eagle, Inc. v. H.C. Hodges Cash & Carry, Inc.*, 679 So.2d 827 (Fla. 1st DCA 1996), and remand with instructions to dismiss the appeal.

Respectfully submitted,

FULLER, JOHNSON & FARRELL, P.A.



Alan R. Horky
Florida Bar No.: 765104
700 South Palafox Street, Suite 170
Post Office Box 12219
Pensacola, Florida 32581
(904) 434-8845
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Charles L. Schuster, Esq., Post Office Box 12564, Pensacola, Florida 32573-2564, Robert Crongeyer, Esq., 3 West Garden Street, Seventh Floor, Pensacola, Florida 32501 and David A. Simpson, Esq., 909 Mar Walt Drive, Suite 1024, Fort Walton Beach, Florida 32547, by regular U.S. Mail, this 7th day of April, 1997.

Alan R. Horky

APPENDIX

A. Opinion of First District Court of Appeal in *Walton Dodge Chrysler-Plymouth Jeep and Eagle, Inc. v. H.C. Hodges Cash & Carry, Inc.*, 679 So.2d 827, 830-831 (Fla. 1st DCA 1996) pp. 1-6.

B. Circuit Court Order Denying Summary Judgment

C. Excerpts from Hearing on Motion for Summary Judgment, pp. 1-9

D. Order Granting Certiorari Review