IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D17-2065; L.T. Case No. 2014-CA-000051

SIMON'S TRUCKING, INC.
Appellant/Defendant,

v.

CHARLES A. LIEUPO
Appellee/Plaintiff.

APPELLANT'S INITIAL BRIEF

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PREFACE

Appellant/Defendant Simon's Trucking, Inc., is referred to as Appellant or "Simon's Trucking." Appellee/Plaintiff Charles A. Lieupo is referred to as Appellee or "Mr. Lieupo." Citations to the Record on Appeal, which includes the trial transcript in a single PDF file, appear as R. __ (PDF page number).

STATEMENT OF THE FACTS AND OF THE CASE

Overview

Charles A. Lieupo alleges that on August 1, 2011, he sustained personal injuries while working as a member of a tow truck crew that had been called by the Florida Highway Patrol to remove a disabled tractor-trailer from Interstate 75 in Hamilton County. The tractor-trailer, which was owned by Simon's Trucking, crashed and burned after its driver suffered a fatal heart attack. Alleging that he was injured by hazardous materials while at the accident site, Mr. Lieupo brought suit against Simon's Trucking, asserting a claim for strict liability under section 376.313(3), Florida Statutes.[1] Mr. Lieupo also asserted a claim for negligence, which he voluntarily withdrew prior to trial. After a four-day trial, the jury found Simon's Trucking strictly liable for Mr. Lieupo's personal injuries and awarded him $5,211,500. In this timely appeal, Simon's Trucking argues that the final judgment must be reversed because, pursuant to the Florida Supreme Court's decision in *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010), damages for personal injuries are not recoverable under section 376.313(3).

I. The Facts

Simon's Trucking is a family-owned trucking company headquartered in the state of Iowa. R. 306. On July 30, 2011, a driver for Simon's Trucking picked up

[1] All statutory references herein are to the 2011 version of the Florida Statutes.

an order of automobile batteries from a customer in Kansas and loaded them onto a tractor-trailer for delivery to a business in South Florida. R. 308; 1715-17; 2882; 9078. Shortly after midnight on August 1, 2011, while driving southbound on Interstate 75 near Jasper, the driver suffered a fatal heart attack. R. 308; 1706; 6246; 9394. The tractor-trailer veered off the highway, crashing into several trees on the shoulder before coming to a stop. R. 9808.

Upon impact, the tractor-trailer burst into flames, engulfing the truck and driver and setting fire to the nearby wooded area. R. 6246; 9412; 9808; 9812. The force of the collision caused several hundred batteries to be thrown forward over the cab of the tractor-trailer into the tree line and woods. R. 6246-47; 9126; 9132. A number of the batteries broke, releasing a mixture of water and sulphuric acid. R. 9121; 9163; 9171-72. Emergency responders, including the Florida Highway Patrol (FHP) and the local fire department, arrived shortly after the accident occurred. R. 308; 6294; 9807. For the next several hours, they worked to put out the fire and investigate the accident. R. 6295; 9808-09.

In 2011, Mr. Lieupo, who was 55 years old at the time, was employed as a tow truck driver by Dennis's Garage in Jennings. R. 9290-91. At approximately 2:00 a.m. on August 1, 2011, Mr. Lieupo and four other employees of Dennis's Garage were called to the scene by FHP to remove the disabled tractor-trailer. R. 9302-04; 9403. When the tow truck crew arrived they were informed by FHP that

they could not begin their work until the police and fire departments concluded investigating the accident scene and putting out fires, and until an all-clear was issued that the area immediately around the tractor-trailer posed no safety risk from hazardous materials.[2] R. 9124-25; 9305; 9380; 9394-95; 9759-60. Mr. Lieupo and his crew parked their tow truck and other equipment on the side of the interstate and waited near the scene. R. 9305. At some point, Mr. Lieupo laid down on the shoulder of the interstate to take a nap until he was awakened by an FHP officer who told him to get off the road. R. 9310-11; 9396.

Mr. Lieupo and the tow truck crew received the all-clear to begin work after sunrise, sometime around 6:30 a.m. R. 9394-95; 9745. Two members of the crew, with assistance from the fire department, placed chains around the tractor-trailer so that it could be hauled out of the trees and back up onto the interstate. R. 9407-08. Mr. Lieupo, acting as the crew chief, operated the wench on the tow truck, which was parked on the pavement of the interstate. R. 9408-10. The crew finished their work around 3:00 p.m. after taking three separate trips from the scene to the tow truck shop to remove the tractor-trailer. R. 9317; 9410.

During the removal of the tractor-trailer, Mr. Lieupo wore khaki pants and work boots that extended six inches high over his ankles and calves, as did the

[2] The parties stipulated that the acid within the automobile batteries that the tractor-trailer was carrying constituted hazardous material. R. 2882.

other members of the tow truck crew. R. 9398-99. The day after the accident, Mr. Lieupo noticed small "red spots" on both of his ankles. R. 9425-26. Several weeks later he told Brice Dennis, the owner of Dennis's Garage, that he "got into a bed of [fire] ants" while he was at the accident site and he "used starter fluid to get them off of him."[3] R. 9391; 9750-51. Despite being encouraged by family and friends to go to a doctor, Mr. Lieupo did not seek medical treatment until 37 days after the accident. R. 9322-23; 9426-27. Instead, he treated the injuries himself with Epsom salt, Neosporin, and "horse salve." R. 9321-22.

Contrary to his statement to Mr. Dennis as to the cause of his condition, Mr. Lieupo testified at trial that he knew the day after the accident the spots on his ankles were due to exposure to battery acid. R. 9426. However, in the two months following the accident, he consistently told treating physicians what he told Mr. Dennis, that his injuries were the result of fire ant bites that had become infected. R. 9325-32. When Mr. Lieupo saw a doctor on September 16, 2011, he "complain[ed] of ulcers on both feet following insect bite[s]." R. 9328; 9386-87. And, as reflected in his medical records from September and October 2011, Mr. Lieupo repeatedly told other doctors and medical personnel the same thing, that he had been bitten by fire ants on August 1, 2011, and that the sores from those bites

[3] At trial, Lieupo testified that there were "millions" of ants at the accident scene, including "pods of ants floating in [the] water" around the disabled tractor-trailer. R. 9311; 9419-20.

had become infected. R. 9327-31; 9386-91; 9790-91. For example, on September 22, 2011, Mr. Lieupo reported that "he was working as a tow truck driver and actually stood in the ant bed during the rainstorm and was completely covered by fire ants at one point." R. 9389. And, in February 2012, more than six months after the accident, Mr. Lieupo told his pain-management doctor, "I had ants all over myself. . . . [T]hey were all in my breeches and stuff and [] the rest of the day they were stinging . . . ." R. 9390-91.

A general surgeon at Lake City Medical Center, who examined Mr. Lieupo on one occasion nearly two months after the accident, testified at trial that, in his opinion, Mr. Lieupo's injuries were from a "chemical burn" due to "prolonged contact" with battery acid. R. 9449, 9463, 9467-68. He referred Mr. Lieupo to a wound care specialist at North Florida Regional Medical Center. R. 9474. However, upon further examination, the wound care specialist determined that Mr. Lieupo's injuries were caused by a preexisting condition known as venous stasis insufficiency,[4] which was aggravated by ant bites, not exposure to battery acid.[5] R.

[4] Venous stasis insufficiency is a blood circulatory condition that prevents the veins from properly delivering blood from the foot and leg back to the heart, causing blood to pool in the lower extremities, which can result in sores and ulcers. R. 9895-99.

[5] According to Mr. Lieupo, the other members of the tow truck crew all wore the same kind of clothing and work boots and worked in the same area of the accident that he did. R. 9398-99. He was not aware of any of them complaining that they had come into contact with battery acid. R. 9425. Similarly, Mr. Dennis

9548-50; 9555-59; 9664.

Over the next five years, Mr. Lieupo underwent numerous medical procedures. R. 9333-62. Ultimately, Mr. Lieupo's injuries healed significantly after he received compression therapy on his ankles, a hallmark treatment for venous stasis insufficiency, beginning in September 2013 and continuing through July 2014. R. 9349-51; 9362; 9715; 9726; 9892.

II. The Case

In a second amended complaint, filed in January 2015, Mr. Lieupo alleged that his injuries were the result of a chemical burn he received by coming into contact with battery acid at the site of the August 1, 2011, accident. R. 306-09. Mr. Lieupo asserted that Simon's Trucking was strictly liable for his injuries pursuant to section 376.313(3), Florida Statutes.[6] R. 311-12. Simon's Trucking

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testified that he did not have any "problems" after working at the accident site even though he walked around the site wearing shorts and Crocs. R. 9748-49; 9754. At trial, Simon's Trucking was precluded from presenting evidence that none of the firefighters, police, or other emergency personnel who responded to the accident and worked at the site claimed to have suffered chemical burns, R. 3074, even though they wore only their standard work gear, and not any special protective clothing. R. 9397; 9819. The only personnel at the scene who were required to wear special protective clothing were employees of SWS Environmental Services engaged in picking up broken batteries in an area designated by SWS as the "hot zone." R. 9148. All other SWS employees, working in the same area as Mr. Lieupo and the tow truck crew, wore jeans, t-shirts, and normal footwear. R. 9149-54.

[6] Mr. Lieupo also named as defendants the Florida Department of Highway Safety and Motor Vehicles, the manufacturer of the automobile batteries, and the

moved for summary judgment, arguing that section 376.313(3) does not provide a cause of action to recover damages for personal injuries. R. 1686-97. The motion for summary judgment was denied. R. 2217-18. As a result of that ruling, the case proceeded to trial in March 2017.

At the close of Mr. Lieupo's case and at the close of all evidence, Simon's Trucking moved for a directed verdict, once again arguing that, as a matter of law, Mr. Lieupo was precluded from recovering damages for his personal injuries under section 376.313(3). R. 9732-37; 9988. The motions for directed verdict were denied, sending Mr. Lieupo's statutory claim to the jury. R. 9737; 9988; 10084.

The jury returned a verdict for Mr. Lieupo, awarding him $5,211,500 in damages.[7] R. 8229-30. Simon's Trucking filed a motion for judgment notwithstanding the verdict in which it renewed its argument that no cause of action for personal injury damages exists under section 376.313(3). R. 8340-51. The trial court entered a final judgment in favor of Mr. Lieupo, and Simon's

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customer to whom the batteries were being transported; however, the claims against those parties were dismissed before trial. R. 306; 525; 1927; 2105-34. Mr. Lieupo also brought a negligence claim against Simon's Trucking, but he voluntarily dismissed that claim prior to trial. R. 1929.

[7] The breakdown of the award for damages is as follows: $730,000 for past medical expenses; $1,500 for future medical expenses; $200,000 for lost earnings; $280,000 for loss of future earning capacity; $3,000,000 for past pain and suffering; and $1,000,000 for future pain and suffering. R. 8229. All of Mr. Lieupo's medical expenses have been covered by Worker's Compensation. R. 9754-55.

Trucking filed a timely notice of appeal, which was held in abeyance pending a ruling on its post-trial motion. R. 8375-78; 8395. Subsequently, the trial court, denied the motion for judgment notwithstanding the verdict, and this appeal commenced. R. 8718, 8722.

SUMMARY OF THE ARGUMENT

This appeal presents a purely legal question—what type of damages are recoverable under the strict liability cause of action in section 376.313(3), Florida Statutes. The Florida Supreme Court answered that question in *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1222 (Fla. 2010), where it held that section 376.313(3) provides a private cause of action to persons who can "demonstrate damages as defined in [section 376.031(5)]." Section 376.031(5) plainly states that damages include "any destruction of the environment and natural resources, including all living things *except human beings*." Therefore, even assuming for purposes of this appeal that Mr. Lieupo was injured by coming into contact with battery acid at the site of the tractor-trailer accident on August 1, 2011, his claim for personal injury damages falls outside the scope of chapter 376.

Simply put, this case never should have gone to trial. Simon's Trucking argued throughout the proceedings below that Mr. Lieupo's claim under section 376.313(3) failed as a matter of law. The trial court's ultimate error was denying Simon's Trucking's motion for judgment notwithstanding the verdict because the statute does not provide a cause of action for personal injury damages, meaning the evidence presented at trial was legally insufficient to support a verdict in favor of Mr. Lieupo. Accordingly, Simon's Trucking respectfully requests that this Court reverse the final judgment and remand the case with instructions that judgment be

entered in its favor.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING SIMON'S TRUCKING'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE PRIVATE CAUSE OF ACTION IN SECTION 376.313(3), FLORIDA STATUTES, DOES NOT PERMIT A PLAINTIFF TO RECOVER DAMAGES FOR PERSONAL INJURY.

A. Standard of Review.

A trial court's ruling on a motion for judgment notwithstanding the verdict (JNOV) is reviewed de novo. *Kopel v. Kopel*, 42 Fla. L. Weekly S26 (Fla. Jan. 26, 2017). The denial of a JNOV motion should be reversed if no reasonable view of the evidence could support a verdict in favor of the nonmoving party. *See id.* The appellate court is required to "view the evidence and all inferences of fact in the light most favorable to the nonmoving party." *Id.*

B. Chapter 376, Florida Statutes – "Pollutant Discharge Prevention and Removal".

Chapter 376 regulates the discharge and removal of pollution in Florida. The "Pollutant Discharge Prevention and Control Act," initially enacted in 1970 and codified in sections 376.011-376.21 ("1970 Act"), prohibits the discharge of pollutants into or upon coastal waters and adjoining lands. §§ 376.011, 376.041, Fla. Stat.; ch. 70-244, Laws of Fla. The "Water Quality Assurance Act," enacted in 1983 and codified in sections 376.30-376.317 ("1983 Act"), prohibits the discharge of "pollutants or hazardous substances" into or upon the inland surface

or ground waters of the state. § 376.302(1)(a), Fla. Stat.; ch. 83-310, Laws of Fla.

In enacting the 1970 Act, the Legislature declared that "the highest and best use of the seacoast of the state is as a source of public and private recreation" and "the preservation of this use is a matter of highest urgency and priority." § 376.021(1)-(2), Fla. Stat. In the 1983 Act, the Legislature declared that "the preservation of surface and ground waters is a matter of the highest urgency and priority, as these waters provide the primary source for potable water in this state." § 376.30(1)(b), Fla. Stat. The Legislature further declared that these uses of the state's coastal, surface, and ground waters "can only be served effectively by maintaining [these waters] in as close to a pristine condition as possible, taking into account multiple use accommodations necessary to provide the broadest possible promotion of public and private interests." §§ 376.021(2), 376.30(1)(c), Fla. Stat. Accordingly, both the 1970 Act and the 1983 Act authorize the Department of Environmental Protection "to sue polluters and force the cleanup of contaminated sites."[8] *Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 22 (Fla. 2004); *see* §§ 376.09(1), 376.051(5), 376.303(1)(j), 376.305(1), Fla. Stat.

[8] In this case, it was not necessary for the Department of Environmental Protection to take such action. Just hours after the accident on August 1, 2011, Simon's Trucking engaged an environmental services company to clean up the area on Interstate 75 where the accident occurred. R. 6246; 9130; 9140-42.

The 1970 and 1983 Acts also created causes of action to allow private parties to be compensated by polluters for certain damages caused by pollution. §§ 376.205; 376.313(3), Fla. Stat. The private action in section 376.313(3) of the 1983 Act, which contains a remedy for parties harmed by the pollution of ground and surface waters, is at issue in this case. It provides:

> Except as provided in s. 376.3078(3) and (11), nothing contained in [the 1983 Act] prohibits any person from bringing a cause of action in a court of competent jurisdiction for all damages resulting from a discharge or other condition of pollution covered by [the 1983 Act] and which was not authorized pursuant to chapter 403. Nothing in this chapter shall prohibit or diminish a party's right to contribution from other parties jointly or severally liable for a prohibited discharge of pollutants or hazardous substances or other pollution conditions. Except as otherwise provided in subsection (4) or subsection (5), in any such suit, it is not necessary for such person to plead or prove negligence in any form or manner. Such person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred. The only defenses to such cause of action shall be those specified in s. 376.308.

§ 376.313(3), Fla. Stat.

Since the enactment of section 376.313(3), the courts have primarily grappled with two questions concerning its application: what is the scope of liability, and what type of damages are recoverable? This appeal raises the second question.[9]

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[9] The Florida Supreme Court addressed the first question in 2004, holding that section 376.313(3) created a private right of action "for strict liability regardless of causation." *Aramark*, 894 So. 2d at 26. As the Second District Court of Appeal explained when asked to construe the statute four years later, "[t]he question that

C. In *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010), the Florida Supreme Court determined that the type of damages recoverable under section 376.313(3) is governed by the definition of damages in section 376.031(5).

Section 376.313(3) states that an individual may bring a cause of action for "all damages resulting from a discharge or other condition of pollution covered by [the 1983 Act]." The term "damages" is not defined in this section. However, in *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010), the Florida Supreme Court conclusively held that the type of damages recoverable in an action brought under section 376.313(3) is governed by the definition of damages in section 376.031(5).

In *Curd*, a group of commercial fishermen filed suit against a phosphate plant, alleging that wastewater from the plant spilled into the Tampa Bay, which "resulted in a loss of underwater plant life, fish, bait fish, crabs, and other marine life." *Id.* at 1218. In a claim brought under section 376.313(3), the fishermen sought what amounted to lost income damages for the "damage to the reputation of the fishery products the fishermen [we]re able to catch and attempt to sell." *Id.* at 1219. The trial court dismissed the fishermen's claim, and the Second District Court of Appeal affirmed the dismissal, concluding that a recovery for damages

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remains unsettled, both in the statute and the case law, is *what type of damages* are recoverable under the statute and by whom." *Curd v. Mosaic Fertilizer, LLC*, 993 So. 2d 1078, 1084 (Fla. 2d DCA 2008) (emphasis added).

under section 376.313(3) is not permitted "when the party seeking the damages does not own or have a possessory interest in the property damaged by the pollution." *Id*.

The Florida Supreme Court rejected the Second District's interpretation of section 376.313(3), and conducted its own construction of the statute. Employing the *in pari materia* canon of statutory construction, the Court held that the damages recoverable in a private cause of action under section 376.313(3) of the 1983 Act are damages as defined in section 376.031(5) of the 1970 Act. *Id.* at 1220-21. Section 376.031(5) defines "damage" as "the documented extent of any destruction to or loss of any real or personal property, or the documented extent . . . of any destruction of the environment and natural resources, including all living things except human beings, as the direct result of the discharge of a pollutant." Relying on this definition, the Court concluded that the fishermen's lack of a possessory interest in the polluted marine life did not preclude them from bringing a claim for lost income under section 376.313(3) because "one can also recover for damages to 'natural resources, including all living things except human beings.'" *Id.* at 1222 (quoting § 376.031(5)). In short, *Curd* instructs that when faced with the question of what type of damages are recoverable under section 376.313(3), courts must look to the definition of damages in section 376.031(5). *See id.* at 1222 (explaining that "the Legislature has provided for private causes of action to any

person who can demonstrate *damages as defined under the statute*") (emphasis added).

In a concurring opinion in which he agreed that the fishermen were permitted to proceed with their claim under section 376.313(3), Justice Polston argued against the majority's construction of the statute. *Id.* at 1229-30 (Polston, J., concurring in part, dissenting in part). He reasoned that the Court should not look beyond the plain meaning of the phrase "all damages" in section 376.313(3) to determine the type of damages that are recoverable. *Id.* at 1230 ("The plain meaning of 'all damages' includes economic damages; and the Legislature has directed that section 376.313(3) be liberally construed. . . . If the statute is overly broad . . . that is an issue for the Legislature to address.").

The undersigned appreciate Justice Polston's approach to statutory construction. However, the majority in *Curd* appropriately harmonized the private cause of action in section 376.313(3) with the private cause of action in section 376.205 by applying the same statutory definition of damages to both. *See Fla. Dep't of Educ. v. Cooper*, 858 So. 2d 394, 396 (Fla. 1st DCA 2003) ("[S]tatutes which relate to the same subject must be read *in pari materia* and construed in such a manner as to give meaning and effect to each part."); *see also State v. Fuchs*, 769 So. 2d 1006, 1009 (Fla. 2000) ("In the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term[.]"). Here,

sections 376.313(3), 376.205, and 376.031(5) are codified in the same statutory chapter, and, as the majority explained, were enacted by the Legislature as part of the same "far-reaching statutory scheme aimed at remedying, preventing, and removing the discharge of pollutants from Florida's waters and lands." *Curd*, 39 So. 3d at 1222. In applying the *in pari materia* canon of statutory construction, the majority clearly found no reason to believe that the Legislature intended for plaintiffs to be compensated for a broader category of damages in a claim filed under section 376.313(3) rather than one filed under section 376.205, or that the Legislature intended to discriminate between pollution to coastal versus inland waters and lands.

Seven years have now passed since the decision in *Curd*. In that time, the Legislature has not amended section 376.313(3) to overrule the Court's decision regarding the types of damages recoverable in a private cause of action under the statute. The Legislature's silence in the face of *Curd* indicates its acceptance of the Court's construction of the statute. *See Goldenberg v. Sawczak*, 791 So. 2d 1078, 1081 (Fla. 2001) ("Long-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction."). In the absence of an intervening decision of the Florida Supreme Court or legislative action to the contrary, this Court is bound by the decision in *Curd* that the damages recoverable in a private cause of action under section 376.313(3) are damages as

defined by the Legislature in section 376.031(5). *See State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) ("Where an issue has been decided by the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues, even though the court might believe the law should be otherwise.").

D. Pursuant to *Curd*'s construction of section 376.313(3), Mr. Lieupo is precluded, as a matter of law, from recovering damages for his personal injuries.

Although the background facts giving rise to the claim in this case and the facts in *Curd* may be different, the legal question in both is the same—what type of damages are recoverable in a private right of action under section 376.313(3). Applying *Curd*'s construction of section 376.313(3) to this case requires a determination that Mr. Lieupo is not permitted to recover damages for personal injuries in a claim brought under that statute.

In *Curd*, the Florida Supreme Court held that section 376.313(3) provides a private cause of action to "any person who can demonstrate *damages as defined under the statute.*" 39 So. 3d at 1222 (emphasis added). The Court then instructed that the definition of damages in section 376.031(5) applies to the cause of action in section 376.313(3). And section 376.031(5) plainly states that damages include "any destruction of the environment and natural resources, including all living things *except human beings*." (Emphasis added). Therefore, even assuming for

purposes of this appeal that Mr. Lieupo was injured by coming into contact with battery acid at the scene of the tractor-trailer accident on August 1, 2011, section 376.313(3) does not provide a cause of action for him to seek compensation for those injuries.

Simon's Trucking argued throughout the proceedings below that Mr. Lieupo's claim under section 376.313(3) failed as a matter of law based upon the Florida Supreme Court's decision in *Curd*. The trial court incorrectly rejected this argument at every turn by denying Simon's Trucking's motions for summary judgment, for a directed verdict, and for judgment notwithstanding the verdict. The injuries suffered by Mr. Lieupo, whatever their cause and as painful as they clearly were, are not compensable under the strict liability provisions in chapter 376. Because the evidence presented at trial was legally insufficient to support a verdict in favor of Mr. Lieupo, Simon's Trucking respectfully requests that this Court reverse the final judgment.

CONCLUSION

For the foregoing reasons, Simon's Trucking respectfully requests that this Court reverse the final judgment and remand this case with instructions to enter judgment in favor of Simon's Trucking.

Respectfully submitted,

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I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) because it was prepared using Times New Roman 14-point font.

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