**IN THE SUPREME COURT OF FLORIDA**
CASE NO. SC01-1346
District Court of Appeal,
Third District Case No. 3D00-1718

**CARIDAD SANCHEZ**, individually,
**ILEEN SANCHEZ**, her daughter and
**GEORGE A. SANCHEZ**, her son,
Appellants/Petitioners,

vs.

**DADE COUNTY SCHOOL BOARD**,
a political subdivision of the State of Florida,
Appellee(s)/Respondent(s).

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ON APPLICATION FOR DISCRETIONARY REVIEW

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# PETITIONERS' REPLY BRIEF ON THE MERITS

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## TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . iii

OTHER AUTHORITIES . . . . . iii

ARGUMENT . . . . . 1

I. The extensive testimony on the issue of whether the Plaintiff, a teacher, and the security monitors and the resource officer were co-employees assigned primarily to unrelated works was an issue of fact not properly decided in the School Board's favor on summary judgment as a matter of law.. . . . . 1

CONCLUSION . . . . . 15

CERTIFICATE OF SERVICE . . . . . 15

CERTIFICATE OF COMPLIANCE . . . . . 16



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## TABLE OF AUTHORITIES

*Dade County School Board v. Laing*,
731 So. 2d 19 (Fla. 3d DCA 1999) . . . . . *passim*

*Lake v. Ramsay*,
566 So. 2d 845 (Fla. 4th DCA 1990) . . . . . *passim*

*Moore v. Morris*,
475 So. 2d 666 (Fla. 1985) . . . . . 2

*Thoma v. Cracker Barrel Old Country Store*,
649 So. 2d 277 (Fla. 3d DCA 1995) . . . . . 2

*Volusia County v. Aberdeen at Ormond Beach, L.P.*,
760 So. 2d 126 (Fla. 2000) . . . . . 2

## OTHER AUTHORITIES

Padovano, Florida Appellate Practice and Procedure (2d ed.) . . . . . 2



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## ARGUMENT

**Summary judgment was error here because the extensive testimony on the issue of whether the Plaintiff, a teacher, and the security monitors and the resource officer were co-employees assigned primarily to unrelated works was an issue of controverted fact not properly decided in the School Board's favor.**

Petitioner affirmatively declines to reciprocate Respondent's personal attacks. Returning to the merits, Respondent's statement of facts, short on quoted testimony and long on circular inferences, violates every rule by which motions for summary judgment are to be properly reviewed: facts should be presented in the light most favorable to the non-movant (Petitioners) along with the requisite notation of any material facts in dispute.[1] Petitioners, having scrupulously quoted the record at length,

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[1] First, review of an order granting summary judgment involves the threshold determination as to the propriety of summary judgment, and, then, review of the correctness of the decision on the merits. Padovano, Florida Appellate Practice and Procedure, at 5.4B (2d ed.). Second, the facts presented to the trial court must be viewed in the light most favorable to the nonmoving party. *See Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130-31 (Fla. 2000); *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985); *Thoma v. Cracker Barrel Old Country Store*, 649 So. 2d 277 (Fla. 3d DCA 1995) ("Contrary to the assertions made by Cracker Barrel both in its brief and at oral argument, we are required to view the evidence in a light most favorable to [the nonmovant], and, moreover, to draw all competing inferences in favor of [the nonmovant], as the nonmoving party below.").

Ms. Sanchez has always candidly admitted the testimony here is controverted, which is why she did not move for summary judgment. . .and why Respondent was not entitled to it either.



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firmly stand by their statement of the case and facts, and welcome the Court's exacting scrutiny.

Second, according to Respondent, school security personnel are engaged in the same "related works" as state-certified public school teachers because the Miami-Dade County School Board's primary responsibility is no longer education; it is security. R.B. at 47-48. Suggesting Florida's educational infrastructure is primarily security strains credulity.

Likewise, Respondent's novel argument is being raised now for the first time in Respondent's brief on the merits.[2] A party and its counsel are ethically and legally

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[2]

What Respondent argued below:

> Rather, the focus is whether the co-employees are involved in the same project, which, in the context of a school setting, is the project of educating.
>
> Clearly, school[-]security personnel provide education[-]related services at their school[,] just as the custodian in Laing[,] provided education[-]related services at his school. Thus, based on Laing, the ["]unrelated works["] exception to workers' compensation immunity does not apply here, and the decision of the trial court should be affirmed. Answer Brief at 14.
>
> Contrary to SANCHEZ's characterization of [Respondent]'s argument, the [Respondent] argues nothing more than that Laing should control the outcome of this case. . . . In fact, the undisputed evidence establishes that they are involved in the same project of providing education[-]related services. A.B. at 31-32.

What Respondent now argues:

> This is because Sanchez and the co-employees in this case worked



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obligated to the Court to honor earlier-taken positions and admissions; and that is particularly true where, as here, Caridad Sanchez has had to oppose the position which the School Board has, until now, advanced.[3] Respondent and its counsel are as bound by these rules as every other citizen and lawyer in Florida.[4] Respondent, facing

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hand-in-hand, so to speak, in providing security; R.B. at 47-48.

[3] *See Palm Beach Co. v. Palm Beach Estates*, 110 Fla. 77, 148 So. 544, 548 (Fla. 1933) ("where a party to a suit has assumed an attitude on a former appeal, and has carried the case to an appellate adjudication on a particular theory asserted by the record on that appeal, he is estopped to assume in a pleading filed in a later phase of that same case, or another appeal, any other or inconsistent position toward the same parties and subject matter."); *Campbell v. Kauffman Milling Co.*, 42 Fla. 328, 29 So. 435 (1900) (party cannot take inconsistent position on appeal); *Kaufman v. Lassiter*, 616 So. 2d 491 (Fla. 4th DCA 1993) ("we hold that appellee cannot maintain inconsistent positions in this lawsuit and that he cannot now unilaterally determine that he is not exercising his option"); *see also Action Manufacturing, Inc. v. Fairhaven Textile Corp.*, 790 F.2d 164, 165 (1st Cir. 1986); *PPX Enterprises, Inc. v. Audiofidelity, Inc.*, 746 F.2d 120, 123 (2d Cir. 1984); *Brown v. Tennessee Gas Pipeline Co.*, 623 F.2d 450, 454 (6th Cir. 1980) ("stipulation and admissions in the pleadings are generally binding on the parties and the Court"); *State Farm Mutual Automobile Ins. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968) (". . . judicial admissions are binding for the purpose of the case in which the admissions are made including appeals."); *Giannone v. United States Steel Corp.*, 238 F.2d 544, 547 (3d Cir.1956); *Hill v. FTC*, 124 F.2d 104, 106 (5th Cir. 1941); *Best Canvas Products & Supplies v. Ploof Truck Lines*, 713 F.2d 618, 621 (11th Cir. 1983); *see also generally Seven-Up Bottling Co. v. Seven-Up Co.*, 420 F. Supp. 1246, 1250-51 (E.D. Mo. 1976), *aff'd*, 561 F.2d 1275 (8th Cir.1977); *Consolidated Rail Corp. v. Providence & Worcester Co.*, 540 F. Supp. 1210, 1220 (D. Del. 1982); *Giles v. St. Paul Fire & Marine Insurance Co.*, 405 F. Supp. 719, 725 n. 2 (N.D. Ala. 1975).

[4] These same rules bind Respondent's belated suggestion–post-motion for rehearing and post-brief on jurisdiction–for the first time in



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jurisdiction now granted to review a summary judgment predicated on its earlier version of its argument below, "may not now repudiate that position and launch an entirely new appeal or cross-appeal from the subject order."[5]

In further reply, Respondent's new argument that, in addition to educational responsibilities, teachers are "primarily" entrusted with security, is belied by Respondent's own testimony, policies and procedures. This was a brutal assault by a known trespassor. The Dade County Public Schools Procedures for Promoting a Safe Learning Environment, by Dade County Principal Moran's own admission, nowhere mentioned teachers or teacher-involvement in confronting trespassors on campus. RIV-790-Moran Depo. at 73-78, 80 & Pl. Exh. "2" at 3, 21-22. Teachers were not to confront trespassers or remove them from School premises; they were to notify School Administration, Law Enforcement or a School Monitor if they saw trespassers. RVII-1346-Guerrero Depo. at 25-26, 29, RIV-790-Moran Depo. at 84, 128-29; Juan Perez Depo. at 19-20. Principal Marcos Moran admitted this:

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Respondent's brief on the merits, that Respondent did not mean what it said when it admitted the School Board was negligent. Petitioners simply cite and rely upon Respondent's statements made during the taped oral argument in this matter before the Third District Court of Appeal.

[5] *See, e.g., Rety v. Green*, 546 So.2d 410, 426 (Fla. 3d DCA), *pet. for rev. den'd*, 553 So.2d 1165, 1166 (Fla. 1989).



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> [Respondent] do[es]n't want teachers to attempt to handle a situation that may be a dangerous situation with a trespasser, no. RIV-790-Moran Depo. at 51-52.

Raul Guerrero, a teacher for twenty-four years for the School Board and at West Miami Middle School for eight years, admitted the State of Florida curriculum guidelines for teachers "contain[ed] no specific reference to the security of the school or the premises". RVII-1346-Guerrero Depo. at 17. In fact, the "safe learning environment" referenced in curriculum guidelines for teachers referred to "the classroom". RVII-1346-Guerrero Depo. at 18.[6] Teacher Guerrero agreed that:

> primary assignments as a teacher at West Miami Middle School are instructional. RVII-1346-Depo. at 15-16, 5, 9.

West Miami Middle School Principle, Marcos Moran, also admitted the teacher's primary assignment were instructional:

> ***<u>to educate and teach</u>*** the students pursuant to the curriculum. RIV-790-Moran Depo. at 57-58. [A]s a teacher you are assigned ***<u>primarily to educating and teaching</u>*** the children [with] <u>*security*</u> [only] <u>*incidental*</u> to the education and the teaching of the children. RVI-1231-Costa Depo. Depo. at 18 (emphasis added).

Then-Assistant Administrator Costa also confirmed these to be instructional:

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[6]

Q. And I believe you testified to this earlier. . .<u>*the only security or safety that the teachers would provide*</u> would be because of the necessity or a school or a school resource officer not being present?

A. In <u>*the classroom*</u>, yes. RVI-1231-Costa Depo. at 26-27 (emphasis added).



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Q. But as a teacher you are assigned primarily to educating and teaching the children?

A. Yes.

Q. And whatever "security" quote, unquote, *security you would perform or safety you would perform, would only be* ***incidental*** *to the education and the teaching of the children*?

A. *Correct*. RVI-1231-Costa Depo. at 18 (emphasis added).

Respondent's argument overlooks the above testimony. But flatly the School Board policies and procedures makes no mention of further burdening teachers with security responsibilities because teachers cannot reasonably be expected to teach and produce A+ students *inside* the classroom if they are, as Respondent urges, also "primarily" acting as their own security *outside* the classroom.

In reply to Respondent's conclusory argument that school security personnel must be "education-support employees" because they do not fall into any of the specific "education employees' defined under § 220.041 (R.B. at 17-18), that statute does not exist.[7] Second, "[t]he difference between the right word and the almost right

[7] On March 2, 2001, Ms. Sanchez filed with the Florida Third District Court of Appeal her notice of supplemental authority of §§ 22**8**.041 and 231.17, Fla. Stat. (2000), because those statutes irrefutably showed that "school security monitors" and "school security personnel" were not defined, in direct contradiction to Respondent's argument advanced to the Third District below, as somehow being employees primarily assigned to "education". *See* Appellants' Notice of Supplemental Authority, Mar. 2, 2001.



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word is the difference between lightning and a lightning bug." Mark Twain (1835-1910). It cannot be reasonably advanced that these school security personnel are "education-support employees" where, as here, they have already testified that they are *not*.

These security monitors and teachers already testified they share none of the same assignments, objectives or services. RVII-1281-Juan Perez Depo. at 30, 36. Security Monitors and Law Enforcement School Board Officers comprised School "security staff" and they:

(1) did not instruct staff,

(2) did not attend education workshops to assist teachers, and

(3) "*d[id] not assist the teachers at all with the education* ***process*** *in the classroom*". RVII-1346-Guerrero Depo. at 42-43 (emphasis added), RVI-1231-Costa Depo. at 26, 63, RIV-790-Moran Depo. at 69-71.

Security Monitor Juan Perez removed any uncertainty over this:

Q. Are you providing security so that there's no damage to the premises, the school?

A. Yes.

* * *

Q. *Are you involved in education related services*?

A. *No*.



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Q. So, it would be fair to say *your primary assignment as security monitor* is for the *protection of the students and the property*?

A. And the school.

Q. And the faculty?

A. *And the faculty*. RVII-1281-Juan Perez Depo. at 16 (emphasis added).

Officer Ramirez and Dade County School Board Police Chief Vivian Monroe, to whom Officer Ramirez reported, confirmed that Officer Ramirez was primarily assigned to security, not "education-support":

Q. Other than speaking to students on occasion, do you have any other involvement in any type of education-related services.

A. No, sir. RVII-1299-Ramirez Depo. at 10.

Police Chief Monroe confirmed Officer Ramirez's role was *not education-related*:

Q. And does Officer Ramirez have anything to do with the education of the students?

A. No. *Does he have any involvement in any type of education related services*?

* * *

*No*. RVII-1367-Monroe Depo. at 29 (emphasis added).

Police Chief Monroe confirmed that they had no involvement "in any policy making as to what type of education services students are to receive" or "in any decision-making" in that regard. RVII-1367-Monroe Depo. at 30-31. "Security staff" do not instruct staff; they do not attend education workshops to assist teachers; and they



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"*d[o] not assist the teachers at all* ***with the education process*** *in the classroom*". RVII-1346-Guerrero Depo. at 42-43 (emphasis added); RVI-1231-Costa Depo. at 26, 63, RIV-790-Moran Depo. at 69-71.

Finally, patrolling faculty parking lots and confronting trespassers were also projects primarily assigned to Security Monitors and Law Enforcement, not Teachers. RIV-790-Moran Depo. at 73-78, 80, RIV-790-Moran Depo Pl. Comp. Exh. "1", Secondary School Teacher Job Description & Basic Objectives ("This is a professional position responsible for the instruction of one or more subjects to secondary school students"), School Monitor Job Description & Basic Objectives (Under general direction from the school principal, he/she performs duties to monitor student activity in promoting and maintaining a safe learning environment"), School Resource Specialist & Basic Objectives ("This is school security work assisting school administrators in creating and maintaining a safe and secure environment. . . .Work is performed under the general supervision of the Region Captain and according to the standard methods, practices and procedures"). Security Monitor Juan Perez also confirmed that he had never seen any teachers assisting in the removal or stopping of trespassers. RVII-1281-Juan Perez Depo. at 20.

Q. [*Y]our primary assignment as a security monitor is to patrol, to make sure the kids are in classes, no vandalism, no disruptions and keep trespassers out*?



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A. That is *correct*.
Q. And it is your understanding that *the job as a teacher is to educate* the students.
A. That is *correct*. RVII-1333-Jose Perez Depo. at 14 (emphasis added).

Likewise, Officer Ramirez's primary assignment was prevention of violations of law, not education-support:

Q. . . . . *Your primary assignment, would it be fair to say, would be to prevent violations of the law from occurring* --

A. *Yes*.

Q. -- at West Miami Middle School?

A. Yes. RVII-1299-Ramirez Depo. at 12-13, 15 (emphasis added).

Officer Ramirez's School Board Resource Chief, Vivian Monroe, agreed:

Q. Your job [as Chief of the School Board resource officers] *simply is to make sure that the schools and the school property are from violations of the law*?

A. *Yes*. RVII-1367-Monroe Depo. at 48-49 (emphasis added).

Equally, the testimony of these other supposed "education-support" employees Respondent points to, further defeats Respondent's argument. Nick Hernandez, then an eleven-year School Board employee and zone mechanic at West Miami Middle School, actually agreed that "his primary assignment has nothing to do with the education of the students". RVII-1319-Hernandez Depo. at 8-11, 14. He had neither security nor education-related responsibilities. RVII-1319-Hernandez Depo. at 8-11,



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14. So it can hardly be argued on this record that these employees here were all "education-support employees".

In reply to Respondent's "slippery slope" argument–that if we give effect to the statute as worded in this case, the exception will swallow the general rule–the analysis of the employment relationship between the employer and between co-employees to ascertain respective responsibilities and control is the only fair way to both give effect to and limit the "unrelated works" exception doctrine. The employer is in the best position to know which group of employees it has specifically entrusted with that duty alleged to have been breached. And it is also fair to the employees; employees know the position responsibilities and roles for which they have been hired and promoted and what factors fall within their primary control. It is also a test capable of demonstrably predictable application by the lower courts.

In further reply, it merits belaboring that the original concept of workers' compensation was that, in the event of a workplace injury, regardless of fault, workers forfeited the right to sue their employers in exchange for a guaranteed and defined set of benefits.[8] Since then, workers' benefits in Florida have been progressively reduced

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[8] The fundamentals of workers' compensation are discussed in a speech given by John F. Burton, Jr. *See* John F. Burton, Jr., Workers' Compensation: The Fundamental Principles Revisited, in Workers' Compensation Desk Book V8-V15 (1992); *see also Broward v. Jacksonville Medical Center*, 690 So. 2d 589 (Fla. 1997) (quoting *Surace v. Danna*, 248 N.Y. 18, 161 N.E. 315, 315-16 (N.Y. 1928)



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and their exceptions to sue in negligence progressively restricted far beyond what workers originally "bargained for". Before 1979, a worker classified as permanently partially disabled received 100 percent of his medical costs and 60 percent of his pre-injury average weekly wage for the number of weeks specified, which was, thereafter, reduced to a percentage of salary.[9] *See* Petitioners' Brief on the Merits.

Respondent rewrites *Lake v. Ramsay*.[10] More correctly, in reversing summary judgment in favor of a co-employee under § 440.11(1) on the "unrelated works" exception, the Fourth District Court of Appeal considered, as a threshold matter, whether a maintenance worker and a construction supervisor working for the same employer could be assigned primarily to unrelated works and concluded that both types of work could be involved in the same construction job.[11] Because the facts were disputed, the Fourth District reversed summary judgment.[12] The same should have been done here.

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(citations omitted)).

[9] § 440.15 (1978); § 440.34(2) (1979); Staff of Fla. S. Comm. on Ins., CS for SB 188 (1979) Staff Analysis 2 (conference committee amendment May 1, 1979) (available at Fla. Dep't of State, Div. of Archives, ser. 19, carton 476, Tallahassee, Fla.).

[10] *Lake v. Ramsay*, 566 So. 2d 845 (Fla. 4th DCA 1990).

[11] *Id*. at 848.

[12] *Id*.



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Instead, the Third District applied the blanket rule of *Dade County School Board v. Laing*,[13] which conclusorily reasoned that, because the teacher and custodian were co-employees undertaking education-related services for students at school when the accident occurred, they were both part of a team that could not be engaged in "unrelated works". [14] In contrast to *Lake*, the *Laing* court said that "Rodriguez and Laing were both working on the same project, in the sense that they were co-employees providing education related services to students at Hialeah High School." So, "[b]ecause both were engaged in *activities primarily related to the provision of education* related services, the 'unrelated works' exception to the School Board's immunity under Section 440.11(1) does not apply."

Respondent's recasting of the *Laing* record is unavailing. Since it is impossible for Ms. Sanchez to argue the non-existence of a negative–of the absence of testimony in *Laing* that was present here–she respectfully urges the Court to review the *Laing* Appendix, because, in so doing, the Court will see that Jose Rodriguez, the negligent

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[13] *Dade County School Board v. Laing*, 731 So. 2d 19 (Fla. 3d DCA 1999).

[14] *Id*. at 20.



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custodian in *Laing*, was never asked about his primary assignment versus that of the injured teacher,[15] Laing App., tab 7 at 1-100, in stark contrast to this record.

The problem with *Laing* remains uncorrected: its expansive rule premised on insufficient analysis. *Laing* is the precedent driving this decision below. *Laing*'s analysis presumes, in contradistinction to *Lake*, that any employee acting in furtherance of the educational institution's purpose must be an employee assigned to the "related works" of education-related services. Yet, the mere fact of co-employees working "in furtherance of the employer's business"–even education–is a statutory precondition before even getting into the "unrelated works" exception consideration. § 440.11(1), Fla. Stat. Thus, *Laing* is built on an erroneous presumption at odds with the plain language of § 440.11(1), its legislative intent through amendment, and sound labor law principles. Respondent does a beautiful job of skirting all that.

Petitioner relies on her initial brief for all remaining points.

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[15] While Respondent dismisses this as invocation of "magical words", the area encompassing an employee's zone of responsibility is at the core of any labor law issue and plainly at the core of the "unrelated works" dispute by virtue of the language chosen by the Florida Legislature: "in furtherance of the employer's business" but "primarily assigned to unrelated works". Neither Jose Rodriguez, the negligent custodian, nor Ronald Laing, the injured teacher, was ever asked whether their responsibilities were education-related services. *Laing* App., tab 11, at 1-84.



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## CONCLUSION

**For the reasons and legal authorities set forth herein**, it is respectfully submitted that summary judgment on the "unrelated works" exception in favor of the Dade County School Board was error, was entered on a controverted record, the judgment should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

BY: _____


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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by **depositing in U.S. Mail**/faxed/hand-delivered on the 9th day of July, 2002 to: Cindy J. Mishcon, Esq., Jeffrey A. Mowers, Esq., PYSZKA, BLACKMON, LEVY & MOWERS, P.A., Miami Lakes Corporate Center, 14750 Northwest 77 Court, Suite 300, Miami Lakes, Florida 33016; Telephone: (305) 512-3737.

BY: _____
Dorothy F. Easley, Esq.

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the typeface and font size, Times Roman 14 point proportionately spaced, as set forth in Rule 9.210, Fla. R. App. P.

BY: _____
Dorothy F. Easley, Esq.



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