IN THE SUPREME COURT OF FLORIDA

In the matter of Standard Jury Instructions (Civil),

Intentional Tort As An Exception to Exclusive Remedy Of Workers' Compensation

_____/

Committee Report Number 09-07

REPORT (NO. 09-07) OF THE SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

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Honorable James M. Barton, II
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Committee Vice-Chair,
Supreme Court Committee on Standard Jury Instructions (Civil)
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To the Chief Justice and Justices of the Supreme Court of Florida:

The Committee on Standard Jury Instructions in Civil Cases recommends this Court approve for publication and use a new Florida Standard Jury Instruction for *Intentional Tort Exception To Exclusive Remedy Of Workers' Compensation*, as set forth below. This Report is filed pursuant to article V, section 2(a), of the Florida Constitution.

I. INTRODUCTION AND PROCEDURAL NOTE

The Committee has submitted simultaneously herewith a proposal for reorganization of the Standard Jury Instructions in Civil Cases, which includes a renumbering of the instructions. The "book reorganization" proposal was separately filed as this Committee's report number 09-01.

This report, number 09-07, proposes a new instruction for use in cases involving the intentional tort exception to worker's compensation immunity. For ease of reference, this report uses the new proposed numbering system. Additionally, the appendix to report number 09-01 includes this proposed instruction as it would appear in the reorganized book if adopted by the Court.

The instruction proposed herein is a stand-alone instruction that can be adopted prior to a ruling on the book reorganization. Should this Court elect to rule on this proposal first, the Committee would simply use its current numbering system for the new instruction.

II. PROPOSED INSTRUCTION

The Committee believes that there is a need for a standard instruction to be used in cases where the plaintiff claims that the intentional tort exception to workers' compensation immunity applies to allow a tort claim against his or her employer.

Prior to 2003, this exception was based on case law. See *Turner v. PCR, Inc.*, 754 So.2d 683 (Fla. 2000). Effective October 1, 2003, the exception was codified by the legislature in section 440.11(1)(b), Florida Statutes.

The Committee initially drafted both a common law instruction for use in cases involving pre-2003 accidents and a statutory instruction for use in cases involving post-2003 accidents. The Committee then determined that few pre-2003 cases are still being tried. Accordingly, the proposed instruction is for use in cases involving accidents on or after October 1, 2003, and is based on section 440.11(1)(b), Florida Statutes. The Committee proposal includes a Note on Use explaining this.

The proposed instruction is as follows:

> **INTENTIONAL TORT EXCEPTION TO EXCLUSIVE REMEDY PROVISION OF WORKERS' COMPENSATION LAW**
>
> The issue for your determination on the claim of (claimant) against (defendant) is whether:
>
> (1) (defendant) deliberately intended to injure (claimant), or

(2) whether (defendant)

(a) engaged in conduct that (defendant) knew, based upon [prior similar accidents] or [explicit warnings specifically identifying a known danger], was virtually certain to result in death or injury to (claimant) and,

(b)(claimant) was not aware of the risk because the danger was not apparent; and

(c) (defendant) deliberately concealed or misrepresented the danger so as to prevent (claimant) from exercising an informed judgment;

and, if so, whether that conduct was a legal cause of [loss] [injury][or][damage] to (claimant).

III. APPENDICES

The following appendices are attached to this Report:

Appendix A:	Proposed instruction
Appendix B:	May 1, 2008, Florida Bar News published notice of proposed instruction
Appendix C:	Comments received by the Committee in response to publication
Appendix D:	Relevant excerpts from the Committee's minutes
Appendix E:	Committee materials relevant to this proposal

IV. DISSENTING VIEWS FROM THE COMMITTEE

There are no dissenting views from the Committee. The Committee unanimously recommends that this Court approve the instruction for publication and use.

V. COMMENTS RECEIVED

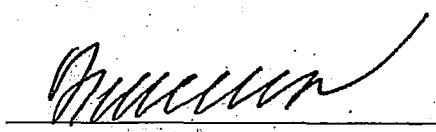
The proposed new instruction was published for comment, and two comments were received. One comment recommended adoption and required no action by the Committee. The other was in the form of a question about what the instruction means. The subcommittee believed that the commentator correctly understood the instruction and so reported to the Committee.

VI. CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court approve the instruction set forth above and in Appendix A for publication and use as a new standard jury instruction for civil cases.

(signature block on next page)

Respectfully submitted,



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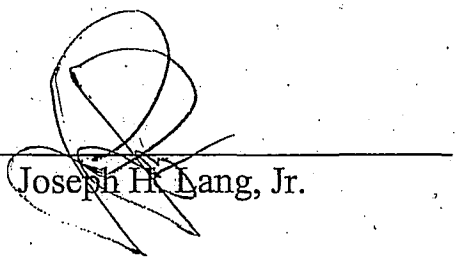
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this report complies with the font standards set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

By: 

Joseph H. Lang, Jr.

TAB A

APPENDIX A

The issue for your determination on the claim of (claimant) against (defendant) is whether:

(1) (defendant) deliberately intended to injure (claimant), or

(2) whether (defendant)

(a) engaged in conduct that (defendant) knew, based upon [prior similar accidents] or [explicit warnings specifically identifying a known danger], was virtually certain to result in death or injury to (claimant) and,

(b)(claimant) was not aware of the risk because the danger was not apparent; and

(c) (defendant) deliberately concealed or misrepresented the danger so as to prevent (claimant) from exercising an informed judgment;

and, if so, whether that conduct was a legal cause of [loss] [injury][or][damage] to (claimant).

NOTE ON USE FOR 414.5

This instruction applies to causes of action accruing on or after October 1, 2003. See *F.S.* 440.11 (2003) (codifying intentional tort exception to workers. compensation immunity and modifying standard announced in *Turner v. PCR Inc.*, 754 So.2d 683 (Fla. 2000)); see also *Travelers Indemnity Co. v. PCR, Inc.*, 889 So.2d 779, n.5 (Fla. 2004) (discussing legislature.s codification of intentional tort exception and new, heightened virtual certainty standard).

TAB B

Notices

Proposed civil jury instructions for medical malpractice insurer's bad faith failure to settle

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes a new instruction 404.5 for a medical malpractice insurer's bad faith failure to settle. This instruction is proposed as part of the overall reorganization of the book. The new instruction is numbered in accordance with the reorganized book and shows where it would fit within the book. This instruction is based on section 766.1185(2), Florida Statutes. Comments are invited. Provide comments on this instruction separately from comments on other aspects of the book reorganization. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court. Send all comments concerning these proposed changes to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or e-mail comments to her at tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by May 30 to ensure that they are considered by the committee.

404.5 MEDICAL MALPRACTICE INSURER'S BAD FAITH FAILURE TO SETTLE

In determining whether (Defendant) acted in bad faith, you shall consider the following factors or circumstances;

[(Defendant's) willingness to negotiate with (Claimant) in anticipation of settlement],

[the propriety of (Defendant's) methods of investigating and evaluating the claim of (Claimant)],

[whether (Defendant) timely informed (Insured) of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation],

[whether (Insured) denied liability or requested that the case be defended after (Defendant) fully advised (Insured) as to the facts and risks],

[whether (Claimant) imposed any condition, other than the tender of the policy limits, on the settlement of the claim],

[whether (Claimant) provided relevant information to (Defendant) on a timely basis],

[whether and when other defendants in the case settled or were dismissed from the case],

[whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from (Insured) or from (Defendant)],

[whether (Insured) misrepresented material facts to (Defendant) or made material omissions of fact to (Defendant)],

[and (list such additional factors as the court may determine to be relevant)].

Jury instructions for intentional torts as an exception to the exclusive remedy of workers' compensation

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes new instructions for intentional torts as an exception to the exclusive remedy of workers' compensation. Instruction 414.5 is based on section 440.11, Florida Statutes. These instructions are proposed as part of the overall reorganization of the book and they follow the format used in the proposed reorganized book (see Notice published on April 15). The table of contents for this section appears below to illustrate how this instruction fits into the new proposed format. Comments are invited. Provide comments on instruction 414.5 separately from comments on other aspects of the proposed book reorganization. After reviewing all comments, the committee may submit its proposal to the Supreme Court. Send all comments concerning these proposed changes to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or e-mail comments to tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by May 30 to ensure that they are considered by the committee.

414 INTENTIONAL TORT AS AN EXCEPTION TO EXCLUSIVE REMEDY OF WORKERS' COMPENSATION

414.1 Introduction
414.2 Summary of Claims
414.3 Clear and Convincing Evidence
414.4 Legal Cause
414.5 Issues on Claim
414.6 Burden of Proof

414.5 ISSUES ON CLAIM

The issues you must decide on (Claimant's) claim against (Defendant) are whether:

1. (Defendant) deliberately intended to injure (Claimant), or
2. whether (Defendant)

(a) engaged in conduct that (Defendant) knew, based upon [prior similar accidents] [or] [explicit warnings specifically identifying a known danger], was virtually certain to result in death or injury to (Claimant); and

(b) (Claimant) was not aware of the risk because the danger was not apparent; and

(c) (Defendant) deliberately concealed or misrepresented the danger so as to prevent (Claimant) from exercising an informed judgment;

and, if so, whether that conduct was a legal cause of [loss] [injury] [or] [damage] to (Claimant).

Proposed changes and reorganization of civil jury instructions for cases for professional negligence

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes changes and reorganization of the jury instructions for civil cases for professional negligence. As part of the overall reorganization of jury instructions for civil cases, the committee has grouped together all professional negligence instructions in a single section, numbered 402. These reorganized instructions follow the same format as is used in the new reorganized book (see Notice published on April 15), so that the jury is first informed of the basic definitions that they must apply, followed by the issues that they must decide. In addition, some of the professional negligence instructions have been substantially rewritten and new provisions have been added to reflect new statutory and/or case law. Finally, as with the rest of the reorganized book, the Committee also has substituted "plain English" language wherever possible without altering the substantive meaning of the instructions. The table of contents for the new, reorganized professional negligence instructions appears below. Due to size limitations, the instructions themselves are not included in this publication but are available to be viewed at www.floridabar.org by clicking on Publications, then click The Florida Bar CLE Publications. Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court. Please provide comments on these changes separately from comments on other aspects of the book reorganization. Send all comments to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker PA, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or e-mail comments to her at tgunn@fowlerwhite.com or fax them to (813) 229-8313. Comments must be received by May 30 to ensure that they are considered by the committee.

402 Professional Negligence
402.1 Introduction
402.2 Summary of Claims
402.3 Greater Weight of the Evidence
402.4 Medical Negligence
402.5 Other Professional Negligence
402.6 Legal Cause
402.7 Legal Cause (Treatment Without Informed Consent)
402.8 Preemptive Charges
402.9 Preliminary Issues - Vicarious Liability
402.10 Burden of Proof on Preliminary Issues
402.11 Issues on Main Claim
402.12 Issues on Claim of Attorney Malpractice Arising Out of Civil Litigation
402.13 Burden of Proof on Main Claim
402.14 Defense Issues
402.15 Burden of Proof on Defense Issues
402.16 Emergency Medical Treatment Claims

Proposed amendments to jury instructions for punitive damages cases

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes changes and reorganization of the jury instructions for civil cases for punitive damages.

As part of the overall reorganization of jury instructions for civil cases, the Committee has reorganized the punitive damage instructions. New material has been added in the form of transitional language and "plain English" terms. These charges are not intended to alter the substantive meaning of the instructions but only to make them more understandable. In addition, the proposed instructions clarify the distinction between a claim of direct liability as opposed to vicarious liability against an employer. A new section has been added to address the factual scenario where punitive damages are being sought against an employer for the acts of its employee who is either not a party or is not being sued for punitive damages.

The instructions for causes of action arising prior to October 1, 1999 have been moved to a new Appendix C.

These proposed instructions are part of the overall reorganization of the civil jury instructions and are numbered in accordance with the reorganized book to show where it would fit within the book.

Due to size limitations, the instructions are not included in this publication but are available to be viewed at www.FloridaBar.org by clicking on *Publications*, then click *The Florida Bar CLE Publications*. Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court. Provide comments on these changes separately from comments on other aspects of the book reorganization.

Send all comments to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or e-mail your comments to her at tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by May 30 to ensure that they are considered by the committee.

TAB C

FLORIDA JUSTICE ASSOCIATION
218 South Monroe St.
Tallahassee, FL 32301

May 30, 2008

Comments of Florida Justice Association on Proposed Revisions to Standard Jury Instructions

The Florida Justice Association, following review by an ad hoc committee of trial lawyers experienced in the field of trail practice and board certified appellate specialists, and approval by the FJA Executive Committee, comments as follows concerning the Proposed Revisions to Standard Jury Instructions.

Proposed Instruction 401.3—Greater Weight of the Evidence

The proposed instruction re-defining greater weight of the evidence should not be recommended for approval because it substantively changes the parties' burden of proof.

Proposed instruction 401.3, Greater Weight of the Evidence, is identical to the existing standard jury instruction on greater weight of the evidence, Florida Standard Jury Instruction (Civil) 3.9, except for the addition of this sentence:

> To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is probably true.

This revision is a substantive change to the definition of greater weight of the evidence because it introduces a new element that is not present in the current instruction, specifically, a probability that the matter to be proven is true. FJA objects to this revision because it is a substantive change in the instruction that can lead to anomalous and unfair results.

The current instruction on greater weight of the evidence does not require the jury to determine whether the claim or defense to be proven is probably true. Instead, it asks the jury to determine whether the evidence favoring the claim or defense is more persuasive and convincing than the evidence opposing it. Current instruction 3.9 reads: "'Greater weight of the evidence' means the more persuasive and convincing force and effect of the entire evidence in the case." Thus, the current instruction directs the jury to perform a balancing test and decide which side's evidence is more persuasive and convincing than the evidence on the other side. It does not ask the jury to determine whether it believes the claim or defense to be proven is probably true.

This distinction will affect the outcome in cases in which the jury is not convinced that either party's case is probably true. After considering all the evidence, jury may decide that the truth is not quite what the plaintiff claims it to be and not quite what the defense claims it to be either. The jury may believe that the truth is

some third version of events that does not match what either party presented in court, or it may find that it simply cannot determine what happened with sufficient confidence to say that it is probably true. In that situation, however, the jury almost always be able to determine that the evidence favoring one side is more persuasive and convincing than the evidence favoring the other. Under the current instruction, that is all that is necessary.

If the party that has the burden of proof puts forth the more convincing case, then it would prevail under the current instruction, but it would not prevail under proposed rule 401.3 if the jury is not convinced that its claim or defense is probably true. This would lead to an anomalous result, because the party who put forth the most convincing case would lose, having failed to convince the jury that its claim or defense is probably true, and the party who put forth the least convincing case would win.

To state this hypothetical in terms of probability percentages, assume a jury decides there is a 45% probability that the plaintiff's version of events is true and a 35% likelihood that the defendant's version of events is true. If the plaintiff has the burden of proof, the plaintiff would prevail under the current instruction because the jury has found the plaintiff's case more convincing than the defendant's, but under the proposed new instruction, the defendant would prevail because the plaintiff has

not convinced the jury that there is a 50% or greater probability that the plaintiff's version is true. Under the proposed new instruction, the defendant would prevail even though its case was the least convincing and least persuasive.

The Second District Court of Appeal's discussion of the greater-weight-of-the-evidence standard in *In re Estate of Brackett, Wakefield v. Brackett*, 109 So. 2d 375 (Fla. 2d DCA 1959) supports the balancing approach embodied in the current instruction, instruction 3.9. The court wrote:

> Weight of the evidence" has been held to be equivalent to "preponderance of the evidence." It simply means that proof on one side of a cause outweighs the proof on the other side.
>
> As was stated in the case of *Waldron v. New York Cent. Ry. Co.*, 1922, 106 Ohio St. 371, 140 N.E. 161, 163, as follows:
>
> "The terms 'weight of evidence' and 'sufficient evidence' have long been regarded as synonymous terms and used interchangeably."
>
> "Weight of evidence" does not necessarily mean a greater number of witnesses, since quality of testimony and credibility must also be considered. *Bjorklund v. Continental Casualty Co.*, 1931, 161 Wash. 340, 297 P. 155, 160.
>
> "Weight of evidence" is not a question of mathematics but depends on its effect in inducing belief. *Chenery v. Russell*, 1933, 132 Me. 130, 167 A. 857, 858.
>
> The expression "weight of evidence" signifies that the proof on one side is greater than on the other, and in any proceedings before a trial judge, probative value of the testimony of each witness, and not the quantity or amount of evidence, determines its weight.

109 So. 2d 378.

Proposed instruction 401.3 confusingly narrows the gap between the greater weight of the evidence standard and the "clear and convincing evidence" standard. To satisfy the greater weight of the evidence standard under 401.3, the party bearing the burden of proof "must convince" the jury to believe the fact in question. Reasonable jurors may find that standard to be indistinguishable from the standard for clear and convincing evidence that the proof "produces a firm belief or conviction without hesitation about the matter in issue." The "must convince" standard is too high.

For these reasons, we object to the second sentence in proposed instruction 401.3, which adds a new element to the definition of greater weight of the evidence requiring the jury to determine if the claim or defense is probably true. We request that this sentence be deleted, recognizing that this would leave the current instruction unchanged.

Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 402.4c—Professional Negligence

The Florida Justice Association submits that the proposed instruction 402.4c.

should be modified because the proposed instruction inaccurately reflects Florida law concerning the effect of the discovery of the presence of a foreign object in a person's body.

Florida Statute section 766.102(3) establishes that "the discovery of the presence of a foreign body, such as sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures shall be *prima facie* evidence of negligence on the part of the healthcare provider." Proposed instruction 402.4c. omits any reference—either expressly or by definition—of the concept of "*prima facie.*" Instead, that instruction states: "The presence of an object in (claimant's) body, such as a (name of foreign body) is evidence of negligence on the part of (defendant) and may be considered by you, together with the other facts and circumstances, in determining whether such person was negligent." The omission from the instruction of any reference to the concept of "*prima facie*" mischaracterizes the legal effect of the discovery of a foreign object because that omission conceals from the jury the fact that discovery of the foreign object is, in and of itself, sufficient evidence of negligence to support a verdict in favor of the claimant.

The definition of "*prima facie*" employed by the Florida Supreme Court means "evidence sufficient to establish a fact unless and until rebutted." *State v. Kahler*, 232

So. 2d 166, 168 (Fla. 1970). *Accord, e.g., Castleman v. Office of Comptroller*, 538 So. 2d 1365 (Fla. 1st DCA 1989). Proposed instruction 402.4(c) is legally insufficient for failing to instruct the jurors that the presence of a foreign object in the claimant's body is evidence sufficient to establish the fact of medical malpractice, unless and until rebutted by the Defendant. Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 402.4d—Professional Negligence

Proposed instruction 402.4d. should not be recommended for approval because it mistakenly states the legal effect of the failure of a defendant to maintain required records. The Florida Supreme Court, in *Public Health Trust v. Valcin*, 507 So. 2d 596 (Fla. 1987), held that the effect of a malpractice defendant's failure to maintain required records that works to the prejudice of the claimant created a "rebuttable presumption . . . [which] shifts the burden of proof, insuring that the issue of negligence goes to the jury." *Id.* at 600-01. The instruction proposed by the committee mistakenly provides only that the jury "may infer that the missing evidence contain proof of negligence," not that a presumption is created by which the burden of disproving negligence is shifted to the defendant.

Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 404.5—Medical Malpractice Insurer's Bad Faith

[Comment to be provided separately]

Proposed Instruction 411.4a. and 414.4a.—Legal Cause

The Florida Justice Association comments as follows concerning the proposed instructions defining "legal cause" in cases involving claims of civil theft and claims by employees against employers possibly subject to the exception to Workers' Compensation immunity.

Proposed instructions 411.4a. and 414.4a., apparently mistakenly, refer to actions being a cause of "severe emotional distress." Such severe emotional distress is not likely to be a consequence of civil theft, and is not necessarily an element of a tort claim against an employer. Apparently the language was imported from the definition of legal cause in cases involving extreme outrageous conduct (Instruction 410.6a.) and was not appropriately modified. Therefore, these two instructions should be corrected before being submitted to the Florida Supreme Court for approval.

Proposed Instruction 414.5—Workers' Compensation Immunity Exception

The Florida Justice Association submits that proposed instruction 414.5should be recommended for adoption and approval by the Supreme Court of Florida, because the proposed instruction accurately reflects Florida law concerning the matter in question in a clear and understandable form.

Proposed Instruction 503.1—Punitive Damages

The Florida Justice Association submits that proposed instruction 503.1, dealing with punitive damages, should be revised before being recommended for adoption and approval by the Supreme Court of Florida so as to substitute another term for the term "guilty," where the instruction states that, "[p]unitive damages are warranted against (defendant) if you find that clear and convincing evidence that (defendant) was guilty of intentional misconduct or gross negligence." Similarly, the Committee should substitute different language for the term "personally guilty" contained in all of the subparagraphs (2) (b), (c), and (d).

The FJA states that the term "guilty" is extremely misleading because it connotes a level of culpability equal to that which would support a criminal conviction. Jurors will invariably confuse the "clear and convincing" standard of proof applicable to punitive damages with the "beyond a reasonable doubt" standard necessary for a "guilty" verdict in a criminal case.

The FJA acknowledges that the term "guilty" has been used in standard instruction PD 1 previously approved by the Court. However, because the Supreme Court's committee is recommending revisions to instructions including the punitive damages instruction, instruction 503.1 should be revised to use less confusing terminology. Therefore, the instruction should not be recommended for approval by

the Supreme Court of Florida.

Respectfully submitted,

By:_____
FRANK M. PETOSA, President

From: Rick Piedra
Sent: Monday, May 05, 2008 8:25 AM
To: 'tgunn@fowlerwhite.com'
Cc: Tom Koval; Ralph Gonzalez
Subject: Proposed Jury Instruction/WC Immunity
Dear Tracy,

I have a question on the proposed jury instructions for intentional torts as an exception to the exclusive remedy of workers compensation. I've been following this issue for some time.

The proposed instruction 414.5 states in par. 2 "whether (Defendant) (a) engaged in conduct that (Defendant) knew, based upon [prior similar incidents] [or] [explicit warnings specifically identifying a known danger], was virtually certain to result in death or injury to [Claimant)..."

I notice that the "prior similar incidents" and the "explicit warnings" phrases are in brackets. I assume this means that one or the other, (or both?), MUST be given to the jury, correct? In other words, before the judge would allow this to go to the jury, he would have to find that the plaintiff has presented evidence of either prior similar accidents or explicit warnings about the condition. Then, subpars. (b) and (c) impose additional requirements to a finding of liability.

Thanks.

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Tel. (941) 907-2557
Fax (941) 907-3380
Email: rpiedra@fcci-group.com

TAB D

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Stetson Law School
Tampa, Florida

February 23-24, 2006
February 23, 2006 (1:00 p.m. to 5:00 p.m.)
February 24, 2006 (8:30 a.m. to noon)

iv. Worker's Compensation--Intentional Tort Exception: Lang explained that practitioners have asked the committee to consider drafting an instruction on the intentional tort exception to worker's compensation immunity. This issue is arising with increasing frequency. Gunn explained that her firm recently handled an appeal dealing with the appropriate instruction. Although the Legislature recently changed the statutory standard, the committee could draft an instruction for both the current and former standards. Gunn recommended forming a new subcommittee to consider this issue. Barton agreed that an instruction would be useful. **Makar created a subcommittee to draft an instruction for the intentional tort exception to the Worker's Compensation Act. The subcommittee will draft versions applicable under both the former and current statutory standards. Makar appointed Kahn (chair), Lang and Wagner.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
The Breakers
West Palm Beach, Florida

July 13-14, 2006
July 13, 2006 (1:00 p.m. to 5:00 p.m.)
July 14, 2006 (8:30 a.m. to noon)

9. INTENTIONAL TORT EXCEPTION TO WORKERS' COMPENSATION ACT (Tab 10)

Kahn explained that the Legislature amended the Worker's Compensation Act in 2003 to overrule the decision in Turner v. PCR, Inc., 754 So. 2d 683, 691 (Fla. 2000). The amended statute makes it very difficult for plaintiffs to prove that the employer's conduct meets the intentional tort exception to worker's compensation immunity. As a result, at least one subcommittee member, Wagner, feels that a jury instruction is unnecessary because almost all cases will be decided against the plaintiff as a matter of law.

The draft instruction on pages 10-2 to 10-3 attempts to remain faithful to the language of the statute. The amendment raised the burden of proof to clear and convincing evidence. The proposed instruction borrows the punitive damages instruction on clear and convincing evidence.

On page 10-4, the subcommittee also drafted an instruction for cases applying the intentional tort exception in effect before the 2003 amendment. Kahn suggested that the instructions may need to use a more plain English term than "intentional tort." Stewart suggested using the language from instruction 3.6, without describing the type of claim. Kahn and Warner agreed.

Lang explained that his firm has a case pending in the Supreme Court, Bakerman v. Bombay Co., SC05-358, that may illuminate the meaning of "substantially certain" used in the pre-2003 instruction.

Barton joined Wagner in questioning whether the committee should exert its resources drafting an instruction for the 2003 amendment. Only a

handful of cases applying the 2003 law will present a jury question on the intentional tort exception. Makar agreed if the committee drafts an instruction, it risks creating a quagmire for the benefit of very few cases. **Rose will e-mail the revised draft instruction to the committee. The draft will be held in abeyance pending the Supreme Court opinion in Bakerman v. Bombay Co., SC05-358.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Tampa, Florida

DATES
Thursday, February 15, 2007 (1:00 p.m. to 5:00 p.m.)
Friday, February 16, 2007 (8:30 a.m. to noon)

11. INTENTIONAL TORT EXCEPTION TO WORKERS' COMPENSATION ACT (Tab 10): Kahn noted that the subcommittee has not taken any action since July 2006 when the committee set the issue aside. Lang noted that the subcommittee is waiting for the Supreme Court to decide Bakerman v. Bombay Co., SC05-358.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
The Breakers
Palm Beach, Florida

[DATES]
July 12, 2007 (1:00 p.m. to 5:00 p.m.)
July 13, 2007 (8:30 a.m. to noon)

3. INTENTIONAL TORT EXCEPTION TO WORKERS' COMPENSATION ACT (Tab 10): Wagner noted that the subcommittee needs to reconvene as a result of the Supreme Court's recent decision in Bakerman v. The Bombay Co., Inc., 32 Fla. L. Weekly S342 (Fla. June 21, 2007).

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
[The Omni Hotel]
Jacksonville, Florida

[DATES]
October 25, 2007 (1:00 p.m. to 5:00 p.m.)
October 26, 2007 (8:30 a.m. to noon)

6. **INTENTIONAL TORT EXCEPTION TO WORKERS' COMPENSATION ACT** (Tab 10): Kahn explained that, with the intentional tort exception to the worker's compensation being in effect for five years now, there's debate about whether a common law instruction is even needed at this time. Kahn asked for guidance from the Committee as to whether the intentional tort subcommittee should still continue to pursue a common law (pre-statutory) instruction.

   Lang explained that when the subcommittee started this project two years ago, it believed there were enough pre-statute cases still lingering to justify work on the common law instruction. However, Lang believes that is probably no longer the case, and it is probably no longer worth pursuing the pre-statutory instruction. He believes the subcommittee should focus instead on the statutory instruction.

Kahn stated that the subcommittee's statutory instruction will likely be ready to be viewed by the Committee at the February meeting. **Makar asked Rose to add the statutory intentional tort exception instruction to the agenda for the February meeting, and to make sure the instruction and the underlying statute are included in the February materials.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
[February 21-22, 2008]
Tampa, Florida

February 21, 2008 (1:00 p.m. to 5:00 p.m.)
February 22, 2008 (8:30 a.m. to noon)

6. INTENTIONAL TORT EXCEPTION TO WORKERS' COMPENSATION ACT (Tab 10)

Kahn informed the Committee that the underlying statute, section 440.11, Florida Statutes, appears on page 10-18 of the materials. The proposed instruction appears on page 10-14 of the materials. The Committee reviewed the proposed instruction. The Committee revised the instruction to read:

> **INTENTIONAL TORT EXCEPTION TO EXCLUSIVE REMEDY PROVISION OF WORKERS' COMPENSATION LAW**
>
> The issue for your determination on the claim of [Claimant] against [defendant] is whether:
> (1) [defendant] deliberately intended ton injure [Claimant], or
> (2)(a) [defendant] engaged in conduct that [defendant] knew, based upon [prior similar accidents] or [explicit warnings specifically identifying a known danger], was virtually certain to result in death or injury to [Claimant] and,
>
> (b) [Claimant] was not aware of the risk because the danger was not apparent; and
> (c) [defendant] deliberately concealed or misrepresented the danger so as to prevent [Claimant] from exercising informed judgment.
>
> If clear and convincing evidence supports the claim of [Claimant], then your verdict should be for [Claimant] on

this issue; however, if clear and convincing evidence does not support the claim of [Claimant] on this issue, then your verdict should be for the defendant on this issue.

"Clear and convincing evidence" means evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

Gunn directed that the instruction (as modified above) be published for comments and simultaneously incorporated into the reorganized book.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
[July 10-11, 2008]
The Breakers, West Palm Beach, Florida

July 10, 2008 (12:00 p.m. to 5:00 p.m.)
July 11, 2008 (8:00 a.m. to 1:00 p.m.)

Comments Concerning the Intentional Tort Exception to Workers' Compensation:

- Two comments were received. One questioned the meaning of the instruction. **The subcommittee reported that the commentator correctly understood the instruction, so no action was required. The other comment recommended adoption of the instruction. This too requires no action. The committee agreed.**

TABLE

MEMORANDUM

DATE: June 30, 2006

TO: Standard Jury Instructions Committee (Civil)

FROM: Subcommittee on Intentional Tort Exception to Workers' Compensation

RE: Intentional Tort Exception to Exclusive Remedy Provision of Workers' Compensation Law

Following you will find two instructions drafted by the subcommittee. The first instruction is intended to apply to accidents on or after October 1, 2003, the effective date of section 440.11(1)(b), the Legislative codification of the exception to exclusiveness of workers' compensation liability. The second instruction is for pre-October 1, 2003, injuries and is based upon Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000). The subcommittee has comments about both of these instructions.

As to the statutory instruction, at least one member of the subcommittee questioned whether a standard instruction is actually needed because the instruction merely tracks the language of section 440.11(1)(b)1., 2., Florida Statutes (2005). On the other hand, the subcommittee recognizes that the existence of a form instruction may well be an aid to a busy trial judge.

As to the pre-October 1, 2003, instruction, the subcommittee notes that although the proposed instruction uses the "substantial certainty" language of Turner, it is possible that the instruction, standing alone, does not convey that the law would require a showing greater than gross negligence. See Turner, 754 So. 2d at 687, n.4. Joe Lang notes that the Florida Supreme Court is currently considering this issue in the case of Bakerman v. The Bombay Co., SC05-358, and that the decision in that case may offer some direct guidance on the definition of "substantial certainty." Accordingly, at this point, the subcommittee has not offered a more specific instruction attempting to define "substantial certainty," but is willing to take any directive from the committee as a whole.

Respectfully submitted,

Alan Wagner
Joseph H. Lang
Charles J. Kahn, Jr.

Instruction for Section 440.11(1)(b), effective October 1, 2003

INTENTIONAL TORT EXCEPTION TO EXCLUSIVE REMEDY PROVISION OF WORKERS' COMPENSATION LAW

The issue for your determination on the claim of [plaintiff] against [defendant] is whether:

(1) [defendant] deliberately intended to injure [plaintiff], or

(2) (a) [defendant] engaged in conduct that:

1. [defendant] knew, based upon prior similar accidents or explicit warnings specifically identifying a known danger, that [plaintiff] would either suffer death or injury from the danger; and

2. [defendant] knew was virtually certain to result in death or injury to [plaintiff]; and

(b) In order to find such conduct, you must also find:

1. [defendant] actively misled [plaintiff] as to the existence of the danger,

2. [plaintiff] was not aware of the risk because the danger was not apparent; and

3. [defendant] deliberately concealed or misrepresented the danger so as to prevent [plaintiff] from exercising informed judgment.

If clear and convincing evidence supports the claim of [plaintiff], then your verdict should be for plaintiff on this issue; however, if clear and convincing evidence does not support the claim of [plaintiff] on this issue, then your verdict should be for the defendant on this issue.

"Clear and convincing evidence" means evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

NOTE ON USE

This charge should be given when the cause of action accrued on or after October 1, 2003.

COMMENT

1. See § 440.11, Fla. Stat. (2003) (codifying the intentional tort exception and modifying the standard announced in Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000)); see also Travelers Indem. Co. v. PCR, Inc., 889 So. 2d 779, 783 n.5 (Fla. 2004) (discussing the Legislature's codification of the intentional tort exception and the new, heightened virtual certainty standard).

2. An employee must prove an intentional tort by clear and convincing evidence. § 440.11(1)(b).

Instruction for Section 440.11(1)(b), effective pre-October 1, 2003

INTENTIONAL TORT EXCEPTION TO EXCLUSIVE REMEDY PROVISION OF WORKERS' COMPENSATION LAW

The issue for your determination on the claim of [plaintiff] against [defendant] is whether [defendant]:

(1) intended to injure [plaintiff], or

(2) knew or should have known that its conduct was substantially certain to result in injury or death to [plaintiff].

If the greater weight of the evidence supports a finding that [defendant] committed an intentional tort, your determination on this issue should be for [plaintiff].

However, if the greater weight of the evidence does not support a finding that [defendant] committed an intentional tort, your determination on this issue should be for [defendant].

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTE ON USE

This charge should be given when the cause of action accrued prior to October 1, 2003.

COMMENT

1. See Turner v. PCR, Inc., 754 So. 2d 683, 691 (Fla. 2000), superseded by statute, ch. 2003-412, § 14, at 3890-91, Laws of Fla. (codified at § 440.11, Fla. Stat. (2003), ("[I]ntentional tort exception includes an objective standard to measure whether the employer engaged in conduct which was substantially certain to result in injury. This standard imputes intent upon employers in circumstances where injury or death is objectively 'substantially certain' to occur.").

2. An employee must prove an intentional tort by a preponderance of the evidence. See Turner, 754 So. 2d at 691 (failing to demand a heightened burden of proof).

WEST'S FLORIDA STATUTES ANNOTATED
TITLE XXXI. LABOR (CHAPTERS 435-453)
CHAPTER 440. WORKERS' COMPENSATION

Current through Chapter 362 (End) of the 2005 Special "B" Session of the Nineteenth Legislature

440.11. Exclusiveness of liability

(1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except as follows:

* * *

(b) When an employer commits an intentional tort that causes the injury or death of the employee. For purposes of this paragraph, an employer's actions shall be deemed to constitute an intentional tort and not an accident only when the employee proves, by clear and convincing evidence, 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.

MEMORANDUM

DATE: July 5, 2007

TO: Standard Jury Instructions Committee (Civil)

FROM: Subcommittee on Intentional Tort Exception to Workers' Compensation

RE: Intentional Tort Exception to Exclusive Remedy Provision of Workers' Compensation Law

Following you will find two instructions drafted by the subcommittee. The first instruction is intended to apply to accidents on or after October 1, 2003, the effective date of section 440.11(1)(b), the Legislative codification of the exception to exclusiveness of workers' compensation liability. The second instruction is for pre-October 1, 2003, injuries and is based upon Turner v. PCR, Inc., 754 So.2d 683 (Fla. 2000). The subcommittee has comments about both of these instructions.

As to the statutory instruction, at least one member of the subcommittee questioned whether a standard instruction is actually needed because the instruction merely tracks the language of section 440.11(1)(b)l., 2., Florida Statutes (2005). On the other hand, the subcommittee recognizes that the existence of a form instruction may well be an aid to a busy trial judge.

As to the pre-October 1, 2003, instruction~~, the subcommittee notes that although the proposed instruction uses the "substantial certainty" language of Turner, it is possible that the instruction, standing alone, does not convey that the law would require a showing greater than gross negligence. See Turner, 754 So. 2d at 687, n.4. Joe Lang notes that the Florida Supreme Court is currently considering this issue in the case of Bakerman v. The Bombay Co., SC05-358, and that the decision in that case may offer some direct guidance on the definition of "substantial certainty." Accordingly, at this point, the subcommittee has not offered a more specific instruction attempting to define "substantial certainty," but is willing to take any directive from the committee as a whole.~~ the Florida Supreme Court has now decided that concealment of the danger is not an indispensable requirement of the old substantial certainty test.

Respectfully submitted,

Alan Wagner
Joseph H. Lang
Charles J. Kahn, Jr.

Instruction for Section 440.11(1)(b), effective October 1, 2003

INTENTIONAL TORT EXCEPTION TO EXCLUSIVE REMEDY PROVISION OF WORKERS' COMPENSATION LAW

The issue for your determination on the claim of [plaintiff] against [defendant] is whether:

(1) [defendant] deliberately intended to injure [plaintiff], or

(2) [defendant] engaged in conduct that:

a. [defendant] knew, based upon prior similar accidents or explicit warnings specifically identifying a known danger, that [plaintiff] would either suffer death or injury from the danger; and

b. [defendant] knew was virtually certain to result in death or injury to [plaintiff]; and

[Give the following if proceeding under (2) above]:

In order to find such conduct, you must also find:

(1) [defendant] actively misled [plaintiff] as to the existence of the danger,

(2) [plaintiff] was not aware of the risk because the danger was not apparent; and

(3) [defendant] deliberately concealed or misrepresented the danger so as to prevent [plaintiff] from exercising informed judgment.

If clear and convincing evidence supports the claim of [plaintiff], then your verdict should be for plaintiff on this issue; however, if clear and convincing evidence does not support the claim of [plaintiff] on this issue, then your verdict should be for the defendant on this issue.

"Clear and convincing evidence" means evidence that is precise, explicit, lacking

in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

NOTE ON USE

This charge should be given when the cause of action accrued on or after October 1, 2003.

COMMENT

1. See § 440.11, Fla. Stat. (2003) (codifying the intentional tort exception and modifying the standard announced in Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000)); see also Travelers Indem. Co. v. PCR, Inc., 889 So. 2d 779, 783 n.5 (Fla. 2004) (discussing the Legislature's codification of the intentional tort exception and the new, heightened virtual certainty standard).

2. An employee must prove an intentional tort by clear and convincing evidence. § 440.11(1)(b).

Instruction for Section 440.11(1)(b), effective pre-October 1, 2003

INTENTIONAL TORT EXCEPTION TO EXCLUSIVE REMEDY PROVISION OF WORKERS' COMPENSATION LAW

The issue for your determination on the claim of [plaintiff] against [defendant] is whether [defendant]:

(1) intended to injure [plaintiff], or

(2) knew or should have known that its conduct was substantially certain to result in injury or death to [plaintiff].

If the greater weight of the evidence supports a finding that [defendant] committed an intentional tort, your determination on this issue should be for [plaintiff].

However, if the greater weight of the evidence does not support a finding that [defendant] committed an intentional tort, your determination on this issue should be for [defendant].

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTE ON USE

This charge should be given when the cause of action accrued prior to October 1, 2003.

COMMENT

1. See Turner v. PCR, Inc., 754 So. 2d 683, 691 (Fla. 2000), superseded by statute, ch. 2003-412, § 14, at 3890-91, Laws of Fla. (codified at § 440.11, Fla. Stat. (2003), ("[I]ntentional tort exception includes an objective standard to measure whether the employer engaged in conduct which was substantially certain to result in injury. This standard imputes intent upon employers in circumstances

where injury or death is objectively 'substantially certain' to occur.").

2. An employee must prove an intentional tort by a preponderance of the evidence. See Turner, 754 So. 2d at 691 (failing to demand a heightened burden of proof).

MEMORANDUM

DATE: February 4, 2008

TO: Standard Jury Instructions Committee (Civil)

FROM: Subcommittee on Intentional Tort Exception to Workers' Compensation

RE: Intentional Tort Exception to Exclusive Remedy Provision of Workers' Compensation Law

Following you will find two instructions drafted by the subcommittee and the controlling statute. The first instruction is intended to apply to accidents on or after October 1, 2003, the effective date of section 440.11(1)(b), the Legislative codification of the exception to exclusiveness of workers' compensation liability. The second instruction is for pre-October 1, 2003, injuries and is based upon Turner v. PCR, Inc., 754 So.2d 683 (Fla. 2000). The subcommittee has comments about both of these instructions.

As to the statutory instruction, at least one member of the subcommittee questioned whether a standard instruction is actually needed because the instruction merely tracks the language of section 440.11(1)(b)1., 2., Florida Statutes (2005). On the other hand, the subcommittee recognizes that the existence of a form instruction may well be an aid to a busy trial judge.

As to the pre-October 1, 2003, instruction, the Florida Supreme Court has now decided that concealment of the danger is not an indispensable requirement of the old substantial certainty test. The subcommittee sees no particular reason to include the old instruction.

Respectfully submitted,

Alan Wagner
Joseph H. Lang
Charles J. Kahn, Jr.

Instruction for Section 440.11(1)(b), effective October 1, 2003

INTENTIONAL TORT EXCEPTION TO EXCLUSIVE REMEDY PROVISION OF WORKERS' COMPENSATION LAW

The issue for your determination on the claim of [plaintiff] against [defendant] is whether:

(1) [defendant] deliberately intended to injure [plaintiff], or

(2) [defendant] engaged in conduct that [defendant] knew, based upon prior similar accidents or explicit warnings specifically identifying a known danger, was virtually certain to result in death or injury to [plaintiff].

[Give the following if proceeding under (2) above]:

In order to find such conduct, you must also find:

(1) [defendant] actively misled [plaintiff] as to the existence of the danger,

(2) [plaintiff] was not aware of the risk because the danger was not apparent; and

(3) [defendant] deliberately concealed or misrepresented the danger so as to prevent [plaintiff] from exercising informed judgment.

If clear and convincing evidence supports the claim of [plaintiff], then your verdict should be for plaintiff on this issue; however, if clear and convincing evidence does not support the claim of [plaintiff] on this issue, then your verdict should be for the defendant on this issue.

"Clear and convincing evidence" means evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

NOTE ON USE

This charge should be given when the cause of action accrued on or after October 1, 2003.

COMMENT

1. See § 440.11, Fla. Stat. (2003) (codifying the intentional tort exception and modifying the standard announced in Turner v. PCR, Inc., 754 So. 2d 683 (Fla. 2000)); see also Travelers Indem. Co. v. PCR, Inc., 889 So. 2d 779, 783 n.5 (Fla. 2004) (discussing the Legislature's codification of the intentional tort exception and the new, heightened virtual certainty standard).

2. An employee must prove an intentional tort by clear and convincing evidence. § 440.11(1)(b).

Instruction for Section 440.11(1)(b), effective pre-October 1, 2003

INTENTIONAL TORT EXCEPTION TO EXCLUSIVE REMEDY PROVISION OF WORKERS' COMPENSATION LAW

The issue for your determination on the claim of [plaintiff] against [defendant] is whether [defendant]:

(1) intended to injure [plaintiff], or

(2) knew or should have known that its conduct was substantially certain to result in injury or death to [plaintiff].

If the greater weight of the evidence supports a finding that [defendant] committed an intentional tort, your determination on this issue should be for [plaintiff].

However, if the greater weight of the evidence does not support a finding that [defendant] committed an intentional tort, your determination on this issue should be for [defendant].

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTE ON USE

This charge should be given when the cause of action accrued prior to October 1, 2003.

COMMENT

1. See Turner v. PCR, Inc., 754 So. 2d 683, 691 (Fla. 2000), superseded by statute, ch. 2003-412, § 14, at 3890-91, Laws of Fla. (codified at § 440.11, Fla. Stat. (2003), ("[I]ntentional tort exception includes an objective standard to measure whether the employer engaged in conduct which was substantially certain to result in injury. This standard imputes intent upon employers in circumstances where injury or death is objectively 'substantially certain' to occur.").

2. An employee must prove an intentional tort by a preponderance of the evidence. See Turner, 754 So. 2d at 691 (failing to demand a heightened burden of proof).

*57658 West's F.S.A. § 440.11

WEST'S FLORIDA STATUTES ANNOTATED
TITLE XXXI. LABOR (CHAPTERS 435-453)
CHAPTER 440. WORKERS' COMPENSATION

Current with chapters in effect from the 2007 First Regular Session of the Twentieth Legislature through March 12, 2007

440.11. Exclusiveness of liability

(1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except as follows:

(a) If an employer fails to secure payment of compensation as required by this chapter, an injured employee, or the legal representative thereof in case death results from the injury, may elect to claim compensation under this chapter or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by negligence of a fellow employee, that the employee assumed the risk of the employment, or that the injury was due to the comparative negligence of the employee.

(b) When an employer commits an intentional tort that causes the injury or death of the employee. For purposes of this paragraph, an employer's actions shall be deemed to constitute an intentional tort and not an accident only when the employee proves, by clear and convincing evidence, 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.

The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business and the injured employee is entitled to receive benefits under this chapter. Such fellow-employee immunities shall not be applicable to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, nor shall such immunities be applicable to employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment. The same immunity provisions enjoyed by an employer shall also apply to any sole proprietor, partner, corporate officer or director, supervisor, or other person who in the course and scope of his or her duties acts in a managerial or policymaking capacity and the conduct which caused the alleged injury arose within the course and scope of said managerial or policymaking duties and was not a violation of a law, whether or not a violation was charged, for which the maximum penalty which may be imposed does not exceed 60 days' imprisonment as set forth in s. 775.082. The immunity from liability provided in this subsection extends to county governments with respect to employees of county constitutional officers whose offices are funded by the board of county commissioners.

*57659 (2) The immunity from liability described in subsection (1) shall extend to an employer and to each employee of the employer which utilizes the services of the employees of a help supply services company, as set forth in Standard Industry Code Industry Number 7363, when such employees, whether management or staff, are acting in furtherance of the employer's business. An employee so engaged by the employer shall be considered a borrowed employee of the employer, and, for the purposes of this section, shall be treated as any other employee of the employer. The employer shall be liable for and shall secure the payment of compensation to all such borrowed employees as required in s. 440.10, except when such payment has been secured by the help supply services company.

(3) An employer's workers' compensation carrier, service agent, or safety consultant shall not be liable as a third-party tortfeasor to employees of the employer or employees of its subcontractors for assisting the employer and its subcontractors, if any, in carrying out the employer's rights and responsibilities under this chapter by furnishing any safety inspection, safety consultative service, or other safety service incidental to the workers' compensation or employers' liability coverage or to the workers' compensation or employer's liability servicing contract. Without limitation, a safety consultant may include an owner, as defined in chapter 713, or an owner's related, affiliated, or subsidiary companies and the employees of each. The exclusion from liability under this subsection shall not apply in any case in which injury or death is proximately caused by the willful and unprovoked physical aggression, or by the negligent operation of a motor vehicle, by employees, officers, or directors of the employer's workers' compensation carrier, service agent, or safety consultant.

(4) Notwithstanding the provisions of s. 624.155, the liability of a carrier to an employee or to anyone entitled to bring suit in the name of the employee shall be as provided in this chapter, which shall be exclusive and in place of all other liability.

CREDIT(S)

Laws 1935, c. 17481, § 11; Comp.Gen.Laws Supp.1936, § 5966(11); Laws 1970, c. 70-25, § 1; Laws 1971, c. 71-190, § 1; Laws 1975, c. 75-209, § 4; Laws 1978, c. 78-300, § 2; Laws 1979, c. 79-40, § 6; Laws 1983, c. 83-305, § 3; Laws 1988, c. 88-284, § 1; Laws 1989, c. 89-289, § 18; Laws 1990, c. 90-201, § 16; Laws 1991, c. 91-1, § 14. Amended by Laws 1993, c. 93-415, § 16, eff. Jan. 1, 1994; Laws 1997, c. 97-103, § 108, eff. July 1, 1997; Laws 2003, c. 2003-412, § 14, eff. Oct. 1, 2003.

<General Materials (GM) - References, Annotations, or Tables>

*57660

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Amendment Notes:

Laws 1970, c. 70-25, § 1, designated subsec. (1) and added former subsec. (2).

Laws 1971, c. 71-190, § 1, inserted in the first sentence of subsec. (1) "to any third party tort-feasor and" preceding "to the employee, his legal representative".

Laws 1975, c. 75-209, deleted in reference to employees exclusive references to the male gender and inserted "or comparative negligence" preceding "of the employee" at the end of subsec. (1).

Laws 1978, c. 78-300, added the third and fourth sentences to subsec. (1).

Laws 1979, c. 79-40 deleted "contributory negligence or" preceding "comparative negligence" in the second sentence of subsec. (1), and substituted "workers' " for "workmen's" compensation throughout former subsec. (2).

Laws 1983, c. 83-305, § 3, added former subsec. (3).

Laws 1988, c. 88-284, § 1, eff. Oct. 1, 1988, added the concluding sentence to subsec. (1).

Laws 1989, c. 89-289, § 8, eff. Oct. 1, 1989, amended subsec. (1) without apparent change; inserted subsec. (2); and renumbered former subsecs. (2) and (3) as subsecs. (3) and (4).

Laws 1990, c. 90-201, § 16, eff. July 1, 1990, in subsec. (1), substituted "employee" for "servant" following "fellow" in the second sentence.

Laws 1991, c. 91-1, § 14, eff. Jan. 24, 1991, reenacted subsec. (1) of the section without change.

FLORIDA JUSTICE ASSOCIATION
218 South Monroe St.
Tallahassee, FL 32301

May 30, 2008

Comments of Florida Justice Association on Proposed Revisions to Standard Jury Instructions

The Florida Justice Association, following review by an ad hoc committee of trial lawyers experienced in the field of trail practice and board certified appellate specialists, and approval by the FJA Executive Committee, comments as follows concerning the Proposed Revisions to Standard Jury Instructions.

Proposed Instruction 401.3—Greater Weight of the Evidence

The proposed instruction re-defining greater weight of the evidence should not be recommended for approval because it substantively changes the parties' burden of proof.

Proposed instruction 401.3, Greater Weight of the Evidence, is identical to the existing standard jury instruction on greater weight of the evidence, Florida Standard Jury Instruction (Civil) 3.9, except for the addition of this sentence:

> To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is probably true.

This revision is a substantive change to the definition of greater weight of the evidence because it introduces a new element that is not present in the current instruction, specifically, a probability that the matter to be proven is true. FJA objects to this revision because it is a substantive change in the instruction that can lead to anomalous and unfair results.

The current instruction on greater weight of the evidence does not require the jury to determine whether the claim or defense to be proven is probably true. Instead, it asks the jury to determine whether the evidence favoring the claim or defense is more persuasive and convincing than the evidence opposing it. Current instruction 3.9 reads: "'Greater weight of the evidence' means the more persuasive and convincing force and effect of the entire evidence in the case." Thus, the current instruction directs the jury to perform a balancing test and decide which side's evidence is more persuasive and convincing than the evidence on the other side. It does not ask the jury to determine whether it believes the claim or defense to be proven is probably true.

This distinction will affect the outcome in cases in which the jury is not convinced that either party's case is probably true. After considering all the evidence, jury may decide that the truth is not quite what the plaintiff claims it to be and not quite what the defense claims it to be either. The jury may believe that the truth is

some third version of events that does not match what either party presented in court, or it may find that it simply cannot determine what happened with sufficient confidence to say that it is probably true. In that situation, however, the jury almost always be able to determine that the evidence favoring one side is more persuasive and convincing than the evidence favoring the other. Under the current instruction, that is all that is necessary.

If the party that has the burden of proof puts forth the more convincing case, then it would prevail under the current instruction, but it would not prevail under proposed rule 401.3 if the jury is not convinced that its claim or defense is probably true. This would lead to an anomalous result, because the party who put forth the most convincing case would lose, having failed to convince the jury that its claim or defense is probably true, and the party who put forth the least convincing case would win.

To state this hypothetical in terms of probability percentages, assume a jury decides there is a 45% probability that the plaintiff's version of events is true and a 35% likelihood that the defendant's version of events is true. If the plaintiff has the burden of proof, the plaintiff would prevail under the current instruction because the jury has found the plaintiff's case more convincing than the defendant's, but under the proposed new instruction, the defendant would prevail because the plaintiff has

not convinced the jury that there is a 50% or greater probability that the plaintiff's version is true. Under the proposed new instruction, the defendant would prevail even though its case was the least convincing and least persuasive.

The Second District Court of Appeal's discussion of the greater-weight-of-the-evidence standard in *In re Estate of Brackett, Wakefield v. Brackett*, 109 So. 2d 375 (Fla. 2d DCA 1959) supports the balancing approach embodied in the current instruction, instruction 3.9. The court wrote:

> Weight of the evidence" has been held to be equivalent to "preponderance of the evidence." It simply means that proof on one side of a cause outweighs the proof on the other side.
>
> As was stated in the case of *Waldron v. New York Cent. Ry. Co.*, 1922, 106 Ohio St. 371, 140 N.E. 161, 163, as follows:
>
> "The terms 'weight of evidence' and 'sufficient evidence' have long been regarded as synonymous terms and used interchangeably."
>
> "Weight of evidence" does not necessarily mean a greater number of witnesses, since quality of testimony and credibility must also be considered. *Bjorklund v. Continental Casualty Co.*, 1931, 161 Wash. 340, 297 P. 155, 160.
>
> "Weight of evidence" is not a question of mathematics but depends on its effect in inducing belief. *Chenery v. Russell*, 1933, 132 Me. 130, 167 A. 857, 858.
>
> The expression "weight of evidence" signifies that the proof on one side is greater than on the other, and in any proceedings before a trial judge, probative value of the testimony of each witness, and not the quantity or amount of evidence, determines its weight.

109 So. 2d 378.

Proposed instruction 401.3 confusingly narrows the gap between the greater weight of the evidence standard and the "clear and convincing evidence" standard. To satisfy the greater weight of the evidence standard under 401.3, the party bearing the burden of proof "must convince" the jury to believe the fact in question. Reasonable jurors may find that standard to be indistinguishable from the standard for clear and convincing evidence that the proof "produces a firm belief or conviction without hesitation about the matter in issue." The "must convince" standard is too high.

For these reasons, we object to the second sentence in proposed instruction 401.3, which adds a new element to the definition of greater weight of the evidence requiring the jury to determine if the claim or defense is probably true. We request that this sentence be deleted, recognizing that this would leave the current instruction unchanged.

Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 402.4c—Professional Negligence

The Florida Justice Association submits that the proposed instruction 402.4c.

should be modified because the proposed instruction inaccurately reflects Florida law concerning the effect of the discovery of the presence of a foreign object in a person's body.

Florida Statute section 766.102(3) establishes that "the discovery of the presence of a foreign body, such as sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures shall be *prima facie* evidence of negligence on the part of the healthcare provider." Proposed instruction 402.4c. omits any reference—either expressly or by definition—of the concept of "*prima facie*." Instead, that instruction states: "The presence of an object in (claimant's) body, such as a (name of foreign body) is evidence of negligence on the part of (defendant) and may be considered by you, together with the other facts and circumstances, in determining whether such person was negligent." The omission from the instruction of any reference to the concept of "*prima facie*" mischaracterizes the legal effect of the discovery of a foreign object because that omission conceals from the jury the fact that discovery of the foreign object is, in and of itself, sufficient evidence of negligence to support a verdict in favor of the claimant.

The definition of "*prima facie*" employed by the Florida Supreme Court means "evidence sufficient to establish a fact unless and until rebutted." *State v. Kahler*, 232

So. 2d 166, 168 (Fla. 1970). *Accord, e.g., Castleman v. Office of Comptroller*, 538 So. 2d 1365 (Fla. 1st DCA 1989). Proposed instruction 402.4(c) is legally insufficient for failing to instruct the jurors that the presence of a foreign object in the claimant's body is evidence sufficient to establish the fact of medical malpractice, unless and until rebutted by the Defendant. Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 402.4d—Professional Negligence

Proposed instruction 402.4d. should not be recommended for approval because it mistakenly states the legal effect of the failure of a defendant to maintain required records. The Florida Supreme Court, in *Public Health Trust v. Valcin*, 507 So. 2d 596 (Fla. 1987), held that the effect of a malpractice defendant's failure to maintain required records that works to the prejudice of the claimant created a "rebuttable presumption . . . [which] shifts the burden of proof, insuring that the issue of negligence goes to the jury." *Id.* at 600-01. The instruction proposed by the committee mistakenly provides only that the jury "may infer that the missing evidence contain proof of negligence," not that a presumption is created by which the burden of disproving negligence is shifted to the defendant.

Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 404.5—Medical Malpractice Insurer's Bad Faith

[Comment to be provided separately]

Proposed Instruction 411.4a. and 414.4a.—Legal Cause

The Florida Justice Association comments as follows concerning the proposed instructions defining "legal cause" in cases involving claims of civil theft and claims by employees against employers possibly subject to the exception to Workers' Compensation immunity.

Proposed instructions 411.4a. and 414.4a., apparently mistakenly, refer to actions being a cause of "severe emotional distress." Such severe emotional distress is not likely to be a consequence of civil theft, and is not necessarily an element of a tort claim against an employer. Apparently the language was imported from the definition of legal cause in cases involving extreme outrageous conduct (Instruction 410.6a.) and was not appropriately modified. Therefore, these two instructions should be corrected before being submitted to the Florida Supreme Court for approval.

Proposed Instruction 414.5—Workers' Compensation Immunity Exception

The Florida Justice Association submits that proposed instruction 414.5 should be recommended for adoption and approval by the Supreme Court of Florida, because the proposed instruction accurately reflects Florida law concerning the matter in question in a clear and understandable form.

Proposed Instruction 503.1—Punitive Damages

The Florida Justice Association submits that proposed instruction 503.1, dealing with punitive damages, should be revised before being recommended for adoption and approval by the Supreme Court of Florida so as to substitute another term for the term "guilty," where the instruction states that, "[p]unitive damages are warranted against (defendant) if you find that clear and convincing evidence that (defendant) was guilty of intentional misconduct or gross negligence." Similarly, the Committee should substitute different language for the term "personally guilty" contained in all of the subparagraphs (2) (b), (c), and (d).

The FJA states that the term "guilty" is extremely misleading because it connotes a level of culpability equal to that which would support a criminal conviction. Jurors will invariably confuse the "clear and convincing" standard of proof applicable to punitive damages with the "beyond a reasonable doubt" standard necessary for a "guilty" verdict in a criminal case.

The FJA acknowledges that the term "guilty" has been used in standard instruction PD 1 previously approved by the Court. However, because the Supreme Court's committee is recommending revisions to instructions including the punitive damages instruction, instruction 503.1 should be revised to use less confusing terminology. Therefore, the instruction should not be recommended for approval by

the Supreme Court of Florida.

Respectfully submitted,

By:_____
FRANK M. PETOSA, President

From: Rick Piedra
Sent: Monday, May 05, 2008 8:25 AM
To: 'tgunn@fowlerwhite.com'
Cc: Tom Koval; Ralph Gonzalez
Subject: Proposed Jury Instruction/WC Immunity
Dear Tracy,

I have a question on the proposed jury instructions for intentional torts as an exception to the exclusive remedy of workers compensation. I've been following this issue for some time.

The proposed instruction 414.5 states in par. 2 "whether (Defendant) (a) engaged in conduct that (Defendant) knew, based upon [prior similar incidents] [or] [explicit warnings specifically identifying a known danger], was virtually certain to result in death or injury to [Claimant)..."

I notice that the "prior similar incidents" and the "explicit warnings" phrases are in brackets. I assume this means that one or the other, (or both?), MUST be given to the jury, correct? In other words, before the judge would allow this to go to the jury, he would have to find that the plaintiff has presented evidence of either prior similar accidents or explicit warnings about the condition. Then, subpars. (b) and (c) impose additional requirements to a finding of liability.

Thanks.

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