IN THE SUPREME COURT OF FLORIDA
Case No.: SC-03-134
Lower Tribunal No.: 2D01-5308

ALLISON GAE REEVES, as Personal Representative of the Estate of Dennis Mitchell Reeves, deceased,

PETITIONER,

vs.

FLEETWOOD HOMES OF FLORIDA, INC., MARVIN MILLER, and MICKIE OLIVER,

RESPONDENTS.

On Discretionary Jurisdiction from the District Court of Appeal of Florida, Second District

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AMENDED ANSWER BRIEF OF THE RESPONDENTS, FLEETWOOD HOMES OF FLORIDA, INC., MARVIN MILLER, and MICKIE OLIVER

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PRELIMINARY STATEMENT

RESPONDENT/DEFENDANT, FLEETWOOD HOMES OF FLORIDA, INC., shall be referred to as "RESPONDENT FLEETWOOD" OR "FLEETWOOD." RESPONDENT/DEFENDANT, MARVIN MILLER, shall be referred to as "RESPONDENT MILLER." RESPONDENT/DEFENDANT, MICKIE OLIVER, shall be referred to as "RESPONDENT OLIVER."

PETITIONER/PLAINTIFF, ALLISON GAE REEVES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DENNIS MITCHELL REEVES, shall be referred to individually as "PETITIONER REEVES". DENNIS MITCHELL REEVES, DECEASED, shall be referred to individually as "DENNIS REEVES."

The Academy of Florida Trial Lawyers shall be referred to as the "AMICUS."

All references to the Petitioners Appendix will be indicated by "Appendix___", followed by the applicable page number(s).

All references to the Respondents Appendix will be indicated by "Respondent's Appendix ___", followed by the applicable page number(s).

STATEMENT OF THE CASE AND FACTS

RESPONDENTS, FLEETWOOD, MILLER and OLIVER, object to the statement of the case and facts set forth by PETITIONER REEVES because it inappropriately includes conclusion and argument.

This case is before this Court based on the Second district court's approval of a Summary Judgment in favor of RESPONDENTS, FLEETWOOD, MILLER and OLIVER, on their workers' compensation immunity defense and the subsequent certified questions from the Second district court.

More specifically, the trial court denied RESPONDENTS MILLER and OLIVER's Motion For Summary Judgment for Workers' Compensation Immunity on Counts IV and V of the Second Amended Complaint, respectively, [Appendix 10], to wit: **Gross Negligence**. Furthermore, the lower court denied RESPONDENT FLEETWOOD's Motion For Summary Judgment on Count VI of the Second Amended Complaint, to wit: **Intentional Tort**.

In a well-reasoned opinion written by Judge Altenbernd the second district court of Appeal reversed the trial court and certified two questions to this Court.

The factual background is that PETITIONER REEVES filed suit for the wrongful death of DENNIS REEVES against RESPONDENTS, FLEETWOOD, MILLER and OLIVER. The death of DENNIS REEVES was a result of an accident that took place on April 1, 1991 while DENNIS REEVES was in the course and scope of his employment at his employer FLEETWOOD. **The following relevant facts are undisputed:**

RESPONDENT FLEETWOOD is a mobile home manufacturing plant in Auburndale, Florida. On April 1, 1991, RESPONDENT MILLER was a material handler, i.e., forklift operator, employed by RESPONDENT FLEETWOOD. [Appendix 2, Page 6.] RESPONDENT MILLER started his employment with RESPONDENT FLEETWOOD on September 27, 1988. Mr. Miller was an experienced forklift operator. [Appendix 2, Page 6.] His experience as a

forklift operator, prior to going to work at Fleetwood Homes of Florida, Inc., was extensive. [Appendix 2, Pages 23-24.] From 1972 through 1975, RESPONDENT MILLER was a forklift operator for a company named Altens Foundry. [Appendix 2, page 12.] From 1975 through 1979 he operated a forklift for Premix. [Appendix 2, Pages 12-13.] Thereafter, for approximately three and one-half (3½) years, until 1984, RESPONDENT MILLER operated a forklift for ITT Grinnell at Statesboro, Georgia. [Appendix 2, Pages 15 and 16.] When RESPONDENT MILLER worked for Premix, he obtained a forklift operator's license stating that RESPONDENT MILLER went through a training course on the proper and safe operation of a forklift. [Appendix 2, pages 24 and 25.]

Indeed, RESPONDENT MILLER was well trained in forklift safety. Besides his extensive experience and training on forklift safety, RESPONDENT MILLER attended ongoing forklift safety meetings at FLEETWOOD, where forklift operators would have meetings, which they were required to attend, about safety rules and safe forklift operating. [Appendix 2, Pages 25-27.] Also, FLEETWOOD showed training films related to the safe operation of forklifts which employees were required to watch. [Appendix 2, Pages 50-51.]

On April 1, 1991, RESPONDENT OLIVER was RESPONDENT MILLER'S immediate **supervisor** at the Auburndale plant. [Appendix 2, Page 27.] The employees at the Auburndale FLEETWOOD plant are divided into different departments, all of which are integral to the manufacturing process as a whole. At the top of the hierarchy was Ronald Stein, General Manager of the Auburndale plant. [Appendix 5, Page 4.] Below Mr. Stein were three department managers; Frank Rowan (Purchasing); Carlton Brown (Production); and, Jim Bradshaw (Sales). [Appendix 5, Page 9.]

On the date of the accident, April 1, 1991, DENNIS REEVES was taping and puttying

windows at the FLEETWOOD plant, which is part of the sheet metal department. [Appendix 3, Page 22-24.]

RESPONDENT MILLER's duties specifically included supplying materials to the sheet metal department, which was the department DENNIS REEVES was working in at the time of the accident on April 1, 1991. [Appendix 3, Page 43.] As part of his duties, RESPONDENT MILLER carried twelve foot rolls of metal roofing, each weighing about 500-600 pounds on his forklift. [Appendix 2, page 97-98, 107; Appendix 3, page 15.] It was customary for the forklift operators to carry three metal roofing rolls at a time. RESPONDENT MILLER carried the rolls of steel roofing into and through the plant (**where the accident occurred**) three times a day, every day. [Appendix 2, page 97.] As a matter of fact, he carried three rolls every time and the rolls were always the same width and the same weight. [Appendix 2, page 98.] The rolls were always identical. [Appendix 2, Page 98.]

Besides carrying sheet metal into the warehouse to the mezzanine, RESPONDENT MILLER also carried rafters on his forklift through the area where the accident occurred. [Appendix 2, Page 102.] He would probably carry three to four sets of rafters daily. [Appendix 2, Page 102.] [1]

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[1] As stated, RESPONDENT MILLER started his employment at FLEETWOOD on September 27, 1988. There are approximately 126 weeks from the time RESPONDENT MILLER started his employment with FLEETWOOD and the time of the accident. Therefore, assuming RESPONDENT MILLER took four weeks off for vacation during that time and assuming he worked five days a week, he would have safely moved through the area of the accident with three rolls of metal roofing on the forklift 1,830 times. **He would also carry rafters through the same area. He did this without incident approximately 1,830 times.** Furthermore, he had maneuvered through the area of the incident countless other times carrying sheet metal wider than the roof rolls and other items.

Both the loads of rafters and sheet metal were too wide to pass through the aisle. [Appendix 2, page 102.] Therefore, the loads would have to be raised several feet in the air to clear the "racks." [Appendix 2, page 102, 103.] As stated, RESPONDENT MILLER usually made the trip with the rolled roofing three times a day **always** taking the same route. [Appendix 2, Page 97-98.]

He would enter the plant with the forks on the forklift lowered. [Appendix 2, Page 127.] Inside the plant, RESPONDENT MILLER would come to an aisle, outlined with yellow lines, with racks of supplies on either side. [Appendix 2, Page 118-119, 124-125.] The rolled roofing was wider than the aisle. Therefore, at that point, RESPONDENT MILLER would stop the forklift and raise the forks several feet into the air and keep them above the racks and shelves. [Appendix 2, Page 106, 129-130.] Next, RESPONDENT MILLER would slowly move forward. Once the forklift was in the main aisle, RESPONDENT MILLER had a "straight shot" through the aisle [Appendix 7, Pages 129-130] according to the map drawn by the OSHA investigator. [Appendix 8, Page 24.] He always lined up his forklift with the yellow lines, because experience had taught him that in that position there was clearance beyond the racks and poles in the plant. [Appendix 2, Page 118-119.]

The "putty pad" where DENNIS REEVES was positioned on the morning of the incident was near the path taken by the forklift, but the rolled roofing would not go directly above the putty table or above DENNIS REEVES. [Appendix 8, Page 54.] The end of rolled roofing would typically be seven feet from the putty table. [Appendix 4, Page 29-28.]

On Monday, April 1, 1991, as RESPONDENT MILLER approached the putty table, he observed DENNIS REEVES and honked the horn of the forklift. [Appendix 2, Page 121.] However, DENNIS REEVES ignored the warning and did not look up from his table. [Appendix

2, Page 121.]

On April 1, 1991, though RESPONDENT MILLER had safely maneuvered through the area hundreds of times before[2], the end of one of the metal roofing rolls apparently struck a pipe and slid off the left side of the forklift, fatally hitting DENNIS REEVES. [Appendix 2, Page 118, 142.] RESPONDENT MILLER actually could not testify as to whether the steel roll struck the pipe. [Appendix 2, Page 113-114.]

The Auburndale plant, specifically the warehouse in which the incident took place, had been operating for ten years with essentially the same layout and production routine; however, **there had never been a prior accident where rolls of metal roofing or similar material had fallen off the forklift.** [Appendix 5, Page 15-16; Appendix 4, Page 26; Appendix 6, Page 28, 33.]

OSHA investigated the incident and prepared a report. On Page 17 of the OSHA report [Appendix 7], the inspector wrote: "We cannot show a willful disregard of our standards." [Appendix 7, page 54.] Again, on page 55 of the OSHA report, the inspector wrote the following:

> **Conference with supervisor failed to show, by the information this CSHO could gather that there was willful disregard of our standard. [Emphasis added]**

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[2] The trial court in its Order stated:

> The court further finds that Marvin Miller performed the maneuver on the date of the incident ***consistent with the manner in which he had performed it on hundreds of previous occasions…***

On March 31, 1993, PETITIONER REEVES filed her Complaint For Damages, which has been amended. At this time, the most current pleading is PETITIONER REEVES' Second Amended Complaint. [Appendix 10.]

On November 7, 2001, the trial court entered an order denying RESPONDENTS' Motion For Summary Judgment For Workers' Compensation Immunity on Count IV (Gross Negligence v. RESPONDENT MILLER), Count V (Gross Negligence v. RESPONDENT OLIVER) and Count VI (Intentional Tort v. RESPONDENT FLEETWOOD). The court made the following finding of fact:

> The court further finds that the maneuvers and routes engaged in by Marvin Miller on the date of the accident ***had been accomplished hundreds of times by him. And the total of thousands of times by forklift operators in the ten years preceding the date of the decedent's death***. With no displacement of materials being carried on the forklift. [Emphasis added.]

The court further found in identical paragraphs, i.e., Paragraph A4 and B3 the following:

> The acts complained of in the instant case ***were not as egregious as those present in the cases cited in the defendants' motion in which the courts found that the defendant's conduct did not rise to the threshold necessary to overcome workers' compensation immunity***. Nevertheless, the court finds that the occurrence of the subject incident was <u>inevitable</u> given the violations alleged by plaintiff (which are disputed by defendants but which must be accepted as true on a motion for summary judgment). [Emphasis added.]

On December 5, 2001 Respondents filed their Notice of Appeal in the second district court of Appeal. On January 9, 2002, PETITIONER REEVES filed her

Motion To Dismiss for Lack of Jurisdiction in the second district court. [Respondent Appendix 3.] In response, Respondents on January 22, 2002, filed their Response to Petitioner's Motion To Dismiss for Lack of Jurisdiction, or in the Alternative, Motion for a Temporary Remand of the Second district court's jurisdiction back to the lower court for clarification. [Respondent Appendix 2.] After the second district court considered both PETITIONER REEVES' Motion and RESPONDENTS' reply, the second district court denied PETITIONER REEVES' Motion To Dismiss [Respondent Appendix 3.].

After both parties filed their briefs on the merits the second district court rendered a written opinion authored by Judge Altenbernd in favor of the Respondents. The second district court held that the undisputed evidence in the light most favorable to the plaintiff simply did not create a genuine issue of material fact and reversed and remanded for entry of judgment in favor of the Respondents.

However, the second district court certified two questions of great public importance.

SUMMARY OF THE ARGUMENT

In her third, virtually identical attempt, PETITIONER REEVES argues that this court should vacate the district court's opinion without considering the two certified questions because the trial court supposedly did not specifically state, as a matter of law, that workers' compensation immunity is unavailable to the Respondents. Therefore, according to the PETITIONER, the district court and this Court lack

jurisdiction to review a non-final Order from the trial court denying Summary Judgment. Petitioner's argument is without merit.

PETITIONER REEVES erroneously concludes that the trial court's Order does not specifically state, as a matter of law, that the defense of workers' compensation immunity is unavailable. [Petitioner's Initial Brief, page 9, 13]

Contrary to PETITIONER REEVES' argument, the order in paragraph I.A.6. uses the language required by *Hastings v Demming*, 694 So. 2d 718 (Fla. 1997) (*"Hastings II")*; more specifically, the trial court stated: "Therefore, as to these counts, as a matter of law, the Defendant's Motion should be denied." [Emphasis added.]

As a result of this language, it is clear that the order conclusively, and finally determined, that the Respondents are not entitled to workers' compensation immunity.

In short, the trial court did not leave the issue of whether the PETITIONER'S exclusive remedy is workers' compensation benefit for the jury to determine. As a result, the order conclusively and finally determined the Respondents' non-entitlement to workers' compensation immunity, as a matter of law.

The district court could have, and did also review the trial court order under its certiorari jurisdiction.

The first certified question addresses a general question that is not applicable to the unique facts of this case because in the instant case it was clear that the trial court did not intend to submit the issue of gross negligence or intentional tort to the

jury as a question of fact. As a result, the certified question is not applicable to the instant case.

Should this court decide to answer the first certified question, the answer to the first certified question should be "yes". In the instant case, the undisputed facts viewed in light most favorable to the Plaintiff are so "crystallized" that a court can determine that the facts in the instant case did not rise to the heights of gross negligence, culpable negligence, or intentional tort as a matter of law. Since the standard of review is *de novo* it makes sense that a non-final order denying "as a matter of law" a Motion for Summary Judgment on the issue of workers' compensation immunity can be reviewed by the appellate court as an additional security to fulfill the court's gate keepers role.

This Court should refrain from answering the second certified question as stated because it is not representative of the issue presented in this case and because the district court did not rule on or *pass* on the question it certified.

If this Court considers the second certified question, this Court, - under the facts of this case - should answer the question, "no."

Respondent Fleetwood is entitled to Workers' Compensation Immunity

An employer who properly secures workers' compensation coverage for its employees is provided with immunity from suit "so long as the employer has not engaged in any intentional act designed to result in or that is '**substantially certain' to result in injury or death to the employee**."

No bright line rule currently exists defining substantial certainty. Most reasonably, whether the facts of the case may support the finding of substantial certainty on the part of the employer can only be determined on a **case by case basis**. In doing so, the proper "gauges" of what is substantial certainty are previously decided cases.

In the instant case, the employer, RESPONDENT FLEETWOOD's behavior does not rise to the level of "substantially certain to result in injury or death."

There were no prior accidents similar to the one that happened on April 1, 1991 in the previous ten (10) years even though several forklift operators had made thousands of similar trips with similar loads through the same area where the accident occurred. Therefore, the quantum of evidence, provided by the particular circumstances surrounding this event, does not even remotely come close to allow a finding of substantial certainty. More specifically, there is no evidence that demonstrates that RESPONDENT FLEETWOOD had a reckless indifference to the safety of its employees. To the contrary, safety has been a high priority at FLEETWOOD as evidenced by the fact that the same trip with the same load had been made thousands of times without any incident.

Also, there is no evidence in the instant case that the employer "deceived" any of its employees, which would have prevented them from exercising an informed judgment whether to perform the task they were assigned.

In sum, viewed in the light most favorable to PETITIONER REEVES, the

undisputed evidence simply does not create a genuine issue of material fact under the high threshold required to establish an intentional tort in this context. Therefore, RESPONDENT FLEETWOOD is entitled to workers' compensation immunity.

Response to "AMICUS" brief.

Boiled to the bone the AMICUS argues that if a party can show reasonable foreseeability of an injury, thereby establishing the duty element of negligence, the issue of whether a set of facts is egregious enough is a jury question. This argument is inconsistent with the intent of the Florida Workers' Compensation Act exclusivity provision because this provision was intended to provide employers immunity from suit and not merely limited immunity from liability. Furthermore, the AMICUS tries to prove its point by relying on premise liability cases. This is not a premise liability case.

As a result, based on the undisputed facts, the opinion of the district court should be affirmed.

STANDARD OF REVIEW

The standard of review of a summary judgment order is *de novo*. *The Florida Bar v. Cosnow*, 797 So. 2d 1255 (Fla. 2001).

ARGUMENT

I. THE SECOND DISTRICT COURT'S OPINION SHOULD BE AFFIRMED BECAUSE THE SECOND DISTRICT COURT DID HAVE JURISDICTION TO REVIEW THE

TRIAL COURT ORDER DENYING SUMMARY JUDGMENT *AS A MATTER OF LAW*

A. The undisputed facts, in the instant case, viewed in the light most favorable to the petitioner are so "crystallized" that a court could determine as a matter of law, that these facts do not rise to the heights of gross negligence, culpable negligence, or intentional tort.

PETITIONER REEVES argues for the third time that this Court should vacate the district court's opinion without considering the certified questions because the trial court, according to the PETITIONER, did not specifically state as a matter of law that workers' compensation immunity is unavailable to the Respondents.[Petitioner's Initial Brief, page 9 and page 12].

PETITIONER's previous attempts to argue this same issue started on January 9, 2002, when PETITIONER REEVES filed her Motion To Dismiss for Lack of Jurisdiction with the second district court of Appeal. [Respondent Appendix 1.] In response, Respondents on January 22, 2002, filed their Response to Petitioner's Motion To Dismiss for Lack of Jurisdiction, or in the Alternative, Motion for a Temporary Remand of the Appellate Court's Jurisdiction Back to the lower court for clarification. [Respondent Appendix 2.] After the second district court considered both PETITIONER REEVES' Motion and Respondents response, the Second district court denied PETITIONER REEVES' Motion To Dismiss [Respondent Appendix 3.].

PETITIONER REEVES erroneously concludes that the trial court's Order does not specifically state, as a matter of law, that the defense of workers' compensation immunity is unavailable. [Petitioner's Initial Brief, page 12.] Furthermore,

PETITIONER REEVES erroneously concludes that the trial court Order implies that the Respondents would have been allowed to argue the defense of workers' compensation immunity before the finder of fact. [Petitioner's Initial Brief, page 13.]

PETITIONER REEVES correctly cites and quotes the controlling law with regard to the appealability of non-final orders denying summary judgment on a claim of workers' compensation immunity, to-wit:

> [N]on-final orders denying summary judgment on a claim of workers' 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.

Hastings v. Demming, 694 So. 2d 718, 720 (Fla. 1997)("*Hastings II*").

A close look at the language in the trial court's order reveals the error in PETITIONER REEVES' argument. Contrary to PETITIONER REEVES' argument, the order in paragraph I.A.6. uses the language required by *Hastings II*, supra; more specifically, the trial court stated: "Therefore, as to these counts, as a matter of law, the Defendant's [Respondents] Motion should be denied." [Emphasis added.]

As a result of this language, it is clear that the Order conclusively determined that the Respondents are not entitled to workers' compensation immunity. Furthermore, it is clear from the language in the order that the Respondents have been precluded from having a jury decide whether they are entitled to workers' compensation immunity. In order to arrive at her strained conclusion, PETITIONER REEVES, as she did in her Motion to Dismiss for Lack of Jurisdiction, and in her

Answer Brief [Petitioner's Initial Brief, Page 12.][Appendix 12], tries to muddy the waters by focusing on superfluous language by the trial court in its Order.

It is abundantly clear that the language in the order cited by PETITIONER REEVES is merely excess language which is usually included in orders denying motions for summary judgment, because on a Motion For Summary Judgment, all material facts are to be considered in favor of the non-moving party. *Tampa Port Authority v. Ness International, Inc.*, 756 So. 2d 241 (Fla. 2nd DCA 2000).

In the instant case, the trial court under the heading "Factual Findings" in paragraph I.A.2., makes the following undisputed findings of fact:

> The court further finds that the maneuvers en route engaged by Marvin Miller on the date of the accident, had been accomplished hundreds of times by him, and a total of thousands of times by other forklift operators in the ten (10) years preceding the date of the decedent's death, with no displacement of materials being carried on the forklift.

Paragraph 3 goes on to say:

> The court further finds that Marvin Miller performed the maneuver on the date of the incident consistent with the manner in which he had performed it on hundreds of previous occasions, but one of the rolls of metal became dislodged from his forklift and struck the Plaintiff in the chest killing him. It is apparent to the court that this roll of sheet metal struck a metal support pole that was obscured from the forklift driver's view.

The court based its ruling on the above-undisputed facts. It is true that the trial court, in its Order, states that it has looked upon the facts in a light most favorable to the non-moving party. However, the findings of fact cited by the court show that the court

used the undisputed facts to arrive at its ruling. The trial court's Order does not state that its denial of summary judgment was based on disputed facts. As a matter of fact, the court ends the paragraph from which the PETITIONER cites her language by stating that, "these circumstances taken in combination presented a high risk of serious injury."

These circumstances on which the court bases its ruling are specifically set forth in paragraphs 2 and 3 of the court's Order. Because the court bases its ruling on the undisputed facts set forth in paragraphs 2 and 3 of its Order, it is clear that the court denied Appellants' Motion For Summary Judgment on their claim of workers' compensation immunity, as a matter of law, and it is clear that the immunity defense is not available to the Respondents period.

The Second District Court of Appeal in *Fleetwood Homes of Florida, Inc., v. Reeves*, 833 So. 2d 857 (Fla. 2d DCA 2002), specifically Judge Altenbernd, held that the trial court expressly included within its order the language mandated by *Hastings, supra*. According to Judge Altenbernd the trial court reviewed a well developed record where the facts viewed in light most favorable to the plaintiff were so 'crystallized" that the trial court could determine - as a matter of law - that the facts in the instant case did not rise to the heights of gross negligence, culpable negligence, or intentional tort. *Id* at 865. Thus, according to Judge Altenbernd, the trial court's order is an appealable order under rule 9.130(a)(3)(C)(v).

In short, the Order conclusively determined the Respondents non-entitlement

to workers' compensation immunity, as a matter of law and therefore is appealable under it. *Id*.

B. Regardless of whether the district court had jurisdiction of this proceeding as an appeal from a non-final order, it had certiorari jurisdiction to review this matter since the trial court's order departed from the essential requirements of the law in depriving the Respondents of their statutory immunity from suit.

The Petitioner makes much ado regarding the second district court's supposed lack of jurisdiction to hear the appeal of the trial court's ruling on the Motion for Summary Judgment under Fla. R. App. P. 9.130(a)(3)(C)(v). In reality, that entire issue is MOOT. As Judge Altenbernd pointed out in the second district court's opinion, that court also had certiorari jurisdiction pursuant to Fla. R. App. P. 9.030(b)(2)(A).

As this Court has stated, certiorari is "an extraordinary remedy" that should be used sparingly and only in those cases where certain criteria are met. *Belair v. Drew*, 770 So. 2d 1164, 1166 (Fla. 2000), quoting *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1098 (Fla. 1987). Those criteria are met when: (1) the trial court departs from the essential requirements of the law, (2) resulting in irreparable injury, (3) that cannot be adequately remedied on appeal following final judgment. *Id*.

An erroneous denial of immunity from suit is the very sort of issue that is ideal for certiorari review, as the second district court recognized here. See *Fleetwood Homes of Florida, Inc. v. Reeves*, 833 So. 2d 857, 865 (Fla. 2d DCA 2002).

For example, in *Stephens v. Geoghegan*, 702 So. 2d 517 (Fla. 2d DCA 1997),

a retired policeman filed a civil rights action under 42 U.S.C. § 1983 against three members of the St. Petersburg police force. The defendants moved for summary judgment based upon absolute and qualified immunity as public officials. The trial court denied the motion, but its order did not make clear whether the immunity was unavailable as a matter of law.[3] The second district court noted, though, that it was clear from the transcript of the hearing that the trial court based its denial on the existence of factual disputes. In this posture, the second district court found that it did not have jurisdiction to review the matter on a direct appeal. On the other hand, it also found that it did have certiorari jurisdiction.

The appellate court determined that a denial of immunity, whether as a matter of law or based upon a disputed issue of fact, satisfies the three requirements set forth above. As the appellate court noted, immunities "are not merely defenses to liability." *Id* at 521. Instead, they protect the party claiming immunity "from having to defend a suit at all." *Id*. (emphasis added).

> This entitlement is lost if the defendant is required to go to trial; having been forced to defend the suit, the public official cannot be reimmunized after-the-fact. Because of the nature and purpose of a claim of immunity, an appeal after final judgment would not be an adequate remedy. Accordingly, we hold that [the defendants] have established the requisite material harm, irreparable on appeal after judgment, needed to invoke our certiorari jurisdiction.

[3] As noted above, the trial court in the instant case DID expressly make its ruling as a matter of law.

Id. (citations omitted).[4]

Following this precedent, the second district court in the instant case exercised its discretion and asserted certiorari jurisdiction. It properly concluded:

> The trial court's concept of an "inevitable" accident as a method to establish gross negligence or an intentional tort is a departure from the essential requirements of the law that deprives the defendants of a statutory right to claim an immunity from suit. ***We cannot adequately remedy on direct appeal a legal error that denies an immunity created by the legislature to avoid trial in the first place.***

Reeves at 865 [Emphasis Added]

It is telling that the Petitioner relegates her entire argument on the issue of certiorari jurisdiction to a single conclusory statement buried in a footnote on page 38 of her Initial Brief. That the Petitioner is trying to downplay this point is understandable, because it is far-reaching in its impact on the other arguments contained in the Initial Brief, and indeed, is fatal to her entire jurisdictional argument.

In addition to the arguments set forth below, concerning direct appeals, the answer to the first certified question is also "Yes" based upon the certiorari jurisdiction so eloquently justified by the second district court. Further, having obtained jurisdiction by both (or either) means, the second district court, having the benefit of a fully developed record and reviewing the case *de novo*, could see for itself that

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[4] The second district court reached a virtually identical result in *Board of Regents v. Snyder*, 826 So. 2d 382 (Fla. 2nd DCA 2002) (involving suit by tenured professor against individual employees of state university).

regardless of whether the trial court saw factual disputes on the issue of immunity or ruled against the Respondents as a matter of law, the trial court clearly should not have reached any conclusion other than to find that the Respondents were entitled to summary judgment as a matter of law.

In other words, by pinning its ruling upon an erroneous "inevitability" standard, the trial court egriously departed from the essential requirements of the law, and the second district court simply put things right, fulfilling its gate keeping role by preventing a trial that should never occur. Respondents submit that the district court could have reviewed the matter under its certiorari jurisdiction. *Fleetwood Homes of Florida, Inc. v. Reeves*, 833 So. 2d 857, 865 (Fla. 2d DCA 2002).

Although, Respondents submit that the district court had jurisdiction of this proceeding as an appeal from a non-final order, Judge Altenbernd additional argument in Reeves leaves no doubt as to the district court's jurisdiction in the instant case.

C. CONCLUSION

The district court had jurisdiction pursuant to Rule 9.130(a)(3)(C)(v) and the district court had certiorari jurisdiction.

II. FIRST CERTIFIED QUESTION

MAY A DISTRICT COURT REVIEW A NON-FINAL ORDER DENYING, "AS A MATTER OF LAW" A MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF WORKERS' COMPENSATION IMMUNITY IF IT IS CLEAR THAT THE TRIAL COURT INTENDS TO SUBMIT THE ISSUE OF GROSS NEGLIGENCE OR INTENTIONAL TORT TO THE JURY AS A QUESTION

OF FACT?

A. This court should refrain from answering this certified question because the certified question is not applicable to the facts of the instant case.

The certified question addresses a general question that is not applicable to the unique facts of this case because in the instant case it was clear that the trial court did not intend to submit the issue of gross negligence or intentional tort to the jury as a question of fact. The part of the first certified question, which states "if it is clear that the trial court intends to submit the issue...to the jury as a question of fact," has nothing to do with this case. To say that the trial court in the instant case was going to submit the issue to the jury would be speculation.

As a result, the certified question is not applicable to the instant case and this Court should refrain from answering the first certified question as stated. *Resha v. Tucker,* 670 So. 2d 56 (Fla. 2d DCA 1996).

B. If this court decides to answer the first certified question the answer should be "YES"

If this Court believes it should answer the first certified question the answer should be a resounding "YES". The answer should be "YES" for the reasons articulated in the well reasoned and cogent opinion of the district court below. Judge Altenbernd stated:

> If the Supreme Court intends to prohibit appellate review of orders denying summary judgment in all cases whether the trial court intends to allow the Plaintiff to proceed to trial on an intentional tort or a claim of gross negligence or culpable negligence, then it

> might be simpler to eliminate Rule 9.130(a)(3)(C)(V) because the Rule would then have virtually no application to any order that a Defendant would wish to appeal.

Reeves supra.

Furthermore, the district court stated:

> Under this interpretation, this jurisdictional rule would allow review only in the very rare case where the trial court determined, as a matter of law, that the undisputed facts established that the Defendant was *not* the statutory employer or co-worker. So interpreted, the rule would allow for appeal only when the trial court was planning to proceed to trial on the issue of Defendant's simple negligence because the trial court had rejected, as a matter of law, the claim that the Defendant was an employer or fellow employee. *Id.*

In the instant case, the facts in a light most favorable to the Plaintiffs are so "crystallized" that a court can determine - and did determine - as a matter of law, that these facts do not rise to the heights of gross negligence, culpable negligence,[5] or intentional tort. Id. *Reeves, citing Hastings,* 694 So. 2d at 719.

The district court hit the nail on the head when it stated that a trial court must serve as the gate-keeper at the initial stages of litigation to foster the legislative policies. Id. *Reeves*. Of course, the goal of the legislative policies regarding workman's

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[5] The District Court did not reach RESPONDENT OLIVER's argument that he is a supervisor entitled to be judged by the culpable negligence standard. See *Heister Company v. David*, 612 So. 2d 678 (Fla. 1st DCA 1993). In 1988 the legislature amended § 440.11(1) in response to *Streeter v. Sullivan*, 509 So. 2d 268, (Fla. 1987), specifically differentiating the tort liability of corporate officers, directors or supervisors of an employer from the liability of fellow employees. *Kennedy v. Moree*, 650 So. 2d (1102 Fla. 4th DCA 1995) citing 1988 Fla. Laws Ch. 88-284.

compensation is to avoid lawsuits at the outset, not simply to prevent adverse verdicts against employers and co-workers at the end of lengthy litigation.[6] Where, as here, the record is fully developed, the relevant facts are undisputed, and the defendants, as a matter of law, either are or are not entitled to immunity, then it not only makes sense, but it also fulfills the appellate court's gate keeper role, reviewing the case de novo, to decide the issue once and for all. In other words as articulated by the district court below, the appellate courts:

> Should not [be prevented] from enforcing the legislative policy of immunity when [the appellate court] can review a well developed record to conclude that the Plaintiff can not present prima facie evidence to establish the exceptional case of gross negligence, culpable negligence, or intentional tort in this context. [Emphasis added.]

Id.

Again, the trial court, as noted by the court below, expressly included within its order the language mandated by *Hastings* to give the court below jurisdiction.

C. CONCLUSION

Because the certified question addresses a general question not based on the facts of this case this court should refrain from answering the first certified question. However, if this court chooses to answer the first certified question the answer should

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[6] The district court also noted that workers' compensation immunity is not usually a defense at trial. *Id* at 863. This is so because workers' compensation immunity is immunity from suit as contrasted with immunity from liability. Clearly immunity from suit is not a jury question.

be "yes".

III. SECOND CERTIFIED QUESTION

IF AN EMPLOYER ALLOWS ITS EMPLOYEES TO PERFORM A NEGLIGENT PROCEDURE REPEATEDLY AND FOR A LONG PERIOD, MAY THE FIRST INCIDENT IN WHICH THE PROCEDURE RESULTS IN INJURY OR DEATH BE TREATED AS AN INTENTIONAL TORT UNDER *TURNER V. PCR, INC.*, 754 So. 2d 683 (FLA. 2000)

A. This court should refrain from answering the second certified question because the district court did not pass upon the specific certified question, therefore, this court lacks jurisdiction to answer the second certified question

This Court should refrain from answering the second certified question because, as phrased, the question does not properly create jurisdiction in this Court. Specifically, the district court did not *pass upon* the specific question certified as required by art. V, § 3(b)(4), Fla. Const. *Salgat v. State*, 652 So. 2d 815 (Fla. 1995) *citing Revitz v. Baya*, 355 So. 2d 1170 (Fla. 1977).

The district court stated in the body of its opinion that "we do not believe that the Supreme Court in *Turner* intended to allow a plaintiff to add together ***small risks of injury*** in order to reach a combined total where the likelihood of injury to some employee sometime was substantially certain." [Emphasis added] *Reeves, supra.* By using the phrase "small risk of injury" the district court defined the type of negligence that was repeated, i.e., a very low-level negligence. Unfortunately, the district court did not define what type of negligence it is referring to in the second question it certified.

This creates a serious problem. Did the district court mean repeated minor negligence, repeated major negligence or repeated culpable negligence? Without knowing to what level of negligence the district court is referring, the certified question is impossible to answer.

Furthermore, the question does not accurately reflect the issue in this case because even if a first incident in which the procedure results in injury or death **"MAY"** be treated as an intentional tort, the facts of the instant case do not warrant such a finding in this case.

B. If this court does consider the second certified question the answer should be "NO"

(1) The district court of appeal did not define the level of repeated violence

If this Court does consider the second certified question, this Court should answer the question "No"; specifically, this Court should answer the question "No" as it applies to the instant case.

Again, the district court did not define the level of repeated negligence which "may" be considered an intentional tort the first time it leads to injury or death. In its opinion the district court describes the conduct by the Respondents as having a "small risk of injury." *Reeves, supra*. Therefore, it logically follows that the negligence the district referred to in its certified question is the type of negligence with "small risk of injury." As a result, the answer to the second certified question must be "No." The petitioner would have this Court answer "yes", which would substantially alter and

expand the law of torts.

Following the Petitioner's argument, any negligent procedure, no matter how slight or how small the risk of harm, if repeated X number of times would magically transform into an intentional tort sufficient to overcome immunities, or even expose a merely negligent defendant to punitive damages.

The better and more sensible approach is that set forth in the case of *Glaab v. Caudill,* 236 So. 2d 180 (Fla. 2d DCA 1970). Although dealing with the issue of gross negligence and not the higher standard of substantial certainty, *Glaab* is rich with guidance on the issue of "repeated negligence."

In *Glaab, supra,* the Second district court of Appeal provided a clear and helpful illustration of the difference between simple negligence and gross negligence which also applies the difference between simple negligence and an intentional tort using the substantially certain to result in injury or death standard. The court generally explained these concepts as follows:

> [I]t's logical to assume that at some point along the line in a potential gross negligence situation the composite of circumstances or conditions will present a risk of grave injury which a rational person of mature judgment is simply unwilling to assume. ***On the lower extreme, to illustrate negotiating a sharp curve at 20 mph, with chargeable awareness that 999 out of 1,000 cars safely do so, would unquestionably be a minim [sic] of risk; and taking such a risk, we can say, would not be negligence at all***. As speed would increase, however, so of course would the risk, until a point is reached when an accident or injury, as a consequence of careless inattention, oversight, or error in judgment ***is foreseeable more than a mere possibility***. Imprudence at this point would be a *careless disregard* [emphasis added] of danger;

> and it can be said then, we think, that this point would be the predicate for ordinary negligence. But, on the high side of a potential gross negligence situation, negotiating that same curve at, say 50 mph, with chargeable awareness that twenty-five % of the cars do *not* [emphasis in original] make it at that speed, might well be a risk a person of mature judgment wouldn't consciously and willingly take (except as might be required in an emergency). Notwithstanding that he has a better than 50-50 chance of making it. At this point in the spectrum, we therefore think that a driver should be particularly *and keenly alerted to caution [emphasis in original] in approaching that curve at 50 mph*. If regardless of the apparent risk and regardless of the particular alertness called for, a driver voluntarily and consciously attempts to take that curve at 50 mph, a jury might very well think that he evinced [sic] a "conscious disregard of consequences" to the extent that he knew such action would "probably and most likely" result in a serious accident. [Emphasis added.]

Id at 184.

Applying these principals to the facts of this case, it is clear that the behavior of RESPONDENT MILLER and RESPONDENT OLIVER does not meet the threshold for gross negligence and certainly does not meet the threshold for an intentional tort. As a matter of fact, according to the illustration set forth in *Glaab, supra,* and adopted in *Merryman v. Matthews*, 529 So. 2d 727 (Fla. 2nd DCA 988), *infra,* the composite of circumstances in the instant case would fit into the "lower extreme" illustration. *Glaab at 184. Merryman at 728.*

The Second District Court of Appeal stated in its illustration that a person would not be negligent at all if "when negotiating a sharp curve at 20 mph, with chargeable awareness that 999 out of 1,000 safely do so, would unquestionably be a

minim [sic] of risk." *Id*.

[7]

Another instructive case is *Merryman, supra.* In *Merryman,* the plaintiffs' decedent was killed when he was struck by a load of steel that had fallen from a malfunctioning crane. The court enumerated the many factors cited by the plaintiff who urged that the defendant acted with gross negligence.

> Petitioners Wyrick and Spotts had been advised by Michael Mattheus, an electrical contractor who is a defendant in a count of the complaint not the subject of the partial summary judgment now on appeal, that the limit switch was functioning only intermittently and was to be replaced. They knew also that the switch had malfunctioned several days earlier, causing the crane's load to drop. Mattheus, who at that prior time had repaired the crane and advised of the problem with the limit switch, did not recommend that the crane not be used but indicated to Petitioners, who were not knowledgeable about crane operations, that the crane should be used with caution to be sure that it was not lifted too high. The employees who worked in that area including decedent and the crane operator, were so advised. Petitioners permitted the

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[7] In the instant case, the evidence showed that RESPONDENT MILLER had "negotiated" the straight away (not even a curve) where the accident took place over 1,500 times in the same manner with the same load without incident. Furthermore, the evidence presented showed that in the previous ten years, other forklift operators had negotiated the straight away where the incident happened several thousand times in the same manner with the same load without incident. During those thousands of times when the forklift operators negotiated the straight away where the incident happened, with the forks raised approximately 12 feet above the ground, carrying three rolls of metal sheet roofing material no accident ever happened. Therefore, it logically follows that the "negotiation" of the straight away in the plant by RESPONDENT MILLER, with chargeable awareness that in the previous years that straight away had been negotiated thousands of times by others and hundreds of times by himself safely, would unquestionably be a minimum risk, and taking such a risk (if any), RESPONDENTS submit, would not be negligence at all.

> continued use of the crane as the work bay involved was the busiest at TBS. [Emphasis added.]

Id.

Despite the numerous warnings and at least one prior incident, the court held that this simply did not rise to the level of gross negligence. *See also Kline v. Rubio,* 652 So. 2d 954 (Fla. 3rd DCA 1995)(no gross negligence as a matter of law where plaintiff was seriously injured by meat-tenderizing machine that was not properly secured and safety features and warnings had been intentionally removed or bypassed.)

The plaintiff in *Merryman* vigorously argued that the Petitioners were grossly negligent because the condition of the crane was extremely dangerous and Petitioners knew of the condition but nonetheless permitted the crane to continue operating. The Second District Court of Appeal disagreed with this proposition. The court stated that "the danger was…, no more than a possibility, and Petitioners, by permitting the continued use of the crane were not shown to have evinced such conscious disregard to the decedent's safety as is requisite for finding of gross negligence on their part." *Id*. The same is true in the instant case. The danger that the metal sheet roofing roll would hit a pole and fall off, let alone kill somebody who happened to be standing in the path of the metal sheet roll was no more than a possibility and an unlikely one at best.

Again, PETITIONER has offered no evidence, and can offer no evidence, to

refute RESPONDENT MILLER's account as to how the accident occurred. Furthermore, PETITIONER REEVES has not even come close to demonstrating that RESPONDENT MILLER's conduct was likely to result in injury.

Likewise, as to RESPONDENT OLIVER, PETITIONER REEVES has offered nothing, other than conclusory allegations in the Second Amended Complaint, to establish any semblance of gross negligence and/or substantial certainty. PETITIONER REEVES has failed to produce any evidence to demonstrate that any of the conditions in the plant were "hazardous" or that there was a "clear and present" danger substantially certain to lead to injury or death.

(2) The facts in the instant case do not parallel the facts in Turner or Connolly

PETITIONER REEVES incorrectly argues that the evidence before the trial court closely paralleled that in *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000). Nothing could be further from the truth. *Turner* is distinguishable from the instant case. The factual situation of *Turner, supra,* is extraordinarily egregious compared to the facts in the instant case. On November 22, 1991, an explosion occurred in a chemical plant in Alachua County, Florida, killing Paul Turner and seriously injuring James Creighton. *Id*. at 684. At the time of the explosion, Defendant PCR, Inc. ("PCR"), employed both Turner and Creighton as technicians. The November 22nd explosion resulted from mixing three chemicals required to produce F-Pentene-2, in a 100 pound liquid fuel cylinder lacking any pressure relief device. *Id*. at 685. Before

the November 22nd explosion, PCR made 36 runs of F-Pentene-2 process. *Id*. at 685. Thirty of those runs involved quantities less than or equal to 20 gallons. *Id*. Six involved 200 gallon runs. *Id*. The explosion at issue occurred during the seventh, 200 gallon run. *Id*. **Turner and Creighton presented evidence showing "at least three" other explosions involving the manufacturing of F-Pentene-2, although the processes differed.** (Notably, the Petitioner in the instant case can show ZERO prior incidents out of thousands of identical runs with sheet metal roofing.)

Turner and Creighton retained two chemical experts to investigate the circumstances surrounding the incident. *Id.* The experts in *Turner* provided affidavits stating it was substantially certain that an explosion would result in mixing large quantities of the chemicals at issue in a propane tank rather than a reactor equipped with pressure relief valves and other safety features. *Id.* The experts stated that tetrafluoroethylene in particular, was "highly reactive, prone to spontaneous and violent decomposition when heated or compressed" and required special equipment and precautions when handled. *Id.* Evidence was also presented that ICI, the manufacturer of TFE had notified PCR that it was discontinuing supplying TFE due to its hazardous nature. *Id*.

Both experts concluded that due to intense pressure placed on PCR and the nearing face-out date for the legal use and manufacture of freon (EI Dupont Neimers & Co. hired PCR to develop the chemical replacement compound for freon 113) and because the creation of the replacement compound (F-Pentene-2) involved

complicated chemical processes, PCR ***intentionally*** changed the product hold for producing F-Pentene-2 to accommodate the existing reaction facility that was unsuited for that purpose. *Id* at 685. **In contrast, in the instant case the expert affidavit is silent as to whether the facts in this case were substantially certain to lead to injury or death. [Appendix 7].** Respondents submit that the affidavits are silent because based upon the undisputed facts in this case a reasonable person cannot find that these facts were substantially certain to lead to injury or death.

Furthermore, evidence was presented that Turner voiced concerns regarding the safety of the project and PCR never informed Creighton regarding the hazards. Theresa J. Fontana, *Proving Employer Intent: Turner v. PCR, Inc. and the Intentional Tort Exception to the Workers' Compensation Immunity Defense*, 25 Nova L. Rev. 365 (citing Initial Brief of Respondents at 4, Turner, No. 94, 468.) **NO SUCH CONCERNS WERE VOICED IN THE INSTANT CASE.**

Finally, PCR, knowing that TFE was dangerously unstable, allowed the practice of manually inverting the chemical containers, thus making it substantially certain that the employees would be harmed. *Turner*, *supra* at 685. Furthermore, the evidence suggested that PCR intentionally stepped up production, intentionally disregarded the safety of its employees and failed to warn them of the highly explosive nature of TFE, in order to meet an approaching deadline and increase profits. *Turner, supra* at 690-691. **NO SUCH EVIDENCE CAN BE SHOWN IN THE INSTANT CASE. ALSO, THE EVIDENCE IN THE INSTANT CASE DOES NOT SHOW ANY**

COVER UP.

In addition, PCR had first hand knowledge of the high risk associated with the handling of TFE because there had been at least three other similar uncontrolled explosions in less than two years at PCR's chemical plant. **THERE HAD BEEN ZERO OTHER INCIDENTS IN THE INSTANT CASE.**

PETITIONER REEVES further argues that "[a] for applying the objective standard to the facts of this case yields the same conclusion as in *Turner*; the evidence raised genuine issues of material fact effectively precluding the entry Summary Judgment". The opposite is true. When applying the objective standard to the facts in this case there is no genuine issue of material fact precluding the Summary Judgment in favor of Respondent, FLEETWOOD.

PETITIONER REEVES makes the erroneous argument that performing an operation that is unsafe - viewing the facts in the light most favorable to the Petitioner - is synonymous with conduct substantially certain to result in injury or death.

The district court addressed this argument in its opinion and stated:

> The procedure for transporting sheet metal that was devised by Fleetwood and implemented by Mr. Oliver and Mr. Miller may have been more dangerous than another method… it was not a procedure that an ordinarily prudent person, in light of the composite circumstances, would regard creating a clear and present danger. Likewise, after years of successfully performing this task, these men [Oliver and Miller] cannot be regarded as acting in conscious disregard for the safety of a co-worker whose workplace was on the opposite side of the aisle from the pipe.
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> * * *

> The tort feasor's conduct must be evaluated in the context of the particular occurrence. In this case, if anything, the numerous successful performances of the challenged procedure show that a risk of accident on April 1, 1991, was far from imminent.
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> * * *
>
> Again, we do not believe that the Supreme Court in *Turner* intended to allow a Plaintiff to ***add together small risks of injury in order to reach a combined total where a likelihood of injury to some employees sometime was substantially certain***. If that were the case, then many injuries that occur while roofing, or while performing any other moderately dangerous, repetitive job would be classified as the result of intentional torts. [Emphasis added]

In *Holderbaum v. IPCO Holding Co.,* 753 So. 2d 699 (Fla. 3rd DCA 2000), cert. den., 2000 Fla. *Lexus 2269* (Fla. Nov. 7, 2000), the court held that although the behavior at issue in that case may have been "perhaps grossly or even culpably" [negligent], the behavior was not substantially certain to result in injury or death. *Id.* at 700. RESPONDENT FLEETWOOD submits that the court in *Holderbaum* was correct in drawing a distinction between culpable negligence and "substantial certainty." In the instant case, the facts do not even rise to the level of culpable negligence. Therefore, there can be no finding of substantial certainty. *Fleetwood Homes of Florida, Inc. v. Reeves*, 833 So. 2d 857, 865 (Fla. 2nd DCA 2002). The *Holderbaum* court emphasized that when "objectively viewed" the fact that the employees:

> May have been negligent--perhaps grossly or even culpably so--in, as they said, not taking Quinones or his threats seriously under the circumstances in fact, as a matter of law, did not meet the "substantial certainty" threshold so as to constitute an intentional tort and thus overcome ITCO's workers' compensation immunity.

Using the facts in *Holderbaum* as a "gauge" it is clear that the facts in the instant case when objectively viewed are far less egregious.

Even when behavior is grossly or culpably negligent, such behavior does not make behavior substantially certain to lead to injury or death.

(3) Whether facts in a case rise to the level of substantial certainty to lead to injury or death can only be determined on a case by case basis

RESPONDENT FLEETWOOD submits that since substantial certainty can only be determined on a **case by case basis**, all prior court decisions discussing facts related to "substantially certain" or discussing facts related to repeated negligent behavior are gauges of intentional behavior under Florida workers' compensation law.

In order to circumvent the Workers' Compensation immunity of DENNIS REEVES' employer, RESPONDENT FLEETWOOD, PETITIONER REEVES must offer evidence that RESPONDENT FLEETWOOD engaged in "intentional acts designed to result in or that is 'substantially certain' to result in injury or death" to PETITIONER REEVES. *Eller, supra.* After this Court's decision in *Turner*, it now seems that "substantially certain

[8] to cause injury or death" now means behavior: That is akin to behavior that

[8] No bright line rule currently exists defining substantial certainty. Substantial certainty, can only be determined on a case by case basis. It is **the quantum of evidence provided by the particular circumstances surrounding the event**, that allows the finding of substantial certainty. For instance, looking to cases surviving this issue -

demonstrates a reckless indifference to the safety of injured employees (that is, culpable negligence)[9];

That arises from "repeated and continuous" conduct[10]; and,

That has an element of deceit that prevents an employee from "exercise[ing] an informed judgment whether to perform [un]assigned task."[11]

Applying these standards to the facts of the case, PETITIONER REEVES does not even come close to showing any of the above necessary elements to prove "substantial certainty" the threshold for an intentional tort. The only "repeated and continuous conduct" that PETITIONER REEVES can point to is the thousands of times the straight away accident site had been traveled safely with loads of metal sheet roofing rolls twelve feet in the air.

PETITIONER REEVES is not able to present a scintilla of evidence that RESPONDENT FLEETWOOD participated in any type of deceit. Petitioners argue

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cases that survive summary judgment on the issue of immunity - it appears that evidence in those cases eliciting particular behavior is especially condemning. See *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 96-97 (Fla. 1st DCA 1990); see also *Connolly v. Arrow Air, Inc.*, 568 So. 2d 448, 451 (Fla. 3rd DCA 1990).

[9] *Turner* at 688 n.4, 689 n.5.

[10] *Cunningham* at 97 (this reasoning from *Cunningham* was adopted by the Court in *Turner*. *Turner* at 690).

[11] *Connolly* at 451 (this reasoning from *Connolly* was adopted by the court in *Turner*.
Turner at 690.)

that FLEETWOOD was deceitful because FLEETWOOD painted the pole on occasion prior to the incident. [Petitioners Initial Brief P. 36]To arrive at the conclusion that this act was deceitful the Petitioner takes a quantum leap. Petitioner presented no evidence that the pole was painted in a deceitful effort to cover up a "clear and present danger." The Petitioner's insinuation that the painting of the pole was a cover up on the order of *Turner* or *Connolly* strains credulity beyond the breaking point.

Next, Petitioner argues that the Respondents were deceitful because they did not tell Reeves that the pole had been hit before. [Petitioners Initial Brief P. 36] They did not tell him because it had never been a problem. There was no reason to tell him. No objective reasonable person would have told him because no incident had ever happened. Furthermore, it did not look like any incident would ever happen.

Although the district court decided the issue *de novo* and the trial court's reasoning really does not matter in this case it interesting to note that even the trial court had problems arriving at its strained conclusion with regard to its ruling on substantial certainty. In Appendix 10, page 128-129, the trial court explained its ruling and finding of substantial certainty by stating the following:

> Well, now, let's go to substantial capacity (sic)(the court meant to say a "certainty"). I don't feel as comfortable with this one as I do the other two, but I think I am going to try to be consistent, ***even though I don't feel as comfortable with it***. And that is, that facts are--and there may be some dispute about this, but the facts that the plaintiff presents are that OLIVER knew full well MILLER's routine of carrying this load in of roofing material. [Emphasis

added]

[Appendix 4, page 127.]

RESPONDENT FLEETWOOD submits that the district court correctly reversed and remanded the trial court for entry of Judgment in favor of RESPONDENT, FLEETWOOD. First, the trial court's finding that the manner in which the forklift was driven with the load in question "was an accident waiting to happen" is simply not supported by the facts. Again, the facts show that for ten years the forklift drivers had been driving the same route with the same type of loads without any incident. Therefore, to say that this was an accident waiting to happen is a gross exaggeration. Furthermore, the trial court's statement that if an accident happened the result was that it was substantially certain to result in injury or death is also based on false logic. Certainly the chances are far greater that a roll would fall off the forklift and not hit a person than they are that a roll would hit a person. Therefore, there is absolutely no substantial certainty that (1) the behavior by RESPONDENT MILLER was an "accident waiting to happen"; and (2) there was no substantial certainty that if a metal sheet roll did fall off, such a fall was substantially certain to result in injury or death.

In another post-*Turner* court opinion, the Third District court of Appeal in *Pacheco v. Florida Power and Light Company*, 784 So. 2d 1159 (Fla. 3rd DCA 2001) held that the Plaintiff, Pacheco, did not circumvent Florida Power and Light Company's workers' compensation immunity because the derelictions by Florida

Power and Light, although very serious and with tragic consequences, did not rise to the level of an intentional tort required to invoke the *Turner* exception. The court stated:

> In so holding, we note that the cases which have actually applied the *Turner* doctrine, especially *Turner* itself, have characteristically involved a degree of deliberate or willful indifference to employees' safety which simply does not exist in this case.

Id.

Certainly, the consequences of the metal sheet roofing roll falling off the forklift had tragic consequences. **However, just because an accident has tragic consequences doesn't make it rise to the level of an intentional tort required to invoke the Turner exception.** As a matter of fact, PETITIONER REEVES cannot present any evidence showing any "derelictions" by RESPONDENT FLEETWOOD. To be sure, PETITIONER REEVES cannot show any derelictions that involve a degree of deliberate or willful indifference to employee safety. It simply does not exist in this case.

In *EAC USA, Inc. v. Kawal*, 805 So. 2d 1 (Fla. 2nd DCA 2001), the district court in its concurring opinion makes an excellent point.

> Over a sufficient period of time, any dangerous job is substantially certain to injure or kill some employee. The builder of the Golden Gate Bridge knew with substantial certainty that building the bridge would cause an employee to sustain a serious injury or death. That did not make the act of building the bridge a battery.

Id at 4.

Judge Altenbernd in his concurrence assumed (and RESPONDENTS submit correctly so) that the only recognized intentional tort that could be alleged in *Kawal, supra, Turner, supra, and Reeves, supra,* would be battery. It is axiomatic that under "classic tort law" in order to be liable for battery, a defendant must do a positive affirmative act with the intent to cause an offensive contact with the plaintiff. *Id* at 4, citing *W. Page Keeton, et al., Prosser and Keeton on Torts §9, at 41* (5th Ed. 1984). The element of intent can be established if the act is substantially certain to cause the offensive contact. *Id*. citing *Keeton, §8 at 36.*

In the instant case, no such positive affirmative act or evidence of intent can be presented by PETITIONER REEVES. Moreover, in the case at hand, there was no "poorly trained employee who operated a dangerous machine without proper guarding." To the contrary, RESPONDENT FLEETWOOD employed a highly trained, highly skilled employee in RESPONDENT MILLER who had made the same trip in the same manner over a thousand times without any accident whatsoever.

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[12] Furthermore, it seems, from reading Judge Altenbernd's concurrence in *Kawal, supra,* that even if, assuming arguendo, RESPONDENT FLEETWOOD's employees were driving a dangerous machine which was operated without proper guarding, i.e., securing the load, by poorly trained employees for a sufficient period of time, this behavior would only constitute a "negligent omission that may rise to the level of gross or culpable negligence." As a result, it logically follows that since the facts in the instant case are not as egregious as the facts assumed by Judge Altenbernd in his concurrence in *Kawal, supra,* there can be no finding in the instant case that the conduct by RESPONDENT FLEETWOOD was substantially certain to result in injury or death.

As noted, RESPONDENTS submit that previous court decisions should be used as gauges as to what facts rise to the level of substantial certainty. In the instant case, the trial court recognized - correctly - that the "acts complained of in the instant case were not as egregious as those present in the cases cited in Defendants' [Respondents] Motion in which the court found that the Defendants' [Respondents] conduct did not rise to the threshold necessary to overcome workers compensation immunity." [Appendix 1, page 2, paragraph B3.].[13]

In *Subileau, supra*, the decedent fell to his death from an elevated construction site that did not have proper guardrails. The decedent's employer conceded that they had been cited by OSHA several times for the violation, and that it had knowledge of injuries resulting from prior falls caused by the lack of proper guardrails. Nevertheless, the court of appeal upheld the grant of summary judgment in favor of the employer. The appellate court compared the conduct of the Defendant Subileau of that of the employer in *Connolly, supra.* The court concluded that a comparison of the conduct between the two employers was not even close. The court stated:

> In the case at bar, although Petitioners did knowingly subject their employees to a **dangerous work condition** by not placing guardrails or other safety devices on the elevated work sites, we

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[13] The cases to which the trial court referred were *Subileau v. Southern Forming, Inc.*, 664 So. 2d 11 (Fla. 3rd DCA 1985), *JB Coxwell Contracting, Inc. v. Schafer*, 663 So. 2d 659 (Fla. 5th DCA 1995), *Gustafson Dairy, Inc. v. Phiel*, 681 So. 2d 786 (Fla. 1st DCA 1996) and *Wilkes v. Boston Whaler, Inc.*, 691 So. 2d 629 (Fla. 5th DCA 1997).

> cannot conclude as in *Connolly* that resultant injuries or deaths were a substantial certainty. Further, unlike *Connolly*, we do not find **the conduct of the Petitioners to be intentionally harmful or deceptive in any way. The potential danger or hazard of working on these elevated work sites without guardrails or safety devices was known and obvious to the employees.** Hence, we can only find that Petitioners' conduct in not securing these work sites amounted to only negligence and thus, §440.11(1) would be a bar to this suit. Summary judgment was therefore proper.

Id. at 12, emphasis added.

Likewise, in the instant case, there is absolutely no evidence that RESPONDENT FLEETWOOD's conduct was "intentionally harmful or deceptive in any way." Indeed, the opposite is true. There were safety meetings, safety courses, safety videos, and posted rules discussing the dangers associated with loads carried on forklifts. In fact, the allegations of PETITIONER REEVES' Second Amended Complaint bear this out. [Appendix 9.] PETITIONER REEVES has alleged that RESPONDENT FLEETWOOD was committed to a policy of providing a safe work place that it asked its employees to follow safety rules, that it had a very active safety program, that it instituted weekly safety meetings and that it provided safety guidelines to its employees. [Appendix 9, paragraph 33.1-33.6 and 35.]

[14]

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[14] Further, PETITIONER REEVES has alleged that RESPONDENT FLEETWOOD had a policy that each new employee (which presumably included PETITIONER REEVES) was provided safety instructions. [Appendix 9, paragraph 34.1-34.4.] Also, whatever risk there was, was known and obvious to every employee, including PETITIONER REEVES, not only because the risk itself was obvious, but because it

The next case cited in RESPONDENT FLEETWOOD's Motion for Summary Judgment which the trial court admitted included more egregious facts than the instant case is *JB Coxwell Contracting, Inc. v. Schafer*, 663 So. 2d 659 (Fla. 5th DCA 1995). In *Schafer,* known risks and clear OSHA violations were not enough to overcome the employer's immunity. See also *Tonico v Resol, Inc.,* 783 So. 2d 309 (Fla. 3rd DCA 2001).

Clearly, as the trial court recognized, the cases discussed include facts much more egregious than those present in the instant case. As a matter of fact, the facts of the instant case fall woefully short of establishing the "intentional act" necessary to bypass RESPONDENT FLEETWOOD's workers' compensation immunity. The evidence presented by PETITIONER REEVES, including her conclusory allegations is devoid of any indications that Appellant FLEETWOOD hid dangers from its employees and tried to deceive them as to the risk they faced. All the evidence presented in the instant case is to the contrary, i.e., that RESPONDENT FLEETWOOD took reasonable steps to make any such risk known to its employees, including PETITIONER REEVES.

Finally, PETITIONER REEVES has not, and cannot, establish RESPONDENT FLEETWOOD's knowledge, or even existence, of prior similar incidents as a matter of fact. Although the same route had been traveled by the forklift operators thousands

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was discussed in safety meetings and posted in safety rules.

of times, as acknowledged by the trial court [Appendix 1, paragraph A3.] there never was a prior incident.

Therefore, as a matter of law, RESPONDENT FLEETWOOD did not engage in intentional acts that were "substantially certain" to result in injury and death to its employees. The fact that the accident happened was, obviously, unfortunate. However, as Judge Altenbernd stated in his concurrence in *Kawal, supra*, an argument can be made that over a sufficient period of time, any dangerous job is substantially certain to injure or kill some employee. However, RESPONDENT FLEETWOOD submits that just because an accident happened, it does not mean that the employer engaged in intentional acts that were "substantially certain" to result in injury or death to its employees.

In sum, the court should not review the second certified question. However, if it does, the answer should be "no", specifically when applied to the facts of this case.

(4) The district court did view the facts of the instant case objectively and used the reasonable person standard in accordance with TURNER.

The AMICUS argues that the district court below did not view the facts objectively as required by *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000). [AMICUS BRIEF P. 6,7,8.] To the contrary, the district court viewed the facts of the instant case objectively in the light most favorable to the PETITIONER. For example the district court stated:

> [I]t was not a procedure that an ***ordinarily prudent person***, in light of the composite of circumstances, would regard as creating a clear and present danger. [Emphasis added.]

Fleetwood Homes of Florida, Inc., v. Reeves, 833 So. 2d 857 (Fla. 2nd DCA 2002)

The district court then used this reasonable person standard and applied it to the facts in the instant case by stating:

> Likewise, after years of successfully performing this task, these man cannot be regarded as acting in conscious disregard for the safety of co-workers …

Id. at 868.

The district court showed further proof that it used the objective person standard when it stated "The tort feasor's conduct must be evaluated in the context of the particular occurrence." *Id. at 868.* In other words, the district court evaluated what a reasonable person would have done under like circumstances as required by *Turner.*

Therefore, the AMICUS self serving argument that the district court did not analyze the fact objectively in accordance with *Turner* is inconsistent with the language of the *Fleetwood* opinion.

(5) The facts in TURNER and the facts in the instant case are clearly distinguishable in that the facts in TURNER were many times more egregious.[15]

***[15] Part of the Amicus Brief appears to be nothing more than an attempt to present fact specific argument of the same type as contained in the PETITIONER's Brief. The Amicus should not be allowed to argue facts in issue. CIBA-GEIGY, Ltd. v. Fish Peddler, Inc.,* 683 So. 2d 522 (Fla. 4th DCA 1996) *citing Strasser v. Doorley,* 432 F. 2d 567 (1st Cir. 1970).**

The AMICUS desperately tries to argue that the facts in *Turner* are similar to the facts in the instant case and that the *Turner* decision was "based upon facts involving a negligent mode of operation that was known to the employer, which created a foreseeable risk of harm to the employees." However, the AMICUS simply allowed its creativity, fiction and perseverance to take precedence over reality when it stated that:

> It was those facts [referring to a mode operation] that the *Turner* court found sufficient to pierce the Worker's Compensation Immunity defense because the employer ignored warning signs that indicated that its "mode of operation" was substantially certain to cause injury or death and therefore was deemed "grossly negligent." [Emphasis added.]

[AMICUS BRIEF, page 3.]

In reality, the facts in *Turner* are many times more egregious than the facts in the instant case. In *Turner*, the Plaintiff's expert claimed that serious danger existed due to the known hazardous activity involved, based on personal knowledge obtained through their investigation. In the instant case the opposite is true.[16] Furthermore, in *Turner*, the Plaintiff's experts offered evidence of ***at least three other explosions*** that occurred at the plant in less than two years involving a chemical used in the fatal

[16] If there was any knowledge on behalf of the RESPONDENT through investigation it was the knowledge that no incident had ever occurred. More importantly, there had never even been a "close call" to warn the RESPONDENT of any potential danger.

explosion. Again, there simply is nothing similar in the instant case. There were no explosions, there were no loads that fell off the forklifts, there were no loads that were in danger of falling off the forklifts, there were no loads that were even displaced at any time according to the undisputed record.[17]

In addition, in *Turner*, there was evidence that the employer, PCR, tried to cover up the danger, affording the employees no means to make a reasonable decision as to their actions. Again, there is no evidence in the instant case that the RESPONDENTS in this case tried to cover up any danger. Simply stated, the AMICUS position that the *Turner* decision was based solely upon facts involving a negligent mode of operation that was known to the employer is simply not true. The decision in *Turner* was based upon a quantum of evidence not solely on a negligent mode of operation, as previously discussed, which included facts that were so egregious that allowed the court a finding of substantial certainty. In the instant case, the district court rightfully concluded that the facts in the instant case do not allow for

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[17] Also, in *Turner*, the evidence suggested that PCR intentionally stepped up production. Again, there is no such evidence in the **(Continued on next page.)** instant case. Furthermore, there was evidence in *Turner* that PCR intentionally disregarded the safety of its employees. There is not a scintilla of evidence in the instant case that the RESPONDENTS intentionally disregarded the safety of their employees. Furthermore, in *Turner* PCR failed to warn their employees of the highly explosive nature of TFE, in order to meet an approaching deadline and increase profits. Again, the record in the instant case is simply devoid of any evidence that comes close to the egregious facts in *Turner.*

the finding of substantial certainty.[18]

(6) Just because a negligent mode of operation creates a foreseeable risk does not make the mode of operation substantially certain to cause injury or death.

The AMICUS erroneously argues that when a negligent mode of operation that was known to the employer creates a foreseeable risk of harm a court may automatically conclude that a condition has been created substantially certain to cause injury or death sufficient to pierce the workers' compensation immunity shield for purposes of summary judgment. [AMICUS BRIEF P. 9.] This argument flies in the face of legislative history and case law precedent. As stated Florida courts have consistently rejected the AMICUS' theory, even when reviewing ***far more egregious facts***. *Hidvegi v. Patriot Specialized Construction, Inc.*, 808 So. 2d 1262 (Fla. 4th DCA (2002) (Affirmed, summary judgment for Employer).

In *Holderbaum v. IPCO Holding Co., Inc.,* 753 So. 2d 699, 699 (Fla. 3rd DCA

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[18] The AMICUS argument is infected with a fallacious concept: that the RESPONDENTS should be charged with the knowledge "that should the forklift 'bump' the 'pipe' while transporting twelve foot, six hundred pound material that then falls fourteen feet and hits a person was a 'substantial certainty' that it would injure or kill that person, as it did in this case." [AMICUS BRIEF, page 7.] First, the AMICUS takes a giant leap when it states "and hits a person there." The odds that a falling load would hit a person are astronomical. However, more importantly, as Judge Altenbernd noted in the *Fleetwood* decision, **(Continued on next page.)** the fact that the same area had been traveled with the same and larger loads thousands of times without incidence, actually should cause a reasonable person to charge the RESPONDENTS with the knowledge that the proceeding in which it was involved was safe.

2000) (Affirmed, summary judgment for Employer), the court similarly held:

> The story is a very compelling one indeed, and the employees may have been negligent--perhaps grossly or even culpably so--…. Nevertheless, we conclude as a matter of law that-- objectively viewed as required by Turner v. PCR, Inc., [supra]--their mistakes…neither "exhibited a deliberate intent to injure nor...[were] substantially certain to result in injury or death" so as to constitute an intentional tort and thus overcome [the employer's] workers' compensation immunity.

And, in *Tinoco v. Resol, Inc.*, 783 So. 2d 309, 310-11 (Fla. 3rd DCA 2001) (Affirmed, summary judgment for Employer), the court similarly explained:

> [T]he facts of this case do not show that the employer "exhibited a deliberate intent to injure or engaged in conduct which is substantially certain to result in injury or death." [*Turner, supra*] Viewed in the light most favorable to the plaintiff, the circumstances here demonstrate negligence. But under the case law, a showing of negligence, or even gross negligence, is not enough.

Indeed, this Court and every District Court of Appeal have specifically and expressly rejected that "intentional acts" breaching the duty to provide a safe working environment constitutes an intentional tort.[19]

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[19] *Fisher v. Shenandoah General Construction Co.*, 498 So. 2d 832, 833 (Fla. 1986); *Eller v. Shova*, 630 So. 2d 537, 539 (Fla. 1993); *Hidvegi*, 808 So. 2d 1262, 1262 (Fla. 4th DCA (2002); *Subileau v. Southern Forming, Inc.*, 664 So. 2d 11, 11-12 (Fla. 3rd DCA 1995); *J.B. Coxwell Contracting, Inc. v. Shafer,* 663 So. 2d 659, 659-60 (Fla. 5th DCA 1995); *Mekamy Oaks, Inc. v. Snyder*, 659 So. 2d 1290, 1291 (Fla. 5th DCA 1995); *Emergency One, Inc. v. Keffer*, 652 So. 2d 1233, 1235 (Fla. 1st DCA 1995); *Kline v. Rubio,* 652 So. 2d 964, 965-66 (Fla. 3rd DCA 1995); *Fred G. Wright, Inc. v. Edwards*, 642 So. 2d 808, 808-09 (Fla. 2nd DCA 1994); *Dynaplast, Inc. v. Siria*, 637 So. 2d 13, 13-14 (Fla. 3rd DCA 1994); *Pinnacle Const., Inc. v. Alderman*, 639 So. 2d 1061, 1062-63 (Fla. 3rd DCA 1994); *General Motors Acceptance Corp. v. David*, 632 So. 2d 123, 125-26 (Fla. 1st DCA 1994); *Timones v. Excel Industries of Florida*, 631

Courts addressing facts similar to - but mostly more egregious - than those alleged by PETITIONER, have routinely distinguished *Cunningham, supra,* and *Connelly, supra,* on a factual basis, holding that *Connelly* and *Cunningham* share a common threat of deceit, cover up and willful indifference to the workers' safety. [20] None of which are present in the instant case.

In sum, Florida precedent is inconsistent with the argument by the AMICUS that a finding of a duty based on foreseeability defeats workers' compensation immunity. The premise liability case law cited by the AMICUS simply does not apply to the instant case. This is not a premise liability case. Furthermore, the instant case is not analogous to the premise liability cases cited by the AMICUS.

(7) The Florida Workers' Compensation act exclusivity provision, F.S. § 440.11, was intended to, and does provide, employers with immunity from suit, not merely limited immunity from liability.

The AMICUS also erroneously argues that if a party can show reasonable

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So. 2d 331, 332-33 (Fla. 1st DCA); *Folk v. Rite Aid of Florida, Inc.*, 611 So. 2d 35, 37-38 (Fla. 4th DCA 1992).

[20] See e.g., *Pacheco v. Florida Power & Light Co.*, 784 So. 2d 1159, 1163 (Fla. 3rd DCA 2001)(Affirmed, summary judgment in favor of employer)("the cases which have actually applied the *Turner* doctrine [distinguishing *Connelly* and *Cunningham*], especially under *Turner* itself, have characteristically involved a degree of deliberate or willful indifference to the safety of the workers which simply does not exist in this case"); *Emergency One, Inc. v. Keffer*, 652 So. 2d 1233, 1235 (Fla. 1st DCA 1995)(Reversed, summary judgment for Employee in favor of the Employer)("The facts in our case simply do not reach the level of culpability alleged in *Cunningham*, or set out in the evidence involved in *Connelly*…both of those cases share the common thread of a strong indication to deceive or cover up the danger involved")

foreseeability of an injury, thereby establishing the duty element of negligence, the question of whether the facts of the case are egregious enough to establish substantial certainty to lead to injury or death is a question for the jury to decide. Taking the AMICUS' argument to its logical extreme would eliminate any court granting a summary judgment on workmen's compensation immunity in favor of the employer if the plaintiff can establish that the employer had a duty toward the plaintiff based upon reasonable foreseeability. Of course, this flies in the face of the intent behind the Florida Workers' Compensation Immunity Act exclusivity provision.

It is clear, that unless the intent and purpose of Workers' Compensation laws throughout the country and Florida's own precedents are disregarded, the Workers' Compensation Act exclusivity provides, and indeed mandates - ***immunity from suit.*** As explained early on by this Court:

> [I]t fully within the power of the Legislature to provide for a Workmen's Compensation system which supersedes other legislation affecting compensation or relief after death or injury. … **Protracted litigation is superseded by an expeditious system of recovery**.

Mullarkey v. Florida Feed Mills, Inc., 268 So. 2d 363, 366 (Fla. 1972) (emphasis added).

Since "immunity from liability," which is a mere "defense" that actually ***requires*** the defendant to be subjected to threats of liability and tort judgments and to ultimately endure the cost, disruption, delay and uncertainly of civil litigation ***through trial***, is obviously ***not*** what the workers' compensation system ever envisioned, since at least 1954 Florida precedent has established that the Workers' Compensation Act provides employers with ***immunity from suit.***

[21]

Accordingly, "since Section 440.11 provides that…[the employer] is immune ***from suit***," *Jones v. Florida Power Corp., et al*. 72 So. 2d 285, 288-89 (emphasis added), "[t]he entitlement 'is effectively lost if a case is erroneously permitted to go to trial…' [because] an order denying…immunity [from suit] 'is effectively unreviewable on appeal from a final judgment,' as the [defendant] cannot be 're-immunized' if erroneously required to stand trial or face the other burdens of litigation. *Tucker v. Resha*, 648 So. 2d at 1189 (citations omitted).

(8) Florida Rule of Appellate Procedure 9.130(a)(3)(C)(v)

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[21] *Jones v. Florida Power Corp., et al.*, 72 So. 2d 285, 288-89 (Fla. 1954) ("since Section 440.11 provides that 'the liability of an employer prescribed in § 440.10 shall be exclusive and in place of all other liability of such employer'…then [the employer] is ***immune from suit*** by the plaintiff….") (emphasis added); *see also, e.g., Turner v. PCR, Inc.*, 754 So. 2d 683, 686 (Fla. 2000) ("While providing employees with benefits on a no-fault basis, the flip side of [the Workers' Compensation] scheme is its provision for ***immunity from common-law negligence suits***"); *Eller v. Shova*, 630 So. 2d 537, 539 (Fla. 1993) ("When employers properly secure workers' compensation coverage for their employees, employers are provided with ***immunity from suit*** by their employees"); *Caramico v. Artcraft Industries, Inc.*, 727 So. 2d 348, 348 (Fla. 5th DCA 1999) (affirming the trial court's "finding that Artcraft was entitled to ***immunity from suit*** under sub section 440.11, Florida Statutes") (emphasis added); *Clark v. Better Construction Company, Inc.*, 420 So. 2d 929, 931 (Fla. 3rd DCA 1982) ("in exchange for enabling injured workers to receive compensation without fault, employers receive ***immunity from suit***.") (*citing The Workmen's Compensation Cases*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917), *Motchkavitz v. L.C. Boggs Industries, Inc.*, 407 So. 2d 910 (Fla. 1981), and *Jones v. Florida Power Corp., supra*)).

Florida Rule of Appellate Procedure 9.130(a)(3)(C)(v) provides for an interlocutory appeal from any non-final order that determines that, "as a matter of law, a party is not entitled to workers' compensation immunity." In accordance with the history and scope of Workers' Compensation Act immunity from suit, prior to this rule's enactment, Florida appellate courts correctly allowed *immediate review* by *petition for writ of prohibition* to fully determine this issue – *prior to subjecting the employer to litigation. See, e.g., Kaplan v. Circuit Court of Tenth Judicial Circuit*, 495 So. 2d 231, 232 (Fla. 2nd DCA 1986).

In 1992, determined to provide an avenue more expeditious than via original jurisdiction "writs" for the earliest possible appellate (an final) resolution of whether an employer is or is not immune from a pending civil suit pursuant to the Workers' Compensation Act, this Court proposed Florida Rule of Appellate Procedure 9.130(a)(3)(C)(v) in *Mandico v. Taos Construction, Inc.*, 605 So. 2d 850 (Fla. 1992). This Court correctly acknowledged that the reason courts historically reviewed Workers' Compensation act immunity from suit issues by prohibition was – logically - "***to avoid the necessity of requiring the trial to proceed to its conclusion***," and amended the Rules, "[b]ecause we are sensitive to the concern for an early resolution of controlling issues." *Id*. at 854.[22]

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[22] Notably, in *Department of Education v. Roe*, 679 So. 2d 756 (Fla. 1996), this Court held that state sovereign immunity was merely "immunity from liability," but distinguished public official immunity *and Workers' Compensation Act immunity* as "immunity from suit," and acknowledged that prompt, interlocutory review of such

No Florida case, beginning with *Hastings v. Demming*, 694 So. 2d 718, 720 (Fla. 1997) and its progeny, have ever even *attempted* to address the obvious incongruity between the legislature's intent of providing an employer with immunity from suit, and some courts' often repeated – and clearly erroneous - presumption that an employers' immunity from suit ***is a jury issue***.

The district court in *Hastings* correctly identified the issue in its certified question as turning on the ultimate effect of the trial court order, irrespective of the reasons provided – i.e., recalling that for the past 100 years "immunity from suit" meant not being subject to litigation and trial (obviously ***not*** a jury issue), if the effect of the trial court's order is to require the employer to be subjected to the litigation through trial, the trial court's order has the effect of finally determining the issue of "immunity from suit" against the employer, which must be subject to immediate review. Otherwise, "[b]ecause of the nature and purpose of a claim of immunity from suit, an appeal after final judgment would not be an adequate remedy; a party cannot be reimmunized from suit after-the-fact." *Stephens v. Geoghegan*, 702 So. 2d 517, 521 (Fla. 2nd DCA 1997); *Vermette v. Ludwig*, 707 So. 2d 742, 744 (Fla. 2nd DCA

"immunity from suit" issues remained *necessarily* intact. *Roe*, 679 So. 2d at 759. *Citing Mandico, supra*, section 440.11 and Fla.R.App.P. 9.130, the Court explained: "[O]ur basis for the amendment [to Rule 9.130] was 'the concern for an early resolution of controlling issues,'" which "pivoted on the Workers' Compensation Law, which was created to provide both the exclusive remedy for plaintiffs and the exclusive basis of liability for defendants," and which involved a "comprehensive legislative scheme that would be furthered by permitting early resolution." *Roe*, 679 So. 2d at 759.

1997).

This Court in *Hastings* responded to the certified question in the negative, holding that Rule 9.130 only allows for an appeal if the effect of the order "preclude[s] [the employer] from having a jury decide whether a plaintiff's remedy is limited to workers' compensation benefits." *Hastings*, 694 So. 2d at 720.[23] However, this Court did not explain how a jury can be allowed to determine whether an employer is immune from suit, when "immunity from suit" is neither a jury issue, nor an issue that can be resolved and redressed by an appeal after final judgment, since "a party cannot be reimmunized from suit after-the-fact." *Stephens v. Geoghegan, supra; Vermette v. Ludwig, supra*.

RESPONDENTS submit that to follow the AMICUS argument that the issue of whether the facts of a case show substantial certainty to lead to injury or death is a jury question, is to abrogate legislatively established Workers' Compensation Act "immunity from suit," and would contradict many years of precedent within and outside this jurisdiction, and to strip Florida employers of clearly defined, previously well-established substantive rights. Such a result – in addition to being clearly erroneous – is prohibited. "The rules adopted by the Supreme Court are limited to

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[23] This Court has repeated what seems to be a legally contradictory explanation from 1997 through present. *See, e.g., Fla. DOT v. Juliano*, 801 So. 2d 101 (Fla. 2001); Florida *Dep't of Corrections v. Culver*, 716 So. 2d 768 (Fla. 1998); *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).

matters of procedure, for a rule cannot abrogate or modify substantive law." *State v. Garcia,* 229 So. 2d 236, 238 (Fla. 1969).

CONCLUSION

Based on the foregoing, Respondents submit that this Court does not have jurisdiction to review the certified questions because they do not accurately reflect the issues in this case. However, if this Court chooses to answer the first certified question, the answer should be "yes." Also, the Second District Court of Appeal did not pass upon the second certified question. Regardless, if this Court chooses to answer the second certified question it should answer "no". Thus, based on the undisputed facts of this case the district court's opinion should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via u.s. mail to Robin Gibson, Esquire, 212 East Stuart Avenue, Lake Wales, Florida 33853 and John Hugh Shannon, Esq., 5300 South Florida Avenue, Suite E-1, Lakeland, Florida 33813, on this _____ day of _____, 2003.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY That The Foregoing Instrument Satisfies The Requirements Of Rule 9.100 Of The Florida Rules Of Appellate Procedure.

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