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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

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

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I.

OPINIONS OF THIS COURT AND THE SECOND DISTRICT COURT OF APPEAL CONFIRM THAT THE DISTRICT COURT DID NOT HAVE JURISDICTION UNDER RULE 9.130

Nothing in the trial court's Order states that the defense of worker's compensation immunity will not be available to the Respondents at trial. This court certainly did not hold in *Hastings II*[1] that the mere appearance of the *magic words* "as a matter of law" is sufficient to confer jurisdiction. On the contrary, the common purpose advanced by *Hastings II*, the 1996 amendment of Rule 9.130(a)(3)(C)(v), and the subsequent case law has been to restrict interlocutory appeals of orders exactly like the one entered here. That same purpose is nowhere more obvious than in *Florida Dept. of Corrections v. Culver*, 716 So. 2d 768, 769 (Fla. 1998) where this court held that "[b]ecause the order in the instant case does not specifically state that workers' compensation immunity is unavailable as a defense, consistent with our decision in *Hastings* [*II*], the district court does not

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

have jurisdiction under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(vi) to review the order."[2] *Culver* was subsequently cited by a panel of the Second District Court of Appeal different than the panel below, clearly stating that "to be appealable, a nonfinal order denying a summary judgment motion which is based on workers' compensation immunity must specifically state that, as a matter of law, a party is not entitled to raise the workers' compensation immunity defense at trial." *Better Roads, Inc. v. Gonzalez*, 744 So. 2d 1123, 1123 (Fla. 2d DCA 1999). The opinion of Second District Court of Appeal in the instant case conflicts with the opinion in *Gonzalez* and attempts to create new law were none is needed or justified.[3]

Rule 9.130 was further amended in 2000 resulting in section (a)(3)(C)(vi) being renumbered as subsection (a)(3)(C)(v).

In the years since *Hastings II*, *Culver* and *Gonzalez*, the Florida Legislature has made no changes to Chapter 440 that would require a new interpretation of Rule 9.130(a)(3)(C)(v). Likewise, during the five years since *Hastings II* the legislature has apparently not felt this Court's interpretation of Chapter 440 violated the spirit or intent of § 440.11, Florida Statutes: the legislature has not amended Chapter 440 in any way to move toward the absolute immunity urged here by Respondents and the district court, and has likewise not attempted to create a greater right to interlocutory appeal in these cases. By its opinion, the district court has violated the principle of *stare decisis* and effectively amended Chapter 440, straining the separation of powers doctrine. *See Hapney v. Central Garage, Inc.*, 579 So. 2d 127, 139 (Fla. 2d DCA 1991) (Lehan, J., dissenting), *disapproved, Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 476 (Fla. 1995).

II.

THE DISTRICT COURT'S CONCLUSION THAT CERTIORARI IS AN ALTERNATIVE JURISDICTIONAL BASIS IS INCORRECT

A. The Trial Court's Denial of Respondents' Motions for Summary Judgment Cannot Qualify for Certiorari Review

As this court has previously held, "common law certiorari is an extraordinary remedy and should not be used to circumvent the interlocutory appeal rule which authorizes appeal from only a few types of non-final orders." *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1098 (Fla. 1987). Moreover, orders denying summary judgment "are particularly unlikely to be reviewed by certiorari." *Tucker v. Resha*, 610 So. 2d 460, 464 (Fla. 1st DCA 1992), *reversed on other grounds*, 648 So. 2d 1187, 1190 (Fla. 1995), *quoting* Haddad, "The Common Law Writ of Certiorari in Florida," 24 *U.Fla.L.Rev.* 207, 223 (1977). Of particular significance here is this court's previous recognition that workers' compensation immunity is an affirmative defense. *Mandico v. Taos Construction, Inc.*, 604 So. 2d 850, 854 (Fla. 1992). The Second District Court of Appeal has previously held that when a trial court makes an erroneous ruling on an affirmative defense, it can be adequately

corrected on appeal from a final order. *Panagakos v. Laufer*, 779 So. 2d 296, 297 (Fla. 2d DCA 1999) (refusing to extend certiorari jurisdiction to decide a claim of judicial proceedings privilege).

The judicial policy favoring limited certiorari recognizes that piecemeal review of non-final trial orders impedes rather than promotes the orderly administration of justice and serves to delay and harass. *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 215 (Fla. 1998) *citing* Haddad, "The Common Law Writ of Certiorari in Florida," 24 *U.Fla.L.Rev.* 207, 222 (1977). The committee notes to Florida Rule of Appellate Procedure 9.130 (the interlocutory appeal rule) further emphasize these considerations:

> The advisory committee was aware that the common law writ of certiorari is available at any time and did not intend to abolish that writ. However, because that writ provides a remedy only if the petitioner meets the heavy burden of showing that a clear departure from the essential requirements of law has resulted in otherwise irreparable harm, it is extremely rare that erroneous interlocutory rulings can be corrected by resort to common law certiorari. It is anticipated that because the most urgent interlocutory orders are appealable under this rule, there will be very few cases in which common law certiorari will provide relief.

Fla.R.App.P. 9.130 (committee note, 1977 amend.) quoted in *Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 215 n. 1 (Fla. 1998).

The instant case is exactly the type disfavored for certiorari review. Rule 9.130 provides a narrow exception for the interlocutory review of workers' compensation cases -- this case is clearly outside that exception. The district court effectively supplants the interlocutory appeal rule without thoroughly considering the language, history, or intent of Rule 9.130. As demonstrated below, this conclusion is fundamentally flawed.

B. The Precedent Cited by the District Court and Respondents Does Not Support the Granting of Certiorari Review in this Case

Respondents echo the district court's conclusion that certiorari review is proper here, based primarily on two opinions: *Stephens v. Geoghegan*, 702 So. 2d 517, 525 (Fla. 2d DCA 1997) and *Board of Regents of State v. Snyder*, 826 So. 2d 382, 387 (Fla. 2d DCA 2002). Both cases involve public official qualified immunity. Because *Snyder* is principally based on the holding in *Stephens*, Petitioner will focus her discussion on *Stephens*.[4] In doing so, Petitioner will

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In addition to public official qualified immunity, *Snyder* also addresses the Board of Regents' claim that it was entitled to sovereign immunity from suit under 42 U.S.C. § 1983. Because civil rights actions are not included in the state's general waiver of sovereign immunity, and the Board was sued as an arm of the state, the

demonstrate how *Stephens* is inapplicable to the instant case.

The central issue in *Stephens* was whether the defendant police officers enjoyed qualified immunity from suit in a federal civil rights action. *Stephens*, 702 So. 2d at 520. Noting that the then-existing interlocutory appeal rule prohibited interlocutory review following denial of summary judgment, the district court considered whether certiorari review was available. *Id.* at 521. Thus the district court considered whether the trial court order denying qualified immunity caused the defendants material harm that could not be remedied on postjudgment appeal. *Id*. The district court reasoned that "absolute and qualified immunity for public officials are not merely defenses to liability; as the terms themselves imply, they protect a public official from having to defend a suit at all." *Id*. The court concluded that because a public official cannot be "reimmunized" following a trial, postjudgment appeal provides an inadequate remedy, and thus the requisite material harm is established. *Id.*

The *Stephens* court made clear that its holding turned on the issue of "whether the defendants may be sued *at all*." *Id*. at 524 (emphasis in original). The court felt it important to further amplify this critical distinction, taking a second

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Board was held immune from suit.

opportunity to point out that

> We emphasize that our holding is applicable only to cases where the public official is seeking immunity from *suit*. Our holding is not applicable to an official seeking immunity from *liability*. *Cf. Roe*, 679 So.2d at 759 (refusing to expand interlocutory appeal right established in *Tucker II*, 648 So.2d 1187, to order denying sovereign immunity; sovereign immunity is an immunity from liability and its benefits will not be lost simply because review must wait until after judgment).

Id. at 525, n. 5 (emphasis in original).

C. This Court's Holding in Dept. of Education v. Roe *Demonstrates the Proper Analysis for the Availability of Certiorari Review*

The key mistake in the district court's certiorari analysis here is the implicit conclusion that because certiorari review was proper in a public official qualified immunity case, then certiorari review is proper. In this same vein, Respondents incorrectly state that "[a]n erroneous denial of immunity is the very sort of issue that is ideal for certiorari review . . . ." (*Answer Brief*, p. 18). But all immunities are not created equal when it comes to certiorari review. This court's opinion in *Dept. of Education v. Roe*, 679 So. 2d 756, 758 (Fla. 1996) demonstrates the error in the district court's and Respondents' conclusions, and provides a workable

framework for analyzing the distinctions between "public official qualified immunity" and "sovereign immunity" that explains why only the former justifies certiorari review. *Id*. at 757.

First Distinction -- Public Policy. Whereas the purpose of public official qualified immunity is to "protect public officials who are required to exercise their discretion from undue interference with their duties and from potentially disabling threats of liability," the public policy behind sovereign immunity does not reach that level. *Id*. at 758 (citations omitted). Because the defense of sovereign immunity suits is not likely to have a chilling effect on the exercise of public officials' duties, the extraordinary remedy of certiorari review is unnecessary. *Id*. at 759.

Second Distinction -- Ability to Separate Immunity Claim from the Action Itself. Certiorari review of decisions regarding public official qualified immunity is justified in part because those decisions fall into a "small class which finally determine claims of right separable from, and collateral to, rights asserted in the action." *Id*. at 758 (citations omitted). The same is not true in sovereign immunity cases. *Id*. *Roe* clearly expresses the concern that permitting interlocutory appeals in sovereign immunity cases would add substantially to the caseloads in the district courts. *Id*. The *Roe* court further reasoned that interlocutory appeals were

improper because "[o]ftentimes, the applicability of the sovereign immunity waiver is inextricably tied to the underlying facts, requiring a trial on the merits." *Id*.[5]

Third Distinction -- "Immunity from Suit" vs. "Immunity from Liability". One of the key distinctions this court noted in *Roe* was that, while sovereign immunity is only a defense to liability, "qualified immunity of a public official best achieves its purpose as an *immunity from suit* rather than a mere *defense to liability*, and that the immunity is effectively lost if a case is erroneously permitted to go to trial." *Id*. at 758 (citations omitted) (emphasis added). Even if the state has to bear the expense of trial, should the state ultimately prevail on its sovereign immunity defense *the benefit of the immunity from liability* will not be lost simply because the review occurred after final judgment. *Id*. at 759.

D. The Roe *Analysis Conclusively Demonstrates that Certiorari Review is Improper in this Case*

Applying the distinctions and analysis of *Roe* to the instant case demonstrates that worker's compensation immunity is very different from public

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That certiorari review is improper where factual decisions must be made is also reflected in this court's opinion in *Globe Newspaper Company v. King*, 658 So. 2d 518, 519 (Fla. 1995) where the court held that "[c]ertiorari is not available to review a determination that there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery [of damages]."

official qualified immunity and the denial of a motion for summary judgment on the affirmative defense of worker's compensation immunity does not justify certiorari review.

Public Policy. The public policy underlying workers' compensation immunity is not like the public policy underlying public official qualified immunity. Qualified immunity is based on the need to protect public officials from undue interference. *Dept. of Education v. Roe*, 679 So. 2d at 759. The clearly-stated intent of workers' compensation immunity is very different: "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." Section 440.015, Fla. Stat. (2000). If the potential of a lawsuit has even a slight chilling effect on the grossly negligent acts of employers and co-employees, then it has served to further the goals of the workers' compensation scheme: workers are kept safe and remain employed, and employers remain free from the expenses associated with injuries and absences.

Ability to Separate Immunity Claim from the Action Itself. Because Respondents are only immune from liability for their acts of simple negligence, cases involving workers' compensation immunity usually require the trier of fact to

make a determination of whether the acts constituted gross or simple negligence. Where that determination can be made as a matter of law, summary judgment is proper and an interlocutory appeal can be taken. Conversely, where the determination cannot be made as a matter of law, the trial court must properly deny a motion for summary judgment.[6] The fact finder is then required to make the determination of gross negligence versus simple negligence based on the evidence presented. Once that decision is made, the trial court is finally in the position to determine the applicability of any claimed immunity. Hence, when a trial court merely denies a motion for summary judgment in a workers' compensation case, the trial court is recognizing that the claim of immunity cannot be separated from the action itself.[7] As set forth in *Roe*, the inability of a trial court -- including the trial court here -- to separate the *claim* of liability from the facts establishing whether the *criteria* for immunity have been met makes certiorari review premature, a waste of limited court resources, and ultimately inappropriate.

Allowing review of every such denial would increase the caseloads at the district courts, precisely the result Rule 9.130 attempts to avoid.

As the Second District Court of Appeals recognized in *Stephens v. Geoghegan*, "when a court denies summary judgment in the face of disputed issues of material fact, it commits no legal error, let alone a departure from the essential requirements of law." 702 So. 2d 517, 525 (Fla. 2d DCA 1997), n.4.

"Immunity from Suit" vs. "Immunity from Liability". Unlike public official qualified immunity, the Florida Workers' Compensation Act only provides "immunity from liability," not "immunity from suit." Section 440.11 ("Exclusiveness of Liability") unambiguously states that the "*immunities from liability* enjoyed by an employer shall extend as well to the employee . . . ." § 440.11(1), Fla. Stat. (2000) (emphasis added). The same section further states that "[t]he *immunity from liability* described in subsection (1) shall extend to an employer and each employee . . . ." § 440.11(2), Fla. Stat. (2000) (emphasis added).[8]

Only where the issue is whether the defendants can be sued *at all* is there a legitimate concern about the inability to "reimmunize" a defendant. As this court

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In response to the Amicus Brief submitted by the Academy of Florida Trial Lawyers, Respondents argue that worker's compensation immunity is an "immunity from suit," relying in part upon cases predating important additions and amendments to § 440.11. In 1978 § 440.11(1) was amended by the addition of current section (3) which states in part that "The same ***immunities from liability*** enjoyed by an employer shall extend as well to each employee . . . ." (Ch. 78-300, § 440.11, at -- , Laws of Fla.) (emphasis added). The current concluding sentence of § 440.11(1) was added in 1988, stating that "The ***immunity from liability*** provided in this subsection extends to county governments . . . ." (Ch. 88-284, § 440.11, at 1053, Laws of Fla.) (emphasis added). Similarly, in 1989 current subsection (2) was inserted to § 440.11 which states that "The ***immunity from liability*** described in subsection (1) shall extend to an employer . . . ." (Ch. 89-289, § 440.11, at 1583, Laws of Fla.) (emphasis added).

recognized in *Tucker v. Resha*, when a public official is erroneously denied immunity *from suit,* society pays the social costs of the expense of litigation, the diversion of official energy from more pressing issues, and the deterrence from citizens accepting public office. *Tucker v. Resha*, 648 So. 2d at 1190 (quotations and citations omitted). Those same societal costs do not exist when the issue before the court is *immunity from liability*. The very continuance of the proceedings does not infringe on the immunity. In fact, as here, further proceedings in the trial court may be necessary to determine whether the immunity exists at all. *Cf. Belair v. Drew,* 770 So. 2d 1164, 1167 (Fla. 2000) (reversing denial of certiorari review where constitutional right to privacy infringed by continuation of proceedings in trial court).[9]

In short, a denial of summary judgment on the affirmative defense of worker's compensation immunity is not similar to a denial of public official qualified immunity. To treat both the same is unjustified and threatens the history

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To the extent Respondents argue that certiorari review is justified because of the expense of litigation, this court has previously recognized that "[l]itigation of a non-issue will always be inconvenient and entail considerable expense of time and money for all parties in the case. The authorities are clear that this type of harm is not sufficient to permit certiorari review." *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1110 (Fla. 1987) *citing Wright v. Sterling Drugs, Inc.*, 287 So. 2d 376, 376 (Fla. 2d DCA 1973), *cert. denied*, 296 So. 2d 51 (Fla. 1974).

of limited certiorari review established by this court.

CONCLUSION

As previously recognized by this court and the earlier precedent of the Second District Court of Appeal, the district court did not have jurisdiction to review the trial court's order because nothing on the face of the order conclusively states that the defense of workers' compensation immunity is unavailable to Respondents. Invoking certiorari jurisdiction does nothing to change that simple fact. Furthermore, certiorari review is improper in this case. Opinions of this court and the Second District Court of Appeal make clear that workers' compensation immunity is not akin to public official qualified immunity, primarily because workers' compensation immunity is merely *immunity from liability*, not immunity from suit. Where the immunity at issue is an immunity from suit, the public policy implications are dramatically different and the claim of immunity itself is severable from the underlying facts. Here the trial court recognized that it was unable to decide issues of fact and therefore could not determine whether Respondents had met the criteria for achieving immunity from liability. "[W]hen a court denies summary judgment in the face of disputed issues of material fact, it commits no

legal error, let alone a departure from the essential requirements of law." *Stephens v. Geoghegan*, 702 So. 2d 517, 525 n. 4 (Fla. 2d DCA 1997). Nothing the trial court did or did not do requires certiorari jurisdiction, and mere disagreement with the interlocutory appeal rule does not justify certiorari review.

Consistent with Rule 9.130, this court's holding in *Hastings II*, the long-standing history of limited certiorari review in Florida, and the very language of the Worker's Compensation Act itself, this court should vacate the district court's opinion and remand the case to the trial court for further proceedings leading to an ultimate decision on immunity from liability and the entry of a final judgment.

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 U. S. Mail 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 28th day of April, 2003.

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