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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2013

ALLISON N. CHASE, as Co-Personal Representative of the Estate of RICHARD CHASE, deceased,

L.T. Case No.: 1D12-2132

Petitioner,

vs.

HORACE MANN INSURANCE COMPANY,

Respondent.

_________________________________/

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Direct Conflict Review from the First District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

This case involves the claims of the Petitioner, Allison Chase ("Allison") for uninsured motorist benefits under an automobile insurance policy issued to her by the respondent, Horace Mann Insurance Company. The First District Court of Appeal reversed the trial court's summary judgment in Allison's favor, and this Court granted review based on conflict between that decision and *Creighton v. State Farm Mut. Auto. Ins. Co.*, 696 So.2d 1305 (Fla. 2d DCA 1997) (A:3). *Horace Mann Ins. Co. v. Chase,* 121 So.3d 1191 (Fla. 1st DCA 2013), *rev. granted,* ___ So.3d ___ (Fla. June 18, 2014); (A:1)

The Underlying Facts:

In 2001 Richard Chase ("Richard") purchased the insurance policy at issue in this case. (I:182)[1] That policy provided for bodily injury liability limits of $100,000 per person, $300,000 per accident, but Richard signed a written form on which he selected nonstacked uninsured motorist limits of $25,000 per person, $50,000 per accident. (*Id.*) His daughter, Allison, was listed as an additional driver on the policy but was not a named insured. (*Id.*) The only insured vehicle under this policy was Richard's 1992 Geo. (I:73)

[1] In this brief, "___:___" will refer to the volume and page number of the record on appeal, and "A:___" will refer to the tab number of the item in the appendix to this brief.

In 2004 Allison sought coverage in her own name on a 1997 Ford Escort, which she had inherited from her grandmother. (I:182); (I:73, ¶9); (I:104). Instead of writing Allison a new policy and informing her of her right to select the uninsured motorist coverage that she desired, on January 24, 2004, Horace Mann changed Richard's existing policy to make Allison the sole named insured and changed the insured vehicle to the Ford Escort, which Allison had inherited three days earlier, and was titled in her name alone. (I:182) The bodily injury liability limits remained unchanged at $100,000/$300,000, as did the UM limits, at $25,000/$50,000. The policy also continued to contain the "owned-but-not-insured" provision, which excluded coverage if an insured was injured while driving a vehicle that the insured owned but was not insured under the policy. (II:286)

At the same time, Horace Mann issued a new policy to Richard and gave him another opportunity to select uninsured motorist coverage. (I:35-36); (I:182-83) Richard never became a named insured on Allison's policy, but, at the time of the accident, he was insured under that policy as a listed additional driver and as a resident relative. (I:73-74)

Horace Mann's adjuster, Theresa Beshears, admitted in her deposition that in 2004 the company could just as easily have issued a new policy to Allison.

> Q. . . . A new policy was issued to Richard Chase, and the same policy was continued to Allison Chase. Would it have been just as

feasible to issue the new policy to Allison Chase and continue the old policy of Richard Chase?

A. It could have been done that way, yes.

Q. Who would have determined which way to do it?

A. The agent.

Q. Okay. If it had been done that latter way and Allison Chase would have been the named insured on the new policy, *would she have been given an uninsured motorist rejection form?*

A. Yes, she would have.

(I:36-37) (Emphasis added).

Allison's policy remained in effect until July 15, 2007, when an underinsured driver collided with motorcycles owned and operated by Allison and Richard, killing Richard and injuring Allison. (I:183) The motorcycles were not listed as insured vehicles in the policy.

Proceedings in the Trial Court:

After Richard's death, Allison sued Horace Mann for a declaratory judgment determining that there was uninsured motorist coverage in the amount of $100,000 per person, $300,000 per accident under her policy.[2] Horace Mann initially took the position that there was $25,000 per person, $50,000 per accident in uninsured motorist coverage, because Richard had previously (in 2001 when the policy was

[2] This case only involves claims under Allison's policy; Richard's policy has never been at issue.

issued) selected uninsured motorist limits lower than his bodily injury liability limits. Horace Mann moved for summary judgment on the amount of coverage, and the trial court denied that motion. (I:181-185; A:2).

Subsequently, Horace Mann was permitted to file an amended answer asserting lack of coverage based on one of the UM exclusions permitted by Fla. Stat. § 627.727(9), which allows an exclusion for owned vehicles not listed on the policy. On cross motions for summary judgment, the trial found that *Creighton v. State Farm, supra,* "is applicable to the undisputed facts of this case and controls the insurance coverage question in this case." (I:184) As a result, the trial court held that there was coverage in the amount of $100,000/$300,000, and that "because Allison Chase did not sign a form selecting limited uninsured insurance coverage at the time when she became the named insured under the policy, the policy exclusion for 'owned but not insured vehicles' is not enforceable." (II:387; A:2)

After the summary judgment ruling, the parties entered into a stipulation that liquidated the damages for Richard's wrongful death, subject to Horace Mann's right to appeal the trial court's coverage ruling. (III:404) The trial court then entered a final judgment in favor of Allison, from which Horace Mann appealed. (III:402; 414)

The Opinion of the First District Court of Appeal:

The First District Court of Appeal reversed, holding that Horace Mann was not required to afford Allison the opportunity to reject uninsured motorist coverage in an amount equal to her bodily injury limits or the opportunity to accept the "owned-but-uninsured" exclusion. *Horace Mann Ins. Co. v. Chase,* 121 So.3d 1191 (Fla. 1st DCA 2013); (A:1) Despite the trial court's explicit reliance on *Creighton v. State Farm,* and Allison's extensive treatment of that case in her answer brief (three pages of which were devoted to a discussion of *Creighton*), the opinion failed to even mention the case. Instead, the First District based its decision on two of its own cases, *State Farm Mut. Auto. Ins. Co. v. Shaw,* 967 So.2d 1011 (Fla. 1st DCA 2011) (A:5), and *Atlanta Cas. Co. v. Evans,* 668 So.2d 287 (Fla. 1st DCA 1996); (A:4).

Citing its decision in *Travelers Ins. Co. v. Harrington,* 86 So.3d 1274 (Fla. 1st DCA 2012), *rev. granted,* 116 So.3d 1264 (Fla. 2013), the district court also held that Richard's waiver of stacked coverage did not deprive Allison of the right to stack UM coverages on her individual claim (as opposed to her claim as Richard's personal representative), because she did not sign the stacking waiver as an additional insured. This was a curious finding, irrelevant to the court's decision, for these reasons: (1) Allison's policy only insured one vehicle, so there was no coverage to stack; (2) Allison never contended (and does not contend

before this Court) that she had a right to sign a stacking election until she became the *named insured*; and (3) the *Harrington* issue was irrelevant to the court's decision, which denied Allison *any* uninsured motorist coverage for the subject accident under the "owned-but-not-insured" exclusion. [3]

Allison petitioned this Court for review on the basis of express and direct conflict with *Creighton*. Horace Mann argued that there was no conflict with *Creighton*, because in *Creighton* the original named insured was a commercial entity and the new named insured was an individual, whereas in this case the original named insured and the new named insured were members "of the same family", and because the *Creighton* policy insured a "new vehicle" while the new policy in this case insured the same vehicle, which, Horace Mann asserted, had been transferred to her by her father. (Answer Brief on Jurisdiction, pp. 2-5)[4] This Court granted review by order dated June 18, 2014.

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[3] This Court has granted review and heard oral argument in *Harrington*, but we wish to make it clear that this case involves a completely different issue. We do not contend that Allison had any right to select uninsured motorist coverage until she became a named insured and, therefore, express no opinion on whether *Harrington* was correctly decided.

[4] The latter contention did not belong in a jurisdictional brief, in that the decision of the court of appeal does not contain the asserted fact. *See* (Fla. R. App. P. 9.120(d), which limits the appendix of a jurisdictional brief to the decision itself and, thus, does not permit the inclusion of facts outside the four corners of the decision in jurisdictional briefs.) The statement is also factually incorrect. As noted above, the policy in which Allison became named insured covered a vehicle that she had only inherited (from her grandmother) a few days earlier. Therefore,

SUMMARY OF THE ARGUMENT

This Court should quash the decision of the First District Court of Appeal in this case and approve *Creighton.* The decision under review misconstrues Florida's Uninsured Motorist Law and elevates form over substance when it holds that a new named insured's right to be advised of her rights under Florida's Uninsured Motorist Law depends on the carrier's fortuitous, arbitrary, and unilateral decision to insert her as the named insured on an existing policy, while issuing a new policy to the original named insured. It is *Creighton,* not the decision in this case, that carries out the Florida Legislature's clear intent that a policy must include certain uninsured motorist benefits unless a named insured under the policy in question selects different coverage in the subject policy or in an earlier policy that was renewed, extended, changed, superseded, or extended by the subject policy.

Allison Chase, the only named insured under the policy, and the only person with the legal right or ability to select lower UM limits or elect limited UM coverage, undisputedly did not do so when the policy was issued to her on January 27, 2004, and, since she was not a named insured before that date, never had the right or opportunity to do so at an earlier date. For this reason, the policy became a new policy when the named insured was completely changed, and the law required

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Horace Mann's assertion that the vehicle insured under the policy had been transferred from Richard to Allison is contrary to the record evidence.

Horace Mann to inform Allison of her options and obtain a written waiver of UM coverage equal to her bodily injury limits and a written election of the "owned-but-not-insured" exclusion.

ARGUMENT

HORACE MANN'S INTERNAL DECISION TO CHANGE THE NAMED INSURED ON THE EXISTING POLICY, RATHER THAN ISSUE A NEW POLICY, DID NOT DEPRIVE ALLISON CHASE OF THE RIGHT TO BE ADVISED OF HER OPTIONS UNDER FLORIDA'S UNINSURED MOTORIST LAW.

In January 2004, when Allison Chase inherited a vehicle from her grandmother, she needed to insure that vehicle. Since she would be a new named insured, insuring a different vehicle, and Richard still needed coverage, it would have been logical for Horace Mann to issue Allison a new policy, while keeping the subject policy in effect with Richard as named insured. If that simple step had been taken, there would have been no question that the law would require Horace Mann to advise Allison of her right to select lower UM limits than her liability limits or her right to decide whether or not she wanted an "owned-but-not-insured" exclusion in the policy. Instead, because of the unexplained choice of the agent who sold the policy, Horace Mann wrote a whole new policy for its existing named insured, Richard, while installing Allison as the sole named insured and her newly-acquired Ford Escort as the insured vehicle in the policy in question. That random act, Horace Mann contends, deprived Allison of the right to have her uninsured

motorist options explained to her in writing and make knowing elections regarding her coverage. The question before this Court is whether Allison's substantial rights under Florida's Uninsured Motorist Law hung by so thin a thread.

A. The Relevant Statutory Provisions:

Florida's Uninsured Motorist Law, § 627.727, Fla. Stat. (2007), requires certain levels and types of coverage unless the insured, having been advised of his or her rights, waives uninsured motorist coverage or selects less coverage than the law provides. As this Court put it in *Young v. Progressive Southeastern Ins. Co.,* 753 So.2d 80, 83 (Fla. 2000):

> The reason insurers are statutorily required to offer uninsured motorist coverage to the insured is
>
> > "to protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party. The *statute is designed for the protection of injured persons, not for the benefit of insurance companies or motorists who cause damage to others.*" (emphasis supplied) (citations omitted).

Statutorily required uninsured motorist coverage cannot be "whittled away by exclusions and exceptions." *Mullis v. State Farm Mut. Auto. Ins. Co.,* 252 So.2d 229, 233 (Fla. 1971).

The relevant provisions of the Uninsured Motorist Law are found in §§ 627.727(1) and 627.727(9), which provide, in pertinent parts:

(1) No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. However, the coverage required under this section is not applicable when, or to the extent that, an insured named in the policy makes a written rejection of the coverage on behalf of all insureds under the policy.

* * *

When an insured or lessee has initially selected limits of uninsured motorist coverage lower than her or his bodily injury liability limits, higher limits of uninsured motorist coverage need not be provided in or supplemental to any other policy which renews, extends, changes, supersedes, or replaces an existing policy with the same bodily injury liability limits unless an insured requests higher uninsured motorist coverage in writing.

* * *

(9) Insurers may offer policies of uninsured motorist coverage containing policy provisions, in language approved by the office, establishing that *if the insured accepts this offer:*

(a) The coverage provided as to two or more motor vehicles shall not be added together to determine the limit of insurance coverage available to an injured person for any one accident, except as provided in paragraph (c).

> (b) If at the time of the accident the injured person is occupying a motor vehicle, the uninsured motorist coverage available to her or him is the coverage available as to that motor vehicle.
>
> (c) If the injured person is occupying a motor vehicle which is not owned by her or him or by a family member residing with her or him, the injured person is entitled to the highest limits of uninsured motorist coverage afforded for any one vehicle as to which she or he is a named insured or insured family member. Such coverage shall be excess over the coverage on the vehicle the injured person is occupying.
>
> (d) *The uninsured motorist coverage provided by the policy does not apply to the named insured or family members residing in her or his household who are injured while occupying any vehicle owned by such insureds for which uninsured motorist coverage was not purchased.*

(Emphasis added.) Subparagraph (9), like subparagraph (1), relieves the insurance company from the obligation to obtain a written election by the insured if the named insured originally selected limited coverage and the policy in question "renews, extends, changes, supersedes or replaces the existing policy."

B. *Creighton's* Interpretation of the Statute:

In *Creighton v. State Farm,* an employer purchased an automobile insurance policy covering a 1987 Honda owned by the employer and listing its employee, Creighton, as a driver. The policy provided limits for bodily injury of $100,000 per individual and $300,000 per accident. However, the sole named insured (the employer) signed a written rejection providing for reduced UM limits of $10,000

per individual and $20,000 per accident. (696 So.2d at 1305) In 1991, Mr. Creighton "leased a 1991 Infiniti in his own name." "Rather than [creating] a new policy for Peter Creighton as the named insured, State Farm made the following changes to the existing [employer's] policy:

> a- changed the owner of the policy from [employer] to Peter Creighton;
>
> b- changed the billing address from [employer]'s business address to Peter Creighton's home address; and
>
> c- changed the insured vehicle from a 1987 Honda Accord to a 1991 Infiniti."

(696 So.2d at 1306)

A couple of years later, the automobile in which Mr. Creighton and his wife were riding was in a collision with an uninsured motorist, resulting in the death of the Creightons' infant child. The Creightons demanded UM benefits from State Farm in the amount of the bodily injury limits ($100,000/$300,000) and sought declaratory relief after State Farm refused. The trial court granted summary judgment in favor of the insurance company, ruling that the employer's initial selection of lower limits was effective as to Mr. Creighton. The Second District Court of Appeal reversed, reasoning as follows:

> Here, Peter Creighton leased a car in his own name and applied to State Farm for insurance. For internal bookkeeping purposes, State Farm changed the existing [employer] policy instead of issuing a new policy. Notwithstanding the mechanics State Farm employed, *this is a new policy as to Peter Creighton, just as if the [employer's] policy*

> *had been canceled and a new policy issued in Peter Creighton's name.* Peter Creighton was not a named insured of the [employer's] policy. Peter Creighton did not waive or reject equal UM benefits under the [employer's] policy, and Peter Creighton was not afforded the opportunity to, nor did he reject, equal benefits under this policy. Neither Peter Creighton nor his wife ever signed a waiver form advising them of any of the information the legislature deemed important. (Emphasis added; footnote omitted.)

(*Id*.) By this reasoning the *Creighton* court recognized that a policy that completely changes the named insured is a new policy and is in no sense a continuation of the original policy for purposes of the saving language in §§ 627.727(1) and (9).

The facts of *Creighton* are indistinguishable from those of the instant case. In both cases the original named insured selected reduced uninsured motorist coverage in the original policy. Mr. Creighton, like Allison, was not a named insured under the original policy but *was* listed as a driver. Mr. Creighton, like Allison, then became the sole named insured so that there was a complete change in named insureds. The insured vehicles in both cases were completely changed. Finally, like State Farm in *Creighton,* Horace Mann failed to inform the new named insured of the available coverage options and obtain the required written consents to reduced coverage.

C. The Decision in this Case:

In the decision under review here, the First District Court of Appeal never addressed the question that *Creighton* found to be dispositive, to-wit, whether a

complete change in named insureds deprives the new named insured of the right to be advised of her uninsured motorist coverage options. Without so much as mentioning *Creighton*, which Allison had argued was squarely on point, the court reversed the summary judgment for Allison on the basis of two of its own decisions: *State Farm Mut. Aut. Ins. Co. v. Shaw,* 967 So.2d 1011 (Fla. 1st DCA 2011) and *Atlanta Cas. Co. v. Evans,* 668 So.2d 287 (Fla. 1st DCA 1996). However, neither of these decisions involved the central issue in this case, which *was* decided in *Creighton*—whether a complete change of named insureds creates a new policy.

It is apparent from the facts recited in *Evans* and *Shaw* that both cases involved uninsured motorist claims by spouses who had been named insureds on the original policies. In *Evans,* the application listed both spouses, and the husband signed a form rejecting uninsured motorist coverage. After the couple divorced, the wife signed a form asking for the same coverage as on the original policy but "requesting that her former husband, Mr. Brinson, be *deleted* as a named insured and that her last name be *changed* on the policy from Brinson to Evans." (Emphasis added.) (668 So.2d at 288) The insurance company made the requested changes but did not offer Ms. Evans uninsured motorist coverage or obtain a written rejection of that coverage. Under these circumstances the original policy

had been "renew[ed] and chang[ed]," so that the husband's earlier rejection of UM coverage remained effective. (*Id.*)

Shaw involved a similar factual scenario. The court described the facts surrounding the original issuance of the policy as follows:

> Prior to his marriage with Stephanie, Sean was married to his first wife, Lori Ditmore, and both were insured with State Farm from 1996 until their divorce in 2000. *Lori and Sean's policy* included liability coverage of $100,000 for each person, limited by $300,000 for each accident. In June of 1996, Lori elected lower limits for UM coverage, consisting of $50,000 for each person, limited by $100,000 for each accident, non-stacking. Lori and Sean renewed their policy from 1996-2000. During this time, changes were made to *their policy*, including adding and replacing vehicles, changes to the policy number, and the addition of their daughter as an insured. *However, Lori and Sean never changed the liability limits or requested a change to their UM coverage.* (Emphasis added.)

(967 So.2d at 1012) After the spouses divorced, State Farm issued a new policy "*exclusively* in Sean's name[.]" (*Id.*) Subsequently, Sean married a second wife, Stephanie, but both were killed in an accident one day later.

The personal representatives of the estates of both Sean and Stephanie claimed uninsured motorist benefits.[5] The issue in the case was whether the

[5] Because *Shaw* involved a claim for Stephanie's death as well as Sean's, Horace Mann argued in its reply brief in the court of appeal that *Shaw* supports the argument that a new named insured is bound by an earlier named insured's rejection of coverage. That argument is incorrect. The trial court in *Shaw* found that Stephanie had coverage as "an insured." There is no indication in the *Shaw*

issuance of that policy required State Farm to again offer uninsured motorist limits equal to the bodily injury liability limits. The trial court found that Lori's original selection of lower UM limits was not binding on Sean, but the First District Court of Appeal, reversed, relying on its decision in *Evans* to hold that Sean's new policy "replaced" the original policy. (967 So.2d at 1015-1016) [6]

The district court's recitations of the facts in *Evans* and *Shaw* show that the original policies in both cases were issued to both spouses as named insureds. *Evans* states that the divorced wife requested that her husband's name be *deleted as a named insured* and that her name be *changed* (not *added* as a named insured) on the policy. *Shaw* states that "both [spouses]" were insured under the original policy, that *neither* spouse requested a change to *their* coverage, and that after the divorce a new policy was issued *exclusively* in Sean's name.

This Court does not need to overrule *Evans* and *Shaw* to rule for Allison in this case. Whether or not one agrees with those decisions, they are both consistent with Allison's position. A policy that only deletes one of the named insureds, as in

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opinion that she had become a *named* insured during the one short day of their marriage. Thus, Stephanie's coverage depended completely on Sean's coverage, and *Shaw* does not involve a claim by a new named insured.

[6] Indeed, under *Shaw,* Horace Mann was *not* required to offer Richard uninsured motorist coverage *under the policy that it issued to him in 2004,* because that new policy "superseded" or "replaced" the existing policy. The *Shaw* court recognized what the district court in this case did not: that one's status as named insured is more important than the policy number that an insurance company chooses to put on a policy.

Evans, is one that "extends, changes, supersedes, or replaces an existing policy." And, as *Shaw* holds, even the issuance of a new policy to one who was a named insured under the existing policy falls within the ambit of the same saving language. As did *Creighton,* these decisions look to substance, not the mere formality of whether a policy is assigned a new policy number or whether it is "new" or "the same" in the eyes of the insurance company. The three cases reach different results—for the insured in *Creighton* and for the insurance company in *Evans* and *Shaw*—because of a single but critical distinction: the insured in *Creighton* had never been a named insured under the existing policy and thus never had a right to select uninsured motorist coverage (because under § 627.727 that right belongs exclusively to the named insured); the insureds in *Evans* and *Shaw* had been named insureds and did have that right. All three cases are consistent; the outlier is the district court's decision in this case, which reaches the wrong result by overlooking both the relevance of *Creighton* and the dispositive factual distinction between *Shaw* and *Evans* and this case.

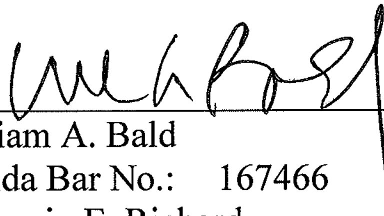
CONCLUSION

Horace Mann figuratively flipped a coin to decide whether or not to advise Allison of rights that our legislature has deemed important enough to require that they be waived in writing, after appropriate disclosures to the insured. Heads, we

issue a new policy to Allison, and she receives a full explanation of her rights and the opportunity to make an informed, written election of those rights. Tails, we issue the new policy to Richard, and in doing so purport to deny Allison those same rights. Apparently, in Horace Mann's judgment, the coin came up "tails." This Court should not allow substantial rights to be lost so arbitrarily. It should quash the decision of the First District Court of Appeal and remand for reinstatement of the final judgment, which is supported by the trial court's well-reasoned orders.

Respectfully submitted,

PAJCIC & PAJCIC, P.A.



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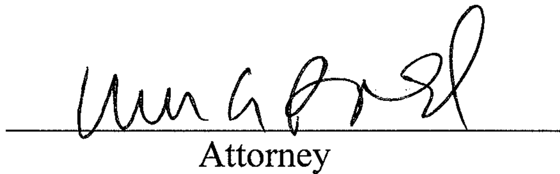
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of foregoing has been furnished to Kathy J. Maus & Julius F. Parker, Attorneys for Respondent Horace Mann Insurance Company, Butler Pappas Weihmuller Katz Craig, LLP by email kmaus@butlerpappas.com and jparker@butlerpappas.com this 10th day of July 2014.



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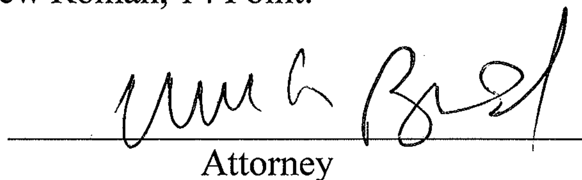
CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

The undersigned counsel hereby respectfully certifies that the foregoing Initial Brief on the Merits complies with the font requirements of Fla. R. App. P. 9.210, and has been typed in Times New Roman, 14 Point.



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