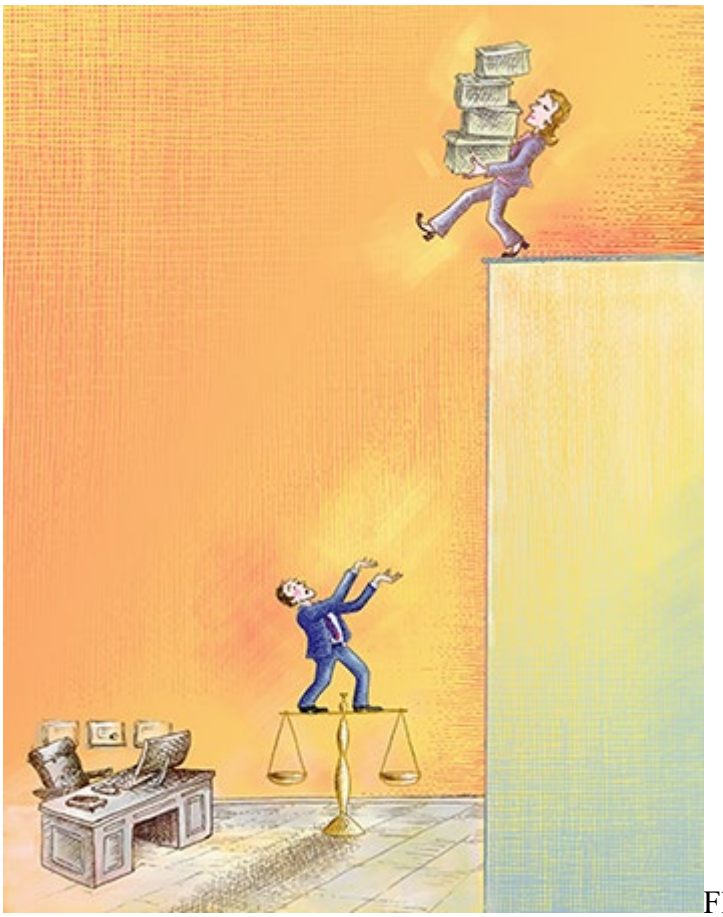
A Primer on the Intentional-tort Exception to Employers' Workers' Compensation Immunity

Vol. 88, No. 10 December 2014 Pg 14 Peter D. Webster and Christine Davis Graves
Featured Article



Florida's Workers' Compensation Law (F.S. Ch. 440) is intended "to assure the quick and efficient delivery of…benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer."[1] It is based on a trade-off pursuant to which, in return for strict liability of employers for workplace injuries, employees give up the right to a common-law action against the employer for negligence.[2] For employee injuries or death "arising out of work performed in the course and the scope of employment,"[3] an employer's obligation to pay benefits pursuant to the workers' compensation law is generally "exclusive and in place of all other liability, including vicarious liability."[4] The legislature's intent was to give employers immunity from suit "except in the most egregious circumstances."[5]

Historically, the only exception to workers' compensation immunity specified in the law was when the "employer fail[ed] to secure payment of compensation"[6] as required by the law, in which case the employee (or his or her legal representative if death resulted from the injury) could "elect to claim compensation under [the law] or to maintain an action at law or in admiralty for damages on account of [the] injury or death."[7] The law did not establish an

exception for intentional torts committed by an employer. Although the law did not create an intentional-tort exception to employers' workers' compensation immunity, and workers' compensation "is entirely a creature of statute and must be governed by what the statutes provide, not by what deciding authorities feel the law should be,"[8] in 2000, the Florida Supreme Court held that such an exception existed.

In *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000), a unanimous court said that, in *Eller v. Shova*, 630 So. 2d 537 (Fla. 1993), the court had "acknowledged that an employer enjoyed no immunity from an employee's action based upon an intentional tort," and that it was "reaffirm[ing] that holding."[9] Although it would appear relatively clear that the statement from *Eller* on which the court relied was pure dicta,[10] that is beside the point for purposes of this article. What matters is that, after *Turner*, it was generally recognized that an intentional-tort exception to employers' workers' compensation immunity existed.[11]

In *Turner*, the court first "reaffirm[ed]" what it said was its holding in *Eller* — that an employer enjoys no immunity from an action asserting an "intentional tort" as that term had been defined in *Fisher v. Shenandoah General Construction Company*, 498 So. 2d 882 (Fla. 1986), and *Lawton v. Alpine Engineered Products, Inc.*, 498 So. 2d 879 (Fla. 1986), *i.e.,* a tort where the employer either "'exhibite[d] a deliberate intent to injure *or* engage[d] in conduct which is substantially certain to result in injury or death.'"[12] It then formulated the standard courts must use when applying the second alternative ground for establishing an intentional tort. In doing so, the court considered "whether, under th[e] second alternative, an employee must establish that the employer actually *knew* (subjective standard) or rather the employer *should have known* (objective standard) that the conduct complained of was 'substantially certain to result in injury or death.'"[13] The court adopted the "objective standard,"[14] thus, requiring an employee to prove only that the employer should have known its conduct was substantially certain to result in injury or death. As the court explained, "the employer's actual intent is not controlling."[15] Rather, "[t]his standard imputes intent upon employers in circumstances where injury or death is objectively 'substantially certain' to occur."[16] The court, however, expressly recognized that a requirement that the employer "knew" of the risks of its conduct would establish a subjective standard.[17]

The legislature reacted to *Turner* in 2003,[18] enacting an amendment to F.S. §440.11(1), which, for the first time, created a statutory intentional-tort exception to workers' compensation immunity.[19] The amendment stated that an employer's actions would "be deemed to constitute an intentional tort and not an accident only when the employee prove[d], by clear and convincing evidence" either that:

1. The employer deliberately intended to injure the employee; or

2. The employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee, and the employee was not aware of the risk because the danger was not apparent and the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.[20]

Thus, although the legislature for the first time recognized a statutory intentional-tort exception to workers' compensation immunity, it is clear that the legislature also fundamentally changed the nature of that immunity from the court-created immunity in at least five important respects:

• It required that the employer's conduct be established by clear and convincing evidence, rather than merely the greater weight of the evidence;

• It rejected the court's objective (should have known) standard[21] in favor of the heightened subjective (actual knowledge) standard;

• It limited the sources from which the employer could obtain actual knowledge to "prior similar accidents" or "explicit warnings specifically identifying a known danger" of potential for injury to the employee;

• It rejected the court's substantial-certainty test in favor of the heightened virtual-certainty test rejected in *Turner* ;[22] and

• It required the employee to establish that she "was not aware of the risk" because "the danger was not apparent and the employer deliberately concealed or misrepresented" the known danger.

As several courts have noted, the effect of the amendment has been to create a significantly higher hurdle that employees seeking to overcome workers' compensation immunity must surmount.[23] Indeed, in *Boston v. Publix Super Markets, Inc.*, 112 So. 3d 654, 657 (Fla. 4th DCA 2013), the court said that "the statute provides an exceptionally narrow exclusion from immunity, requiring intentional, deceitful conduct on the part of the employer."[24] Though relatively few in number, opinions applying the 2003 amendment graphically illustrate how high the district courts of appeal believe that hurdle is. Every opinion concludes that the employee failed to overcome the hurdle established by the 2003 amendment. Indeed, as the following discussion demonstrates, in all but two of those opinions, the court affirmed a summary judgment entered in favor of the employer.

In *Gorham v. Zachry Industrial, Inc.*, 105 So. 3d 629 (Fla. 4th DCA 2013), the Fourth District affirmed a summary judgment holding that the employer was entitled to workers' compensation immunity as a matter of law. In doing so, the court quoted from a New Jersey Supreme Court decision, which had, in turn, quoted *Prosser on Torts* for the proposition that:

"[T]he mere knowledge and appreciation of a risk-something short of substantial certainty — is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong."[25]

The Fourth District then said that "[o]ur [l]egislature has taken this one step further and required virtual certainty, even more stringent than substantial certainty"[26] that the employee had "'alleged nothing more than withholding knowledge of a potentially dangerous condition,'" conduct not "virtually certain" to result in injury or death.[27] The court concluded by noting that

the 2003 amendment "adopted an extremely strict exception which, we suspect, few employees can meet."[28]

In *List Industries, Inc. v. Dalien*, 107 So. 3d 470 (Fla. 4th DCA), *rev. den.*, 122 So. 3d 867 (Fla. 2013), decided by a different Fourth District panel on the same day as *Gorham*, the court reversed a $2.7 million judgment in favor of an employee, holding the trial court should have granted the employer's motion for a directed verdict. Stating that "[t]he change from 'substantial certainty' to 'virtually certain' is an extremely different and a manifestly more difficult standard to meet" because "[i]t would mean that a plaintiff must show that a given danger will result in an accident every — or almost every — time."[29] The court concluded "the employee did not prove that it was 'virtually certain' that operating [the machine he was running when injured] would result in injury to the employee, as there had been no prior accidents on the machine."[30] Stating that "[t]here are some types of work (and in this case some machines) that are so obviously and inherently dangerous that the danger would be obvious to anyone working in the vicinity,"[31] t he court further concluded that "the employee did not prove by clear and convincing evidence that the employee was unaware of the risk, that the danger was not apparent, and that the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work."[32]

Finally, the court noted that because the goal behind immunizing employers from civil suits was "' *to avoid lawsuits at the outset, not simply to prevent adverse verdicts against employers and coworkers at the end of lengthy litigation*, '" trial courts "' *must serve as gatekeepers at the initial stages of litigation*. '"[33] Accordingly, "given the stringent standard required to overcome an employer's statutory immunity," the issue should generally be resolved by summary judgment.[34]

Three months after *Gorham* and *List Industries*, the Fourth District again addressed the issue. In *Boston*, the court affirmed a summary judgment in favor of the employer in an action resulting from the death of an employee who was injured while performing work within the course and scope of his employment. The court first noted that, in *Gorham* and *List Industries*, it had said that the "'virtual certainty' standard" adopted in the amendment was extremely difficult to satisfy because "'a plaintiff must show that a given danger will result in an accident every — or almost every — time."[35] It next noted that, in *List Industries*, it had said that workers' compensation immunity claims were "particularly suitable for determination on summary judgment given the extraordinarily high standard to overcome statutory immunity."[36]

The court then concluded that summary judgment in favor of the employer had been appropriate because "there is no evidence that prior similar accidents occurred." The accidents relied on by the plaintiff as similar "did not concern the *same danger*. . . or even a *similar danger*. "[37] In addition, while the fact that the backup alarm on the truck involved in the accident was not working may have made the injury "more likely," it did not make it virtually certain to occur.[38] In reaching its conclusion, the court expressly rejected the plaintiff's argument that the virtual certainty standard had been met because it was "certain that at some time an accident will occur as a result of the lack of a backup alarm."[39] The court said that "'[a]ny modestly dangerous activity at a workplace that is repeated often enough or long enough will eventually result in an accident,'" but that it is not appropriate to "' *add together or cumulate the individual*

probabilities of an accident on each occasion to reach a conclusion that an accident is inevitable or that a risk is inordinately high.'"[40]

Shortly after the Fourth District decided *Boston*,[41] the Third District affirmed a summary judgment in favor of an employer in *Vallejos v. Lan Cargo, S.A.*, 116 So. 3d 545 (Fla. 3d DCA 2013). Quoting from *List Industries*,[42] the Third District said that because the intentional-tort exception "'was intended to be the rarest of exceptions to the immunity granted to the employer'" by F.S. §440.11(1), the issue of immunity "'is amenable to being decided on summary judgment.'"[43] The court also noted that "the test is not whether the injury was preventable,"[44] and that the employer's "knowledge of possible risks and its failure to make [the work environment] 'more safe' is not sufficient to establish. . . an intentional tort."[45] The fact that the employer knew that an injury was possible did not satisfy the virtual certainty standard.[46] Again relying on *List Industries*,[47] the court said that, to satisfy the virtual certainty standard, "'a plaintiff must show that a given danger will result in an accident every — or almost every — time.'"[48] Finally, the court said that "failure to train or warn of obvious dangers does not amount to concealing or misrepresenting the danger so as to prevent [the employee] from exercising informed judgment" as required by §440.11 to establish liability for an intentional tort.[49] A month after *Vallejos* was decided, in *Figueroa v. Delant Construction Co.*, 118 So. 3d 272 (Fla. 3d DCA 2013), another Third District panel also affirmed a summary judgment in favor of an employer, relying on *Boston*, *List Industries*, and *Vallejos.*[50]

Most recently, in *R.L. Haines Construction, LLC v. Santamaria*, 2014 WL 4648522 (Fla. 5th DCA 2014), the Fifth District added its voice to those of the Third and Fourth districts. Reversing a $2.4 million judgment in favor of the wife and children of an employee killed when a 33-foot high steel column weighing more than 2,000 pounds fell on him, the court held that the trial judge erroneously concluded that sufficient evidence had been presented to permit the jury to decide whether the intentional-tort exclusion applied. Expressly relying on *Gorham*, *List Industries*, *Boston*, and *Vallejos*,[51] t he court held that, as a matter of law, the employee's widow had failed to present evidence sufficient to establish by clear and convincing evidence that the employee's death "was virtually certain to occur" as the result of the employer's conduct.[52] In reaching its decision, the court noted (among other things) that "'the test is not whether the injury was preventable'"[53] but, rather, whether "it was virtually certain that the decedent would be injured or killed as a result of the resumption of work before the epoxy [anchoring the column to the base] had fully cured."[54] The court also noted that "[i]t would erode the statutory standard for overcoming workers' compensation immunity to indulge an inference of virtual certainty from the fact that the employee was injured or killed."[55]

In sum, unhappy with the broad intentional-tort exception to employers' workers' compensation immunity crafted by the Florida Supreme Court in *Turner*, the legislature reacted in 2003 by amending F.S. §440.11(1), to create a much narrower intentional-tort exception. doing so, the legislature clearly signaled its intent that, in all but the most outrageous cases, employers who comply with the law's provisions to ensure compensation of employees injured as the result of work performed in the course and scope of their employment are immune from a civil action seeking damages by the employee. To date, the district courts of appeal that have considered the 2003 amendment have construed it in a way that is consistent with the legislature's apparent intent. The Florida Supreme Court has not yet expressly addressed that amendment, but, given

the legislature's relatively clearly expressed intent, one would expect that, when the Florida Supreme Court does consider such a case, the result will be consistent with those of the district courts of appeal.

[1] *See* Fla. Stat. §440.015 (2013).

[2] *E.g.*, *Turner v. PCR, Inc.*, 754 So. 2d 683, 686 (Fla. 2000); *Boston v. Publix Super Markets, Inc.*, 112 So. 3d 654, 656 (Fla. 4th DCA 2013) (citing *Turner*).

[3] *See* Fla. Stat. §440.09(1) (2013).

[4] *See* Fla. Stat. §440.11(1). *But see Fla. Workers' Advocates v. State*, 21 Fla. L. Weekly Supp. 1037a (11th Cir. 2014), *appeal pending*, Case No. 3D14-2062 (Fla. 3d DCA 2014) (holding §440.11 "facially unconstitutional" to the extent it provides that the workers' compensation law is the exclusive remedy for employee injuries or death "arising out of work performed in the course and the scope of employment" because the act "no longer provides full medical care or any compensation for permanent partial disability").

[5] *See Bakerman v. Bombay Co.*, 961 So. 2d 259, 262 (Fla. 2007); *accord Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d 857, 864 (Fla. 2d DCA 2002), *quashed on other grounds*, 889 So. 2d 812 (Fla. 2004) (stating that "[t]he history of the workers' compensation system demonstrates that the legislature intended to give coworkers and employers immunity from suit except in extraordinary situations"). Indeed, one court has recently said that "[a] civil personal injury lawsuit by an employee against an employer…was intended to be the rarest of exceptions to the immunity granted to the employer." *List Indus., Inc. v. Dalien*, 107 So. 3d 470, 473 (Fla. 4th DCA), *rev. den.*, 122 So. 3d 867 (Fla. 2013).

[6] *E.g.*, Fla. Stat. §440.11(1) (1993).

[7] *Id.*

[8] *J.J. Murphy & Son, Inc. v. Gibbs*, 137 So. 2d 553, 562 (Fla. 1962). *Accord City of Hollywood v. Lombardi*, 770 So. 2d 1196, 1200 (Fla. 2000) (citing *Gibbs* and *Travelers Ins. Co. v. Sitko*, 496 So. 2d 920, 921 (Fla. 1st DCA 1986)).

[9] *Turner*, 754 So. 2d at 687.

[10] In *Eller*, 630 So. 2d at 538 (emphasis added), the question before the court was whether a 1988 amendment to Fla. Stat. §440.11(1), that "raised the degree of negligence necessary to maintain a civil tort action *against policymaking employees* from gross negligence to culpable negligence" was constitutional. The opinion does include the following: "When employers properly secure workers' compensation coverage for their employees, employers are provided with immunity from suit by their employees 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. *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882 (Fla. 1986); *Lawton v. Alpine Engineered Prods., Inc.*, 498 So. 2d 879 (Fla. 1986)." *Id.* at 539. However, this language had no

bearing on the issue before the court. Moreover, in both *Fisher* and *Lawton*, although the district court had certified as a question of great public importance whether "the Florida Workers' Compensation Law preclude[s] actions by employees against their corporate employers for intentional torts even though the injuries were incurred within the scope of their employment" (*Fisher*, 498 So. 2d at 882-83; *Lawton*, 498 So. 2d at 880), the court expressly declined to reach the question of whether the Workers' Compensation Law provided the exclusive remedy for employers' intentional torts because it concluded that the facts in both cases were legally insufficient to establish an intentional tort. *Fisher*, 498 So. 2d at 884; *Lawton*, 498 So. 2d at 880-81. Although the court expressly declined to reach the question in both cases, some district courts of appeal read the two decisions as holding that an intentional-tort exception *did* exist. *E.g.*, *Mathews Corp. v. Peters*, 610 So. 2d 111, 112 (Fla. 3d DCA 1992). *See also Emergency One, Inc. v. Keffer*, 652 So. 2d 1233, 1235 (Fla. 1st DCA 1995) (apparently reading *Eller* as having so held).

[11] *See*, *e.g.*, *Bakerman v. Bombay Co.*, 961 So. 2d 259, 262 (Fla. 2007); *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 781 (Fla. 2004); *Pendergrass v. R.D. Michaels, Inc.*, 936 So. 2d 684, 689 (Fla. 4th DCA 2006); *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d 857, 863-64 (Fla. 2d DCA 2002), *quashed on other grounds*, 889 So. 2d 812 (Fla. 2004).

[12] *Turner*, 754 So. 2d at 687 (quoting *Fisher*, 498 So. 2d at 883).

[13] *Id.* at 688 (emphasis in original).

[14] *Id.* at 689, 691.

[15] *Id.* at 688.

[16] *Id.* at 691. *See also Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 781 (Fla. 2004) (stating that "[w]e held in *Turner* that an injured employee could satisfy the intentional-tort exception either by demonstrating that his employer actually intended to injure him or by demonstrating that his employer engaged in conduct that was objectively substantially certain to result in injury").

[17] *Turner*, 754 So. 2d at 688 ("a subjective approach essentially requires a determination as to whether an employer actually knew or intended the consequences of its conduct").

[18] *See Gorham v. Zachry Indus., Inc.*, 105 So. 3d 629, 633 (Fla. 4th DCA 2013) (stating that the amendment "was adopted by the [l]egislature in 2003 as a reaction to *Turner*).

[19] Laws of Fla., Ch. 2003-412, §14 at 3890-91.

[20] Laws of Fla., Ch. 2003-412, §14 at 3891.

[21] *See Turner*, 754 So. 2d at 688-89.

[22] *Id.* at 687 n.4; *see also Gorham v. Zachry Indus., Inc.*, 105 So. 3d 629, 634 (Fla. 4th DCA 2013).

[23] *See*, *e.g.*, *Bakerman v. Bombay Co.*, 961 So. 2d 259, 262 n.3 (Fla. 2007) (stating that the amendment "heightened the standard needed to fall within the [intentional-tort] exception"); *Travelers Indem. Co. v. PCR Inc.*, 889 So. 2d 779, 784 n.5 (Fla. 2004) (calling the *Turner* standard "much more liberal" than the "virtual-certainty standard" in the amendment); *Locke v. Suntrust Bank*, 484 F.3d 1343, 1350 n.5 (11th Cir. 2007) (same); *Feraci v. Grundy Marine Constr. Co.*, 315 F. Supp. 2d 1197, 1205 n.11 (N.D. Fla. 2004) (stating that the *Turner* standard for establishing an intentional-tort exception was lower than that set by the amendment).

[24] Citing *Gorham v. Zachry Indus., Inc.*, 105 So. 3d 629, 633-34 (Fla. 4th DCA 2013).

[25] *Gorham,* 105 So. 3d at 634 (quoting *Millison v. E.I. du Pont de Nemours & Co.*, 501 A.2d 505, 514 (N.J. 1985), which had, in turn, quoted W. Prosser & W. Keeton, The Law of Torts §8 at 36 (5th ed. 1984)).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Gorham,* 107 So. 3d at 471.

[30] *Id.* at 473.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 474 (quoting *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d 857, 864-65 (Fla. 2d DCA 2002), *quashed on other grounds*, 889 So. 2d 812 (Fla. 2004)) (emphasis in original).

[34] *Id.* at 473.

[35] *Boston*, 112 So. 3d at 657.

[36] *Id.*

[37] *Id.* at 658 (emphasis in original).

[38] *Id.*

[39] *Id.*

[40] *Id.* (quoting *Fleetwood Homes of Fla., Inc. v. Reeves*, 833 So. 2d 857, 868 (Fla. 2d DCA 2002), *quashed on other grounds*, 889 So. 2d 812 (Fla. 2004)) (emphasis in original).

[41] *Boston*, 112 So. 3d 654.

[42] *List Industries,* 107 So. 3d 470.

[43] *Vallejos*, 116 So. 3d at 554 (quoting *List Industries*, 107 So. 3d at 473).

[44] *Id.* at 554-55 (citing *Bourassa v. Busch Entm't Corp.*, 929 So. 2d 552, 559 (Fla. 2d DCA 2006), a pre-amendment decision).

[45] *Id.* at 555 (citing *Bourassa*).

[46] *Id.*

[47] *List Indus., Inc. v. Dalien*, 107 So. 3d 470 (Fla. 4th DCA 2013).

[48] *Vallejos*, 116 So. 3d at 555 (quoting *List Indus.*, 107 So. 3d at 471).

[49] *Id.*

[50] A pplying the 2003 amendment, summary judgment in favor of an employer was also affirmed in *Guevara v. Doormark, Inc*. , 946 So. 2d 1228 (Fla. 4th DCA 2007). In addition, applying the 2003 amendment, summary judgment was entered in favor of an employer in *Mastalsz v. Georgia-Pacific Corp*. , 2007 WL 1521481 (S.D. Fla. 2007).

[51] *See R.L. Haines Constr., LLC v. Santamaria*, 2014 WL 4648522 at *3-5 (Fla. 5th DCA 2014).

[52] *Id.* at *5. As a result, the court found it unnecessary to discuss the employer's "contentions that [a]ppellees failed to establish the other elements required by section 440.11(1)(b)2." *Id.* at n.8. The decision was 2-1. While the dissenting judge did not disagree with the majority's analysis of the applicable law, he was of the opinion that the evidence was legally sufficient to present a jury issue. *Id.* at *5-7 (Cohen, J., dissenting).

[53] *Id.* at *4 (quoting *Vallejos v. Lan Cargo, S.A.*, 116 So. 3d 545, 554 (Fla. 3d DCA 2013)).

[54] *Id.*

[55] *Id.* at *5.

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