SUPREME COURT OF FLORIDA
CASE NO: SC03-520

SUNSET HARBOUR NORTH CONDOMINIUM ASSOCIATION, ET AL., and **STATE OF FLORIDA, DEPARTMENT OF REVENUE**,

Appellants,

vs.

JOEL W. ROBBINS, as Property Appraiser for Dade County, Florida,

Appellee.
_____/

Lower Tribunal No.
3D02-2316

BRIEF OF AMICUS CURIAE, PROPERTY APPRAISERS' ASSOCIATION OF FLORIDA, INC. IN SUPPORT OF APPELLEE, JOEL W. ROBBINS

(Consented to by the Parties and Granted by Order dated June 3, 2003)

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PRELIMINARY STATEMENT

Appellant, Sunset Harbour North Condominium Association, will be referred to herein as "Sunset Harbour." Appellant, Florida Department of Revenue, will be referred to herein as the "department." Appellee, Joel Robbins, Dade County Property Appraiser, will be referred to herein as the "appraiser." Amicus Curiae, Property Appraisers' Association of Florida, Inc., will be referred to herein as the "PAAF."

STATEMENT OF THE IDENTITY OF THE AMICUS CURIE AND ITS INTEREST IN THE CASE

The Property Appraisers' Association of Florida, Inc. (PAAF), is an association comprised of elected county property appraisers throughout the State of Florida. This year, its membership consists of property appraisers from the following 39 counties: Baker, Bay, Bradford, Calhoun, Citrus, Clay, Columbia, DeSoto, Dixie, Escambia, Flagler, Franklin, Gadsden, Gilchrist, Glades, Gulf, Hamilton, Hardee, Highlands, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Nassau, Okeechobee, Osceola, Putnam, St. Johns, St. Lucie, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton, and Washington.

The PAAF's amicus curiae brief addresses the standing issue raised in the briefs of two amici curiae appearing on behalf of Sunset Harbour North Condominium Association (Sunset Harbour), Florida Power & Light Company (FPL), and the Florida Association of Homes for the Aging (Homes for the Aging). The PAAF's members have an interest in informing this Court of their position on the standing issue and how it affects the performance of their duties. The PAAF urges this Court to reaffirm its decision in Fuchs v. Robbins, 818 So.2d 460 (Fla. 2002), which set forth the circumstances when property appraisers may raise the issue of a statute's unconstitutionality.

A property appraiser's primary responsibility is to ensure that assessments within the county are imposed on an equitable and fair basis, comply with the constitutional requirement of just value, and that all property required to be taxed under the Florida Constitution bears its proper proportionate tax burden. In many situations, property appraisers must analyze whether a property is entitled to an ad valorem tax exemption under the applicable statutes, constitution, and case law. Upon occasion, a statutory exemption simply cannot be reconciled with the constitution or case law. In these circumstances, property appraisers should have the ability to deny the exemption and, if sued, have standing to assert the unconstitutionality of the statute in order to fairly, equitably, and constitutionally perform their duties.

SUMMARY OF ARGUMENT

The PAAF respectfully urges this Court to reaffirm its statements in Fuchs regarding the circumstances when a property appraiser has standing to assert the unconstitutionality of a statute, hold that the property appraiser has standing in the instant case, and affirm the district court's decision that section 192.042, Florida Statutes (2002)(the substantially complete statute), is unconstitutional. When property appraisers are faced with a decision of whether to grant a statutory exemption that conflicts with the constitution and applicable case law from this Court, they must be permitted to deny the exemption and, if sued, have standing to

assert the statute's unconstitutionality in court. Decisional law of this Court and the constitution undeniably control over conflicting legislative enactments. The position of the amici curiae, FPL and the Homes for the Aging, would have this Court decide otherwise.

The PAAF's members vigorously express their support for the position of the Dade County Property Appraiser. Legislative gerrymandering of ad valorem tax statutes to provide preferential treatment for certain taxpayers in derogation of the Florida Constitution only creates inequity and unfairness among county residents, which directly conflicts with the property appraisers' primary responsibility of creating equity among assessments in their respective counties.

STANDARD OF REVIEW

The constitutionality of a statute is reviewed de novo. City of Miami v. McGrath, 824 So.2d 143, 145 (Fla. 2002).

ARGUMENT

I. IN THE INSTANT CASE, THE PROPERTY APPRAISER HAS STANDING TO RAISE THE CONSTITUTIONALITY OF SECTION 192.042, FLORIDA STATUTES (2002).

This Court recently addressed the issue of a property appraiser's standing to assert the unconstitutionality of a statute in Fuchs v. Robbins, 818 So.2d 460 (Fla. 2002). There, the issue decided was "whether, in an action filed by a property appraiser seeking review of an adverse decision of the VAB which has overturned the appraiser's ad valorem tax assessment on a subject property, the appraiser may, within an appeal pursuant to section 194.036, Florida Statutes (1997), challenge the validity of a statute on the basis that such statute is contrary to limitations imposed by the United States Constitution or the Florida Constitution." Fuchs, 818 So.2d at 463 (emphasis added). This Court held that "an appraiser may not, in that context, challenge the constitutionality of an applicable valuation statute." Id. (emphasis added).

In reaching its decision, this Court discussed the general rule that a property appraiser may not "ordinarily initiate an independent action challenging the validity of a taxing statute which allegedly provides for an ad valorem tax exemption (express or *de facto*) which is contrary to the limitations imposed by the Florida Constitution." Id. (emphasis added). This Court further emphasized that this

general rule was subject to two important exceptions: (1) the appraiser can make such a challenge if the taxing statute involves disbursement of public funds; and (2) if operation of a statute is brought at issue by another against the property appraiser, he or she may defensively raise the question of the statute's constitutionality. Id. As this Court stated:

> The appraiser can make such a challenge, however, if the taxing statute at issue involves the disbursement of public funds. *See Kaulakis v. Boyd*, 138 So.2d 505, 507 (Fla.1962)(recognizing that 'the general rule that a ministerial officer cannot in a judicial proceeding attack the validity of a law imposing duties on him is subject to the exception that such a law may be challenged where it involves the disbursement of public funds'); *Barr v. Watts*, 70 So.2d 347, 351 (Fla.1953)(observing, without finding it applicable, that an exception to the *Atlantic Coast Line* rule that the 'right to declare an act unconstitutional . . . cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution' becomes applicable 'when the public may be affected in a very important particular, its pocketbook,' and, in such case, 'the necessity of protecting the public funds is of paramount importance, and the rule denying to ministerial officers the right to question the validity of the Act must give way to a matter of more urgent and vital public interest'). The appraiser may also raise such a constitutional defense in an action initiated by the taxpayer challenging a property assessment. *See Department of Educ. v. Lewis*, 416 So.2d 455, 458 (Fla. 1982)(observing that, while state officers 'must presume legislation affecting their duties to be valid, and do not have standing to initiate litigation for the purpose of determining otherwise,' because, in such case, they do not 'have sufficiently substantial interest or

> special injury to allow the court to hear the challenge,' if 'the operation of a statute is brought into issue in litigation brought by another against a [state officer, the officer] may defensively raise the question of the law's constitutionality').

Fuchs, 818 So.2d at 464 (emphasis added).

This Court then concluded by observing that the statute under which the property appraiser filed suit challenging an adverse VAB decision specifically provided that:

> (1) If the property appraiser disagrees with the decision of the board, he or she may appeal the decision to the circuit court if one or more of the following criteria are met:
> (a) The property appraiser determines and affirmatively asserts in any legal proceeding that there is a specific constitutional or statutory violation, or a specific violation of administrative rules, in the decision of the board, except that nothing herein shall authorize the property appraiser to institute any suit to challenge the validity of any portion of the constitution or of any duly enacted legislative act of this state;

§ 194.036(1)(a), Florida Statutes (2002). Based upon the express statutory language, this Court held that the property appraiser could not challenge the constitutionality of a statute "within an appeal pursuant to section 194.036 . . .." Fuchs, 818 So.2d at 463.

The amici curiae, FPL and the Homes for the Aging, largely ignore Fuchs, except to characterize its statements regarding the appropriate

circumstances when the property appraiser may assert the unconstitutionality of a statute as "dicta." (FPL brief at p. 14, Homes for the Aging brief at pp. 2, 8-10) However its statements are characterized, this Court in Fuchs was carefully limiting its decision to a property appraiser's standing to attack the constitutionality of a statute when initiating suit under section 194.036 by delineating circumstances when its holding would be inapplicable. The First District Court long ago addressed a similar argument in a case involving a property appraiser's standing to assert a statute's unconstitutionality by stating that:

> It might be said with some justification that the expression of our Supreme Court last above quoted is dictum in that the control of the expenditure of public funds was not involved in that case. We perceive no reason, however, why the court should have qualified the general rule adhered to in that opinion by reiterating the exception last mentioned unless it was to again bring to the attention of the bench and bar that the exception remained a sound principle of law to be observed in those cases falling within its purview.

Green v. City of Pensacola,, 108 So.2d 897, 901 (Fla. 1st DCA 1959), aff'd, 126 So.2d 566 (Fla. 1961)(emphasis added).

The PAAF's members have been involved in other cases since Fuchs was decided where the taxpayers are claiming that this Court's statements were dicta and uncontrolling on trial courts. Thus, it would be appropriate for this Court to once again reaffirm that these exceptions to the general rule are an integral part of

Florida jurisprudence and remain viable. Otherwise, special interests may be able to lobby the legislature to pass unconstitutional preferential tax treatment and then argue that property appraisers cannot raise the issue in court, effectively eviscerating the constitution protections.

The amici curiae, FPL and the Homes for the Aging, prefer to rely upon language in Turner v. Hillsborough County Aviation Auth., 739 So.2d 175 (Fla. 2d DCA 1999), which this Court approved in Fuchs. Turner held that a property appraiser may not attack the constitutionality of a statute because such a challenge "is not only prohibited by common law, it is also prohibited by the express language of the statute under which Turner's suit was filed." 739 So.2d at 179. In reaching this decision, the court commented that "[i]t both defies logic and violates the rule of *State ex rel. Atlantic Coast Line Railway Co.* to suggest that Turner can ignore the law by denying an exemption based on his belief that it is unconstitutional and then be allowed to ask the court to approve his disobedience by upholding his denial." Turner, 739 So.2d at 178.[1] The district court concluded by holding that Turner's lawsuit was "expressly prohibited by section 194.036(1)(a), Florida Statutes (1997)." Id.

[1] Turner must reason that it is more appropriate for the property appraiser to be "disobedient" of the constitution or this Court's decisions and grant a statutory exemption clearly without constitutional authority or legal support.

The district court noted that, in a case involving a property appraiser, it had recently held a statute unconstitutional in Sebring Airport Auth. v. McIntyre, 718 So.2d 296 (Fla. 2d DCA), aff'd, 783 So.2d 238 (Fla. 2001). The district court specifically stated that "our decision in Sebring is not dispositive of the threshold standing issue that we address herein, nor does it moot that appeal because at the time Turner declined to grant the exemption at issue here, the statute had not yet been declared unconstitutional." Turner, 739 So.2d at 178 n. 1. The district court's footnote appears to attempt to distinguish the procedural posture of that case from that in Turner. At that time, the second district court's decision in Sebring was pending before this Court. However, when the trial court invalidated the statute in Sebring, which the Second District Court affirmed, the statute never had previously been declared unconstitutional.

As this Court recognized in Fuchs, there are two well-recognized exceptions to the general rule relating to standing of public officials to challenge the constitutionality of a statute: (1) the public official may raise the issue defensively; and (2) the public official may raise the issue to protect public funds. The position of the amici curiae, FPL and Homes for the Aging, would read Fuchs' approval of the district court's decision in Turner to eviscerate this Court's careful delineation of the exceptions to the general rule regarding standing set forth in that same decision. Such a position is untenable.

(1) The property appraiser may defensively raise the constitutionality of a statute.

The first exception, and the one most applicable in suits brought against property appraisers involving the entitlement to ad valorem tax exemptions, was recognized by this Court in Dept. of Educ. v. Lewis, 416 So.2d 455 (Fla. 1982), which was cited in Fuchs. There, this Court held that the state agency or officer may defensively raise the question of the statute's constitutionality. As this Court stated:

> If, on the other hand, the operation of a statute is brought into issue in litigation brought by another against a state agency or officer, the agency or officer may defensively raise the question of the law's constitutionality. *City of Pensacola v. King*, 47 So.2d 317 (Fla.1950); *State ex rel. Harrell v. Cone*, 130 Fla. 158, 177 So. 854 (1937); *State ex rel. Florida Portland Cement Co. v. Hale*, 129 Fla. 588, 176 So. 577 (1937).

Lewis, 416 So.2d at 458.

In the instant case, Sunset Harbour argued that its property was not substantially complete under section 192.042. The property appraiser responded by contending that the property was substantially complete under the statute. The property appraiser further argued that, if the property was not substantially complete, his assessment should be upheld because the statute was unconstitutional. As such, the issue properly has been raised defensively under Lewis.

In a recent case of significant statewide importance, this Court held unconstitutional a 1994 statute purporting to grant ad valorem tax exemption to "profit-making ventures conducted on property leased from a governmental entity -- a result which the Florida Constitution does not allow." Sebring Airport Auth. v. McIntyre, 783 So.2d 238 (Fla. 2001). There, as in the instant case, the property appraiser raised the statute's constitutionality defensively. In fact, the issue of the statute's constitutionality was more directly at issue in McIntyre than in the instant case. As this Court specifically observed, the property involved fell squarely within the statutory definition and could not be resolved without determining the its constitutionality. McIntyre, 783 So.2d at 234 n.3. Importantly, the property appraiser's ability to raise the statute's constitutionality as a defensive matter was so well established that neither the second district court nor this Court addressed the issue in their opinions.[2]

On numerous occasions, this Court has held unconstitutional various statutes placed in issue by the property appraiser in defending against a lawsuit. See e.g. Canaveral Port Auth. v. Dept. of Revenue, 690 So.2d 1226 (Fla. 1996); Capital City Country Club v. Tucker, 613 So.2d 448 (Fla. 1993); Valencia Center, Inc. v. Bystrom, 543 So.2d 214 (Fla. 1989); Am Fi Investment Corp. v. Kinney,

[2]The undersigned counsel were counsel for the property appraiser in McIntyre. The standing issue was raised in the briefs filed before the Second District Court, but not addressed in its opinion.

360 So.2d 415 (Fla. 1978); Archer v. Marshall, 355 So.2d 781 (Fla. 1978); ITT Community Dev. Corp. v. Seay, 347 So.2d 1027 (Fla. 1977); Interlachen Lakes Estates v. Snyder, 304 So.2d 433 (Fla. 1974); Palethorpe v. Thompson, 171 So.2d 526 (Fla. 1965); see also Dickinson v. Stone, 251 So.2d 268 (Fla. 1971)(a non-property appraiser case). In none of these cases was the property appraiser's standing to assert the statute's unconstitutionality as a defense disputed. If the amici curiae, FPL and the Homes for the Aging, were correct in asserting that a property appraiser must comply with a statute until a final appellate decision determines it unconstitutional, none of these cases ever would have been decided.

(2) The property appraiser may raise the constitutionality of a statute to protect public funds.

The second exception is where the public official raises the constitutionality of a statute to protect public funds. The property appraiser has the duty under Florida law of appraising all property in the county and administering exemptions. See §§ 193.023, 193.085, 193.114, 196.011, Fla. Stat. (2002). The property appraiser must ensure that all taxable property is appropriately assessed and that any property receiving exemption is lawfully entitled, both constitutionally and statutorily, to receive the exemption. The property appraiser ensures that an equitable tax base is available for the levy of

taxes for the support of local government including the county, school district, and municipalities.

Unconstitutional statutory exemptions erode the tax base of these entities. Whenever constitutionally unauthorized exemptions are granted within the county, moreover, the result is that the tax burden for that year is shifted to other taxpayers. In tax exemption cases, a "newly-created tax exemption necessarily involves a direct shift in tax burden from the exempt property to other, non-exempt properties." McIntyre, 783 So.2d at 250. One person's exemption from tax is an increase in another person's tax.

This Court set forth the basis for the exception to standing where public funds are involved in Barr v. Watts, 70 So.2d 347 (Fla. 1953). As this Court stated:

> As indicated above, there is, of course, an exception to this rule–and that is, when the public may be affected in a very important particular, its pocket-book. In such case, the necessity of protecting the public funds is of paramount importance, and the rule denying to ministerial officers the right to question the validity of the Act must give way to a matter of more urgent and vital public interest.

Barr, 70 So.2d at 351 (emphasis added); accord, Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962)(in tort action against county, county commissioners had right and duty to challenge validity of home rule charter).

Similarly, the state comptroller is a proper party to challenge the constitutionality of the statute when public funds are at issue. As the First District Court has stated:

> To the general rule, denying the right of a ministerial officer to question the constitutionality of a legislative act, our Supreme Court has announced a clear and well defined exception. It has been held that if a legislative act affects a ministerial officer in the performance of his lawsuit duties with regard to the *control* and *disbursement* of public funds, his official capacity gives him such an interest in the matter that he may challenge the validity of the act in mandamus.

Green, 108 So.2d at 900. Continuing, the court stated:

> In the latest expression by our Supreme Court on the exception to the general rule above mentioned, it was said "As indicated above, there is, of course, an exception to this rule–and that is, when the public may be affected in a very important particular, its pocket-book. In such case, *the necessity of protecting the public funds is of paramount importance*, and the rule denying to ministerial officers the right to question the validity of the Act must give way to a matter of more urgent and vital public interest.

Green, 108 So.2d at 901. The instant case fits squarely within these pronouncements.

The fact that this case involves a situation whereby the property appraiser is protecting the county tax base, as opposed to guarding against the expenditure of county funds, does not require a contrary result. This Court in

Dept. of Admin. v. Horne, 269 So.2d 659, 660 (Fla. 1972), made "short shift" of the state's argument that "standing" should be limited to situations involving "expenditures" of funds only, stating:

> Appellees cite Florida and sister state authorities allowing taxpayer attacks upon "unlawful *expenditures*." Appellants accept these authorities insofar as efforts to stop actual expenditures or levying of a tax is concerned but would distinguish "expenditure" and "appropriation" (as in the General Appropriations Act) which appellants see as only a "cutting of the pie" and not at all as "eating" it by the ultimate expenditures of funds. This seems to be a "distinction without a difference." We do not view the matter as turning upon whether or not it constitutes a direct "expenditure."

(Emphasis added.)

In the instant case, drawing a distinction between a "post tax reduction" by way of refund, and a "pre tax reduction" by way of exemption is a "distinction without a difference." Whether diluting the tax base so as to provide for a special tax exemption thereby saving the taxpayer money, or by way of an improper payment to the taxpayer, the result is the same; a taxpayer receives a monetary benefit at the expense of the remainder of the property owners in the county, and the public coffers are directly affected.

If a statute were drawn which would have the effect of making a direct payment to the property owner, under prior case law the expenditure of such money pursuant to said law would provide the necessary standing or interest for the

public official to challenge the constitutionality of the statute requiring such expenditure. Thus, there certainly is no logical reason why the same legitimate fiscal interest would not apply to an illegal exemption resulting in non-collection of money. In either situation, the amount of money would be the same and the preferential treatment would be identical.

FPL's argument that the expenditure of public funds exception does not apply because property appraisers do not collect taxes is meritless. (FPL brief at p. 19) In Florida, the collection of ad valorem taxes is a two-step process involving two independent constitutional officers. The duty falls upon the property appraiser to assess all taxable property and administer exemptions and to include all property on the assessment rolls for each year. This is the first step in the overall process of collecting the county's money. That is, the property appraiser must identify each parcel of property in the county, determine its taxable or exempt status, assign a value to each such parcel, and extend the millage against such properties as certified by the local budgeting entities.

Once the taxes are extended, this same tax roll is then used by the tax collector to send the tax notices (bills) to each owner of the property listed on the tax roll as listed by the property appraiser. The function of collecting the money is exactly that; a basic ministerial function since the tax collector has no authority to

deviate from the assessments as certified by the appraiser and extended as taxes on the tax rolls.

The entire burden of ensuring that all properties in the county pay their proper share of the taxes for the operation of the budget entities rests on the property appraiser. Property appraisers have the constitutional duty to assess all taxable property at just value and any statutes which sanction deviation from just value prevent them from performing their constitutional duty. The constitution is quite specific that all property must be assessed at its just valuation, except those specific classes and types of property listed therein. See Art. VII, §§ 3, 4, Fla. Const. (1968).

As a purely practical matter, the only "watchdog" for the county in ensuring that all properties are assessed according to the mandates of the constitution is the property appraiser. The property appraiser has the function of ensuring on an annual basis that all property subject to tax in the county is properly identified, reported, and included on the county's assessment rolls. The average John Q citizen would have no way of knowing that the legislature had passed statutes providing special tax exemptions to select taxpayers thereby diluting the funds available for the local government operations performed by budget entities, such as the county, school board, and municipalities.

When property appraisers are faced with a decision of whether to grant a statutory exemption that conflicts with the constitution and applicable case law from this court, they must be permitted to deny the exemption and then have standing to assert the statute's unconstitutionality in court. Decision law of this court and the constitution without question control over conflicting legislative enactments. The position of the amici curiae would have this Court decide otherwise.

Other amici curiae also argue that property appraisers will be unable to fairly assess incomplete improvements to property if the substantially complete statute is declared unconstitutional. This argument is without merit and unsupported by any record evidence. In fact, prior to 1961, property appraisers assessed all real property improvements in existence on January 1. Prior to 1980, property appraisers also assessed all tangible personal property located in Florida on January 1, regardless of its completion or operable status.

The housing industry boom of the 1950's gave rise to developers having at times hundreds of houses in various stages of completion on January 1, and property appraisers assessed same. In 1961, developers sought what was tantamount to a real property inventory tax exemption, and the legislature responded by enacting the substantially complete law which exempted all improvements under construction. See ch. 61-240, Laws of Fla. (1961). The

developers, through control of final completion, could take advantage of this exemption.

Nineteen years later, industry, primarily utilities, obtained the benefit of the tangible personal property "substantially complete" law which renders nontaxable millions of dollars of equipment, machinery, fixtures, etc., by defining or classifying it as "construction work in progress." See ch. 80-274, Laws of Fla. (1980). This required connection to some preexisting taxable operational system or facility to permit taxation. See §§ 192.042, 192.001(11)(d), Fla. Stat. (2002).

Identifying and assessing all property on January 1 was not difficult before 1961 and 1980 and will not be if the law is stricken. Buildings are constructed and financed generally with money releases in increments as the work progresses. Equipment is most frequently purchased by invoice or work order. Cost is always an acceptable method for valuing property. See Mazourek v. Wal-Mart Stores, Inc., 831 So.2d 85 (Fla. 2002); Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984); § 193.011(5), Fla. Stat. (2002)(property appraisers must consider the "cost of said property and the present replacement value of any improvements thereon;" in assessing property).

Amicus Curiae, National Association Real Estate Investment Trusts, suggests that this Court cannot make an informed decision because there is no judicial record as to how property appraisers could administer the law if the statute

were invalidated and suggests that the Uniform Standards of Professional Appraisal Practices (USPAP) applies to property appraisers. (NAREIT brief at p.8) USPAP, however, does not apply to property appraisers. In Florida, section 193.011, Florida Statutes (2002), sets forth the criteria which property appraisers must consider in assessing property. Moreover, USPAP standards expressly contain a jurisdictional exception for local law. See The Appraisal Foundation, Uniform Standards of Professional Appraisal Practice, Jurisdictional Exception Rule (2003)("If any part of these standards is contrary to the law or public policy of any jurisdiction, only that part shall be void and of no force or effect in that jurisdiction."). The International Association of Assessing Officers (IAAO) is simply an organization which includes in its membership lawyers, industry representatives, licensed appraisers and, if they choose to join, elected property appraisers.

CONCLUSION

Based upon the aforementioned arguments and authorities, the PAAF respectfully urges this Court to reaffirm its statements in Fuchs regarding the circumstances when a property appraiser has standing to assert the unconstitutionality of a statute, hold that the property appraiser has standing in the instant case, and affirm the district court's decision that section 192.042 is unconstitutional.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for amicus curiae, Property Appraisers' Association of Florida, Inc., certifies that the font size and style used in the foregoing brief is 14 Times New Roman and complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a).

—

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