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SID J. WHITE
MAR 13 1998
CLERK, SUPREME COURT
By_____________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,211

STATE OF FLORIDA,
DEPARTMENT OF CORRECTIONS,

Petitioner,

V.

JUNE CULVER AND GLENN CULVER,

Respondents.

On Discretionary Review from the District Court
of Appeal, First District

RESPONDENTS' BRIEF ON THE MERITS

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STATEMENT OF THE FACTS AND OF THE CASE

On February 13, 1995, June Culver, a prison psychologist, **was** brutally beaten and viciously raped by Willie Price, an inmate incarcerated at Apalachee Correctional Institute. An investigation revealed that Willie Price had left the educational services building to go to the dormitory to obtain headache medication. To get to the dormitory, Willie Price was required to get a pass from school counselor Dan Coulliette, go through a checkpoint gate, and then go to the dormitory. Procedure dictated that the dormitory officer check his pass, initial it, and indicate the time he arrived and left the dormitory. This was not done. Willie Price left the dormitory, went back through the checkpoint gate, and was admitted back to the educational/psychological building. The gate keeper let him back into the complex despite the fact that his pass was not properly filled out. Instead of returning to class as required, Willie Price went to June Culver's office and raped her. The investigation further revealed that Willie Price had previously threatened June Culver and had been

disciplined. Department of Corrections and school officials were aware of this prior incident.

Mrs. Culver and her husband, Glenn Culver, served notice on the Department of Corrections and the Correctional Education School Authority, of their intent to sue those entities for negligence in failing to supervise Willie Price. The claim was denied by the state and this lawsuit was filed. Discovery was undertaken and the Department of Corrections filed its motion for summary judgment alleging that it was entitled to workers compensation immunity. Affidavits were filed by both parties which established that June Culver was a master's degree level psychologist working in the psychological services department of the prison with responsibilities of testing, advising, and counseling inmates. The affidavits also confirmed that correctional officers are responsible for security and supervision of inmates incarcerated in the facility.

A hearing on the motion for summary judgment was held on November 13, 1996 before Circuit Court Judge John

Roberts. The issue of workers compensation immunity **was** argued exhaustively by counsel for the Department of Corrections. As the hearing progressed, the court asked the following question two times:

> THE COURT: Is that a question of law or is that a question of fact? Who is going to make that determination? . . . .
>
> THE COURT: . .But what I am saying is, and y'all help me, is that a question of law or **a** question of fact? If it is a question of fact then the jury has to make that determination, not me.
>
> MS. LUTTON-SHIELDS: Well, there is (sic) cases that say the question is a question of law. I don't understand how you deal—
>
> THE COURT: How am I going to make that determination unless I hear testimony?
>
> MS. LUTTON-SHIELDS: That's what I say. I am not **real** clear on this angle, the courts are pretty confusing on it.... (App. 1)

On November 15, 1996, the court entered an order which denied the Department's motion. (App. 2)

The Department appealed to the First District. On December 31, 1997, the First District dismissed the appeal on the basis of <u>Martin Electronics v. Glomboski</u>, 22 **Fla.** L.

Weekly D2054 (Fl. 1st DCA 8/27/97). The court certified the following question to be one of great public importance:

> In determining the appealability of a nonfinal order denying a motion for summary judgment based on workers' compensation immunity, are we restricted to looking only at the order on appeal or may we review the record in the manner described in Hastings v. Demming, 682 So. 2nd 1107 (Fla. 2nd DCA 1996)?

On January 26, 1998, this Court entered an order requiring the submission of briefs on the merits.

SUMMARY OF THE ARGUMENT

This court need look no further than the transcript of the summary judgment hearing to understand the trial court's ruling in this matter. It is obvious that the trial judge denied the motion for summary judgment on the ground that he believed that there existed material issues of fact in dispute which needed to be determined by the jury. Since Rule 9.310(a) (3) (C) (vi) only applies to orders which decide as a matter of law that worker's compensation immunity is not a defense in a case, this case should be returned to the trial court for jury trial.

ARGUMENT

The Florida Rules of Appellate Procedure authorize an appeal of a nonfinal order only when the trial court determines *as a matter of* law that a defendant is not entitled to raise worker's compensation immunity as a defense.

Rule 9.130(a)(3)(C)(vi), Fla.R.App.P., provides 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.

In Hastinss v. Demminq, 694 So. 2d 718 (Fla. 1997), this very court was asked to address the issue of when a defendant was entitled to appellate review of a non-final order denying a defendant's motion for summary judgment on the basis of worker's compensation immunity. In Hastinss, the plaintiff was injured when he fell from a ladder while at work. The employer filed **a** motion for summary judgment contending that he was entitled to worker's compensation immunity. The employers' motion for summary judgment was denied without elaboration. The employer appealed to the district court which dismissed his appeal after concluding

that the trial court did not decide, ***as a matter of*** law, that the employer was precluded from raising immunity as a defense. The decision **was** affirmed at the Supreme Court. In reaching this decision, this court issued the following guidance:

> Nonfinal orders denying summary judgment on **a** claim of worker's compensation immunity are not appealable unless the trial court order specifically states that, as **a** matter of law, such a defense is not available to a party. In those limited cases, the party is precluded from having a jury decide whether **a** plaintiff's remedy is limited to workers' compensation benefits and, therefore, an appeal is proper. Otherwise, the denial of the summary judgment **may** be based on a factual dispute and the party is still likely able to present an immunity defense to the jury. In those cases, the new rule makes clear that the district courts have no jurisdiction to hear an appeal of the nonfinal order. In sum, the new rule codifies the result reached by the district court in this case. Id. at 720.

Our analysis of this issue should then take us no further. Judge Roberts' order states that the Department's motion for summary judgment [is] denied. It did not specifically state that the Department of Corrections was forever precluded from having a jury decide whether it is entitled to immunity. A review of the transcript of the hearing indicates that the court was not slamming the door

on the Department's right to argue that it **was** entitled to claim it was immune from suit because it had paid worker's compensation benefits. Instead, the trial court felt that because there were factual issues in dispute, this was a question for the jury.

At least two district courts have addressed this issue since this court's ruling in Hastings. In Pinker Materials Corporation v. Holmes, 697 So. 2d 558 (Fla. 4th DCA 1997), the court held that there is no appellate jurisdiction to entertain appeals of nonfinal orders denying summary judgment when the denial is based on the presence of disputed triable issues of fact. In Rinker Materials, the trial judge denied a summary judgment motion without stating the basis for the denial. The appellate court relinquished jurisdiction and asked the trial court to explain whether the denial was based upon his decision that worker's compensation immunity did not apply as a matter of law or whether the court found "triable issues." The trial court responded that it denied the motion because 'triable facts" existed. In the interim, the decision in Hastings v. Demming, 694 So. 2d 718 (Fla. 1997), was released overruling

the Fourth District's decision in Breakers Palm Beach, Inc.v. Gloger, 646 So. 2d 718 (Fla. 4th DCA 1994). In discussing Hastings, the Fourth District noted that they had "broadly construed rule 9.130(a)(3)(C)(vi) to permit review of *any* order denying summary judgment on workers compensation immunity grounds, even when the denial is ***based*** on *disputed issues of* fact " in the Breakers decision. Id. (emphasis added) In deciding Rinker Materials, the court acknowledged the jurisdictional limitations that Hastings places upon appellate review when there are disputed issues of material facts.

The issue has also been addressed by the First District in Martin Electronics, Inc. v. Glomboski, 22 Fla. L. Weekly D2054 (Fla. 1st DCA 8/26/97). Martin involved a defense motion to dismiss rather than **a** motion for summary judgment but the rationale for the decision was the same. In dismissing the appeal, the court observed that

> under Hastings II an order denying **a** motion for summary judgment is not appealable under Rule 9.130(a)(3)(C)(vi) unless on the face of the order the trial court expressly determines that 'as a matter of law, such a defense is not available." Id. Although we share some of the concerns expressed in Judge Wolf's concurring opinion, we read this language in Hastings II as **clearly**

> **precluding a district court from reviewing the record in making a judicial determination under this rule....** Id. *(emphasis added)*

The Supreme court has revisited and applied the Hastings holding in H.C. Hodges Cash & Carry, Inc. v. Walton Dodge Chrysler-Plymouth Jeep & Eagle, 696 So. 2d 762 (Fla. 1997) and Pizza Hut of America, Inc. v. Miller, 696 so. 2d 340 (Fla. 1997). In each of these cases, the trial court stated that there were factual issues to be determined by the jury. In H.C. Hodges, the court observed that the trial court's order 'did not contain findings of fact and, consequently, did not conclusively and finally establish Walton Dodge's entitlement to worker's compensation immunity." Id.

The cases that have followed Hastings have consistently adhered to the principle it established. There should be no exception in this case.

Conclusion

In Martin Electronics, the First District commented that the Hastings decision precluded a district court from reviewing the record in making a judicial determination under Rule 9.310(a)(3)(C)(vi). Yet, in Department of Corrections v. Culver, Case No. 96-4883 (1st DCA, December 31, 1997) Judge Wolf seeks to do the very thing that Martin Electronics tells him he cannot.

The rule and the Hastings decision are very clear. A defendant is not entitled to appellate review of a nonfinal order denying a motion for summary judgment on the grounds of worker's compensation immunity unless the trial court has precluded the defendant from raising that defense at trial. The order must state that the court has decided the motion as a matter ***of* law.** Clearly, Judge Roberts did not deny the motion ***as a matter of* law.** Instead, the transcript demonstrates that he felt there were disputed issues of material fact to be determined by the finder of fact, the jury.

It is not the province of the appellate court to go on a fact finding mission. That is the responsibility of the jury. For that reason, this case should be returned to Jackson County so that a jury can determine the factual issues which remain to be resolved in this case.

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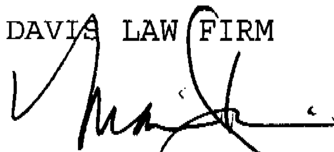

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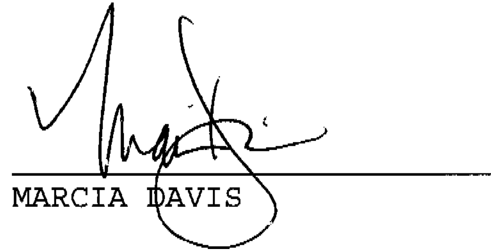
Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished to Robert A. Butterworth, Attorney General, Pamela Lutton-Shields, Assistant Attorney General, and David Herman, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, by regular U.S. mail, this **11**th day of March, 1998.



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