IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1432
Lower Tribunal Nos: 3D01-1187
3D01-2526

LAZARO PADILLA and
ELOY and IRMA RIVERO,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE
COMPANY and URBAN INSURANCE
COMPANY OF PENNSYLVANIA,

Respondents;

consolidated with:

CASE NO. SC03-1327
Lower Tribunal No: 4D02-391

SANDRA MALU,

Petitioner,

v.

SECURITY NATIONAL
INSURANCE COMPANY,

Respondent.

ANSWER BRIEF OF RESPONDENT URBAN INSURANCE COMPANY OF PENNSYLVANIA

Doreen E. Lasch, Esquire
Conroy, Simberg, Ganon,
Krevens & Abel, P.A.
Counsel for Urban Insurance Co.
3440 Hollywood Boulevard
Hollywood, Florida 33021
(954) 961-1400

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INTRODUCTION

Respondent, URBAN INSURANCE COMPANY OF PENNSYLVANIA, objects to Petitioners' Introduction and Statement of Jurisdiction. While Respondent agrees with the jurisdictional statements contained therein, the remainder of Petitioners' Introduction consists of impermissible argument and, in part, a misstatement of the facts of this case. Respondent will rebut these misstatements and argument in the appropriate sections of this brief.

In this brief, the Petitioners, LAZARO PADILLA and ELOY and IRMA RIVERO, will be referred to collectively as "Plaintiffs", and individually as either "Padilla" or "Rivero". The Respondents, LIBERTY MUTUAL INSURANCE COMPANY and URBAN INSURANCE COMPANY OF PENNSYLVANIA, will be referred to collectively as "Defendants", and individually as either "Liberty Mutual" or "Urban". Record references will be designated as follows:

"R1." followed by the appropriate page number for references to the appellate record in the Padilla case;

"R2." followed by the appropriate page number for references to the appellate record in the Rivero case;

"T2" followed by the appropriate page number for references to the motion to dismiss hearing transcript from the Rivero case; and

"A" followed by the appropriate page number for references to the appendix to this brief.[1]

[1] Respondent has attached an appendix to this Brief containing the Third District Court of Appeal's Order entered in this case on May 30, 2003. Respondent is simultaneously filing herewith a Motion to Supplement the Record to include this Order.

STATEMENT OF THE CASE AND FACTS

Plaintiffs have invoked this Court's jurisdiction to review a decision of the Third District, which certified an express and direct conflict with a decision of the Fifth District, on the same question of law. This Court has discretionary jurisdiction pursuant to Article V, §3(b)(4), of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). By Order dated November 14, 2003, this Court postponed its decision on jurisdiction. By an additional Order of the same date, the cases of Padilla and Rivero, previously consolidated, were consolidated with the case of Sandra Malu v. Security National Insurance Company (Case No. SC03-1327; LT No. 4D02-391), In Malu, the petitioner has sought review of a decision of the Fourth District on the same issues of law and fact. At the time the Consolidation Order was entered, the Malu case had been fully briefed in this Court.

Trial Court Proceedings in Rivero

In their Complaint[2], the Riveros alleged that they were insured by an automobile insurance policy issued by Urban. (R2:2). They further alleged that they were

[2]The Complaint purports to be a class action filed individually and on behalf of similarly situated insureds. (R2:2). However, no class was certified at the time of the dismissal and no class issues are pertinent to this appeal.

involved in a motor vehicle accident on November 8, 2000, in which they suffered personal injuries necessitating medical attention. (R2:2).

The basis for the Riveros' claim against Urban concerns reimbursement for transportation expenses associated with the Riveros' travel, in their personal auto, to and from medical treatment.(R2:2-3, 7-8). The Riveros alleged that Urban breached its contract of insurance by failing to comply with Florida's No-Fault Law, as set forth in §627.736(1)(a), Florida Statutes. (R2:8). Specifically, the Riveros argued that Urban breached the contract and violated the PIP statute by paying 32.5 cents per mile as reimbursement to the Riveros. (R2:8). The Riveros' Complaint does not allege that they incurred expenses greater than 32.5 cents per mile, only that they traveled a round-trip of 14.4 miles on 30 different occasions, for which they sought additional reimbursement. (R2:10).

The Complaint was brought in three counts: Count I for declaration of rights; Count II for breach of contract; and Count III for breach of contract. (R2:2-8). In Count I, the Riveros sought damages and a "judgment that Florida Statute §627.736(1)(a) does not permit URBAN to pay automobile usage mileage at the rate it set, 32.5 cents per mile." (R2:6). Count II alleges that Urban set and paid the medical treatment transportation mileage rate at only 32.5 cents per mile, and thus

breached the insurance contract. (R2:7). Count III is duplicative of Count II, and again alleges that Urban breached the insurance contract as a result of paying 32.5 cents per mile as reimbursement for medical travel expenses. (R2:8).

The Riveros suggested that a higher mileage rate was appropriate and, in support of this argument, attached to their Complaint various documents downloaded from the United States Department of Transportation (USDOT) website. (R2:11-16). Contrary to the Riveros' representations, these documents do not reflect any official findings "promulgated" by the USDOT, but are simply a reprint of an article issued by the American Automobile Association. (R2:16).

Urban moved to dismiss the Riveros' Complaint. (R2:18-39). In Urban's Motion to Dismiss, it raised two main arguments. (R2:18). First, Urban argued that the rate of 32.5 cents per mile is reasonable as a matter of law for reimbursement under Florida Statutes §627.736(1)(a). (R2:21-26). The rate paid by Urban is higher than the then applicable mileage rate set by the IRS, is higher than the rate utilized in Florida's workers compensation scheme for reimbursement of medical travel expenses, and is higher than the rate set by various Florida statutes dealing with reimbursement of employees' travel expenses. (R:21-26). Second, Urban argued that the trial court did not have "primary jurisdiction" over the issue of setting an appropriate reimbursement

rate, and that such a determination was the province of the Florida Department of Insurance (DOI). (R2:28).

The trial court conducted a hearing on Urban's Motion to Dismiss (T2:1), after which the trial court dismissed Riveros' Complaint with prejudice (R2:54-55). In its Order, the trial court expressly found that Urban's reimbursement of 32.5 cents per mile for the cost of transportation associated with medical treatment under Florida Statute §627.736(1)(a) is reasonable as a matter of law. (R2:54-55). The trial court based its finding on "recognition of the fact that the Florida Worker's Compensation Statute reimburses transportation costs associated with medical treatment at 29 cents per mile" and "judicial notice that the State of Florida reimburses state employees for business travel at the rate of 29 cents per mile as does the Internal Revenue Service". (R2:54-55). The trial court further held that it lacked "primary jurisdiction" as "this matter is better determined by. . .The Department of Insurance ("DOI"). (R2:54-55). Accordingly, the trial court dismissed the Complaint (R2:54-55), and the Riveros took an appeal to the Third District. (R2:51-53).

Third District Court of Appeal
Proceedings in Rivero

The Riveros appealed the dismissal of their Complaint to the Third District. (R2:51-53). On appeal, the Riveros raised as issues both of the bases for the Trial

Court's dismissal: 1) the finding that 32.5 cents per mile reimbursement was reasonable as a matter of law; and 2) the holding that the trial court lacked primary jurisdiction. The Rivero and Padilla cases were consolidated for appeal. (R2:59-63).

During the course of the appeal in the Third District, Padilla filed a petition with the DOI, seeking a declaratory statement as to whether or not the DOI had primary jurisdiction to determine the mileage reimbursement rate and, if so, asking the DOI to make such determination (R2:59-63). The DOI dismissed Padilla's petition because he had not "demonstrated a present need for declaratory relief". (R2:59-63). Padilla appealed the ruling to the First District Court of Appeal, which affirmed the dismissal. *Padilla v. Liberty Mutual Insurance Co. and Dept. of Insurance*, 832 So. 2d 916 (Fla. 1st DCA 2002). The Riveros were not parties to either the DOI proceedings or the appeal in the First District.

Thereafter, while the Rivero and Padilla appeals were still pending in the Third District, the Fourth District issued its opinion in *Malu v. Security National Insurance Co.*, 848 So. 2d 373 (Fla. 4th DCA, 2003). As mentioned previously, *Malu* has now been consolidated with *Padilla* and *Rivero* in this Court because the same issues of law and fact are involved. In *Malu*, the Fourth District affirmed the dismissal of Malu's Complaint for failure to state a cause of action. *Id.* The Court examined

§627.736(1)(a), Florida Statutes (2001), which includes as medical benefits:

> Eighty percent of all reasonable expenses for medically necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and medically necessary ambulance, hospital, and nursing services.

§627.736(1)(a), Fla. Stat. (2001). *Id.* The trial court had not considered whether the PIP statute included reimbursement of transportation costs because the court was bound to follow an opinion issued by the Fifth District in 1986 in *Hunter v. Allstate Insurance Co.*, 498 So. 2d 514 (Fla. 5th DCA, 1986). *Id.* at 374. The Fourth District, not being bound by *Hunter*, concluded that reimbursement of auto transportation expenses are not payable under the PIP statute. *Id.* Accordingly, the Fourth District affirmed the trial court's dismissal on this alternative theory, thereby mooting the issues raised by Malu. *Id.*

When the Third District learned of the Fourth District's *Malu* opinion, it issued an Order directing the parties to serve memoranda addressing whether the Third District should follow the Fourth District's opinion in *Malu.* (A.1). After its receipt of the parties' briefs, the Third District ultimately issued its opinion in this case, in which it adopted the Fourth District's reasoning in *Malu* and held that §627.736(1)(a), Florida Statutes does not provide for payment of automobile transportation expenses. (R2:59-63). Accordingly, it affirmed the dismissal of the plaintiffs' actions and

certified conflict with *Hunter*. (R2:59-63). Plaintiffs have brought this appeal, seeking review of the Third District's opinion.

SUMMARY OF THE ARGUMENT

The Third District correctly applied the "Tipsy Coachman" Rule to affirm the dismissal of plaintiffs' action by the trial court because an appellate court is obliged to affirm the order if there was any theory or principle of law that would support it. Plaintiffs do not deny the validity of the "Tipsy Coachman" rule, but argue that the Record before the appellate court did not support the alternative theory. This argument is unavailing since the alternative theory upon which the Third District based its affirmance was its interpretation of Florida Statute 627.736(1)(a) and its conclusion that the statute does not provide for reimbursement of personal auto transportation expenses. Both the statute and the plaintiffs' claims for reimbursement were certainly before the trial court; they were the very subject matter of plaintiffs' Complaints. On appeal, the Third District was free to conclude that the statute does not provide for payment of personal auto transportation expenses, and base its affirmance of the dismissal upon this alternative theory. Thus, the Third District's application of the "Tipsy Coachman" rule to affirm the order of the trial court was correct.

The Third District also correctly applied by maxim of *expressio unius est exclusio alterius* to reach its conclusion that personal auto transportation expenses are not reimbursable under the PIP statute. By the clear language of the statute, it

specifically provides for medically necessary ambulance transport; it does not provide for the cost of driving one's own auto to and from medical appointments. Contrary to plaintiffs' argument, this Court should disapprove the Fifth District's opinion in *Hunter v. Allstate* because that Court based its opinion on its mistaken belief that Florida's workers compensation law and its PIP law are analogous, which they are not. Moreover, subsequent to *Hunter,* the Legislature amended the applicable provision of the PIP statute to clarify the limitations of the medical benefits intended to be provided. As recognized by the Third District below, the only type of transportation mentioned by the Legislature in the statute is medically necessary ambulance transport. Under the longstanding principle of statutory construction, *expressio unius est exclusio alterius,* the exclusion of benefits for personal automobile transportation expenses is implied. If, in the future, the Legislature chooses to provide for personal auto transportation expenses under the PIP statute, it is its role to so amend the statute; it is not a proper function of the courts.

Accordingly, the Third District correctly applied the principle of *expressio unius est exclusio alterius* in its interpretation of Florida Statute 627.736(1)(a) as excluding benefits for personal auto transportation expenses.

ARGUMENT

Standard of Review

Judicial interpretation of Florida statutes is a purely legal matter and therefore subject to *de novo* review. *Racetrac Petroleum Inc. v. Delco Oil, Inc.*, 721 So. 2d 376 (Fla. 5th DCA, 1998), *citing, Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 670 (Fla. 1993), *aff'd in part, rev'd in part on other grounds,* 512 S.S. 753, 129 L.Ed. 2d 593, 114 S. Ct. 2516 (1994).

Point I

THE THIRD DISTRICT WAS CORRECT IN ITS APPLICATION OF THE "TIPSY COACHMAN" RULE TO THIS CASE.

If the order of a trial court is based on improper reasoning, it will nonetheless be upheld if there is any theory or principle of law in the record which would support the order. *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999). In *Radio Station WQBA,* this Court quoted from its Opinion issued in *In re Estate of Yohn*, 238 So. 2d 290 (Fla. 1970):

> It is elementary that the theories or reasons assigned by the lower court as its basis for the order or judgment appealed from, although sometimes helpful, are not in any way controlling on appeal and the Appellate Court will make its own determination as to the correctness of the decision of the lower court, regardless of the reasons or theories assigned therefor.

Id. at 295. "If the trial court reaches the right result, but for the wrong reasons, it will be upheld if there is **any** basis which would support the judgment in the record". *Radio Station WQBA*, at 644 (emphasis added). The alternative theory may be raised *sua sponte* by the appellate court, without having been argued by the parties on appeal. *Id.* at 645. The trial court's decision is what matters, not the reasoning used. *Applegate v. Barnett Bank*, 377 So. 2d 1150, 1152 (Fla. 1979). The appellate court is obliged to affirm the order if there was **any** theory or principle of law that would support it. *Cohen v. Mohawk, Inc.*, 137 So. 2d 222, 225 (Fla. 1962). In fact, This longstanding principle of law was dubbed the "Tipsy Coachman" rule. *Home Depot U.S.A. Co. v. Taylor*, 676 So. 2d 479, 480 (Fla. 5th DCA 1996).

In the instant case, plaintiffs do not deny the validity of the "Tipsy Coachman" rule. Instead, they argue that the Record does not support the alternative theory. This argument is without merit. The alternative theory upon which the Third District based its affirmance of the trial court's dismissal was its interpretation of Florida Statute §627.736(1)(a) and its conclusion that reimbursement of auto transportation expenses are not payable under the statute. Certainly, the statute and the plaintiffs' claims for reimbursement of auto transportation expenses under that statute were part of the trial court record. They were the very subject matter of plaintiffs' Complaints. Plaintiffs

sought additional reimbursement because they contended that the mileage rate at which defendants had reimbursed them was unreasonable. The trial court dismissed plaintiffs' complaints. On appeal of the dismissal, the Third District (and the Fourth District in *Malu)*, was free to interpret the statute as it did and base its affirmance of the dismissal upon this alternative theory.

Plaintiffs assert, in their brief to this Court, that "it is unfair, improper, and violative of due process" for the Third District to have based its decision on a theory that, until the appellate panel issued its opinion, was "**completely foreign to the proceeding**". (Initial Brief of Petitioners, p.16; emphasis added.) Plaintiffs' assertions are at the very least disingenuous, if not a deliberate attempt to mislead this Court. During the pendency of this appeal, when the Third District learned of the Fourth District's opinion in *Malu*, the Third District issued an Order directing the parties to serve memoranda addressing whether this Court should follow the *Malu* decision. It was not until this issue was fully briefed by all of the parties, that the Third District issued its opinion in the instant case. The Court committed no error by applying the "Tipsy Coachman" rule to affirm the dismissal of plaintiffs' actions.

Point II

THE THIRD DISTRICT CORRECTLY APPLIED THE MAXIM OF *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS* TO F.S. 627.736(1)(a) TO CONCLUDE THAT TRANSPORTATION COSTS ARE NOT COMPENSABLE UNDER THE PIP STATUTE.

The Third District below agreed with the Fourth District in holding that Florida Statute 627.736(1)(a) does not provide for payment of automobile transportation expenses. In so doing, the Court examined the applicable provision of the PIP statute, which describes required medical benefits as:

> (a) Medical benefits. Eighty percent of all reasonable expenses for medically necessary medical, surgical, x-ray, dental, and rehabilitative services, including prosthetic devices, and medically necessary ambulance, hospital, and nursing services.

§627.736(1)(a), Fla. Stat. (2001). Thus, by the clear language of the statute, it specifically provides for transport by ambulance; it does not provide for the cost of driving one's own auto to and from medical appointments. *Malu*, at 373.

Plaintiffs argue that the Fifth District's interpretation of the PIP statute in *Hunter v. Allstate Insurance Co.,* 498 So. 2d 514 (Fla. 5th DCA 1986), wherein it held that the cost of auto transportation is reimbursable, *Id.* at 516, is correct. In reaching its conclusion, the *Hunter* Court relied on this Court's opinion in *Mobley v. Jack & Son*

Plumbing, 170 So. 2d 41 (Fla. 1964), which interpreted a provision of Florida's workers' compensation law, specifically §440.13(5). In *Mobley*, the Court reasoned that the provision which required the employer to provide "such remedial treatment, care and attendance as the injury shall require" must be interpreted to include travel expenses to and from medical appointments. *Id.* at 47. The Court stated that in the workers' compensation context, "there can be no doubt that the Legislature intended that an injured employee be given medical treatment at the expense of the employer-carrier and without expense to himself" and that "[t]his legislative intent would not be fully accomplished if the employee were required to pay his own travel expenses". *Id.* Plaintiffs argue that Florida's workers' compensation law and Florida's PIP law are analogous and that therefore the same benefits should be available under the PIP statute as are available under the workers' compensation statute.

Plaintiffs' argument is flawed, however, because Florida's workers' compensation law and Florida's no-fault (or PIP) law are not analogous as to benefits provided. Whereas, the workers's compensation law intends that the employee be provided medical care **without any expense to himself,** *Mobley* at 47, the PIP statute expressly provides that the insured shall bear 20% of the cost of his medical treatment up to $10,000, and 100% of the cost beyond $10,000. §627.736(1), Fla. Stat. Accordingly,

the Legislature clearly did not intend for PIP insurance to cover all of the insured's medical care, without any expense to the insured.

As further support for their argument, Plaintiffs contend that "although the PIP statute has been amended repeatedly over the years" since *Hunter*, the Legislature has failed to make any change to the statute which would indicate its disagreement with *Hunter* and that such failure shows that the Legislature agrees with the Fifth District's interpretation of the statute.

In fact, the applicable provision of the PIP statute has been amended only one time since *Hunter* was decided in 1986. In 2001, the Legislature added the word "medically" in two places to clarify the description of required medical benefits:

> (a) Medical benefits. Eighty percent of all reasonable expenses for **medically** necessary medical, surgical, x-ray, dental, and rehabilitative services, including prosthetic devices, and **medically** necessary ambulance, hospital, and nursing services.

§627.736(1)(a), Fla. Stat. (2001); Ch. 2001-271, Laws of Florida. At the same time, the Legislature added the definition of "medically necessary" to further clarify the benefits it intended to be provided by the statute:

> As used in §§627.730-627.7405, Fla. Stat.:
>
> * * *
>
> (2) "Medically necessary" refers to a medical service or supply that a

> prudent physician would provide for the purpose of preventing, diagnosing, or treating an illness, injury, disease, or symptom in a manner that is:
>
> > (a) In accordance with generally accepted standards of medical practice;
> >
> > (b) Clinically appropriate in terms of type, frequency, extent, site, and duration; and
> >
> > (c) Not primarily for the convenience of the patient, physician, or other health care provider.

§627.732(2), Fla. Stat. (2001). Clearly, the Legislature's acts in clarifying the limitations of the benefits intended to be provided by the PIP statute cannot be construed as signaling its approval of the Fifth District's interpretation of the statute as providing benefits which were not named in the statute.

As recognized by the Third District below, if the Legislature wants to provide for automobile transportation expenses under the PIP statute, it can certainly do so specifically, as it did for ambulance transport. *Padilla v. Liberty Mutual*, 28 Fla. L. Weekly D 1679 (Fla. 3d DCA 2003). Under the principle of statutory construction, known as *"expressio unius est exclusio alterius"*, the mention of one thing implies the exclusion of another. *Moonlit Waters Apartments, Inc. v. Cauley,* 666 So. 2d 898, 900 (Fla. 1996). In the statutory provision at issue, the only type of transportation mentioned by the Legislature is "ambulance"; this implies the exclusion of other types

of transportation. *Id.* As this Court has instructed, in construing a statute, we look first to the statute's plain meaning. *Lamont v. State,* 610 So. 2d 435 (Fla. 1992). Where, as here, the language of the statute is unambiguous, and provides benefits for medically necessary ambulance transportation, the exclusion of benefits for personal automobile transportation expenses is implied. *Moonlit Waters* at 900.

The Third District correctly applied the longstanding principle of *expressio unius est exclusio alterius* in its interpretation of §627.736(1)(a), Fla. Stat. to exclude benefits for personal auto transportation expenses.

Point III

THE THIRD DISTRICT COURT OF APPEAL'S OPINION DID NOT ADDRESS THE ISSUE OF PRIMARY JURISDICTION BECAUSE IT CONCLUDED THAT THE ISSUE WAS MOOT.

In its order of dismissal, the trial court included a holding that the court did not have "primary jurisdiction" over the plaintiffs' claim that the 32.5 cent per mile rate for auto travel expenses was unreasonable. (R2:54-55). The trial court concluded that "this matter is better determined by an administrative agency, specifically The Department of Insurance". (R2:54-55). As acknowledged by plaintiffs in their brief, the Third District's opinion did not address the issue of the doctrine of primary jurisdiction because it concluded that the issue was moot, since it affirmed the dismissal on alternative grounds. *Padilla*, 28 Fla. L. Weekly D 1679.

As further stated by the Third District in its opinion below, if, in the future, the Legislature should choose to provide for reimbursement of personal auto travel expenses under the PIP statute, it can at that time also provide the Department of Insurance with rule-making authority to determine the appropriate rate for such benefits. *Id.* Since at the present time, the PIP statute does not provide such benefits, the issue of primary jurisdiction is moot.

Point IV

THE ISSUE OF CLASS CERTIFICATION WAS NOT ADDRESSED BY EITHER THE RIVERO TRIAL COURT OR THE THIRD DISTRICT COURT OF APPEAL.

The trial court in *Rivero* did not reach any issues of class certification, and the Third District held the class certification issues to be moot. Accordingly, URBAN will not respond to plaintiffs' argument in Point IV of their brief, as to do so would be inappropriate.

CONCLUSION

For the reasons expressed herein, this Court should affirm the opinion of the Third District in *Padilla/Rivero* and the opinion of the Fourth District in *Malu* in these consolidated appeals, and further should express the Court's disapproval of the Fifth District's opinion in *Hunter v. Allstate Insurance Co.*

Respectfully submitted,

Conroy, Simberg, Ganon,
Krevins & Abel, P.A.
Attorneys for Respondent,
Urban Insurance Company
3440 Hollywood Boulevard
Hollywood, FL 33021
(954) 961-1400

BY: _____
Doreen E. Lasch
Fla. Bar No. 905770

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of January, 2004, to: Diane H. Tutt, Esquire, Diane H. Tutt, P.A., 8211 West Broward Boulevard, Suite 420, Plantation, Florida 33324; Jennifer Cohen Glasser, Esquire, Nina Kole Brown, Esq., Akerman Senterfitt, One Southeast Third Avenue, 28th Floor, Miami, FL 33131-5095; Carlos Lidsky, Esquire and Leo Bueno, Esquire, Lidsky, Vaccaro & Montes, 145 East 49th Street, Hialeah, FL 33013; Mark Mintz, Esquire, Mintz, Truppman & Higer, P.A., 1700 Sans Souci Boulevard, North Miami, FL 33181; Frank A. Zacheri, III, Esquire, Colleen A. Hoey, Esquire and Joey E. Schlosberg, Esq., Shutts & Bowen, LLP, 1500 Miami Center, 201 South Biscayne Blvd., Miami, Florida 33131 and S. Marc Herskovitz, Esquire, Division of Legal Services, 612 Larson Building, Tallahassee, FL 32399-0333.

CONROY, SIMBERG, GANON,
KREVANS & ABEL, P.A.
Attorneys for URBAN
3440 Hollywood Boulevard, Second Floor
Hollywood, Florida 33021
(954) 961-1400 (Broward)
(305) 940-4821 (Dade)
(954) 967-8577 (fax)

By: _____
Doreen E. Lasch, Esquire
Florida Bar No. 905770

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

The undersigned hereby certifies that this brief is filed in compliance with the requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure. The brief is presented in the Times New Roman, 14-point font.

By: _____
Doreen E. Lasch, Esquire
Florida Bar No. 905770