IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,269

FILED
SID J. WHITE
NOV 18 1996
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

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 D STRICT
COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This case concerns the scope of the jurisdiction vested in District Courts of Appeal by Fla.R.App.P. 9.130(a)(3)(C)(vi), which permits District Courts of Appeal to review non-final orders of trial courts which determine "a party is not entitled to worker's compensation immunity as a matter of law . . ." Petitioner requests 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 sought to review decisions of District Courts of Appeal that "expressly and directly conflict with a decision of another District Court of Appeal or with the Supreme Court on the same question of law. . ."

The relevant facts are that on the day of his injury, Charlie DePauw was an employee of Appellant/Respondent, Walton Dodge Chrysler-Plymouth Jeep and Eagle, Inc., a Florida corporation (Walton Dodge). Located on the premises of Walton Dodge, was a metal flagpole. This flagpole was positioned directly beneath uninsulated power lines carrying between 7200 and 12,000 volts of electricity. **A** decision had been made by Walton Dodge to strengthen the existing flagpole by inserting a flagpole of lesser diameter inside the existing flagpole. **(A** 2-3, 1**1-12).**

Prior to the injury, employees of Walton Dodge, in effort to figure out a way to place the metal pole inside the existing flagpole, contacted the local electric company, requesting the use of a utility owned bucket truck. The use of the truck would have permitted DePauw to attempt to insert the metal pole into the existing flagpole from a vantage point adjacent to the top of the existing flagpole. Walton Dodge employees and DePauw were present when an electric company employee delivered the warning "that line is hot . . . and it would kill them, and I told them not to get around it." The electric company denied the use of its equipment for that purpose **(A 3,** 12).

Walton Dodge thereafter contacted Appellee/Petitioner Hodges Cash & Carry, Inc. (Hodges) to request the use of a scissors truck. Hodges agreed, and brought its truck to the premises of Walton Dodge. The driver of the truck, a Hodges' employee, maneuvered the truck into a position so that DePauw, standing on the raised bed, and holding the 25-pound, **17-foot** flagpole in a vertical position, could slide the pole into the existing flagpole (**A 3,** 11). DePauw was being directed in this endeavor by two employees of Walton Dodge, one of whom was a part owner of that dealership (A 2). DePauw's catastrophic injuries occurred when the metal pole he was holding came into contact, or very close contact, with an uninsulated high-voltage power line (**A** 3).

The record evidence was that the existing flagpole stood directly beneath the high-voltage power lines. It was not established by Walton Dodge how high the power lines were or how close they were to one another. The record did not rule out the possibility that Walton Dodge required DePauw to insert one end of the 25 pound, **17** foot metal pole into the top of the existing flagpole, while threading the other end between high-voltage power lines only inches apart overhead (A 11).

DePauw sued Hodges for negligence in its use of the scissors truck. Hodges in turn brought a third-party complaint against Walton Dodge for contribution under the Uniform Contribution Among Tortfeasors Act, § **768.3**1(2)(a), Fla. Stat. (1**993).** After discovery, Walton Dodge moved for *summary* judgment on the ground that § 440.11(1), Fla. Stat., grants employers and supervisors immunity from tort actions for work related injuries. The motion for *summary* judgment was denied. The order does not set forth the trial court's reasons for denying *summary* judgment, however, from the transcript of the hearing, it appears that the trial court was of the view that there remained unresolved issues of material fact as to whether the actions of Walton Dodge were substantially certain to result in injury to DePauw (B, C, ***63-66).***

Walton Dodge brought an appeal pursuant to § 9.130(a)(3)(c)(vi), Fla.R.App.P., from the trial court's non-final order denying *summary* judgment. The District Court of Appeal, First District, reversed, finding:

> 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 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*, 21 Fla. L. **Weekly** D1756 (Fla. 2d DCA July **3**1, 1996)[1] (D). This motion was denied (E).

This timely Petition for discretionary review follows.

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[1] Because the District Court majority apparently relied upon the absence of proof of employer concealment of danger in concluding that Walton Dodge was entitled to immunity, Petitioner also requested that the District Court certify the following issue as one of great public importance,

> WHETHER AN **INJURED** EMPLOYEE IN A **SUIT AGAINST** AN EMPLOYER FOR PERSONAL INJURY IS REQUIRED, IN ORDER TO DEFEAT THE IMMUNITY CONFERRED UPON THE EMPLOYER BY § 440.11 FLA. STAT., TO ESTABLISH THAT THE EMPLOYER INTENTIONALLY CONCEALED A KNOWN **HAZARD** FROM THE EMPLOYEE,

This request was also denied (E).

SUMMARY OF ARGUMENT

While this case was pending before the First District Court of Appeal, 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,*** 21 Fla. L. Weekly D1668 (Fla. 2d DCA July 17,1996); and *Hustings* ***v. Demming***, **21 Fla.** L. Weekly D1756 (Fla. 2d DCA July 31, 1996). The Second District Court of Appeal's holding in these cases was that Fla.R.App.P. **9.130(a)(3)(C)(vi)** does not permit review of a non-final order denying summary judgment on the basis of worker's compensation immunity, unless the order denying summary judgment is based upon an issue of law. The First District Court of Appeal's exercise of jurisdiction in the instant case expressly and directly conflicts with the decisions of the Second District Court of Appeal in these cases.

ARGUMENT

I. THE DISTRICT COURT'S EXERCISE OF JURISDICTION IN THIS **CASE** EXPRESSLY AND DIRECTLY CONFLICTS WITH RECENT DECISIONS OF THE SECOND DISTRICT COURT OF APPEAL, WHICH HOLD THAT THE DISTRICT COURTS OF APPEAL DO NOT HAVE JURISDICTION TO REVIEW NON-FINAL ORDERS DENYING SUMMARY JUDGMENT ON THE BASIS OF WORKER'S COMPENSATION IMMUNITY, UNLESS DENIAL OF WORKER'S COMPENSATION IMMUNITY IS BASED UPON A QUESTION OF LAW.

Florida Rule of Appellate Procedure 9.130 is the successor of Rule 4.2, 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. ***Travelers Ins.*** Co. ***v. Bruns,*** 443 So.2d 959 (Fla. 1994). Rule 9.130 as originally adopted did not provide for review of non-final

orders denying worker's compensation immunity, as a matter of law, or otherwise. Under the Rule as originally adopted, a party which had been denied *summary* judgment based upon worker's compensation immunity had the option of seeking a writ of 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.

In ***Mandico*** *v.* ***Taos Constr., Inc.***, 605 **So.2d** 850, 854-855 (Fla. **1992),** this Court amended Rule 9.130(a)(3) to read in pertinent part:

> (3) Review of non-final orders of lower tribunals is limited to those which. , ,
>
> (C) determine:
>
> (vi) that a party is not entitled to worker's Compensation immunity as a matter of law (emphasis supplied by Petitioner) . . .

The Court in adopting the amendment to Rule 9.130 recognized, as it had in ***Murphree,*** that it would be undesirable to require a "trial to proceed to its conclusion when it (is) evident from a construction of the relevant statutes that the plaintiffs exclusive remedy (is) to obtain worker's compensation benefits." ***Id.*** at **854.**

Following the amendment of Rule 9.130 in ***Mandico,*** the District Courts of Appeal interpreted the Rule, with virtual unanimity, as permitting review of non-final orders denying *summary* judgment on the basis of worker's compensation immunity, even if the denial was based **upon a** trial court's determination that there existed unresolved factual issues. In *Ross v.* ***Baker, 632*** So.2d 224 (Fla. 2d **DCA** 1994), the trial court's denial of summary judgment turned solely upon an issue of law, the *Ross* **court** nevertheless observed, in what is purely dicta, that **(632** So.2d at 225)

> 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 conclusion was also based in part upon its view that, by placing the phrase "as a matter of law" at the end of the amendment, rather than after the word "determine," that this court intended to broaden the jurisdiction conferred upon appellate courts by the Rule.

Subsequently, the Fifth District Court of Appeal in ***City of Lake Mary v. Franklin, 668*** So.2d **712** (Fla. 5th DCA 1996), relying upon the *Ross* dicta and the holding of ***Gloger,*** reached a conclusion identical to that reached by those courts.[2] Thus, at the time the appeal in this case was taken by Walton Dodge, Florida Appellate Courts had, upon the basis of the dicta contained in *Ross* and the brief analysis contained in ***Gloger,*** interpreted the Rule as permitting the jurisdiction which the District Court of Appeal exercised in this case.

Subsequent to briefing and oral argument in this case, the Second District Court of Appeal rendered its opinions in ***Pizza Hut of America v. Miller,* 674** So.2d 178, ***American Television and Communication Corporation v. Florida Power Corporation,*** 21 Fla. L. Weekly D1668 (Fla. 2d **DCA**

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[2] The ruling of the District Court of Appeal in ***Franklin*** was at least apparently inconsistent with the ruling by that same court in ***Integrity Homes of Central Florida, Inc. v. Goldy,* 672** So.2d 839 (Fla. 5th DCA **1996).** Thereafter, the court in ***ACT Corporation v. Devane,*** 672 So.2d **611** (Fla. 5th **DCA 1996),** adopted the ***Franklin*** court's interpretation of the Rule.

July 17, 1996), and ***Hustings* v. *Demming,*** 21 Fla. L. Weekly D1756 (Fla. 2d DCA July 31, 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 on the basis **of** worker's Compensation immunity, unless the order denying summary judgment specifically precludes the defendant from asserting entitlement to worker's compensation immunity. In ***Hastings,*** the most recent of the three decisions, the court expressly declined to follow its earlier dicta in *Ross,* and certified express and direct conflict with the holdings of the Fifth District Court of Appeal in ***Franklin,*** and the Fourth District Court **of** Appeal in *Gloger*.

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 ***Hustings,*** 21 Fla. L. Weekly D1757, relied upon the language employed by this Court in its ***Mandico*** decision. This 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 worker's compensation immunity, in cases in which it is "evident" that worker's compensation is the sole remedy available to plaintiffs. The ***Hustings*** court reasoned that **by** use of the word "evident", the ***Mandico*** court intended that in order to be appealable, "the order denying a motion for summary judgment must essentially determine the non-existence of the worker's compensation defense, such that the party asserting the defense is precluded from having a jury decide the issue.

The ***Hustings*** court further reasoned that the interpretation of the Rule by the Fifth and Fourth District Courts of Appeal, was inconsistent with the longstanding jurisprudence of this state, regarding *summary* judgments. On the one hand, an order denying a motion for summary judgment based upon the existence of unresolved factual issues bearing upon entitlement to worker's compensation immunity would be correct. Such order would nevertheless, under the interpretation

of the rule adopted by the Fourth District in *Gloger*, and the Fifth District in *Franklin*, be subject to reversal. The *Hastings* court stated that it could not conceive that this Court, in amending the rule, intended to burden the appellate courts of this state with the task of reviewing orders that do nothing more than deny a motion without finally determining a factual issue. *Id.* at 1759.

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, asserting the defense of qualified immunity by a public official, was subject to interlocutory review to the extent that the order turns on an <u>issue of law</u> (emphasis added by the court) *Id.* at 1190. One of the reasons stated by the *Tucker* court for permitting such review was that the defense provides immunity from suit rather than just a defense to liability. Accordingly, 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. Petitioner respectfully suggests that there is no logical reason to permit broader entitlement to appellate review of cases in which the defendant is merely asserting a defense to liability, than in cases in which the defendant not only has a defense to liability, but immunity from suit itself.

The interpretation of the rule adopted by the Second District Court of Appeal in *Miller*, *Florida Power Corporation,* and *Hastings*, is further consistent with the approach recently 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. ____ (1995), the Court ruled against

permitting a defendant to appeal a district court's denial of a summary judgment motion, which was premised on the defendant's right to invoke a qualified immunity defense. 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.

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: 1) ". . ., 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 experience 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 important error correcting benefits when they involve factual issues, than in cases in which only legal matters are at issue. *Id.* at 249; and 2) determining whether or not a record demonstrates a genuine issue of material fact, could consume inordinate amounts of appellate time. In instances in which the appellate court upholds the trial court's denial of summary judgment, the appellate court may be faced with the same factual issue again, after entry of final judgment, requiring a separate review of the same issue on what would presumably be a better developed record. *Id.* at 249.

These considerations were considered sufficiently compelling to the court in *Johnson,* to militate against permitting interlocutory appeals from non-final orders denying immunity on the basis of an existing factual issue, even when the party asserting immunity is entitled, not only to immunity from liability, but to immunity from suit. These considerations can only weigh more heavily, in instances such as this one in which the defendant asserting entitlement to immunity, is entitled to

immunity from liability, and not immunity from suit.

Finally, Petitioner must point out that the district court majority, in its opinion below, did not consider its exercise of jurisdiction in this case to conflict with the holding in *Hastings*, because the majority concluded, based upon its review of the record sub judice that there existed no genuine issue of material fact on the issue of Respondent's entitlement to worker's compensation immunity (A 10). Petitioner respectfully contends that this conclusion is simply incorrect, for the reasons expressed by Judge Benton in his dissenting opinion (A 11-12). Even if the conclusion were correct however, what is at stake here is whether a class of orders, denying summary judgment on the basis of worker's compensation immunity, on the basis of an unresolved issues of material fact, should be subject to appellate review. For the reasons set forth herein, Petitioner respectfully contends that this Court should accept jurisdiction and rule that such non-final orders are not subject to appellate review.

CONCLUSION

Petitioner respectfully requests that this Court exercise its discretionary jurisdiction to accept review of this case based upon express and direct conflict with the cited decisions of the Second District Court Appeal. Petitioner further requests that this Court remand this case to the District Court of Appeal, with instructions to dismiss this appeal.

Respectfully submitted,

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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 14th day of November, 1996.

Alan R. Horky

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