IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 1D14-0125

DONNA MAE POOLE,
as Personal Representative of the
ESTATE of Dennis Allen Pangburn (Deceased),

Plaintiff-Appellant,

v.

CSX TRANSPORTATION INC., a foreign corporation,
TIMOTHY G. TOWAN and DAN W. VAUGHN,

Defendants-Appellees.

ANSWER BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT OF THE CASE AND FACTS

Legal Background

This wrongful-death action concerns Dennis Pangburn, who was intoxicated and trespassing when he was struck and killed by a train owned and operated by defendant CSX Transportation ("CSXT"). The case turns principally on application of Florida Statute § 768.075. As originally enacted in 1990, Section 768.075 immunized landowners from liability for injuries to intoxicated trespassers caused by the landowner's simple negligence (but not by "gross negligence or willful and wanton misconduct") when the trespasser's injury "result[ed] from or ar[ose] by reason of the trespasser's commission of the offense of trespass." Fla. Stat. § 768.075 (1990).

The legislature amended Section 768.075 in 1999 "to expand the immunity of property owners from liability to trespassers." H. Staff Analysis of HB 775, § II(E) (Feb. 12, 1999) (available at http://perma.cc/EJ33-5NG6) (hereinafter "Staff Analysis"). With respect to intoxicated trespassers in particular, it removed the qualification that the injury must have "result[ed] from or ar[isen] by reason of the trespasser's commission of the offense of trespass," and it reduced the threshold for intoxication from 0.10 to 0.08 percent. *See* Fla. Stat. § 768.075(1).

The legislature also added two new provisions to Section 768.075. *First*, using language that tracks the intoxicated-trespasser provision, it provided that "[a] person or organization owning or controlling an interest in real property . . . is not

liable for ***any*** civil damages for the death of or injury or damage to ***any*** discovered or undiscovered trespasser," except that a landowner is liable for "intentional misconduct" that proximately injures an undiscovered trespasser and for "gross negligence or intentional misconduct" that is the proximate cause of injury to a discovered trespasser. Fla. Stat. § 768.075(2), (3)(b) (emphasis added). As with the revised intoxicated-trespasser provision, the legislature omitted the qualification that the trespasser's injury must have "result[ed] from or arise[n] by reason of the trespasser's commission of the offense of trespass."

Second, the legislature added a provision eliminating entirely any duty of care that landowners might owe to "a person who is attempting to commit a felony or who is engaged in the commission of a felony on the property," regardless of the person's status as a trespasser or invitee. Fla. Stat. § 768.075(4). This Court has held that the "plain language" of Section 768.075(4) immunizes landowners from liability for injuries to persons committing felonies, regardless of whether the injury "arose out of the commission of the felony" or otherwise. *Kuria v. BMLRW, LLLP*, 101 So. 3d 425, 426 (Fla. 1st DCA 2012).

The House staff analysis explained that the modifications to Section 768.075 were intended to encourage "personal responsibility" by "reduc[ing] the ability of some trespassers to bring actions for personal injuries." Staff Analysis § II(C)(3). More broadly, the changes were intended to "reduce the case load of the courts by restricting certain actions" and to "reduce the costs of liability insurance and self-

insurance in the private economy," in order to "attract more business investments in Florida" and "make Florida businesses more competitive, more profitable and expand employment in the state." *Id*. §§ III(A)(2), (C)(2)-(3).

Factual Background

1. *The accident*. The uncontested evidence demonstrates that Pangburn, who had a blood-alcohol level almost three times the legal limit at the time of his death (R762 (autopsy report)), sat down in the middle of a railroad track owned by CSXT in the early morning of July 31, 2008, and waited for a train to hit him. R768 (autopsy report); R594-595 (Stock deposition).[1] Pangburn "had been picked up by the paramedics earlier that week and placed on a 72 hour hold for suicide watch" after telling the paramedics "that he had wanted to kill himself in front of the train." R688 (crime-scene report); *see also* R628 (offense report) (similar). The crime-scene report also indicated that Pangburn "ha[d] a history of being drunk and disorderly." R688; *see also* R564 (Nydam deposition) (similar).

The evidence suggests that Pangburn was struck at around 5:30 in the morning, when it was still dark out. R530 (Vaughn deposition). Defendant Dan Vaughn—the conductor assigned to the train that "most likely struck Mr. Pangburn" (R631 (offense report))—testified that he did not see Pangburn on the tracks.

[1] Because the evidence suggests that Pangburn had passed out on the rails, common sense suggests he was lying down, and not sitting. But because this appeal arises from a grant of summary judgment, we assume (without conceding) that Pangburn was sitting. *See Cole Taylor Bank v. Shannon*, 772 So. 2d 546, 550 (Fla. 1st DCA 2000).

R530, 533. Vaughn said that if he had seen Pangburn or otherwise been "confronted with an emergency," he would not "have [had] any hesitation" "at all" to sound the horn or engage the emergency brakes. R534; *see also* R538, 543 (similar). He further testified that it is not unusual for objects to get hit by trains without the conductor's knowledge because "[t]here's multiple things that could . . . keep you from looking or finding, seeing things" on the tracks, including darkness, weather conditions, and distractions like automobile headlights. R533 (Vaughn deposition). Vaughn also explained that train crews are not always looking forward because they have "many, many duties," including communicating over the radio, reviewing "slow orders," and looking "back at the train to make sure that there's no smoke sparks, anything dragging." R532. Indeed, Vaughn did not become aware that Pangburn had been struck until several hours after the accident, when a CSXT official left him a voice message at his home phone number informing him of the accident. R529.

2. ***The footpath*****.** In the vicinity of where Pangburn was hit, pedestrians have created a footpath that crosses the train tracks perpendicularly, connecting two roads on either side of the tracks: Dunmore Way and Congress Avenue. R906 (Lee deposition); *see also* R463 (map attached to Poole affidavit). The evidence suggests that, around where the pathway begins on either side of the tracks, "the brush is beat down," and across the tracks themselves, "extra ballast is piled up." R907 (Lee deposition); *see also* R467-469 (photographs attached to Kann

affidavit). There is no evidence, however, that the footpath was sanctioned by CSXT. In fact, the undisputed evidence indicates the opposite: a CSXT official affirmed that CSXT did not design, construct, or maintain a pedestrian crossing at that location. R256 (Lee affidavit).

Pangburn's body was discovered by a passerby on the CSXT tracks several hours after Pangburn was hit. R627 (offense report); R768-769 (autopsy report). According to the investigating officer—Lieutenant John Stock—Pangburn was discovered "quite a ways off" of Dunmore Street (R588 (Stock deposition)), to the west of the footpath that crosses the tracks in that area (R460 (Poole affidavit)). Pangburn was not on the footpath itself when he was struck; instead, he was "within the gage of the railroad tracks," in a nearby area "not . . . open to the public." R782 (Cochran affidavit); *see also* R628 (offense report) (Pangburn was discovered in an "area" that is "accessible via [the] path"). Pangburn was not invited onto CSXT's property where he was struck. R782.

Procedural Background

Pangburn's mother, plaintiff Donna Poole, filed suit against CSXT, Vaughn, and engineer Timothy Toman,[2] alleging that the defendants (whom we refer to collectively as "CSXT") (1) negligently operated the train that struck Pangburn because they failed to keep a proper lookout, apply the brakes and blow the horn, or otherwise avoid hitting Pangburn (R446) (Count I); (2) negligently designed,

[2] Poole misspells Toman's name as "Towan." *E.g.*, Initial Br. ii.

constructed, and maintained the footpath near where Pangburn was killed (R447-448) (Count II); and (3) engaged in intentional misconduct and gross negligence because they failed to keep a proper lookout, apply the brakes and blow the horn, or otherwise avoid hitting Pangburn (R449-450) (Count III).

Following discovery, Poole moved for summary judgment as to the constitutionality of Sections 768.075 and 768.036, and CSXT moved for summary judgment on Counts I and II and for dismissal of Count III.

The trial court denied Pangburn's motion and granted CSXT's. Although the court initially dismissed Count III concerning intentional misconduct and gross negligence (R474), it granted summary judgment to CSXT on its Section 768.075 defense, which subsumed the intentional-misconduct and gross-negligence issues. *See* R983-984. The court held more specifically, with respect to "facts [that] are not in dispute," that (1) Pangburn was a trespasser and not an invitee; (2) Pangburn "cannot meet the burden of pleading/proof necessary" to establish "gross negligence/intentional misconduct"; (3) for purposes of Section 768.075, it is immaterial whether the alleged negligence concerns so-called "active negligence" on the part of the defendant or the condition of the land; and (4) Section 768.075 is constitutional. R983-984.

SUMMARY OF ARGUMENT

The trial court properly granted summary judgment to CSXT under Section 768.075, because Pangburn was trespassing and CSXT was not engaged in intentional misconduct or gross negligence.

I.A. It is undisputed that Pangburn was trespassing at the time and location of his death. Poole points to evidence that there was a footpath crossing the tracks in the vicinity of the accident, but that is beside the point. It is uncontested that, even supposing Pangburn accessed the area where he was killed using the footpath, he ***left*** the footpath and walked westward, before sitting down between the rails. Because Pangburn was struck ***outside*** of the footpath, it makes no difference whether its presence near the accident implicitly invited passers-by to cross the tracks ***within*** the footpath. Either way, Pangburn was trespassing.

The evidence also is undisputed that Pangburn was undiscovered. The train's conductor, Dan Vaughn, testified that it is not unusual to miss and collide with an object in the tracks when it is dark out; and in this case, specifically, he testified that he did not see Pangburn either before or after Pangburn was struck. In response, Poole invites the Court to speculate (impermissibly) that Vaughn is a liar. But she points to no evidence contradicting his testimony or impeaching his credibility. Any reasonable jury would have to find that Pangburn was undiscovered. And because there is no evidence of intentional misconduct here, that alone is sufficient to affirm the grant of summary judgment.

Even supposing that Pangburn were a discovered trespasser to whom CSXT owed a duty to refrain from gross negligence, summary judgment was appropriate, for two reasons. First, Poole argues only that she adequately ***alleged*** gross negligence. But the trial court granted summary judgment on the gross-negligence issue as part of CSXT's defense under Section 768.075. Thus, the question at this stage is whether Poole adduced sufficient ***evidence*** from which a jury could find gross negligence. Poole makes no argument on that score and therefore has waived the issue. Second, and in any event, there is no evidence from which a jury could find gross negligence. Poole's theory of the case is only that Toman and Vaughn failed to keep a proper lookout, which is a textbook example of simple negligence. There is no proof of a conscious disregard of a clear and present danger.

Worse, Pangburn was engaged in the third-degree felony of obstructing active railroad tracks at the time that he was killed. Poole asserts that walking along or crossing train tracks is not a violation of the felony-obstruction law, but she does not disagree that ***sitting down*** between the rails ***is*** a violation. That is just what Pangburn was doing. CSXT therefore owed him no duty of care at all because he was committing a felony at the time of the accident. That is another independent basis for affirming the judgment below.

I.B. In an effort to dodge these arguments, Poole argues that the reduced duties of care that Section 768.075 imposes on landowners apply only to conditions of the premises, and not to active conduct. The plain text of the statute

demonstrates otherwise. The legislature's use of the modifier "any" in front of the words "civil damages" and "trespasser" indicates that it meant the statute to cover ***all*** civil damages to ***all*** trespassers, regardless of cause. The statute also expressly requires landowners to refrain from "intentional misconduct," which would not be necessary if injuries caused by the defendant's active conduct, as opposed to merely conditions of the premises, were outside the scope of Section 768.075.[3]

Poole's resort to pre-enactment common law provides no basis for concluding differently. Where, as here, a statute's unambiguous text cannot coexist with preexisting common-law rules, it is settled that the statute displaces the common law. Poole ignores this hornbook rule.

II. Finally, Poole argues that Sections 768.36 and 768.075 are unconstitutional. Those arguments are unavailing. As an initial matter, because CSXT did not base its summary-judgment motion on Section 768.36, and the trial court did not rely on that provision in granting summary judgment, Poole's attack on that provision is a red herring. As for Section 768.075, the Florida Supreme Court repeatedly has held that merely changing the degree of negligence necessary for particular plaintiffs to maintain tort actions against particular defendants does not violate the Florida Constitution's access-to-courts provision. That is all we have

[3] We use "active conduct" and "active negligent conduct" to refer to conduct that is distinct from conduct (or omissions of conduct) relating to the condition of the premises.

here. And Poole's due-process and equal-protection challenges are each subject to rational-basis review, which Section 768.075 readily satisfies.

STANDARD OF REVIEW

"[A] trial court's ruling on [a] summary judgment motion [is reviewed] de novo." *Ramsey v. Home Depot U.S.A., Inc.*, 124 So. 3d 415, 416 (Fla. 1st DCA 2013). The trial court's "interpretation of section [768.075]" and its "determination of the statute's constitutionality, are pure questions of law, [likewise] subject to de novo review." *D.M.T. v. T.M.H.*, 129 So. 3d 320, 332 (Fla. 2013).

ARGUMENT

I. SECTION 768.075 BARS RECOVERY HERE

A. CSXT is not liable for Pangburn's death under Section 768.075.

Section 768.075 provides that "[a] person or organization owning or controlling an interest in real property . . . is not liable for ***any*** civil damages for the death of or injury or damage to ***any*** discovered or undiscovered trespasser," except that a landowner is liable for "intentional misconduct" that proximately injures an undiscovered trespasser and for "gross negligence or intentional misconduct" that is the proximate cause of injury to a discovered trespasser. Fla. Stat. § 768.075(2), (3)(b) (emphasis added).

In granting summary judgment to CSXT based on Section 768.075, the trial court straightforwardly determined that Pangburn was a trespasser and that Poole

could not prove that CSXT engaged in gross negligence or intentional misconduct. Both holdings are correct and should be affirmed.

1. Pangburn was a trespasser, not an invitee.

We begin with the question whether Pangburn was a trespasser on CSXT's land within the meaning of Section 768.075. In order for a jury to find that Pangburn was anything ***other*** than a trespasser, it would have to conclude that Pangburn "ha[d] an objectively reasonable belief that he [was] invited or . . . otherwise welcome on that portion of the real property where [his] injury occur[ed]." Fla. Stat. § 768.075(3)(a)(1). There is not an iota of evidence to support a finding in Poole's favor on that issue.

To begin with, the evidence is undisputed that Pangburn was not expressly invited onto CSXT's land. Roadmaster Stephen Cochran affirmed that "CSXT never invited or otherwise welcomed Dennis Allen Pangburn onto CSXT's property on July 31, 2008." R782 (Cochran affidavit). And there is no suggestion in the evidence that Pangburn was a CSXT employee, or that he was accompanied by a CSXT employee, at the time he was killed.

There also is no evidence that Pangburn was implicitly invited onto that portion of CSXT's property where his injury occurred. Poole disagrees, noting that "there was record evidence that a pathway" was "present in the area where Mr. Pangburn was found," and "the pathway was in continuous and regular use by pedestrians." Initial Br. 21-22. This, she argues, is proof that Pangburn was not

trespassing because "there is no unlawful trespass when peaceable entry is made, without objection, under common custom and usage." Initial Br. 22.

That misses the point. Assuming for the sake of argument that a jury could find that the existence of the unsanctioned footpath implicitly invited passers-by to cross the tracks between Dunmore Way and Congress Avenue, that would have authorized Pangburn to enter the footpath ***to cross the tracks***, and no more; it would not have authorized him to ***leave*** the path and walk westward ***along*** the tracks—much less to sit down in between the rails once he came to a stop. As one court has put it, even assuming that Pangburn's "status was not that of a trespasser while traveling the well beaten pathway, . . . after he left the pathway . . . he exceeded the tacit permission of which he was availing himself" and became a trespasser. *James v. Thompson*, 35 So. 2d 146, 148 (La. Ct. App. 1948); *accord, e.g.*, *Sandoval v. Ne. Ill. Reg'l Commuter R.R.*, 21 F. App'x 492, 495 (7th Cir. 2001) (Illinois trespassing statute).

To borrow Poole's own analogy (*see* Initial Br. 21), although a "front path" leading to a "knocker on the front door" may serve as "an invitation" to all passing by and "permit[a] visitor to approach the home" and "knock promptly [and] wait briefly to be received" (*Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013)), it assuredly is not an invitation for passers-by to enter the home and sit on the home-owners' couch, idly waiting for the homeowners to return from their absence. Poole admits all this, readily acknowledging that an invitee on private land "lose[s]

his status as such by going to a part of the [p]remises [t]hat is beyond the scope of his or her invitation." Initial Br. 21 (citing *Dougherty v. Hernando Cnty.*, 419 So. 2d 679, 681 (Fla. 5th DCA 1982)).

That principle is dispositive here. No matter how the evidence is construed, there is no dispute that Pangburn was off the footpath, and therefore trespassing, when he was hit by the train. David Poole affirmed that Pangburn was struck some distance to the west of path, not in it. R460. And Lieutenant Stock's offense report observes that Pangburn was discovered, not in the footpath itself, but in an "area" that is "accessible via a path through the [shrubs] at the end of Dunmore Way." R628. In fact, as Lieutenant Stock later testified, Pangburn was discovered on the tracks "quite a ways off" of Dunmore Street. R588.

Poole once again admits all this: the path where "members of the public have [customarily] entered onto Defendant's tracks" was merely "***in the vicinity*** where Mr. Pangburn was struck." Initial Br. 23 (emphasis added); *see also* Initial Br. 3 (similar). As she puts it elsewhere, Pangburn was struck "***near*** a heavily used pedestrian pathway." Initial Br. 7 (emphasis added). There accordingly is no dispute that Pangburn was not within the pathway when he was struck by the train; he left the footpath and walked westward before sitting down in the tracks. Because Pangburn went to a part of CSXT's land that was beyond the scope of any possible implied invitation, where no person reasonably could have believed he

was welcome to be, he was a trespasser for purposes of Section 768.075. There is no evidence in the record that would permit a rational jury to find otherwise.[4]

2. There is no evidence from which a reasonable jury could find that Pangburn was "discovered," and CSXT did not commit intentional misconduct.

Because it is undisputed that Pangburn was trespassing at the time and place of the accident, Section 768.075(2) applies here. That means that CSXT owed Pangburn a duty of care to refrain from intentional misconduct (if Pangburn was an ***undiscovered*** trespasser) or gross negligence (if Pangburn was a ***discovered*** trespasser). On this issue, Section 768.075 sets a clear standard: A trespasser is "discovered" when his "actual physical presence was detected, within 24 hours preceding the accident" by the landowner. Fla. Stat. § 768.075(3)(a)(2). He is "undiscovered" when his "actual physical presence was ***not*** detected, within 24 hours preceding the accident" by the landowner. Fla. Stat. § 768.075(3)(a)(3) (emphasis added). Here, there is no evidence from which a reasonable jury could find that Pangburn was a "discovered" trespasser, and no evidence from which a reasonable jury could find that CSXT committed intentional misconduct. But even if Pangburn had been discovered, there is no evidence from which a reasonable jury could find that CSXT was grossly negligent, either.

[4] Poole's complaint alleges that the footpath was negligently designed, constructed, and maintained (R446), but she has since abandoned that theory of liability. It is easy to see why, since nothing about the design or condition of the footpath had anything to do with Pangburn's death. To the extent the footpath is at all relevant here, it bears exclusively on the trespassing question.

a. No reasonable jury could find from the evidence in this record that Pangburn was a "discovered" trespasser. That alone is enough to affirm the summary judgment, because Poole does not contend that CSXT is guilty of intentionally causing Pangburn's death.

Vaughn testified in simple terms that he did not see Pangburn sitting between the rails. R530, 533.[5] And Cochran affirmed that CSXT had not otherwise detected Pangburn's presence any time within 24 hours before the accident. R782. Both those accounts are consistent with common experience, which suggests that if Toman or Vaughn had detected Pangburn between the rails in front of them, they would have done whatever they could have to avoid the accident, including braking and blowing the horn. That is just how Vaughn testified: If he had seen Pangburn, he would have applied the emergency brake "even [if he] knew he couldn't stop" in time to avoid hitting him. R537.

Poole nevertheless asserts (without pointing to a single article of evidence) that it "certainly" would be a "reasonable inference[]" to conclude that Pangburn was "clearly visible to Defendants" and that Vaughn simply "gave false testimony." Initial Br. 31. That is flat wrong. There is not a shred of evidence establishing directly or by inference that Pangburn was "clearly visible" to Toman or Vaughn. For his part, Vaughn explained that it is not unusual for train conductors

[5] Poole also deposed Toman but tellingly did not order a transcript of Toman's testimony, which was not put before the trial court.

to miss objects in the tracks because "[t]here's multiple things that could . . . keep you from looking or finding, seeing things," including darkness, weather conditions, and distractions like automobile headlights. R533. And the evidence here is that it was dark when Pangburn was hit. R530.

Vaughn also explained that a train "conductor has many, many duties," including talking with the engineer and dispatcher over the radio, reviewing "slow orders," and looking "back at the train to make sure that there's no smoke sparks, anything dragging." R532. The upshot is that a reasonable conductor is not always looking forward. And even when a conductor ***is*** looking forward, there is no guarantee that he would see a person passed out between the rails ***a half-mile ahead***, in time to stop the train and avoid the accident. *See* R533 (Vaughn's testimony that it would have taken 2,000 to 3,000 feet to stop the train).

A jury would not have the slightest basis for disregarding Vaughn's testimony as unbelievable. Vaughn's credibility went entirely unimpeached, and his testimony was consistent with all of the other evidence in the record. It is fundamental that a plaintiff "cannot defeat summary judgment" by merely asserting that "a jury might disbelieve [a witness]'s testimony" while "fail[ing] to point to any affirmative evidence" actually contradicting the witness's testimony. *Engstrom v. John Nuveen & Co.*, 668 F. Supp. 953, 964 (E.D. Pa. 1987) (emphasis omitted). Poole, for her part, may feel comfortable speculating that an unimpeached witness is a liar—but as for a jury, it "must rest [a] verdict on considerations of real

substance," and not "on conjecture, fancy, caprice, or speculation." *Cudahy Packing Co. v. Ellis*, 140 So. 918, 919 (Fla. 1932); *see also, e.g.*, *Reaves v. Armstrong World Indus., Inc.*, 569 So. 2d 1307, 1309 (Fla. 4th DCA 1990) (per curiam) (a jury may not "speculate[] upon matters outside the evidence"). Given the evidence in the record, no reasonable jury could have found that Toman or Vaughn detected Pangburn on the tracks before the accident.

b. Because Pangburn was undiscovered, the only duty that CSXT owed was a duty to avoid intentional misconduct. *See* Fla. Stat. 768.075(3)(b). But Poole does not argue that the evidence was sufficient to establish intentional misconduct. That is because it is not.

The intentional-misconduct standard sets a high bar; it requires more than carelessness or recklessness. Instead, a defendant commits intentional misconduct when he has "actual knowledge of the wrongfulness of the conduct" and understands that there is "a high probability that injury or damage" will result, and "despite that knowledge," nevertheless "intentionally pursue[s] that course of conduct." *In re Standard Jury Instructions In Civil Cases*, 35 So. 3d 666, 796 (Fla. 2010) (per curiam) (instruction 503.2(b)(1)). Applied to this case, the evidence would have to show that Toman and Vaughn actually saw Pangburn between the rails and, despite their knowledge that the train would hit and probably kill Pangburn, deliberately proceeded forward, intending to bring about that outcome. As we have just explained, however, the evidence uniformly indicates that Toman

and Vaughn did ***not*** see Pangburn between the rails. There is therefore no way a reasonable jury could find that they committed intentional misconduct.

Poole does not really argue otherwise. True, she asserts baldly in the summary of her argument that Toman and Vaughn "made no effort to stop their train or sound a warning before knowingly running over Mr. Pangburn and leaving him on the tracks to die." Initial Br. 6-7. But she does not point to any evidence supporting that implausible and misanthropic assertion; nor does she develop or defend it in the argument section of her brief. On that basis alone, the grant of summary judgment should be affirmed.

3. Even if a jury could find that Pangburn was "discovered," CSXT was not grossly negligent.

Even supposing that there were evidence from which a reasonable jury could conclude that Toman and Vaughn saw Pangburn before the train hit him, summary judgment was appropriate because there is no evidence of gross negligence, which is the standard of care required with respect to discovered trespassers under Section 768.075(3)(a)(2).

a. We note at the outset that Poole has waived any argument that a reasonable jury could find CSXT liable for gross negligence. That is because she limits her argument concerning gross negligence to the dismissal of Count III, and not to the trial court's grant of summary judgment on the Section 768.075 issue. *See* Initial Br. 11-15. She thus merely describes the allegations in the complaint

and argues that she "sufficiently ***allege[d]*** gross negligence" and that "count III should not have been ***dismissed***." Initial Br. 12-13, 15 (emphasis added).

The problem is that—although the trial court did dismiss Count III of the complaint (R474)—it unambiguously disposed of the gross-negligence issue on summary judgment as well, holding that, in light of the "facts [that] are not in dispute" on the record, Poole "cannot meet the burden of pleading/proof necessary" to establish "gross negligence." R983-984. That the trial court reached the merits of Poole's gross-negligence theory in its summary judgment order makes sense, because gross negligence was bound up with CSXT's affirmative defense that Section 768.075 bars recovery here. Because CSXT invoked Section 768.075, in other words, the issue of gross negligence remained live and was addressed by the parties throughout discovery and in their summary-judgment briefing, even after the trial court dismissed Count III.

The trial court's prior dismissal of Count III is therefore immaterial. The real question on appeal is not whether gross negligence was sufficiently ***alleged***, but whether a reasonable jury, construing the record evidence in Poole's favor, could ***find*** CSXT liable for gross negligence. That distinction matters, because Poole conspicuously fails to present any argument addressing that second question. The issue whether a reasonable jury could find CSXT liable for gross negligence is therefore "not before [this Court] on appeal" because "an argument not raised in an initial brief is waived." *Tillery v. Fla. Dep't of Juvenile Justice*, 104 So. 3d 1253,

1255-1256 (Fla. 1st DCA 2013) (citing *Goings v. State*, 76 So. 3d 975, 980 (Fla. 1st DCA 2011)).

b. It is unsurprising that Poole did not argue that a reasonable jury could find that CSXT committed gross negligence on this record, because none could. Even if Poole had not waived the issue, the grant of summary judgment still would have to be affirmed.

While it is true that "the line between simple and gross negligence is often uncertain and indistinct," two principles are clear. *Villalta v. Cornn Int'l, Inc.*, 109 So. 3d 278, 280 (Fla. 1st DCA 2013). *First*, gross negligence requires "clear and present danger of serious harm" known to the defendant, coupled with a "conscious disregard of that danger." *Id*.; *accord In re Standard Jury Instructions In Civil Cases*, 35 So. 3d at 798 (conduct "so reckless or wanting in care that it constitute[s] a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct"). That means, *second*, that gross negligence requires "more than ordinary inadvertence or inattention." *Restatement (Second) of Torts* § 282 (1965) (citing *Thomas v. Rijos*, 780 F. Supp. 2d 376, 385 (D.V.I. 2010)). In the context of car accidents, for example, mere "failure . . . to keep a proper lookout," without more, constitutes ***simple*** "negligence," falling short of "grossly careless disregard of safety and welfare of the public." *Peel v. State*, 291 So. 2d 226, 228 (Fla. 1st DCA 1974) (case involving criminal culpable negligence).

Under these standards, no reasonable jury could find that CSXT was grossly negligent here. Poole's primary theory of the case, in her own words, is that Toman and Vaughn "drove their train blind," "without looking." Initial Br. 6; *see also* Initial Br. 12, 15, 25, 31. As both *Peel* and the Restatement demonstrate, that is a textbook allegation of simple negligence.

To be sure, Poole also alleges that Toman and Vaughn were operating "their train ***over a known pedestrian crossing*** without looking down the tracks." Initial Br. 12 (emphasis added). But the presence of the footpath would make a difference only if there were evidence ***both*** that driving past the pedestrian crossing without keeping a lookout would have created a "clear and present danger of serious harm" ***and*** that Toman and Vaughn consciously disregarded that danger. Neither of those conditions is supported by the evidence.

Evidence of "mere danger" or a "possibility of injury" is not enough to establish a clear and present danger for purposes of a gross-negligence claim; instead, a plaintiff must demonstrate that the defendant's conduct was so reckless that it "***'would probably and most likely' result in a serious accident***." *Merryman v. Mattheus*, 529 So. 2d 727, 729 (Fla. 2d DCA 1988) (emphasis supplied by the *Merryman* Court) (quoting *Glaab v. Caudill*, 236 So. 2d 180, 184 (Fla. 2d DCA 1970), and citing *Sullivan v. Streeter*, 485 So. 2d 893, 895 (Fla. 4th DCA 1986), *approved*, 509 So. 2d 268 (Fla. 1987)). The sort of evidence that might satisfy that standard in this case would have been testimony establishing that the footpath was

used so incessantly, even in the dawn hours, that a train coming through the area between 5:00 and 5:30 in the morning ***would probably and most likely*** hit a pedestrian in the crossing if the crew were not looking.

No reasonable jury could draw that inference on the record here. Vaughn, who frequently conducted trains past the site of the accident, testified that he "never saw anybody crossing . . . in that area." R542-543. Even Officer Nydam, who ***had*** seen people using the path "regularly" (but not incessantly) during the day, testified that it is ***not*** "well-trafficked" in the early morning, when the accident occurred. R565-566. The affidavit of long-retired train master David Beaty does not change matters. *See* R470-472.[6] Beaty's stale recollection concerning "regular[]" use of the footpath in the "late 80s/early 90s" is irrelevant to the question of its use at the time of Pangburn's death decades later, in 2008. *See Thigpen v. United Parcel Servs., Inc.*, 990 So. 2d 639, 646 (Fla. 4th DCA 2008) (evidence of "a prior dangerous condition" is "not relevant" if it is "too remote in time") (citing *Sims v. Brown*, 574 So. 2d 131, 133-134 (Fla. 1991)). Thus proof that Toman and Vaughn failed to keep a proper lookout would have established, at most, the creation of a "mere danger" and a "possibility of injury," which is the essence of simple negligence. *Merryman*, 529 So. 2d at 729.

[6] Poole misspells Beaty's name as "Beatty." Initial Br. 3. Beaty corrected the spelling of his name in his affidavit, clarifying that it is spelled with a single "t."

Beyond that, the evidence shows that Toman and Vaughn had no knowledge of the footpath. As we have observed, Vaughn testified that he had not noticed "a place in that area with ballast piled up for pedestrians to cross" and "never saw anybody crossing . . . in that area." R542-543. Poole points to no evidence contradicting that testimony. In short, there is no evidence of a conscious disregard of a clear and present danger sufficient for a jury to find gross negligence. Neither *Courtney v. Florida Transformer, Inc.*, 549 So. 2d 1061 (Fla. 1st DCA 1989), nor *Foy v. Fleming*, 168 So. 2d 177 (Fla. 1st DCA 1964) (cited at Initial Br. 14) supports a contrary conclusion. Both cases involved conscious violations of safety practices and laws under circumstances that suggested a conscious and deliberate disregard of obvious and imminent danger. There was nothing like that in this case.

No matter whether Pangburn was undiscovered or discovered, there is no evidence that CSXT was either intentionally malfeasant or grossly negligent. The grant of summary judgment therefore should be affirmed.

4. Pangburn was engaged in the third-degree felony of obstructing a railroad track.

There is yet another reason to affirm the trial court's grant of summary judgment: Section 768.075 eliminates any duty of care that a landowner owes to "a person who is attempting to commit a felony or who is engaged in the commission of a felony on the property," regardless of the person's status as a trespasser or invitee. Fla. Stat. § 768.075(4). Even if there were evidence that CSXT had been

intentionally malfeasant or grossly negligent, Pangburn was committing the felony of obstructing the railroad tracks in violation of Florida Statutes § 860.09. CSXT therefore owed Pangburn no duty of care ***at all*** under Section 768.075(4).

Section 860.09 provides that "[a]ny person, other than an employee or authorized agent of a railroad company acting within the line of duty, who knowingly or willfully . . . obstructs any railroad . . . track . . . used in railroad operations is guilty of a felony of the third degree." Fla. Stat. § 860.09. In ordinary usage, the verb "obstruct" means "to block" or "place an obstacle in." *Webster's Third New International Dictionary* 1559 (1986). There is no serious dispute that, when a person trespasses on railroad property and sits down in between the rails of a train track, that person is blocking, and is an obstacle to, the passage of trains on the track, in violation of the statute. That is just what Pangburn did. And because Section 860.09 is not a specific-intent statute, it makes no difference whether "Mr. Pangburn intended to obstruct [the] train." Initial Br. 20.

Poole does not directly disagree. In her view, the legislature could not have meant to "prohibit pedestrians from ***crossing or walking upon*** railroad tracks," and a contrary reading of Section 860.09 would be "unreasonable, harsh, [and] absurd." Initial Br. 20 (emphasis added). We do not concede that such a reading of the statute would be absurd, but that is neither here nor there. This case is not about Pangburn merely crossing or walking on the tracks. It is about his decision to sit down in the middle of the tracks and wait for a train to come, a course of conduct

that not even Poole denies is an obstruction of the tracks. On this basis, too, the order granting summary judgment to CSXT should be affirmed.[7]

B. Section 768.075 applies to "any civil damages," whether caused by the defendant's active negligent conduct or by an unreasonable condition of the premises.

In an effort to dodge summary judgment under Section 768.075, Poole argues that the statute does not apply in this case because "an individual's status on the property of another is only relevant when the individual brings a claim arising out of a condition on the premises" and not out of "active, personal negligence," such as the negligent operation of a train. Initial Br. 15-16. The statute's plain text shows otherwise.

1. "[L]egislative intent is determined primarily from the statute's text." *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007) (citing *Maggio v. Fla. Dep't of Labor & Emp. Sec*., 899 So. 2d 1074, 1076-1077 (Fla. 2005)). "As with any case of statutory construction," this Court therefore must "begin with the 'actual language used in the statute.'" *Id*. (quoting *Borden v. East–European Ins. Co*., 921 So. 2d 587, 595 (Fla. 2006)). And if "the statute is clear and unambiguous," the Court must "not look behind the statute's plain language [by] resort[ing]

[7] Because Pangburn was under the influence of alcohol at the time of his death, CSXT's duty of care was also limited by Section 768.075(1), relating to intoxicated trespassers. But because Section 768.075(2) applies "regardless of whether the trespasser was intoxicated or otherwise impaired," nothing in this case turns on Pangburn's intoxication.

to [any other] rules of statutory construction to ascertain intent." *Borden*, 921 So. 2d at 595 (quoting *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005)).

Here, the language of Section 768.075 is plain and unambiguous. Insofar as relevant here, it provides that "[a] person or organization owning or controlling an interest in real property . . . is not liable for ***any*** civil damages for the death of or injury or damage to ***any*** discovered or undiscovered trespasser," except that a land-owner is liable for "intentional misconduct" that is the proximate cause of injury to an undiscovered trespasser and for "gross negligence or intentional misconduct" that is the proximate cause of injury to a discovered trespasser. Fla. Stat. § 768.075(2), (3)(b) (emphasis added). For two separate reasons, that language forecloses Poole's effort to superimpose upon the statute a distinction between injuries caused by conduct and injuries caused by the condition of the premises.

First, and most obviously, "the adjective 'any' is not ambiguous" and means "indiscriminately of whatever kind." *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999); *see also Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008) (the word "'any' . . . is most naturally read to mean . . . of whatever kind"); *Perry v. State*, 174 So. 2d 55, 58 (Fla. 1st DCA 1965) ("the adjective 'any' generally mean[s] 'of whatever kind'). Put more simply, "any means ***all***." *Clover*, 176 F.3d at 1353 (emphasis added). In using the word "any," the legislature thus unambiguously intended for Section 768.075 to cover ***all*** "civil damages" incurred by ***all*** "discovered or undiscovered trespasser[s]" as a result of simple negligence,

without qualification for whether the damage was caused by negligent conduct or an unreasonably dangerous condition of the premises; "there is no indication that [it] intended" the application of Section 768.075 "to turn on the type of [negligence] being [alleged]." *Ali*, 552 U.S. at 220-221.

Poole notes that the legislature used somewhat different language in Section 768.36(a), which provides that a plaintiff may not recover "in any civil action" if the plaintiff was intoxicated at the time of his or her injury and was more than 50% at fault as a result of the intoxication. *See* Initial Br. 18-19. That is a puzzling observation. The role of the courts is to "interpret legislative intent from the statute ***as written***," and not to imagine "what the legislature ***might*** have said." *State v. Lukas*, 62 A.3d 883, 695 (N.H. 2013) (second emphasis added). The legislature's use of slightly different language in Section 768.36(a) does not suggest that it meant in Section 768.075 anything other that what ***that*** section's unambiguous language indicates. That the legislature could have put it differently is beside the point; "'there is more than one way' for the legislature 'to skin the cat.'" *Id*. at 696 (quoting *Knight v. Comm'r*, 552 U.S. 181, 194 (2008)).

Second, the statute provides that landowners are liable to trespassers for injuries caused by (among other things) "intentional misconduct." If Poole were right that Section 768.075 does not apply to civil damages caused by active conduct of ***any*** kind, these express exceptions for injuries caused by ***intentional*** misconduct would be superfluous. Because "[s]tatutory language is not to be

assumed superfluous," and "a statute must be construed so as to give meaning to all words and phrases contained within that statute" (*Terrinoni v. Westward Ho!*, 418 So. 2d 1143, 1146 (Fla. 1st DCA 1982)), the legislature's express qualification that landowners are liable for injuries caused by intentional mis***conduct*** plainly means that they are not liable to trespassers for injuries caused by mere negligent mis***conduct***.

The Third District reached precisely that conclusion in *Ryan v. National Marine Manufacturers Association*, 103 So. 3d 1001 (Fla. 3d DCA 2012). The trespasser in that case had passed out drunk under a truck and was killed when the truck's driver (who "was not aware [that the decedent] was under the truck") ran him over. *Id*. at 1002. Like Poole here, the plaintiff in that case argued that the defendant could not invoke Section 768.075 because the injury had resulted from "active negligence . . . rather than an alleged defective or dangerous condition [of the premises]." 2012 WL 1344475, at *12; *see also id*. at *12-16. The Third District rejected that argument and affirmed the grant of summary judgment to the defendants under Section 768.075. *See* 103 So. 3d at 1003.[8]

[8] Poole argued before the trial court that footnote three of the Second District's opinion in *Byers v. Radiant Group LLC*, 966 So. 2d 506 (Fla. 2d DCA 2007), stands for the opposite proposition. But *Byers* involved an injury arising from "the condition of the property," and not "affirmative negligence," so nothing in that case turned on the distinction between the two kinds of negligence. *Id*. at 508 n.3. The *Byers* footnote is therefore nonbinding dictum. *See Adams v. Aetna Cas. & Sur. Co.*, 574 So. 2d 1142, 1153 n.10 (Fla. 1st DCA 1991).

In sum, Section 768.075's language unambiguously provides for an unqualified limitation of liability for civil damages arising from simple negligence, whether negligence relating to the defendant's active conduct or the conditions of the land. Poole's contrary interpretation cannot be reconciled with the statute's plain text and offends the cardinal rule that "courts 'are not at liberty to add words to statutes that were not placed there by the Legislature'" (*State v. J.M.*, 824 So.2d 105, 111 (Fla. 2002) (quoting *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999))).

2. Unable to show that the statute's plain language supports her argument, Poole argues that ***pre-enactment common law*** establishes "a distinction . . . between active, personal negligence on the part of a landowner and that negligence which is based upon a condition of the premises." Initial Br. 15-16 (citing *Hix v. Billen*, 284 So. 2d 209 (Fla. 1973); *Fla. East Coast Ry. v. Gonsiorowski*, 418 So. 2d 382 (Fla. 4th DCA 1982); *Seaboard Sys. R.R. v. Mells*, 528 So. 2d 934 (Fla. 1st DCA 1988)). That makes a difference, in her view, because the legislature must be presumed to "adopt[]" rather than "repeal" common-law rules when it enacts a statute. Initial Br. 16-17. As we have just demonstrated, however, Section 768.075's text is clear and unambiguous. There is thus no basis for "resort[ing] to the rules of statutory construction." *Borden*, 921 So. 2d at 595.

Setting that aside, Poole's reliance on the common-law rule announced in *Hix* is misplaced. It is well settled that a statutory rule displaces a common-law rule if "the two cannot coexist." *Thornber v. City of Fort Walton Beach*, 568 So. 2d

914, 918 (Fla. 1990). Thus, while "[s]tatutory abrogation ***by implication*** of an existing common law [rule]" is not "favored," that principle means only that a statutory rule that is "merely cumulative" of a common-law rule should not "be held to have changed the common law." *Id*. (emphasis added); *see, e.g.*, *Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 25 (Fla. 2004) ("A 'cumulative remedies' clause in a statute usually does not supersede other common law remedies.").

In contrast, when a statute ***revises*** common-law rights or remedies in a manner that is irreconcilable with the pre-enactment common law, the statute displaces the common law, and not the other way around. *Thornber*, 568 So. 2d at 918. The Florida Supreme Court applied precisely that rule in holding that the legislature's redefinition of a "dwelling" for purposes of the burglary statute was "clear and unambiguous" and that "a resort to rules of statutory construction" was therefore "unnecessary." *Perkins v. State*, 682 So. 2d 1083, 1085 (Fla. 1996) (per curiam). Observing that "the statute must be given its plain and obvious meaning," the Court upheld, without hesitation, the "legislature's prerogative" to displace "the prior common law definition of 'dwelling.'" *Id*. at 1084-1085; *see also*, *e.g.*, *Niemi v. Brown & Williamson Tobacco Corp.*, 862 So. 2d 31, 33 (Fla. 2d DCA 2003) (observing that Florida Statutes § 46.021 has "overridden the common law" on survival of claims after death), *approved sub nom. Capone v. Philip Morris USA, Inc.*, 116 So. 3d 363 (Fla. 2013).

Here—using equally unambiguous language (and by eliminating the prior version's requirement that the injury arise "by reason of the trespasser's commission of the offense of trespass")—the legislature exercised the same prerogative to displace the *Hix* rule concerning duties owed to trespassers on land.[9]

Other language in the statute confirms that the legislature intended to deviate from the common-law rule when it revised Section 768.075. Specifically, Paragraph (3)(c) provides that Section 768.075 "shall not be interpreted or construed to alter the common law ***as it pertains to the 'attractive nuisance doctrine***.'" Fla. Stat. § 768.075(3)(c) (emphasis added). That language demonstrates that the legislature (1) understood that it was drafting against the backdrop of a developed common-law scheme, (2) knew that certain elements of Section 768.075 were inconsistent with that scheme, and (3) when it wished to preserve elements of the common law scheme, it said so expressly. While the legislature expressly preserved the common-law attractive-nuisance doctrine, it notably did ***not*** preserve any distinction between damages arising from active negligent conduct and damages arising from the condition of the premises. In fact, by

[9] Poole does not cite *Perkins* or *Niemi*. Instead, she cites *City of Ormond Beach v. City of Daytona Beach*, 794 So. 2d 660, 664 (Fla. 5th DCA 2001), *ContractPoint Florida Parks, LLC v. State*, 958 So. 2d 1035, 1037 (Fla. 1st DCA 2007), and *Schwartz v. GEICO General Insurance*, 712 So. 2d 773, 775 (Fla. 4th DCA 1998). Each of those cases stands for the unrelated proposition that the legislature is "presumed to know, and to have adopted, existing judicial constructions" of a given statute when its amends that statute. *Ormond Beach*, 794 So. 2d at 664. That rule has no application here.

eliminating the prior version's requirement that the injury arise "by reason of the trespasser's commission of the offense of trespass," it accomplished the exact opposite.

There accordingly is no basis for concluding that Section 768.075 incorporates "a distinction . . . between active, personal negligence on the part of a landowner and that negligence which is based upon a condition of the premises." Initial Br. 15-16. Its plain language covers liability for ***any*** civil damages to ***any*** trespasser, without exception for civil damages arising from active negligent conduct. And because there is no evidence of gross negligence or intentional misconduct in this case, the trial court correctly granted summary judgment.

II. POOLE'S CONSTITUTIONAL ARGUMENTS ARE MERITLESS

In a final, Hail Mary effort to avoid application of Section 768.075, Poole and the Florida Justice Association argue that the statute is unconstitutional. Their constitutional challenges to Section 768.075 are wholly insubstantial, but before we explain why, two points of clarification are warranted.[10]

First, both Poole (Initial Br. 33-46) and the FJA (Amicus Br. 3-14) dedicate substantial portions of their briefs to an attack on Section 768.36, which establishes a complete affirmative defense against a "plaintiff [who] was under the influence of any alcoholic beverage or drug" and "[a]s a result of the influence of such alco-

[10] The Attorney General was served with a copy of Poole's brief pursuant to Section 86.091, but elected not to intervene in this appeal—doubtless because the statute's constitutionality cannot seriously be questioned.

holic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm." Fla. Stat. § 768.36(2). CSXT did not raise that provision in its summary judgment briefing, and the trial court did not rely on it. More to the point, because Poole cannot establish gross negligence or intentional misconduct, the degree to which Pangburn's intoxication contributed to his death makes no difference here. And even if it could in theory make a difference, it would be too early to say whether it does in fact. In short, this case presents no occasion to address the constitutionality of Section 768.36, as Poole herself admits. *See* Initial Br. 9, 33.

Second, this case does not require the Court to evaluate the constitutionality of Section 768.075(1), either. True enough, Pangburn was intoxicated when he was struck by the train. But Section 768.075(2) applies "***regardless*** of whether the trespasser was intoxicated or otherwise impaired" (emphasis added). Because no reasonable jury could find that Pangburn was anything other than a trespasser within the meaning of Section 768.075(3) at the time and location where he was struck, nothing in this case turns on whether he was under the influence of alcohol. We accordingly limit our analysis to the constitutionality of Section 768.075(2)-(3), which is all that is necessary to affirm.

A. Section 768.075 does not limit access to the courts.

Poole and the FJA argue principally that Section 768.075 violates the Florida Constitution's access-to-courts provision. According to Poole, Section 768.075 "completely eliminates" certain claims, "eliminates a right of redress,"

and "abolish[es a] cause of action." Initial Br. 30-32. The FJA similarly asserts that Section 768.075 "grant[s] a cloth of immunity" to landowners, has "eliminated" a trespassing "plaintiff's right to recovery," and has "abolish[ed]" an "established common law right." FJA Br. 4-7, 11-12. Those are mistaken characterizations of what Section 768.075 actually accomplishes.

In fact, all the statute does is "change[] the degree of negligence necessary for a [trespasser] to maintain a tort action against [a landowner]." *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973) (citing *McMillan v. Nelson*, 5 So. 2d 867 (Fla. 1942)). Whereas an ***invitee*** who is injured on another's land must prove only simple negligence to recover against the landowner, a ***trespasser*** must prove gross negligence or intentional misconduct. As the Florida Supreme Court has said repeatedly, merely "raising the degree of negligence required to successfully maintain a tort action does not limit an existing right of access." *Eller v. Shova*, 630 So. 2d 537, 542 (Fla. 1993) (citing *Kluger*, 281 So. 2d at 4, and *Iglesia v. Floran*, 394 So. 2d 994, 996 (Fla. 1981) (per curiam)).

Eller proves the point. There, the Second District had invalidated, under the access-to-courts provision, a statutory amendment that "raised the degree of negligence necessary to maintain a civil tort action against policymaking employees from gross negligence to culpable negligence." 630 So. 2d at 538. The Florida Supreme Court reversed: "Because the amendment at issue merely raises the degree of negligence required to sue a policymaking coemployee, we find that

the amendment has not abolished a right of access." *Id*. at 542. This case is on all fours with *Eller*, which both Poole and the FJA tellingly decline to cite.

B. Section 768.075 is rationally related to legitimate legislative ends.

Poole also mounts a challenge to Section 768.075 under the Due Process and Equal Protection Clauses of the federal and Florida constitutions. Her arguments on those scores are equally meritless.

"When a law challenged on substantive due process grounds does not infringe upon a fundamental right," the Court must "review the law under the rational basis test, which requires that the law bear 'a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive.'" *Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co.*, 97 So. 3d 204, 212 (Fla. 2012) (quoting *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 15 (Fla. 1974). Likewise, when "neither a suspect class nor a fundamental right is implicated . . ., [the Court] review[s an] equal protection claim under the rational basis test." *Samples v. Florida Birth-Related Neurological Injury Comp. Ass'n*, 114 So. 3d 912, 917 (Fla. 2013).

In evaluating a rational-basis challenge to a duly-enacted law, "[i]t is not [the Court's] task to determine whether the legislation achieves its intended goal in the best manner possible, but only whether the goal is legitimate and the means to achieve it are rationally related to the goal." *Samples*, 114 So. 3d at 917. And because the constitutional invalidation of a statute "place[s] the matter outside the

arena of public debate and legislative action," the Court must exercise great caution not to "transform[]" rational basis review into a reflection of "the policy preferences of the members of this Court." *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). For that reason, among others, "[a]ll statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute bears the burden of demonstrating that it is invalid." *Fla. Gaming Ctrs., Inc. v. Fla. Dep't of Bus. & Prof'l Regulation*, 71 So. 3d 226, 228 (Fla. 1st DCA 2011) (citing *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1214 (Fla. 2000) (per curiam)).

Poole does not come close to meeting her burden.

Invoking the "substantive" aspect of due process, Poole asserts—as if saying it makes it so—that Section 768.075 "is discriminatory, arbitrary and oppressive" because it "simply gives a free pass to active tortfeasors." Initial Br. 29-30. With respect to equal protection, she says—again without demonstrating—that Section 768.075 "imposes unfair and illogical burdens on" "victims of negligent conduct" and does not "relieve[] landowners of any unfair or oppressive duty to make conditions on their property safe." Initial Br. 32.

There is good reason that Poole cannot offer up more than conclusory assertions. The revised version of Section 768.075 was enacted in 1999 as part of bill comprising "comprehensive modifications to Florida's civil justice system." *See* Staff Analysis § I. Those modifications were intended to encourage "personal

responsibility" by, among other things, "reduc[ing] the ability of some trespassers to bring actions for personal injuries." *Id*. § II(C)(3)(a). The revisions to Section 768.075 were further intended to "reduce the case load of the courts by restricting certain actions" and to "reduce the costs of liability insurance and self-insurance in the private economy," in order to "attract more business investments in Florida" and "make Florida businesses more competitive, more profitable and expand employment in the state." *Id*. §§ III(A)(2), (C)(2)-(3). Those are not only legitimate, but laudable legislative goals, and Section 768.075 is self-evidently related to them. That is all that is required.

CONCLUSION

The trial court's grant of summary judgment should be affirmed.

Respectfully submitted this 30th day of May, 2014.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing was prepared in accordance with Rule 9.100(l) of the Florida Rules of Appellate Procedure.

/s/ *Eric L. Leach*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by electronic mail and third-party courier service to counsel for plaintiffs-appellant:

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on this 30th day of May, 2014.

/s/ *Eric L. Leach*