IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC02-1680

NAJI NEHME,
as Personal Representative of the Estate of Rhonda Nehme,

Petitioner,

v.

SMITHKLINE BEECHAM CLINICAL LABORATORIES, INC.,
WILLIAM H. SHUTZE, M.D., and
PREMIERE MEDICAL LABORATORIES, P.A. f/k/a
DRS. SHUTZE & TECHMAN, P.A. f/k/a DRS. SHUTZE & RENDON, P.A.,

Respondents.

ANSWER BRIEF
OF
PREMIERE MEDICAL LABORATORIES, P.A.

ON REVIEW OF A CERTIFIED QUESTION
FROM THE FIFTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Premiere accepts the Statement of the Case and Facts set out in the initial brief of petitioner, Naji Nehme, as Personal Representative of the Estate of Rhonda Nehme ("the Estate"). The recitation there is incomplete for the arguments being presented here, however, so that Premiere is obliged to add the following few record facts.

When Rhonda Nehme was diagnosed with cervical cancer in February 1997, she and her husband (the plaintiff in this lawsuit in his capacity as Personal Representative of her Estate) were told her cervical cancer was at stage one. (R2:434-35). Three to four weeks later, doctors advised them that the cancer was actually far more advanced, and that she was in stage three or four. (R2:435). At that point, Mr. Nehme thought there was "something wrong, doctor or somebody did something wrong," because "you cannot just go from stage one to stage three or four within three or four weeks." *Id.* When his wife's condition did not improve, he "checked with an attorney . . . here in Daytona" (*Id.*), because he thought that "[s]omething's wrong" and "[n]ot necessarily the doctor." (R2:436).

SUMMARY OF ARGUMENT

The Court has been asked to exercise its discretionary review to answer the following certified question with respect to the "concealment" exception for lawsuits not brought within the four-year statute of repose:

> Does the term concealment as used in section 95.11(4)(b), Florida Statutes, encompass negligent diagnosis by a medical provider?

Nehme v. Smithkline Beecham Clinical Labs., Inc., 822 So. 2d 519, 522 (Fla. 5th DCA 2002) (Appendix 1).

"Concealment" is not an issue in the Estate's untimely lawsuit, however, because the Estate could have brought its medical malpractice claim within the four-year period following the date of the incident giving rise to its claim. The applicable statute of repose expressly provides that the time extension exceptions, one of which is for "concealment," is not applicable if suit could have been brought within the four-year repose period. The plaintiff in this case had knowledge that Rhonda Nehme's injury might reasonably have been caused by medical malpractice within the four-year repose period. Decisions from the district courts of appeal applying the applicable statute uniformly hold that a suit which could have been brought within the repose period is barred if it was not.

Since the Estate's claim of medical malpractice does not implicate the "concealment" exception to the repose period found in section 95.11(4)(b), the Court would be issuing a purely advisory opinion if it were to accept this case for review and render a decision on the certified question. The Court should avoid offering gratuitous advice by declining to exercise its discretion to review the district court's decision.

Were the Court to accept this case for review, the certified question should be answered in the negative. The concealment exception to the four-year statute of repose does not encompass merely negligent, unintentional acts of medical

malpractice. This conclusion is compelled by the legislative history of the statute. Section 95.11(4)(b) was enacted in 1975 as part of a package of laws designed to deal with a health care crisis in Florida resulting from exorbitant medical malpractice premiums. A short statute of limitations and a short repose period were imposed to provide predictability for physicians and insurers, subject to three narrow and specific exceptions which operate to extend the repose period. A construction of the concealment exception to extend the repose period for mere negligence is incompatible with the legislature's intention that liability arising from medical malpractice be predictable.

The same conclusion is compelled by the judicial doctrine that terms used consecutively and disjunctively in a single sentence of a statute draw meaning and context from other terms in the same sentence. The term "concealment" in section 95.11(4)(b) was placed by the legislature between the words "fraud" and "intentional misrepresentation," both of which require a knowing intent to deceive or mislead as distinct from unintentional negligence. Placement of the term "concealment" between those two terms is indicative of an intent on the part of the legislature to extend the four-year statute of repose only when concealment of medical malpractice by a health care provider is intentional.

ARGUMENT

The single issue posed by the district court's certified question is one of statutory interpretation. Any question of statutory interpretation necessarily begins with an identification of the provision which is being construed. The Estate has not

fully identified the statute which applies to the alleged act of negligence that gives rise to its claim on behalf of Rhonda Nehme, however.

Throughout its initial brief (referenced here as "IB"), the Estate has referenced the applicable statute only as "§95.11(4)(b), Fla. Stat.," never mentioning the year of the volume of the Florida Statutes which contains the version of section 95.11(4)(b) which is applicable to the Estate's claim. *E.g.*, IB 14. The text of section 95.11(4)(b) which the Estate has cited, referenced and discussed is that which existed after this provision was amended in 1996, however, and not the version which existed prior to that amendment. The prior version, however, is the one that is applicable to the Estate's cause of action. Although the difference between the pre- and post-1996 versions of the statute is a mere four words, those four words are determinative of whether the Estate's cause of action can be extended by the concealment exception to the four-year bar of the repose statute.

The following chronology is provided to assist the Court in analyzing the applicability of section 95.11(4)(b) to the Estate's lawsuit.

May 23, 1994	Rhonda Nehme's pap smear was taken
June 3,1994	Premiere reported the pap smear as "normal"
July 1, 1996	Effective date of the prospective amendment to the medical malpractice statute of repose
Feb. 21, 1997	Rhonda Nehme was diagnosed with cervical cancer
Pre-Dec. 1997	**Plaintiff thought something was wrong, and not necessarily the doctor, and consulted an attorney**
Dec. 9, 1997	Rhonda Nehme passed away
June 3, 1998	**Last day of the four-year statute of repose**

Jan. 27, 1999	The Estate initiated its lawsuit by petitioning for a 90-day extension of statute of limitations
Sept. 7, 1999	The Estate's medical malpractice suit was filed

The Estate has identified no fact or circumstance not known to or available to the Estate prior to June 3, 1998, but which came to light after that date, that brought to light the reasonable possibility that Rhonda's injury was caused by medical malpractice.

The version of section 95.11(4)(b) which is applicable to the Estate's cause of action is the 1993 version, which states in relevant part that the four-year statute of repose is extended where

> it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the injury *within the 4-year period* . . . .

Section 95.11(4)(b), Fla. Stat. (1993) (emphasis added).

Statutes of repose periods are measured from the date of the discrete act on the part of a defendant which has caused injury, without regard to when the cause of action accrued. *Kush v. Lloyd*, 616 So. 2d 415, 418 (Fla. 1992). A medical malpractice cause of action accrues when the plaintiff has knowledge of an injury, and of the reasonable possibility (not "probability") that the injury was caused by medical malpractice – a determination which can be made from the fact of the injury itself when the injury did not arise from natural causes. *Tanner v. Hartog*, 618 So. 2d 177, 181-82 (Fla. 1993).

The record affirmatively establishes that the plaintiff here believed, well within the four-year repose period, that the acceleration of Rhonda's cancer in 1997 was

not natural, that there was a reasonable possibility that "somebody" did something wrong that gave rise to Rhonda's injury, and that it was not necessarily the doctors. Under the terms of the statute then applicable, the exception for concealment which allows the statute to be extended for two additional years, and which would have made the Estate's suit timely if the term "concealment" includes mere negligence, is completely irrelevant to the Estate's medical malpractice lawsuit.

Neither the trial court nor the district court addressed the inapplicability of the concealment exception in the statute of repose to the facts of this case. Their failure to do so, however, does not bar the Court from doing so. In *Robertson v. State*, 27 Fla. L. Weekly S829, S830-31 (Fla. Oct. 10, 2002), the Court reaffirmed the tipsy coachman doctrine – *i.e.*, that a trial court's ruling, even if based on improper reasoning, will be upheld on appeal if there is any theory or principle of law in the record that supports the ruling. That is precisely the situation here.

The district court affirmed the trial court's entry of final summary judgment in favor of Premiere, based on the four-year statute of repose. *Nehme*, 822 So. 2d at 520-22. The trial court reached its conclusion in reliance on the Fifth District's decision in *Myklejord v. Morris*, 766 So. 2d 1160, 1162 (Fla. 5th DCA 2000), *review denied*, 789 So. 2d 347 (Fla. 2001), where the court had held that the concealment exception to the four-year statute of repose required an intentional rather than merely negligent concealment of the injury giving rise to the plaintiff's lawsuit. The grant of summary judgment was correct on that basis, as Premiere will explain later in this brief. It was also correct, however, because the concealment

exception never came into play. The *decision* of the court – that the suit was untimely by reason of the bar of the four-year statute of repose – controls, rather than the reasoning which the court utilized to reach its decision. *Robertson*, 27 Fla. L. Weekly at S830 (citation omitted).

I. The Court should decline to answer the certified question because the concealment exception to the four-year bar of repose is not implicated by the facts of this case.

Premiere respectfully suggests that the Court should decline to exercise its discretion to review the district court's decision or answer its certified question, since the statutory provision the Court is asked to construe is not implicated by the facts of the Estate's lawsuit. The Court has repeatedly declined to express its views on legal questions that are not at issue in a pending proceeding. *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So. 2d 993, 994-95 (Fla. 1976); *Department of Admin. v. Horne*, 325 So. 2d 405 (Fla. 1976); *Sarasota-Fruitville Drainage Dist. v. Certain Lands Within Said District Upon Which Drainage Taxes for the Year 1952 Have Not Been Paid*, 80 So. 2d 335, 336 (Fla. 1955); *Cottrell v. Amerkan*, 35 So. 2d 383, 384 (Fla. 1948).

The starting point for considering the inapplicability of the concealment exception to the Estate's lawsuit is the history of the medical malpractice statute of repose. In 1975, the Florida Legislature enacted the Medical Malpractice Reform Act of 1975 to address a health care crisis in Florida posed by the high cost of medical professional liability insurance, out of a concern that "without some legislative relief, doctors will be forced to curtail their practices, retire or practice

defensive medicine at increased cost to the citizens of Florida." Ch. 75-9, Laws of Florida, pmbl. A key provision in the Reform Act amended the generic statute of limitations to add a new paragraph (b) to subsection 95.11(4)------.

It is undisputed that the plaintiff was ***not*** prevented from discovering "the incident or occurrence out of which the cause of action accrued" – the misreading of Rhonda's pap smear – prior to June 3, 1998. In fact, the record establishes that prior to the expiration of the four-year period of repose, the plaintiff knew something was wrong, suspected medical malpractice by either a physician or "somebody," and consulted an attorney to find out what was wrong. (R2:435). Under the statute of repose then in effect, this knowledge required a filing of the Estate's suit before June 3, 1998, unless the legislature's removal of the phrase "within the 4-year period" in 1996 applied to the 1994 incident giving rise to its claim. It did not.

In providing an effective date for the amendment, the Florida Legislature expressly made the amendment prospective in application by declaring that its elimination of the four-year discovery provision did ***not*** apply to causes of action which arose "from acts, events, or occurrences that take place before [July 1, 1996]." Ch. 96-167, § 2, Laws of Florida- does not implicate the extension exceptions for fraud, concealment or intentional misrepresentation. *See Cobb v. Maldonado*, 451 So. 2d 482, 483 (Fla. 4th DCA 1984) ("discovery having been made within the four-year period" the suit is barred and summary judgment is affirmed); *Carlton v. Ridings*, 422 So. 2d 1067, 1068 (Fla. 1st DCA 1982)

(affirming summary judgment for the defendant because plaintiffs "discovered the alleged injury before [expiration date for the repose period] and failed to file suit before that date"). *And see Allen v. Orlando Reg'l Med. Ctr.*, 606 So. 2d 665, 665-66 n.1 (Fla. 5th DCA 1992), *decision approved*, 620 So. 2d 993 (Fla. 1993), in which the medical incident giving rise to the plaintiff's cause of action was discovered during the four-year repose period but suit was not barred because the plaintiff there, unlike the Estate here, had filed a suit-tolling notice before the four-year period had expired.

The Estate's cause of action for medical malpractice in this case was not brought within the four-year period of the statute of repose, but could have been. The extension exception for concealment never came into play. Accordingly, there is no occasion for the Court to determine whether that exception encompasses negligent diagnoses. Given that the Court's review of a certified question from a district court is available on a purely discretionary basis, Premiere respectfully suggests that the Court should decline to exercise that discretion. There is no reason for the Court to answer to an abstract certified question, and any decision on the question would be purely advisory in nature. *State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980); *Sandstrom v. Leader*, 370 So. 2d 3, 4 (Fla. 1979).

II. Were the Court to exercise its discretion to answer the certified question, the answer should be in the negative since the term "concealment" in section 95.11(4)(b) requires active concealment.

Legislative intent is the polestar which guides any court's interpretation of a

statute. *Donato v. American Tel. & Tel. Co.*, 767 So. 2d 1146, 1150 (Fla. 2000); *City of Clearwater v. Acker*, 755 So. 2d 597, 600 (Fla. 1999). The first place for ascertaining legislative intent is the language of the statute itself. *Donato*, 767 So. 2d at 1150. If the language is plain and unambiguous, inquiry ends and the statute is construed in conformity with its express verbiage. *Id*. (citations omitted). If the language of a statute is not plain and unambiguous, however, legislative intent is sought from the history of the enactment and, where that's not available a statute is construed based on recognized principles of statutory construction. *Donato*, 767 So. 2d at 1150; *Acker*, 755 So. 2d at 600-01.

The term "concealment" in section 95.11(4)(b) is unquestionably ambiguous. The Estate does not argue that the term is plain and unambiguous, although it offers a passing suggestion that the term is "not inherently ambiguous" because its meaning is easily ascertained from the dictionary. (IB 21). The Estate's sole authority for suggesting the absence of inherent ambiguity is one district court decision which referenced a dictionary in order to determine if scienter was "necessarily" an element of concealment, and then concluded that it was not because the dictionary had two conflicting definitions for the term. (IB 21, citing to *Hernandez v. Amisub (Am. Hosp.), Inc*., 714 So. 2d 539, 541 & n.1 (Fla. 3d DCA), *review denied*, 728 So. 2d 200 (Fla. 1998). The competing dictionary definitions identified in *Hernandez* were alone sufficient to establish the ambiguity of this term in section 95.11(4)(b). The Estate's back-handed approach to statutory analysis, moreover, is not the way courts seek to determine ambiguity (or

not) from a statute's language.

In statutory construction, the question is not whether a statutory term is "not inherently ambiguous," or would not "necessarily" mean one particular thing. The question is whether the term can be said to have a meaning which is readily apparent and commonly understood. *Seagrave v. State*, 802 So. 2d 281, 286 (Fla. 2001); *Rollins v. Pizzarelli*, 761 So. 2d 294, 297 (Fla. 2000). Since five district court of appeal judges in Florida have considered the term "concealment" in section 95.11(4)(b) to require "active" concealment [1] and four district court judges have taken the opposite view,[2] it cannot be said that the term "concealment" has a meaning which is commonly understood to have only one meaning.

Where the language of a statute is ambiguous, as here, legislative intent is first sought in the legislative history of the enactment, if any exists. *State v. Jefferson*, 758 So. 2d 661, 665 (Fla. 2000); *Webber v. Dobbins*, 616 So. 2d 956, 958 (Fla. 1993); *Blinn v. Florida Dep't of Transp.*, 781 So. 2d 1103, 1106-07 (Fla. 1st DCA 2000). This statute has a legislative history which indicates that the word "concealment" was intended by the Florida Legislature to mean a knowing and intentional act of concealment, as opposed to a merely negligent failure to disclose.

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1 *Nehme*, 822 So. 2d at 520-22; *Myklejord*, 766 So. 2d at 1161-62.

2 *Myklejord*, 766 So. 2d at 1162-63 (Dauksch, J., dissenting); *Hernandez*, 714 So. 2d at 541 & n.1. *And see Doe v. Hillsborough County Hosp. Auth.*, 816 So. 2d 262, 266 (Fla. 2d DCA 2002) (recognizing apparent conflict).

The legislative history of this 1975 statute is contained in six documents that repose in the Florida State Archives. Those six documents are attached to this answer brief as Appendices 2A through 2F. This legislative history and the "Whereas" clauses to the 1975 enactment indicate that this provision was one of several designed to address a crisis which threatened the loss of medical care in the State of Florida due to exorbitant malpractice insurance premiums. (App. 2A at 1-2; 2B at 1-2). The Court had acknowledged that compelling public purpose when it held that this provision was enacted for "an overriding public necessity" in *Carr v. Broward County*, 541 So. 2d 92, 95 (Fla. 1989).

Through several mechanisms created by this statute, the legislature sought to provide immediate financial relief to physicians by making medical malpractice insurance available at predictable costs. The legislature's "Reform of the Tort System" provisions in the Act (App. 2B at 5) included the imposition of a statute of repose whose harshness was mitigated only for instances of fraud, concealment or the intentional misrepresentation of a fact. (App. 2B at 5-6; 2D at 3; 2F at 2).[3]

Although not express, language in the archival documents is consistent with a legislative intent to except from the rigors of repose only intentional conduct, as opposed to merely negligent behavior. For example, the legislature was concerned that an action for medical malpractice could be brought "at any time within two years of the discovery of the injury, even if that happened to be ten or twelve years

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[3] The language in which these exceptions was cast has not been altered by the legislature since its original enactment in 1975.

after the injury was inflicted," and that "[i]nsurance companies had no actuarially sound basis for predicting the number of claims to be generated during a given policy year and were forced to inflate rates to protect against claims made in future years." (App. 2A at 5; *see* 2B at 1-2, 5-6). The statute of repose, with its limited extension exceptions, was designed to establish "a much more reliable basis for predicting future liability." (App. 2A at 5).

Applicable principles of statutory construction lead to the same conclusion. The Court has long applied the principle that terms placed in a string of words by the legislature take their meaning one from the other – a principle that derives from the Latin maxim *noscitur a sociis. E.g., State ex rel. Wedgworth Farms, Inc. v. Thompson*, 101 So. 2d 381, 385 (Fla. 1958); *Townsend v. State*, 57 So. 611 (Fla. 1912). Applying that principle of statutory construction here, the word "concealment" would draw its meaning from the terms which surround it – "fraud" and "intentional misrepresentation of a fact." Both of those terms embody acts which are knowing and intentional. Only *active* concealment is consistent with the legislature's intent that fraud and intentional misrepresentation would constitute a basis to extend the four-year statute of repose for another two years. This parallel and symbiotic nature of the three exceptions to the four-year repose period was noted in *Doe v. Hillsborough County Hosp. Auth.*, 816 So. 2d at 266.

Recognizing that the term "concealment" might be considered ambiguous, the Estate has suggested an examination of that term "in other contexts" as one way to

resolve the ambiguity. (IB 21-22). The "other contexts" analysis offered by the Estate, however, is a far cry from the traditional manner by which courts construe statutes from related and contemporaneous contexts. The Estate has asked the Court to compare "concealment" with the *dissimilar* wording "*fraudulent* concealment" found in two provisions of the Nursing Homes and Related Health Care Facilities chapter of the Florida Statutes which were enacted in 2001, and one provision enacted in 1974 with respect to product liability actions. (IB 20). These provisions are not helpful in determining the meaning of section 95.11(4)(b)-[4] for the fraudulent concealment of a medical incident. *E.g.*, IB 10-12. Although acknowledging that this common law doctrine has nothing to do with section 95.11(4)(b) (IB 13), the Estate nonetheless uses the term "fraudulent concealment" throughout its brief as if that term were identical to the unmodified word "concealment" in the statute. *E.g.*, IB 15 (asserting that the statute "includes a provision which incorporates a fraudulent concealment exception"). There is no basis for this assertion that can be found in the legislative history of section 95.11(4)(b)-*; Proctor v. Schomberg*, 63 So. 2d 68, 71-72 (Fla. 1953); *Berisford v. Jack Eckerd Corp.*, 667 So. 2d 809, 811 (Fla. 4th DCA 1995). *And see* IB 17, 22.

That is *not* the policy which underlies the fraud, concealment or intentional misrepresentation exceptions to the medical malpractice statute of repose. The legislative history evinces a knowing decision by the legislature to move away from the body of case law which had developed the common law doctrine of fraudulent

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[4] *Nardone v. Reynolds*, 333 So. 2d 25 (Fla. 1976).

concealment, and to craft a distinctive exception which specified that only affirmative acts taken by health care practitioners would operate to extend the four-year repose period. Only by excepting active and intentional acts could the legislature provide a reliable basis on which physicians could predict and control their own future exposure to liability. (App. 2A at 5). The policy considerations underlying that statute are *public* policy considerations, rooted in the legislature's concern for fiscal predictability, that are entirely distinct from the private considerations which led the Court to fashion the common law exception to repose for fraudulent concealment.

The district court's decision which has been brought for the Court's review, and the *Myklejord* majority view which the district court chose to follow,[5] are sound decisions. The case law source for those decisions, *Nardone*, is limited to a judicially-crafted principle of the common law based on non-governmental policy considerations that differ greatly from the *public* policy considerations which underlie the medical malpractice statute of repose. *See* App. 2A-F.

Statutes of limitations impose time restrictions on lawsuits because defendants are prejudiced by the absence of witnesses, documents, and other evidentiary sources as a result of the passage of time. *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074-75 (Fla. 2001) (citing *Nardone*, 333 So. 2d at 36); *Totura & Co., Inc. v. Williams*, 754 So. 2d 671, 680-81 (Fla. 2000). As between private parties to a

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[5] *Myklejord*, 766 So. 2d at 1161-62.

lawsuit, the legislature has enacted statutes of limitations so that plaintiffs are not advantaged by their own delay in bringing suit. *Nardone* and its progeny overlaid that notion with a fraudulent concealment exception in order to level the playing field, and to prevent defendants from gaining an advantage from their knowing acts of malpractice.

The statute of repose in the medical malpractice statute serves a *public* purpose grounded in the health and welfare of all of Florida's citizens and residents – the need for adequate physicians in the state. The three exceptions to the statute of repose do not erode the legislature's goal of tort claim predictability. Physicians can expect suits when they know of their mistakes, but not when they do not. Thus, the policy of the statute is consistent with only one aspect of *Nardone* – the extent to which an adverse condition is known to the doctor. 333 So. 2d at 39. The policy of the statute is not consistent with *Nardone's* other aspect – the extent to which an adverse condition is "readily available to [a physician] through efficient diagnosis" (*i.e.*, simple negligence). *Id.*

In *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659 (Fla. 1985), the Court pointed out the unique policy reasons which underlie statutes of repose. Those policy reasons were reiterated in *Carr v. Broward County*, *supra*, where the Court stated:

> [S]tatutes of repose are a valid legislative means to restrict or limit causes of action in order to achieve certain public interests . . . [and] the legislature may properly take into account the difficulties of defending against a stale fraud claim in determining a reasonable period for the statute of repose . . . . [S]ection 95.11(4)(b) was properly grounded on an announced public necessity and no less stringent measure would obviate the problems the legislature sought to

address. . . .

541 So. 2d at 95.

Premiere contended below and reiterates here that a determination by the Court that mere negligence is encompassed within the statute of repose will effectively abolish the four-year statute of repose. The exception would apply in every medical malpractice negligence case arising from an alleged failure to diagnose, thereby making the statute of repose seven years for all such cases.

[6]

CONCLUSION

Premiere respectfully requests that the Court discharge the petition for review as improvidently granted, inasmuch as the Estate's lawsuit does not bring into play the concealment exception to the medical malpractice statute of repose. Should the Court accept the case for review, Premiere respectfully requests that the Court confirm the Fifth District's affirmance of the summary judgment entered for Premiere by the circuit court.

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[6] The two-year extension for the three repose exceptions dates from discovery of the injury or when it should have been discovered, but cannot exceed seven years from the date of the incident giving rise to the injury. Section 95.11(4)(b), Fla. Stat. (1993).

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.