IN THE SUPREME COURT OF FLORIDA

Case No. SC03-134

Lower Tribunal No.: 2DO1-5308

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

INITIAL BRIEF OF PETITIONER ALLISON GAE REEVES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DENNIS MITCHELL REEVES, DECEASED

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PRELIMINARY STATEMENT

In this brief, respondent FLEETWOOD HOMES OF FLORIDA, INC. is referred to as "FLEETWOOD;" respondent MARVIN MILLER is referred to as "MILLER;" and respondent MICKIE OLIVER is referred to as "OLIVER."

DENNIS MITCHELL REEVES, deceased, is referred to individually as "REEVES."

All references to the four volumes of petitioner's appendix are indicated by "Appendix {tab number}" and followed by the applicable page number(s).

STATEMENT OF THE CASE AND OF THE FACTS

As argued below, pursuant to *Hastings v. Demming*, 694 So. 2d 718, 720 (Fla. 1997), the district court lacked jurisdiction to review this nonfinal order denying summary judgment. On that basis, the Court should vacate the district court's opinion without considering the two certified questions. In the event the Court considers the second certified question, the following material facts were those before the trial court when it correctly entered its order.

The Incident

The day of the accident was the first day Dennis Reeves had worked at this particular workstation in the Fleetwood plant. (App. 2, p. 121, lines 17-19). As Miller drove his forklift toward Reeves immediately before the accident, the forklift load consisted of three, 12-feet wide rolls of metal roofing material weighing over 1500 pounds each. (App. 7, pp. 13, 47; App. 2, p. 107, lines 9-15). The load had to be raised 14 feet in the air because the aisle way at pedestrian level was too narrow for the 12-feet wide rolls to pass. (App. 2, p. 103, lines 14-20). The rolls were not strapped or secured onto the forklift in any way. (App. 7, pp. 13, 47; App. 2, p. 107, lines 9-15).

This was the first load of metal roofing transported that morning.[1] (App. 2, p. 97, lines 13-16). According to Miller, these roofing materials with the forks

elevated left only a four-to-six inch clearance between the rolls and a stationary pole across from Reeves' assigned workstation. (App. 2, p. 119, lines 24-25; p. 120, line 1). Miller was driving the forklift with the load positioned in front of him. (App. 6, p. 38, line 25; p. 39, lines 1-3; App. 8, p. 47). Because of the size and elevation of the load, Miller was unable to watch the critical clearance of the overhead load as he approached the stationary pole. The pole extended to the ceiling and Miller knew it was directly across the aisle way from Reeves. (App. 7, pp. 42-44; 46-47; App. 2, p. 120, lines 7-14).

Miller realized that his raised load was in danger of hitting the pole unless he was able to ease the forklift by the pole in a particular way. (App. 2, pp. 118-120). Within the previous year, Miller himself had struck the same pole with a load of roof rafters,[1] leaving a mark on the pole. (App. 2, p. 115, lines 16-25; p. 116, lines 1-5). Miller also knew that other forklift drivers had hit the pole.[2] (App. 2, p. 114, lines 15-25; p. 115, lines 1-15; p. 132, lines 20-25; p. 133, line 1). Although he was unaware of how many times the pole had been hit, Miller was aware that the pole had been painted at least once, covering up the previous strike marks. (App. 2, p.

Miller estimated that the roof rafters were actually *narrower* than the metal roofing rolls. (App. 2, page 125, lines 3-8).

Miller described "marks" at two different heights on the pole, indicating multiple collisions. (App. 2, p. 115, lines 3-15).

133, lines 1-8).

When Miller previously struck the pole with a load, he reported it to his foreman, respondent Oliver, but no changes in forklift procedures (e.g., a different path or moving the workstation where Reeves was working) or additional safety requirements (i.e., securing the loads with straps or harnesses) had resulted. (App. 3, Vol. II, p. 19, lines 18-25; p. 20, lines 1-10).[3] Neither Miller nor Oliver filed an accident report. (App. 2, p. 116, lines 6-7).

Forklift drivers could avoid hitting the overhead pole by driving with the forklift's left tire positioned on top of a yellow line painted on the warehouse floor. (App. 2, p. 119, lines 7-19). As Miller approached the "putty table" workstation where Reeves had been assigned, he was watching the yellow line to his left. (App. 2, p. 118, lines 11-21). Miller believes he sounded the forklift's horn and looked up in Reeves' direction -- also to Miller's left.[4] (App. 2, p. 121, lines 5-12). The pole was on Miller's right side. (App. 7, pp. 42-43).

Miller did not recognize Reeves and knew Reeves was new to the "putty table." (App. 2, p. 121, lines 3-4; 13-19). Although Miller may have sounded the

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[3] The two volumes of Oliver's deposition in Appendix 3 are separately paginated.

[4] In his deposition, Miller subsequently admits that he lacks specific recollection of the events associated with this specific trip with the forklift. (App. 2, p. 148, lines 18-25; p. 149, lines 1-10).

forklift's horn as he approached, Miller confirms he never made eye contact with Reeves and never saw Reeves look up from his work. (App. 2, p. 121, lines 8-12). When Reeves did not acknowledge Miller's presence, instead of getting off the forklift or yelling to Reeves to move out of the way, Miller pressed ahead with the forklift load. (App. 2, p. 121, lines 5-7). As a result, Reeves was positioned between the oncoming forklift and the stationary objects around the workstation. (App. 8, p. 10).

Because it was so common for other Fleetwood employees to walk under forklift loads and to ignore an approaching forklift's horn (App. 2, p. 92, lines 8-9), Miller had been instructed to continue driving forward, even if employees did not move.

> I was told that the people have been fair warned and if they continue to ignore you with a load over their head, to not stop your job, you can't just stop your job, go and do your job and then they will be talked to about it.

(App. 2, p. 123, lines 1-5; App. 3, Vol. I, p. 27, lines 10-22).

Although Reeves had never worked at the putty table before that day, neither Miller nor Oliver spoke to Reeves and told him about the danger of the forklift loads passing overhead. (App. 2, p. 121, lines 1-24; App. 3, p. 22, lines 9-25; p. 23, lines 1-4). No safety or warning signs were posted at the work station alerting

Reeves of the dangers of forklifts and overhead loads coming through the area. (App. 3, Vol. I., p. 57, lines 5-12). Reeves died from multiple injuries when Miller struck the pole with the load and the end of a falling roll hit Reeves directly in the center of his chest like a huge projectile. (App. 7, pp. 48-53).

Safety at the Fleetwood Plant

At the time of the incident, Fleetwood's plant employed 131 people. (App. 7, p. 12).[5] The plant had no safety director and no one was assigned responsibility for monitoring compliance with the rules and regulations of the Occupational Safety and Health Act ("OSHA"). (App. 5, p. 17, lines 9-20; p. 18, lines 9-12).

As a forklift operator, Miller's safety training at Fleetwood consisted of watching videotapes (generally App. 2, pp. 49-51) and reviewing and signing a list of written safety rules when he was first hired. (App. 3, Vol. I, p. 20, lines 11-24). Miller did not receive a copy of the signed rules. (App. 3, Vol. I, p. 20, line 25; p. 21, line 1). After initial training, Fleetwood employees were never again required to review the videotapes or safety rules. (App. 6, p. 20, lines 12-18).

The forklift operator's manual also included instructions for safe forklift operation (App. 8, pp. 8-9), but Fleetwood did not require its operators to read the manual. (App. 3, Vol. I, p. 49, lines 4-15). Likewise, the OSHA regulations on

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Page references to Appendix 7 correspond to the circled numbers appearing at the bottom of the pages, although some pages appear in the document out of order.

"transporting objects or materials by forklift" (App. 8, pp. 9-10) were unknown at the plant, as no one was assigned responsibility for being knowledgeable of those regulations. (App. 5, p. 17, lines 9-20).

Plaintiff's expert safety witness opined that Miller and the other forklift drivers were instructed and expected by Fleetwood to violate the safety rules, forklift procedures and OSHA regulations. (App. 8, p. 14). On this specific occasion, in violation of these safe practices and procedures, Miller: (1) had not secured the three-roll load to the forklift to prevent movement; (2) was operating the forklift with the load at a high elevation; (3) was not driving the forklift in reverse to overcome his obstructed view; (4) had failed to ensure that Reeves was not under the elevated load; (5) had failed to center the load on the forklift forks; (6) had failed to ensure that the load was stable and safely arranged; (7) had continued to run the forklift forward even though Reeves was in harm's way, the result of which was to trap Reeves between the forklift and stationary objects; (8) had transported the load without the forklift forks being spread to their widest position; and (9) was watching the yellow stripe on the warehouse floor, instead of observing the forklift's path of travel. (App. 8, pp. 10-15).

OSHA Inspector's Findings and Citations

An OSHA inspector reviewed the plant and Fleetwood's operation

immediately following the incident. (App. 7). The OSHA inspector found that the pole had been struck "on numerous occasions," of which foreman Oliver was aware. (App. 7, p. 55).[6] OSHA fined Fleetwood $7,000 for multiple violations, including Miller's failure to load the forklift in a stable and safe manner. (App. 7, p. 4). Specifically, the inspector found that "[t]he load was off center and not secured to the forklift to prevent movement . . . ." (App. 7, p. 4).

Oliver's Status as "Supervisor"[7]

Although Oliver was referred to as a "supervisor," according to Oliver's deposition testimony the terms "foreman" and "supervisor" were used

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One of the OSHA inspector's photographs is accompanied by the following description: "Mr. Oliver identified the higher chips as steel roll strikes and the lower ones as rafter strikes from forklift loads." (App. 8, p. 36/37 (as marked)).

Because the district court concludes that the actions of Miller and Oliver did not rise to the level of gross negligence, the district court does not address respondent/appellant's argument below that Oliver was in a managerial or policymaking position with Fleetwood. Petitioner/appellee responded below, and maintains here, that this issue was not properly before the district court because it had not been originally presented to the trial court. Fla. Emergency Physicians-Kang and Assoc., M.D., P.A. v. Parker, 800 So. 2d 631, 636 (Fla. 5th DCA 2001). Furthermore, this is a factual determination. Madaffer v. Managed Logistics Systems, 601 So. 2d 1328, 1329 (Fla. 2d DCA 1992). In the event this Court addresses this issue, these record facts are provided to demonstrate that Oliver's duties at Fleetwood were not in a managerial or policymaking capacity. As a result, Oliver, like Miller, was subject to the "gross negligence" standard and not the heightened "culpable negligence" standard urged by respondents. Eller v. Shova, 630 So. 2d 537, 541 (Fla. 1993) (holding corporate negligence standard applies only to those engaged in managerial or policymaking decisions).

interchangeably at Fleetwood. (App. 3, Vol. II, p. 17, lines 18-25; p. 18, lines 1-2). Oliver reported to the plant's purchasing manager and assistant purchasing manager. (App. 4, p. 5, lines 11-21; p. 7, lines 11-18). When OSHA cited the plant for Miller's failure to secure the forklift load, it was Oliver's superior, the purchasing manager, along with the production manager and the plant's general manager who decided all forklift loads would in the future be secured to the forklift. (App. 6, p. 8, lines 1-2; p. 31, lines 11-23; App. 5, p. 4, lines 6-23). Oliver did not participate in the policy decision. Likewise, Oliver did not participate in rule changes for forklifts, and was not in a position to approach management and suggest rule changes for forklifts:

> Q: As supervisor of the Indirect Department and the most senior management dealing with forklifts, did you participate in rule changes for forklifts if that was necessary?
>
> A: Only if it was dictated through management down to me.
>
> Q: So you wouldn't go to management and say, "Hey, listen, we need to change this"?
>
> A: No.

(App. 3, Vol. II, p. 46, lines 18-25; p. 47, line 1).[8]

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[8] Even Oliver's immediate superior, the assistant purchasing manager, was not in a position to make or change forklift-related rules: "It would be more of a suggestion thing, suggesting something if I saw something and bringing it up to Frank [Rowan,

SUMMARY OF THE ARGUMENT

Pursuant to this Court's decision in *Hastings v. Demming*, 694 So. 2d 718, 720 (Fla. 1997), the district court did not have jurisdiction to review the trial court's order denying summary judgment because of disputed issues of material fact. The trial court's order does not state that, as a matter of law, the defense of workers' compensation immunity is not available to the defendants. Instead the trial court applied the well-settled law of Florida and determined, as a matter of law, that the existence of genuine issues of material fact precluded the entry of summary judgment in the defendants' favor. Nothing in the trial court's order prohibits the defendants from arguing the defense of workers' compensation immunity before the jury at trial. As a result, this Court should vacate the district court's opinion and remand this case to the trial court for further proceedings.

If the Court considers the first certified question, the Court should answer the question "no." The law of Florida is clear: disputed issues of material fact preclude the entry of summary judgment, but denying a motion for summary judgment does not preclude defendants from arguing affirmative defenses before the finder of fact. Because the legislature made clear that co-employee's are not immune from acts of gross negligence, there is no justification for not applying this

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the purchasing manager]." (App. 4, p. 21, lines 16-24).

well-settled law to these defendants. Furthermore, if the first certified question was answered "yes," the number of nonfinal appeals would increase, most including unresolved issues of fact. Such a result would be directly contrary to the intent of Florida Rule of Appellate Procedure 9.130. As currently stated and applied, Rule 9.130 properly balances the competing interests of plaintiffs and defendants, relies upon trial courts to perform their traditional gatekeeping functions, looks to juries to serve as fact finders, and properly preserves error for plenary appeal. The district court has not shown any justification for receding from this proven formula.

If the Court considers the second certified question, the Court should answer the question "yes." This Court's decision in *Turner v. PCR, Inc.*, 754 So. 2d 683, 685 (Fla. 2000) demonstrates that an employer's actions resulting in injury or death, even when the employer has performed or condoned the activity for an extended period of time, can constitute an intentional tort. As in *Turner*, the facts of this case show that the employer encouraged its employees to engage in fundamentally unsafe activities, ignored previous non-fatal incidents exposing the dangers involved, and withheld such knowledge from its employees, all indicating a degree of deliberate or willful indifference to employee safety. The record on appeal demonstrates that the trial court carefully reviewed the evidence before it and applied an objective test faithful to *Turner*. Answering the second certified

question "no" would encourage employers' "willful blindness" toward unsafe work practices, effectively undercutting *Turner* and decreasing workplace safety.

STANDARD OF REVIEW

Appellate courts review summary judgment orders de novo, resolving all facts and inferences in favor of the non-moving party. *The Florida Bar v. Cosnow*, 797 So. 2d 1255, 1258 (Fla. 2001).

ARGUMENT

I.

THE DISTRICT COURT'S OPINION SHOULD BE VACATED BECAUSE THE COURT DID NOT HAVE JURISDICTION TO REVIEW THE ORDER DENYING SUMMARY JUDGEMENT ON ISSUES OF FACT

Controlling Law

This Court has previously held that "[n]onfinal 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 [of workers' compensation immunity] is not available to a party." *Hastings v. Demming*, 694 So.2d 718, 720 (Fla. 1997) (*"Hastings II"*). The Court has further focused this precedent to permit interlocutory appeals only if the lower court's order explicitly precludes a workers' compensation immunity defense. *Fla. Dept.*

of Corrections v. Culver, 716 So. 2d 768, 769 (Fla. 1998). A district court is not authorized to look beyond a trial court's order to the hearing transcript. *Id*.

A. The Trial Court's Order Did Not State That The Defense of Workers' Compensation Immunity Was Not Available to a Party

Nowhere in the trial court's order did the court state or imply that the defendants would not be entitled to present the defense of workers' compensation immunity to the jury, or that the trial court was determining as a matter of law that the defendants were not entitled to the defense. The order itself (App. 1) defeats any such interpretation:

• Paragraph A.1. of the "Factual Findings" (addressing the gross negligence allegations against Miller and Oliver) states that the evidence filed by plaintiff "must be viewed in the light most favorable to the plaintiff."

• In paragraph A.4., the trial court finds that the "occurrence of the subject incident was inevitable, *given the violations alleged by plaintiff (which are disputed by defendant but, which must be accepted as true on a Motion for Summary Judgment*)." (emphasis added).

• In paragraph A.5. the court finds a composite of circumstances constituting an imminent danger, but with the preface that "[t]he facts of this case and the *allegations* of the plaintiff, *viewed in the light most favorable to the plaintiff, create a factual basis*" for the composite of circumstances. (emphasis

added).

• Paragraph B.1. (addressing the intentional tort of Fleetwood) again acknowledges unresolved issues of fact: "the Court finds that the occurrence of the subject incident was inevitable, *given the violations alleged by plaintiff (which are disputed by defendant but, which must be accepted as true on a Motion for Summary Judgment*)." (emphasis added).

• None of the summary judgment denials were "with prejudice."

B. Mere Use of the Phrase "As A Matter of Law" Did Not Confer Jurisdiction Upon the District Court

The district court wrote that "[t]he trial court in this case expressly included within its order the language mandated by Hastings to give this court jurisdiction. It reviewed a well-developed record. We conclude that the trial court was correct in concluding that its order was appealable under rule 9.130(a)(3)(C)(v)."[2] *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d 857, 865 (Fla. 2d DCA 2002).

The trial court's use of the phrase "as a matter of law" did not and could not confer jurisdiction upon the district court as implied in its opinion. Pursuant to Florida Rule of Appellate Procedure 9.130 ("Rule 9.130") and the relevant case law, what clearly must be determined "as a matter of law" is that the defendant will not be allowed to argue the defense of workers' compensation immunity before the finder of fact. Especially when viewed in the light most favorable to the petitioner, nothing in the trial

court's order states or implies that such a determination was made below. *Turner v. PCR, Inc.*, 754 So. 2d 683, 684 (Fla. 2000) (stating appellate court reviews record of summary judgment entry in light most favorable to non-moving party). The respondents were not precluded from arguing workers' compensation immunity.

C. Conclusion

Because the district court lacked jurisdiction to consider this nonfinal order, this Court should vacate the district court's opinion and remand the case to the trial court for further proceedings leading to the entry of a final judgment.

II.

FIRST CERTIFIED QUESTION

MAY A DISTRICT COURT REVIEW A NONFINAL 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?

THE COURT SHOULD ANSWER THE FIRST CERTIFIED QUESTION "NO"

A. The History of the Workers' Compensation Subdivision of Rule 9.130 Is Consistent with Answering the First Certified Question "No"

This Court's controlling opinion in *Hastings II* was the result of a series of well-reasoned opinions by which the Court carefully balanced the rights of both employers and employees under

Florida's workers' compensation scheme, while at the same time keeping the operation of that scheme consistent with the remainder of the substantive and procedural law of Florida.

1. The Law of Summary Judgments and Affirmative Defenses

Florida law is well settled on issues regarding the granting and appeal of summary judgment motions. Before a motion for summary judgment can be granted, the moving party must conclusively show the absence of any genuine issue of material fact. *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985). In considering the movant's evidence, the trial court must draw every possible inference in favor of the non-moving party. *Id*. "If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it." *Id*. In fact, the trial court is prohibited from weighing the evidence when facts are in dispute. *Davis v. Hathaway*, 408 So. 2d 688, 689 (Fla. 2d DCA 1982).

Summary judgments are disfavored in negligence cases. *Kennedy v. Moree*, 650 So. 2d 1102, 1108 (Fla. 4th DCA 1995). The denial of a motion for summary judgment generally does not establish an issue in a case. *Hastings v. Demming*, 682 So. 2d 1107, 1112 (Fla. 2d DCA 1996) (*"Hastings I"*), *aff'd*, 694 So. 2d 718, 720 (Fla. 1997) (citations omitted). Similarly, a denial of a motion for summary judgment does not establish the law of the case, but instead merely defers the issue until final hearing. *Steinhardt v. Steinhardt*, 445 So. 2d 352, 356-57 (Fla. 3d DCA), *rev. denied sub nom. Lehman v. Steinhardt*, 456 So. 2d 1181 (Fla. 1984).

Because it attempts to "defeat or avoid the plaintiff's cause of action," a defendant's pleading of the workers' compensation immunity provisions serves as a "defense" to a plaintiff's cause of action for

damages for injury or death. *Martin County v. Edenfield*, 609 So. 2d 27, 29 (Fla. 1992). Consistent with the law of summary judgments, this Court held in *Edenfield* that "[a] defense is not a sufficient basis for granting a motion for summary judgment unless the evidence supporting that defense is so compelling as to establish that no issue of material fact actually exists." *Id*. Thus, when the trial court in this case found evidence of disputed material facts, it correctly held -- "as a matter of law" -- that summary judgment had to be denied.

2. Rule 9.130 and the Provision for Limited Nonfinal Appeals

The intent of Rule 9.130 is to restrict the number of appealable nonfinal orders for the purposes of saving appellate court resources and eliminating delays in achieving final judgments. *Traveler's Ins. Co. v. Bruns*, 443 So. 2d 959, 960-61 (Fla. 1984).

In *Mandico v. Taos Construction, Inc.*, 605 So. 2d 850, 853-54 (Fla. 1992), this Court held that while prohibition was the improper vehicle to challenge a trial court's denial of summary judgment on the issue of workers' compensation immunity, there was a countervailing need to encourage early resolution of controlling issues where it is evident that the plaintiff's exclusive remedy is workers' compensation. To further this policy, the Court amended Rule 9.130 to include a right of nonfinal appeal where a trial court had determined "that a party is not entitled to workers' compensation immunity as a matter of law." *Id.*

In both *Breakers Palm Beach, Inc. v. Gloger*, 646 So. 2d 237, 237 (Fla. 4th DCA 1994) and *City of Lake Mary v. Franklin*, 668 So. 2d 712, 714 (Fla. 5th DCA 1996), the district courts, like the district court in the instant case, interpreted Rule 9.130 as allowing review of an order denying summary judgment even when the denial was the result of disputed issues of fact. At that time, a panel

of the Second District Court of Appeal ("Second District") disagreed with its sister courts' analysis and certified conflict. *Hastings I*, 682 So. 2d at 1110. In *Hastings I*, the Second District held that "unless and until the material facts at issue presented to the trial court are so 'crystallized,' conclusive, and compelling as to leave nothing for the court's determination but a question of law, those facts, as well as any defenses, must be submitted to the jury for its resolution." *Id*.

In affirming the Second District's analysis and holding, this Court amended Rule 9.130 to eliminate the competing interpretations among the district courts. *Hastings II*, 694 So. 2d at 720. The committee notes accompanying the amendment state that, in moving the words "as a matter of law" from the end of the rule to the beginning of the rule, the committee was "clarifying that this subdivision was not intended to grant a right of nonfinal review if the lower tribunal denies a motion for summary judgment based on the existence of a material fact dispute." Fla. R. App. P. 9.130 (Committee Notes). This intent is further reflected in *Hastings II* where the Court held that "[n]onfinal 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 II*, 694 So. 2d at 720 (emphasis added). [3]

As discussed in section I.B. *supra*, the trial court's order in this case did not specifically state or imply that the court had determined, as a matter of law, that the defense of workers' compensation immunity was no longer available to the defendants.

B. The District Court's Rationale for Finding Jurisdiction Is Based Upon Conclusions Unsupported in Fact or in Law

The district court states that its "jurisdictional dilemma is predicated on the fact that workers' compensation immunity is not usually a defense at trial." *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d at 863. The district court's ultimate finding of jurisdiction rests primarily upon the further conclusion that the only way to give effect to the term "immunity" is to allow nonfinal appeal at whatever point a trial court decides that the case will not be dismissed prior to a trial before the finder of fact. To support this result, the district court first arrives at a series of conclusions: (1) workers' compensation immunity is not usually a defense at trial; (2) if the plaintiff can prove the heightened level of misconduct, the defendant has no "defense" of workers' compensation immunity; (3) the goal of Florida's workers' compensation policy is to avoid lawsuits at the outset; and (4) if the appellate courts are to monitor compliance with the goals of the workers' compensation law, the review of denials of summary judgment must take place at the time the nonfinal order is entered. *Id.* at 864-65. These conclusions deserve close scrutiny.

1. "Workers' compensation immunity is not usually a defense at trial"

The district court's conclusion that the "defense" of workers' compensation

immunity is "not usually a defense at trial" is incorrect. In fact, "where the line separating simple and gross negligence is doubtful or indistinct, the questions of whether the negligence is ordinary or gross is one which should be submitted to the jury." *Courtney v. Fla. Transformer, Inc.*, 549 So. 2d 1061, 1065 (Fla. 1st DCA 1989) (holding in a workers' compensation immunity case) (quotations and citations removed); *accord Foreman v. Russo*, 624 So. 2d 333, 336 (Fla. 4th DCA 1993), *rev. denied*, 637 So. 2d 234 (Fla. 1994) (also a workers' compensation immunity case).

Like other defenses, the defense of "workers' compensation immunity" operates on two levels: first, summary judgment can be granted based on the defense, but only if the defendant has conclusively shown that no genuine issue of material fact actually exists. *Martin County v. Edenfield*, 609 So. 2d 27, 30 (Fla. 1992). Otherwise, when the case is presented to the fact finder, the defendant is entitled to submit all available evidence to establish that his acts did not rise to the level of gross negligence. *Id.* If the defendant is successful, the immunity is triggered and the defense has been achieved; otherwise, the defendant's acts are in excess of the immunity provided by the legislature. § 440.11(1), Fla. Stat. (1991). Protection for grossly negligent acts does not further the goals and policies of the workers' compensation scheme. *Eller v. Shova*, 630 So. 2d 537, 540 (Fla. 1993).

Regardless of the outcome, the defense was available throughout.

Hastings II is consistent with both this analysis and the well-settled law of summary judgments: a simple denial of the *operation* of the defense at the first level (summary judgment) does not deny the operation of the defense at the second level (trial). And as long as the defense is available to the defendant on at least one of the two operational levels, the defense is intact. Only when a trial court determines that the defendant is not entitled to the defense at *both* operational levels is nonfinal appeal justified, because only then is the defense completely unavailable.[4]

2. "If the plaintiff can prove the heightened level of misconduct . . . the defendant has no 'defense' of workers' compensation immunity"

Here the district court appears to confuse the availability of the defense of workers' compensation immunity with the ultimate entitlement to the immunity's protection. As long as the defendant is a co-employee, manager, or employer (and meets the other requirements of Chapter 440), the defense of workers' compensation immunity is available to the defendant, and the defendant should be allowed to present the defense at both levels of operation as discussed immediately above. If the fact finder ultimately determines that the evidence proves the defendant's acts were at the heightened level, then the defendant is not entitled to immunity for those acts. Such a standard is wholly consistent with the theory and purpose of the workers' compensation scheme.

The workers' compensation law provides immunity for certain acts, but not for all acts. § 440.11(1), Fla. Stat. (1991). By its own language, it is clear the legislature never intended for co-employees to receive any protection or special treatment for acts of gross negligence. As this Court has previously held, "[t]hese statutes unambiguously impose liability on all employees for their gross negligence resulting in death or injury to their fellow employees." *Streeter v. Sullivan*, 509 So. 2d 268, 271 (Fla. 1987).

At trial a defendant co-employee enjoys the "defense" of workers' compensation immunity. If the evidence convinces the jury that the co-employee's act did not rise to the level of gross negligence -- but instead was merely an act of simple negligence -- then the immunity is triggered and the co-employee is able to "defeat or avoid the plaintiff's cause of action". *Martin County v. Edenfield*, 609 So. 2d 27, 29 (Fla. 1992). On the other hand, if the jury finds that the co-employee did commit an act of gross negligence, then the co-employee is outside the intended scope of the immunity and is not entitled to the protection of the workers' compensation law. § 440.11(1), Fla. Stat. (1991).

The district court's conclusion that "[i]f the plaintiff can prove the heightened level of misconduct . . . the defendant has no 'defense' of workers' compensation immunity" misses the mark. It is not the proof of the heightened

level of misconduct that determines whether a defendant has available the defense of workers' compensation immunity. The availability of the defense is solely dependent upon whether the defendant (and the employer, if the defendant is not the employer) satisfies the requirements of Chapter 440. If those requirements are satisfied, the defendant has the defense of workers' compensation immunity. The "proof of the heightened level of misconduct" determines whether the defendant's acts will ultimately be excused.

3. "The goal of [Florida's workers' compensation policy] is to avoid lawsuits at the outset"

The district court reasons that, "[i]f the trial courts are to foster [the legislative policies and goals of the workers' compensation system], they must serve as gatekeepers at the initial stages of litigation. If the appellate courts are to monitor compliance with these legislative policies, the review must take place at the time the nonfinal order is entered, and not after lengthy and expensive litigation." *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d at 864-65. This conclusion is in part based upon the district court's belief that "the goal of the [workers' compensation] policy is to avoid lawsuits at the outset . . . ." *Id*. at 864.

It would be more accurate -- taking into account a strict interpretation of the

workers' compensation statutes[9] -- to say that the goal of the Workers' Compensation Act is to avoid lawsuits when a work-related injury or death is the result of acts falling under the immunity umbrella created by the system. This conclusion is more accurate because the stated intent of the workers' compensation scheme is clear that behavior falling *outside* the scope of immunity is not protected. § 440.11(1), Fla. Stat. (1991). There is no legislative intent to prevent or in any way effect lawsuits based on the unprotected behavior, and hence there is no basis for treating such cases procedurally any differently.[10] § 440.015, Fla. Stat. (1991).

A significant practical difference exists between the district court's premise of "avoiding lawsuits at the outset" and the statute-based premise of "avoiding lawsuits based on behavior protected by the statute." To avoid these lawsuits at the outset would be a simple matter of imposing absolute immunity for both simple and gross negligence. Because that is clearly not the intent of the legislature, the court system is then required to perform its traditional role of examining the alleged

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As statutes in derogation of the common-law rights and defenses of employees and employers, the workers' compensation statutes must be strictly construed. *Ady v. Am. Honda Finance Corp.*, 675 So. 2d 577, 581 (Fla. 1996).

In fact, it would be inconsistent with the legislature's unambiguously stated intent to allow these lawsuits if the courts were then allowed to simply dismiss them on summary judgment in spite of unresolved factual issues.

behavior and determining whether it clearly falls on the side of the dividing line marked "immunity," or alternatively whether it could reasonably fall on the side marked "no immunity." The trial court below correctly performed its required role in this regard.

4. "If appellate courts are to monitor compliance with [the workers' compensation law policies] the review [of denials of summary judgment] must take place at the time the nonfinal order is entered."

As the district court correctly stated, the role of trial courts is to "serve as gatekeepers at the initial stages of litigation." *Fleetwood Homes of Fla., Inc., v. Reeves*, 833 So. 2d at 864-65. While the workers' compensation scheme changed the degree of negligence necessary to sue an employer, manager, or co-employee, it did nothing to change the method by which trial courts perform their gatekeeping functions of evaluating cases and insuring fairness for all parties. *See Eller v. Shova*, 630 So. 2d 537, 540 (Fla. 1993) (explaining result was a change in degree of negligence, not elimination of cause of action).

Like any other civil lawsuit, a case with a workers' compensation immunity defense is subjected to "gatekeeping" at several turns: on motion to dismiss, motion for judgment on the pleadings, summary judgment, motions for directed verdict at the close of the plaintiff's and defendant's cases, and motion for new trial. Each juncture presents an opportunity for the trial court to bring to bear the

immunity protection and dismiss the action. Each juncture presents the trial court with the burden of balancing the plaintiff's rights to seek redress with the defendant's right to avoid the time and expense of unnecessary litigation.[11] But at no juncture does the gatekeeper's decision alter either the plaintiff's burden of proof or the defendant's right to present a complete defense to the fact finder. Only at the point where the trial court finally determines that the defendant will not be entitled to argue the defense of workers' compensation immunity, based upon undisputed facts, has the gatekeeper's performance become ripe for review. *Hastings II*, 694 So. 2d at 720.

With the trial courts performing their traditional functions, what justification is there for the district courts to have jurisdiction "at the time the nonfinal order is entered?" The district court's conclusion in this case is that only by exercising such jurisdiction can appellate courts ensure these defendants are not forced to endure lengthy and expensive litigation. *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d at 865. Of course, as discussed above, the stated intent of the legislature is to avoid litigation in clearly-defined areas -- not across the board.[12]

These defendants are also entitled to seek recovery of some of their expenses through the process of making proposals for settlement in accordance with § 768.79, Fla. Stat. (2000) and Rule 1.442, Fla. R. Civ. P.

The legislature has equally made clear that "workers' compensation cases shall be decided on their merits" and additionally that "the facts in a workers' compensation

Nothing in the Workers' Compensation Act speaks to an intent of the legislature to protect defendants from litigation -- even extended litigation -- for torts *excluded* from immunity.

To insure that plaintiffs have the right to seek redress for grossly negligent acts, while at the same time allowing defendants to exercise their rights of defense, the trial courts apply the same procedural law, by the same procedural method as with other tort claims, and defendants have the opportunity to challenge the plaintiff's cause of action at multiple points in the litigation's course. The role of the district courts of appeal should be equally consistent, including following the same procedural law (plenary appeal) and applying the same substantive legal standards (e.g., *de novo* review of summary judgment proceedings). In only this way are the goals and principles underlying the entire history of this subdivision of Rule 9.130 upheld.

C. Affirming the District Court Below Would Defeat the Well-Reasoned Holdings Culminating in Hastings II

The district court's sudden expansion of its jurisdiction to review orders denying summary judgment as a result of factual disputes poorly serves this Court's rationale and holdings in numerous cases. For example, such an expansion

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case are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer." § 440.015, Fla. Stat. (1991).

would be contrary to the reasoning in *Traveler's Ins. Co. v. Bruns*, 443 So. 2d 959, 961 (Fla. 1984) that "[t]he thrust of rule 9.130 is to *restrict* the number of appealable nonfinal orders. The theory underlying the more restrictive rule is that appellate review of nonfinal judgments serves to waste court resources and needlessly delays final judgment." (emphasis added). The rule urged here by the district court would increase the number of nonfinal appeals as every denial of a defendant's motion for summary judgment -- whether on an issue of law or, as in the vast majority of cases, based upon disputed issues of fact -- would trigger the district court's jurisdiction.[13]

This expanded right of nonfinal appeal would not simply move a district court's efforts to an earlier time closer to the denial of the summary judgment. If a district court affirmed a trial court's decision, nothing would restrict the defendant from having another motion for summary judgment heard later in the litigation, after further development of the record. *See generally Hastings I*, 682 So. 2d at 1115 (discussing needless expenditure of appellate resources in that case). If again denied by the trial court, the district court's jurisdiction would again be triggered. In spite of these multiple appeals, nothing would prevent the district court from facing these same issues yet again on plenary appeal. Thus, contrary to the goal of

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Because defendants would still desire the immunity's protection, it seems likely that all summary judgment denials would result in appeals.

avoiding delays in reaching final judgment, these appeals could significantly increase the time and expense of litigation, not only to the parties, but to the trial and appellate courts as well.

The district court's new rule would also create the only occasion where Florida's appellate courts would be accepting nonfinal appeals on factual issues that are not fully developed. The rule suggested by the district court likewise flies in the face of this Court's holding in *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985) that "[i]f the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, of if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it."

D. Conclusion

Because co-employees are not immune from their acts of gross negligence, there is no logical basis for procedurally treating actions sounding in gross negligence any differently than other civil lawsuits. The district court has not demonstrated sound reasons for departing from this Court's precedent, nor has it shown that trial courts are unable to appropriately manage and decide these cases such that plenary appeal insufficiently protects defendants' rights. A decision to dramatically expand the district courts' nonfinal appeal jurisdiction would increase the number of nonfinal appeals while simultaneously creating in co-employees and

employers unique rights never intended by the legislature. For all of these reasons, petitioner respectfully suggests the first certified question must be answered "no."

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).

THE COURT SHOULD ANSWER THE SECOND CERTIFIED QUESTION "YES"

A. The District Court's Certified Question Incorrectly Presumes the Procedure Resulting in Injury or Death was Merely "Negligent" and that Repeating that Procedure was the Co-Employees' Only Wrongful Act Contributing to Reeves' Death

Taken in the light most favorable to the plaintiff, the evidence before the trial court supports its conclusion that the plaintiff made a prima facie case of gross negligence by Fleetwood's employees. Applying the gross negligence test announced in *Glaab v. Caudill*, 236 So. 2d 180, 182-84 (Fla. 2d DCA 1970), which the district court here agrees is the relevant standard, the trial court

concluded that summary judgment should be denied because

> The facts of this case and the allegations of the plaintiff, viewed in the light most favorable to the plaintiff, create a factual basis for a composite of circumstances which, together, constituted an imminent or clear and present danger amounting to more than normal and usual peril . . . .

(Appendix 1, p. 2, para. A.5.).[14]

In referencing a "composite of circumstances," the trial court was indicating that it was not merely the repeated misoperation of the forklift that rose to the level of gross negligence, but -- faithful to *Glaab* -- the intentional misoperation of the forklift "coupled with" the "critical mass of ordinary hazards."[15] Hence, the trial

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Although the trial court does not cite *Glaab* in its order, *Glaab* was discussed at the hearing (App. 9, pp. 88-90, 120-21), and the language used in the resulting order is virtually identical to *Glaab*'s conclusion that "gross negligence presupposes the existence of a 'composite' of circumstances which, together, constitute an 'imminent' or 'clear and present' danger amounting to more than normal and usual highway peril." *Glaab v. Caudill*, 236 So. 2d at 183.

Glaab v. Caudill, 236 So. 2d at 183. In the context of the "normal and usual perils" of automobile guest-passenger cases, the *Glaab* court further defined the "composite of circumstances" as potentially involving four fact-based scenarios, one of which is "intentional or voluntary mis-operation or non-operation of an automobile *coupled with* conditions which, in the event of such mis-operation or non-operation, would constitute a 'clear and present' danger; . . . ." *Id*. (emphasis in original). The evidence before the trial court here was that the forklift was operated in violation of numerous safety rules and procedures of Fleetwood, the forklift manufacturer, and OSHA (e.g., driving with the load in front, driving with an obscured field of vision, driving with an elevated load, driving with an unsecured load, etc.). The other "conditions" included the forklift driver being required to operate the forklift while looking down on a yellow stripe painted on the floor in order to keep the elevated load from striking a protruding pole with only a four-to-six inch clearance, the load weighing 1,500 pounds, the load being off balance, the forks not being placed at their widest points, Reeves being new to the job, Reeves not being informed of the overhead forklift procedures, Reeves not acknowledging (or perhaps even hearing) the forklift's horn, Reeves not having an available escape route, and forklift operators being instructed by Fleetwood to not stop if employees did not move out of the way.

court based its denial of summary judgment not solely on the repeated misoperation of the forklift as implied by the district court, but additionally on the "composite of circumstances" that made the employees' acts grossly negligent and that were "substantially certain to result in injury or death" to Reeves.

B. The Evidence Before the Trial Court Closely Paralleled that in **Turner v. PCR, Inc.** *and Raised Genuine Issues of Material Fact as to Whether it was Substantially Certain Reeves Would Suffer Injury or Death*

The trial court had before it a detailed record, including depositions of the forklift operator, his supervisor, the Fleetwood plant manager, and an affidavit from plaintiff's safety expert, in addition to a copy of the OSHA investigative report and penalty notices. As appropriately noted in the trial court's order, the court was required to consider all of this evidence in the light most favorable to the plaintiff. (App. 1, pp. 1-2).

This Court's opinion in *Turner v. PCR, Inc.*, 754 So. 2d 683, 688-89 (Fla. 2000), further establishes that, in determining whether the employer engaged in conduct substantially certain to result in injury or death, the evidence is to be viewed objectively.[16] *Turner* demonstrates the correct application of the objective standard to the facts presented. Applying the objective standard to the facts of this

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There is no evidence here supporting the alternative test that Fleetwood exhibited a deliberate intent to injure Reeves.

case yields the same conclusion as in *Turner*: the evidence raised genuine issues of material fact effectively precluding the entry of summary judgment. *Id*. at 689.

1. Like Turner, *in this case there was evidence that the forklift procedure was fundamentally unsafe*

Fleetwood ignored employee safety. Fleetwood's plant had no safety director and no one at the plant was responsible for monitoring OSHA compliance. As recounted in the affidavit of plaintiff's safety expert, Miller's operation of the forklift -- as instructed to him and approved by his foreman, Oliver -- violated numerous provisions of Fleetwood's own written safety procedures, its safety videos, the forklift operator's manual, and the OSHA regulations. This evidence was corroborated in the depositions of Fleetwood's employees, including Miller. From this evidence, a jury could reasonably conclude that Fleetwood's forklift operations were fundamentally unsafe, and that Fleetwood, in condoning and encouraging these continuous and flagrantly unsafe practices, engaged in conduct substantially certain to result in injury or death. *See e.g., Cadillac Fairview of Fla., Inc. v. Cespedes*, 486 So. 2d 417, 421 (Fla. 3d DCA) (suggesting that OSHA violations may be proper evidence of duty or of proximate cause), *rev. denied*, 479 So. 2d 117 (Fla. 1985).

2. Like Turner, *this case contains evidence that the employer knew of previous non-fatal incidents indicating the dangerousness of its procedures*

As noted by the district court, the complaint conformed with *Turner*'s requirements, alleging that Fleetwood intentionally created a situation where injury or death was a substantial certainty. *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d at 861. As in *Turner*, the trial court had before it an affidavit from a qualified safety expert as well as other sworn testimony. *Turner v. PCR, Inc.*, 754 So. 2d at 685, 690. While no previous injuries had resulted from the unsafe, but often-repeated procedures (also consistent with *Turner*), other elevated forklift loads had struck the same pole adjacent to Reeves' workstation. In fact, one previous collision was of a load transported by the same forklift operator (Miller) within the previous year. Given these heavy loads, elevated fourteen feet off the ground, coupled with these previous collisions, it was reasonable for the trial court to conclude that Fleetwood knew before the date of the accident that its procedure created a high risk of injury or death to its employees.

3. Like Turner, *this case contains evidence that the employer put the concern for profits first, ignoring safety risks*

As in *Turner*, Fleetwood chose to ignore these previous incidents. *Turner v. PCR, Inc.*, 754 So. 2d at 691. Fleetwood did not change its work procedures, did not require loads to be secured, and did not alter the workplace environment to a layout better suited to the safe transport of materials and the safety of employees. Plaintiff's safety expert concluded that Miller and the other forklift drivers at

Fleetwood were instructed and expected by Fleetwood to violate Fleetwood's own safety rules, the safety procedures in the forklift operator's manual, and the safety regulations of OSHA. As in *Turner*, all this evidence indicates a degree of deliberate or willful indifference to employee safety. *Pacheco v. Power & Light Co.*, 784 So. 2d 1159, 1163 (Fla. 3d DCA), *rev. denied*, 805 So. 2d 806 (Fla. 2001). As in *Turner*, a jury could reasonably conclude from all this evidence that Fleetwood was more concerned with profits than safety. *Turner v. PCR, Inc.*, 754 So. 2d at 691. On a motion for summary judgment, it was not for the trial court to resolve these factual issues, but merely to recognize their existence and deny summary judgment accordingly.

4. Like Turner*, this case contains evidence that the employer withheld knowledge of the danger from its employees, including Reeves*

Similar to *Turner*, *Connelly v. Arrow Air, Inc.*, 568 So. 2d 448, 451 (3d DCA), *rev. denied*, 581 So. 2d 1307 (Fla. 1990) and *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 97 (Fla. 1st DCA), *rev. denied*, 574 So. 2d 139 (Fla. 1990), the evidence in this case supports the conclusion that Fleetwood attempted to cover up the danger, affording employees no means to make reasonable decisions as to their actions. *Turner v. PCR, Inc.*, 754 So. 2d at 691. The pole that Miller hit with his load less than a year before was also hit other times, but had been subsequently painted, covering up evidence otherwise observable to

Reeves and other employees. When Miller hit the pole he was concerned enough to report it to his foreman (Oliver), but no written report was ever filed by either of them. In spite of the known danger, no safety signs or warnings were posted at Reeves' workstation or anywhere in the plant warning of passing overhead loads or the danger of falling objects. Furthermore, those who knew first hand of the danger -- Miller and Oliver -- told Reeves nothing that morning about the overhead loads and the deadly danger they presented. Thus, Reeves was presented with no opportunity to learn of, evaluate, or protect himself from the danger around him. *Cf. Tinoco v. Resol, Inc.*, 783 So. 2d 309, 310 (Fla. 3d DCA 2001) (affirming summary judgment where danger was obvious and plaintiff worked with machine in its malfunctioning condition for six hours immediately preceding injury). At the summary judgment hearing, the evidence was unrebutted: Fleetwood did not disclose the danger and Reeves had no idea of the dangerous situation he was working in.

In addition to the similarities to *Turner*, here there is additional undisputed evidence that Fleetwood actually *instructed and encouraged* its employees to disobey safe practices and OSHA regulations in order to get their jobs done more quickly. This is precisely the "willful blindness" *Turner* aimed to keep in check by establishing an objective test. *Turner v. PCR, Inc.*, 754 So. 2d at 691. Using that

test, the trial court correctly concluded that Fleetwood's motion for summary judgment could only be denied.

In sum, the evidence of Fleetwood's knowledge of danger and deliberate indifference to employee safety were at least as egregious as the facts in *Turner*. Consistent with *Turner*, the unrebutted evidence was that Fleetwood knew of the danger but actively kept that information from employees like Reeves. "[W]here the employer, as in this case, withholds from an employee, knowledge of a defect or hazard which poses a grave threat of injury so that the employee is not permitted to exercise an informed judgment whether to perform the assigned task, the employer will be considered to have acted in a 'belief that harm is substantially certain to occur.'" *Connelly v. Arrow Air,* 568 So. 2d at 451. (citations omitted).

C. The District Court Incorrectly Assumes that the Trial Court Added Together Small Risks of Injury In Order to Reach a Combined Total

Nothing in the trial court's order supports the district court's conclusion that the trial judge "add[ed] together small risks of injury in order to reach a combined total where the likelihood of injury to some employee sometime was substantially certain." *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d at 869. Although the word "inevitable" appears in the trial court's order, it does not appear in the hearing transcript. Instead, the trial judge discusses the rationale for his ruling, acknowledges the existence of disputed facts, refers to the teachings of *Turner*,

and references the foreman's (and therefore Fleetwood's) knowledge that important safety procedures were routinely violated. (App. 9, pp. 127-29). The trial judge concluded that the plaintiff had presented sufficient evidence that "the conduct was such that it was substantially certain to result in injury or death." (App. 1, p. 2, Para 5.). Thus, even if the trial judge also thought that an accident was "inevitable," the record is clear that he applied *Turner*'s objective test to the evidence, ultimately finding disputed issues of material fact precluding the entry of summary judgment.[17]

D. The Opinions of this Court and the District Courts Confirm that the First Incident Resulting in Injury or Death May Be Treated as an Intentional Tort Consistent with Turner v. PCR, Inc.

Although the chemical explosion in *Turner v. PCR, Inc.* was the first explosion associated with the specific production process that caused an injury or death, it was not the first explosion associated with the same unsafe procedure. *Turner v. PCR, Inc.*, 754 So. 2d at 685. In the two years preceding Mr. Turner's death, his employer had made thirty-six production runs of the chemical compound, "at least three" of which had resulted in uncontrolled explosions. *Id.*

Because the trial court adhered to the *Turner* standard, therefore not departing from the "essential requirements of law," the district court is incorrect in its conclusion that, even without jurisdiction under Rule 9.130, it could review this matter under its certiorari jurisdiction. *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d at 866.

If the district court in this case is correct that the first incident in which a procedure results in injury or death cannot be considered an intentional tort, then *Turner* was wrongly decided.

Turner cites with approval the district court opinion in *Connelly v. Arrow Air, Inc.*, 568 So. 2d 448, 449 (Fla. 3d DCA 1990). In *Connelly*, the airplane crash that resulted in the plaintiff's death was the only crash of the plane. But prior to the crash, problems with exhaust gas temperature had been noted fifteen times in the preceding two months; the leaking hydraulic system had been written-up twenty times in the preceding six months; and numerous other safety problems -- ranging from compressor stalls to sticking thrust reversers to elevator control column ratcheting -- were well known to the employer. *Id*. at 450. Under the district court's rationale in this case, each of these aircraft performance problems, flight safety "work arounds," and FAA regulation violations preceding the crash would qualify as "a standard, proven method" for operating the plane because they had taken place over an extended period of time without resulting in injury or death. *See Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d at 868 (describing Miller and Oliver's forklift procedure). If the district court is correct that the first incident in which a procedure results in injury or death cannot be considered an intentional tort, then *Connelly* was also wrongly decided.

The obvious implication of the district court's second certified question is that if an employer allows a dangerous procedure long enough by willfully ignoring or deliberately bypassing safe work practices, somehow the *unsafe* practice is transformed into a *safe* practice. As a matter of public policy, answering the second certified question "no" would be an endorsement of the long-term violation of safe work practices, including OSHA. Workers would be at higher risk for injury and employers would face the possibility of more work absences from the resulting injuries. Furthermore, answering the second certified question "no" would be completely inconsistent with *Turner*'s rationale for adopting an objective test and the overall rationale for this Court recognizing an intentional tort exception to the Workers' Compensation Act.

E. Conclusion

Contrary to the district court's conclusion, the trial court did not simply deny summary judgment as a result of Fleetwood's allowing a negligent procedure to be repeatedly performed. The transcript of the summary judgment hearing confirms that the trial court carefully considered and then applied this Court's teachings in *Turner*. In doing so the trial court recognized that the disputed facts in this case were at least as egregious as those in *Turner*. The trial court further recognized that these disputed facts existed on the material issue of whether

Fleetwood engaged in conduct substantially certain to result in injury or death. *Turner* and *Connelly v. Arrow Air, Inc.* clearly demonstrate that the first incident causing injury or death can be -- and has been -- treated as an intentional tort. Petitioner respectfully suggests the Court should answer the second certified question "yes."

CONCLUSION

The trial court's order is clear on its face: the court merely denied defendants' motions for summary judgment based on disputed issues of fact. The trial court had not ruled, as a matter of law, that the defense of workers' compensation immunity was not available to the defendants, nor had the court ruled that the defense could not be argued to the jury. The trial court carefully considered the evidence before it, recognized several disputed issues of material fact, and, pursuant to the law of Florida, denied summary judgment. This Court has previously made clear that such a decision and such an order are not subject to nonfinal appeal. *Hastings II*, 694 So. 2d at 718. On that basis, the district court's opinion should be vacated and the case remanded to the trial court for further proceedings.

Similarly, the district court's first certified question should be answered "no." If the trial court makes clear that it intends to submit the issues of gross negligence or intentional tort to the jury as a question of fact, then the only conclusion is that the trial court found these issues unresolved and has not denied the defendants' workers' compensation immunity as a matter of law. Consistent with Rule 9.130, the protection of appellate resources, and this Court's opinions culminating in *Hastings II*, district courts have no jurisdiction to review these

nonfinal orders. The best occasion to challenge such trial court rulings is on plenary appeal. As a result, the district court's opinion should be vacated and the case remanded to the trial court for further proceedings.

The district court's second certified question has been previously answered "yes" in *Turner v. PCR, Inc.* and *Connelly v. Arrow Air, Inc.* Those cases confirm that an employer's actions resulting in injury or death can be treated as an intentional tort *especially when* the employer has performed or condoned the activity for an extended period of time. In *Turner*, *Connelly*, and this case, by allowing the activity to continue even after the employer had knowledge of its high danger and potential for injury or death, the employers demonstrated a degree of deliberate or willful indifference to employee safety. The record before the trial court here demonstrates that the court was correct in its decision to deny Fleetwood's motion for summary judgment -- the facts closely parallel those in *Turner* and when viewed objectively support a conclusion that "a reasonable person would understand that the employer's conduct was substantially certain to result in injury to the employee." *EAC USA, Inc. v. Kawa*, 805 So. 2d 1, 4 (Fla. 2d DCA 2001). As a result, petitioner respectfully suggests the second certified question should be answered "yes," the opinion of the district court vacated and the case remanded to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief satisfies the requirements of Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2).

CERTIFICATE OF SERVICE

I hereby certify that an original and seven copies of the foregoing has been furnished by Federal Express to the Clerk of the Supreme Court of Florida, with a copy by U. S. Mail to JOHN W. FROST, ESQ., 395 South Central Avenue, Bartow, FL 33830; and to GLENN WADDELL, ESQ., Waddell & Bouchillon, P.A., P.O. Box 1363, Auburndale, FL 33823, Attorneys for Respondents, this _____ day of _____, 2003.

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Miller had started work at 7:00 a.m. According to the OSHA inspection report, the accident occurred at approximately 9:00 a.m. (App. 7, p. 14).

This is a curious comment as the trial court's order makes no reference or comment to the order's appealability. A close reading of the transcript of the summary judgment hearing shows that the trial court was initially unaware of a possibility of interlocutory appeal, and was mistakenly advised by the parties' lawyers that any denial of summary judgment regarding workers' compensation immunity was an "automatic" appeal. (App. 9, pp. 123-24). Of course, mistakes of trial counsel or the trial court cannot create jurisdiction where none exists. Moreover, the district court was not entitled to base its exercise of jurisdiction upon the hearing transcript to any degree given this Court's holding in *Fla. Dept. of Corrections v. Culver*, 716 So. 2d 768, 769 (Fla. 1998).

Even in cases of qualified immunity, the denial of summary judgment is subject to nonfinal review only "to the extent that it turns on an issue of law. . . ." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (emphasis added); *accord Tucker v. Resha*, 648 So. 2d 1187, 1190 (Fla. 1994). In the context of qualified immunity the "issue of law" is limited to "[w]hether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit . . . ." *Elder v. Holloway*, 510 U.S. 510, 516 (1994). If the trial court determines that the federal right was clearly established, *which is a legal determination that the defendant will not be immune from his acts*, then the jurisdiction for interlocutory review is triggered. Similarly here, if the trial court determines that the defense of workers' compensation immunity is not available to the defendant, *which is a legal determination that the defendant will not be immune from his acts*, then the jurisdiction for interlocutory review is triggered. Other than those narrow exceptions, nonfinal appeal is not authorized. Even in cases of qualified immunity, issues of fact must still be resolved by the fact finder and are not subject to interlocutory appeal. *See Mitchell v. Forsyth*, 472 U.S. at 512-13 (noting factual disputes presenting triable issues).

This principle is clearly reflected in this Court's reasoning in Hastings II that "the denial of a summary judgment may be based on a factual dispute and the party is still likely able to present an immunity defense to the jury. In those cases, the new rule makes clear that the district courts have no jurisdiction to hear an appeal of the nonfinal order." *Hastings II*, 694 So. 2d at 720.