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IN THE SUPREME COURT OF THE STATE OF FLORIDA

LETICIA MORALES, Individually and as Personal Representative of the Estate of Santana Morales, Jr., deceased, as parent and natural guardian of SM and RM, minors, as legal guardian for Santana Morales, III and Marciela Morales, individually,

Plaintiffs/Appellants,

vs.

ZENITH INSURANCE COMPANY,

Defendant/Appellees.
_____/

CASE NO.: SC13-696

USCA Case No.: 12-11755

USDCT Case No.: 8:10-cv- 00733-T30-JSM-TGW

APPELLANTS' REPLY BRIEF ON THE MERITS

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT

Tracy Raffles Gunn, Esq.
Fla. Bar. No. 984371
tgunn@gunnappeals.com
tbishoff@gunnappeals.com
Gunn Appellate Practice, P.A.
400 N. Ashley Dr., Ste. 2055
Tampa, FL 33602
(813) 254-3183 Telephone
Appellate Counsel for Appellants

Lee D. Gunn IV, Esq.
Fla. Bar. No. 367192
lgunn@gunnlawgroup.com
ssears@gunnlawgroup.com
Gunn Law Group, P.A.
400 N. Ashley Dr., Ste. 2050
Tampa, FL 33602
(813) 228-7070 Telephone
Counsel for Appellants

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REPLY ARGUMENT

(1) THE ESTATE HAS STANDING TO BRING ITS BREACH OF CONTRACT CLAIM AGAINST ZENITH UNDER THE EMPLOYER LIABILITY POLICY.

Zenith's response to this point on appeal is to argue that an employee claiming coverage under a workers compensation policy cannot directly sue the workers compensation insurer. This is irrelevant. The type of coverage at issue here is liability coverage. This is not a claim for workers compensation coverage.

Zenith argues that Florida's nonjoinder statute "does not create a right in third parties to sue an insurer, but merely addresses the *procedure* for joinder of a liability insurer." AB, P. 24 (emphasis in original). Even assuming that a statute could create a procedural rule, Florida law is clear that the nonjoinder statute is not merely procedural; it creates a substantive right on the part of a liability carrier not to be sued by the third party tort victim unless and until the condition precedent stated in the statute – obtaining a settlement or verdict against the insured – is met. *See VanBibber v. Hartford Accident and Indem. Ins. Co.*, 439 So.2d 880, 882–83 (Fla.1983) (declaring section 627.4136 substantive).

Conversely, under the statute, once the third party does obtain a settlement or verdict, he has a "beneficial interest" in the defendant's policy with its insurer, and has standing to bring a direct cause of action against that insurer. *See Lantana Ins., Ltd. v. Thornton*, --- So.3d ----, 2013 WL 3723499 at *1 (Fla. 3d DCA 2013) (citing *S. Owners Ins. Co. v. Mathieu*, 67 So.3d 1156, 1158-59 (Fla. 2d DCA

2011); *Mathieu, 67 So.3d at 1158* (where the third party claimants "have not obtained a settlement with or verdict against [the insured], they did not *yet* have a beneficial interest in [the insured's] liability policy") (e.s.); *General Star Indemnity Co. v. Boran Craig Barber Engle Construction Co.*, 895 So.2d 1136, 1138 (Fla. 2d DCA 2005) ("An injured person has no beneficial interest in the wrongdoer's liability policy *until* a judgment is entered against the insured.") (e.s). *See also State Farm Mut. Auto. Ins. Co. v. InterAmerican Car Rental, Inc.*, 781 So.2d 500 (Fla. 3d DCA 2001) (expressly recognizing a claim under section 627.4136 as a "third party beneficiary" claim).

Zenith claims that a judgment creditor has no common law third party beneficiary status, and further claims that the nonjoinder statute does not confer that status. Zenith's argument is directly contrary to this Court's holding in *VanBibber*, 439 So.2d 880, 882–83 (Fla.1983), in which this Court explained that section 627.4136 embodies the legislature's intent "to modify the third-party beneficiary concept adopted by this Court in *Shingleton v. Bussey* [citation omitted] to provide that an injured party has no beneficial interest in a liability policy *until* that person has first obtained a judgment against an insured." (e.s). Therefore, as this and other courts have explained, obtaining the judgment or settlement against the insured is what creates Morales' standing to bring this claim directly against Zenith. *See Valley Forge Ins. Co. v. Olem Shoe Corp.*, 2011 WL 3652561 (S.D.Fla. 2011)(" Because [claimant] is not an insured, it has no standing

to assert a cause of action against an insurance company until it obtains a settlement or verdict against an insured."); *Clarendon America Ins. Co. v. Bayside Restaurant, LLC*, 2006 WL 449247 (M.D.Fla.2006) (explaining that the plaintiff has standing to sue the defendant's liability insurer when plaintiff obtains a judgment against the insured); *Blue Cross and Blue Shield of Michigan v. Halifax Ins. Plan, Inc.*, 961 F.Supp. 271 (M.D.Fla.1997)(noting that satisfying the conditions of the nonjoinder statute gives a third party claimant standing to sue the tortfeasor's liability insurer). Because Morales obtained a judgment against Lawns, Morales has standing to bring direct actions against Zenith under the liability policy. *See Macola v. Government Employees Ins. Co.*, 953 So.2d 451, 455 (Fla. 2006); *Universal Underwriters Ins. Co. v. Abe's Wrecker Service*, 2007 WL 1412954 (M.D. Fla 2007).

Zenith appears offended or confused by the fact that Morales brings an action directly against Zenith, the tortfeasor's insurer, because Morales was adverse to the tortfeasor below. AB, P. 26. This is precisely what the nonjoinder statute and established Florida case law allows.

At bottom, Zenith's standing argument is nothing more than a continuation of its attempt to characterize this as solely a workers compensation case. Zenith's argument is based solely on Santana Morales' status as an employee of Lawns. Zenith ignores the fact that Morales' estate and survivors were plaintiffs in a tort liability case and obtained a valid tort judgment against an entity that is insured by

Zenith under a liability policy. Zenith's argument also ignores the fact that it issued an Employers Liability policy - a policy specifically designed to cover tort liability for injuries to employees and a coverage that this Court has already recognized is separate from the workers compensation coverage. *Travelers Indmenity Co. v. PCR, Inc.*, 889 So.2d 779, 784 n.7 (Fla. 2004).

This Court should answer the first certified question in the affirmative, finding that the Estate, a judgment creditor, does have standing to bring its breach of contract claim against Zenith under the Employer Liability policy.

(2) THE PROVISION IN THE EMPLOYER LIABILITY POLICY WHICH EXCLUDES FROM COVERAGE "ANY OBLIGATION IMPOSED BY WORKERS' COMPENSATION ... LAW" DOES NOT EXCLUDE COVERAGE OF THE ESTATE'S CLAIM AGAINST ZENITH FOR THE TORT JUDGMENT.

The most notable thing about Zenith's Answer Brief is what it does not contain. Zenith does not even attempt to explain how a tort judgment imposed under Florida's Wrongful Death Act can qualify as an "obligation imposed by workers compensation...law." Zenith's only possible basis for avoiding coverage under the policy is this exclusion. The exclusion must be strictly construed in favor of coverage. Therefore, unless the underlying tort judgment is an "obligation imposed by workers compensation [] law," the judgment is covered under the terms of the policy. Zenith's failure to address the actual language of its own policy exclusion mandates a finding in favor of Morales.

Apparently recognizing that it cannot prove that the tort judgment is an

"obligation imposed by" workers compensation law, Zenith instead continues to argue that the judgment against Lawns should have been barred by workers compensation immunity. Zenith does not contest the fact that the insured's workers compensation immunity is a tort defense. Zenith also admits that it cannot assert tort defenses in this coverage case. However, Zenith continues to question whether the Morales claim against Lawns should have been barred by workers compensation immunity. It is far too late for Zenith to contest the judgment against Lawns.

The undisputed fact is that Morales has a valid and enforceable state court tort judgment against Zenith's insured. This Court should reject Zenith's efforts to revisit the substantive basis for that liability in this coverage case. If Zenith is correct that the claim should have been precluded by workers compensation immunity, then the judgment exists because Zenith failed to defend its insured and assert that defense for the insured's benefit. Established Florida law dictates that Zenith cannot assert the same defense for its own benefit now.

Zenith's argument requires this Court to determine that the judgment against Lawns should have been barred by workers compensation immunity, and then to apply that defense for Zenith's benefit in this coverage case. This is contrary to Florida law, and should be rejected in favor of the plain language of the policy, which requires Zenith to cover the judgment against its insured unless it is an "obligation imposed by" workers compensation law. Again, Zenith does not even

attempt to argue that the tort judgment is an "obligation imposed by" workers compensation law.

The Cases Cited by Zenith Construe CGL Policies and Are Not Applicable To This Employer's Liability Policy

Instead, for its response on the workers compensation exclusion, Zenith relies on two cases: *Indian Harbor Insurance Company v. Williams*, 998 So.2d 677 (Fla. 4th DCA 2009), and *Florida Guaranty Insurance Association v Revoredo*, 698 So.2d 890 (Fla. 3d DCA 1997). Zenith argues that these cases establish that "a liability policy does not cover a negligence-based tort judgment against an employer when the policy contains a workers' compensation exclusion." AB. P. 2;11. Both cases did hold that claims by employees against employer/insureds were not covered. Importantly, however, both cases involved Commercial General Liability (CGL) policies and not an Employer Liability Policy.

Zenith argues that the distinction between CGL policies and Employer Liability policies was not mentioned in *Indian Harbor* or *Revoredo*. See AB, P.14, n7.[1] To the contrary, *Indian Harbor* and *Revoredo* both expressly relied on the fact that the policies before the courts in those cases were CGL policies, which are not

[1] The fact that the law governing a CGL policy does not apply to a case involving an Employer Liability policy may not have been expressly mentioned in the two cases relied upon by Zenith, but it is well established in Florida law that different types of policies are not subject to the same law and the case law is not interchangeable. *See Progressive American Ins. Co. v. Rural/Metro Corp. of Florida*, 994 So.2d 1202 (Fla. 5th DCA 2008); *Government Employees Ins. Co. v. Sweet*, 186 So.2d 95 (Fla.4th DCA 1966).

meant to cover any injuries to employees. The court in *Revoredo* emphasized that the policy was a CGL policy expressly excluding bodily injury to "[a]n employee of the insured arising out of and in the course of employment by the insured." Likewise, the key to the holding in *Indian Harbor* was that under a CGL policy "the only coverage intended, and for which the insurance premium was paid, was the liability of the insured to the public." 998 So.2d at 679. Approving the *Revoredo* case, the *Indian Harbor* court explained that the issue in a CGL case is "distinguish[ing] the employer's liability to the public from the liability of the insured to its employees." 998 So.2d at 679.

In fact, the analysis of the workers compensation exclusion in *Revoredo* supports Morales' argument here. In *Revoredo*, the court held that where the employer was liable under section 440.11 as a penalty for not securing workers compensation coverage, that liability was "under" workers compensation law. 698 So.2d at 892-893. This makes perfect sense because the liability in that case was actually imposed by workers compensation law. Here, in contrast, Lawns' liability to Morales for the tort judgment was not created or imposed by chapter 440.[2]

Zenith dismisses *Wright v. Hartford Underwriters Insurance Co.*, 823 So.2d

[2] Furthermore, the court in *Indian Harbor* expressly stated that the key issue was whether the employer's liability was to the public (covered) or an employee (not covered), regardless of "whether or not they were protected by the workers' compensation law." 998 So.2d at 679. Therefore, the court in *Indian Harbor* expressly noted that whether the employer is protected by workers' compensation immunity is not relevant to the issue of coverage for the tort claim.

241 (Fla. 4th DCA 2002), the case that did address an Employer Liability policy, as a "discordant note" in Florida law, AB P. 13, implying that *Wright* is inconsistent with *Indian Harbor* and *Revoredo*. Zenith further claims that *Wright* did not address a coverage defense under the policy. AB, P. 4. It is true that *Wright* confirmed the rule an insurer cannot raise tort defenses (such as the employer's workers compensation immunity) in the coverage case. However, Zenith ignores the *Wright* court's further holding as to the policy coverage defense:

> We do point out, however, that the workers compensation exclusion in the employer's liability coverage in part II, relied upon by the trial court below, does not apply to Wright's civil action because the settlement judgment was not an "obligation imposed by worker's compensation" law. Rather, the judgment arose from the claims in the civil action and the settlement agreement among Wright, Pettit and Jacobi, neither of which involve obligations imposed by workers compensation law.

823 So.2d at 243. The court further stated that "[w]hether Jacobi is an insured under the policy and whether the intentional tort exclusion applies are issues remaining to be determined," meaning that the workers compensation exclusion had been rejected and did not remain to be determined. The 11th Circuit properly found that this was not mere dicta.

Wright involves the same exclusion, under the same type of coverage, as this case. *Indian Harbor* and *Revoredo* involve the different situation of a CGL policy. This Court should reaffirm the *Wright* court's holding that a tort judgment is not an "obligation imposed by" workers compensation law and is not excluded under an Employers Liability policy.

Employers Liability Insurance Can Cover Accidents For Which Workers Compensation Benefits Have Been Paid; This Is Not Double Dipping, And Furthermore Double Dipping Is Not A Basis For Rewriting The Contract Of Insurance

Zenith next defends the district court's concerns about double recoveries. Zenith cites *XL Insurance America v. Ortiz*, 673 F.Supp. 1331 (S.D.Fla. 2009), but neglects to inform this Court that *Ortiz* is another CGL case and therefore does not apply here. Zenith then continues its confusion between CGL and Employer Liability policies by dismissing this Court's decision in *Travelers Indemnity Company. v. PCR Inc.*, 889 So.2d 779 (Fla.2004), as merely holding that "an employer may" "address the risk that an employee will bring a claim that falls outside of the exclusive remedy created by the Workers' Compensation Law" "by purchasing CGL coverage, together with workers' compensation coverage, using the CGL coverage as a 'gap-filler'." AB, P. 17.

Therefore, Zenith apparently admits that some insurance does cover claims by employees against employers that are not barred by workers compensation immunity. However, what this Court actually held in *Travelers v. PCR* was that Employer Liability insurance, not CGL coverage, provided that protection. 889 So.2d at 784, n.7. As explained in the *Indian Harbor* case relied upon by Zenith, CGL coverage never applies to claims by employees against the employer. CGL coverage would never serve as "gap-filler" coverage for employees' tort claims. The coverage that serves that purpose is Employers Liability coverage, the type of

coverage that Zenith issued here.

Florida law has already rejected Zenith's double dipping argument.[3] Contrary to Zenith's argument, the receipt of workers compensation benefits does not preclude an injured employee or his estate from suing the employer in tort for the same accident. *Jones*, 932 So.2d at 1107. An Employer's Liability policy can provide liability coverage even if the same carrier has already provided workers compensation benefits for the same accident. *See FCCI Ins. Co. v. Horne*, 890 So.2d 1141 (Fla. 5th DCA 2004). Even where workers compensation benefits are paid, the employer may still have tort liability for the same incident. *See Jones v. Martin Electronics, Inc.*, 932 So.2d 1100, 1108 (Fla.2006). Employer's Liability Coverage covers that "gap." *Travelers v. PCR*, 889 So.2d at 784, n.7

Zenith does not respond to the fact that the workers compensation exclusion upon which it relies does not refer to a double recovery. If Zenith meant for its policy to bar liability coverage for any accident for which compensation benefits have been paid, it should have written the policy as such. Instead, Zenith's policy excludes only an obligation "imposed by" workers compensation law. The exclusion must be applied as written.

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[3] Morales does not have space in this Reply Brief to respond to the California and out of state case law argued by Zenith's amicus on the double recovery issue. Suffice it to say that Florida law allows an employee to recover under both workers' compensation law and tort law for the same incident, and that setoffs and other protections are in place to prevent unfair duplication of recovery. If this Court would like Morales to present an exhaustive response on the handling of this issue in other jurisdictions, Morales would be happy to do so.

Public Policy Favors Morales

Zenith attempts to argue public policy, but the public policy factors in this case weigh in favor of Morales. An insurer cannot be permitted to allow a judgment to be entered against its insured and then avoid coverage for that judgment by asserting a tort defense that, by the carrier's own argument, should have protected the insured from liability. Florida law requires the carrier to protect the insured; if it fails to do so, it shares the insured's liability.

Zenith mentions repeatedly that the verdict was entered without a defense presented at trial, which is apparently meant to call into question the judgment that Morales obtained. However, whether the trial was contested or not makes no difference; even a voluntary settlement would equally bind the carrier. *See Gallagher v. Dupont*, 918 So.2d 342, 347–48 (Fla.5th DCA 2005); *Wright v. Hartford Underwriters Ins. Co.*, 823 So.2d 241, 242–43 (Fla. 4th DCA 2002); *Ahern v. Odyssey Re (London) Ltd.*, 788 So.2d 369, 371 (Fla. 4th DCA 2001); *Indep. Fire Ins. Co. v. Paulekas*, 633 So.2d 1111, 1114 (Fla. 3d DCA 1994).

Zenith also claims that it should not have been required to defend the tort claim in order to now benefit from Lawns' alleged tort immunity. AB, P.21-23. This argument is directly contrary to years of Florida law, which require a liability insurer to defend its insured and separately litigate its coverage defenses. It is well established that an insurer that fails to defend its insured does so at its peril. Refusing to allow Zenith to benefit from the tort defense it failed to use to protect

its insured is simply an application of established Florida law. This Court should reject Zenith's complaints that a finding in favor of Morales would create a new peril for Florida's insurers.

Zenith also argues that it would be unfair to prevent it from asserting Lawns' workers compensation immunity because Lawns allegedly failed to cooperate in its own defense. To the extent that any difficulty was created by Lawns' alleged failure to cooperate, that issue remains to be determined in the District Court should Morales prevail in this appeal. The alleged failure to cooperate is a separate defense that Zenith will have an opportunity to prove. It does not expand the scope of the workers compensation exclusion, and does not entitle Zenith to assert tort defenses for its own benefit in this coverage case.

The amicus briefs supporting Zenith's position likewise present no valid public policy basis for rewriting the insurance contract. Notably, none of the many amici presented by Zenith were able to defend the federal district court's finding that the tort judgment is an "obligation imposed by" workers compensation law. Instead, the Institute/Chamber amicus brief argues that weakened workers compensation immunity would increase the number of tort claims against employers, and the Associated Industries brief argues that the employer is immune from suits alleging simple negligence. These statements may be generally true, but they are irrelevant. The issue here is not whether Lawns was entitled to immunity. Zenith's policy does not exclude "any judgment that should have been barred by

workers compensation immunity," or "any judgment based on simple negligence," but that is how Zenith and its amici ask this Court to rewrite the policy. In fact, the Associated Industries amicus brief argues that Employers Liability coverage "excludes payment to an employee based on a simple negligence claim against an insured employer." Amicus Brief, P.7. If the Zenith policy actually did contain such an exclusion, this case may be very different. However, Zenith must prove the exclusion it actually wrote into its policy – that the tort judgment is an "obligation imposed by" workers compensation law. Zenith cannot do so.

This Court should answer the second certified question in the negative, and hold that the workers compensation exclusion does not bar coverage for the tort judgment against Lawns.

(3) THE RELEASE IN THE WORKERS' COMPENSATION SETTLEMENT AGREEMENT DOES NOT PROHIBIT THE ESTATE'S COLLECTION OF THE TORT JUDGMENT.

A. Election Of Remedies Is A Tort Defense That Cannot Be Asserted In This Coverage Case.

Zenith does not respond to the point that election of remedies is a tort defense that cannot be asserted as a defense to a coverage claim.

B. The Settlement Agreement Is Limited By Its Terms To The Workers' Compensation Claim.

Zenith claims that the reference to the "coverage provided" is sufficient to expand the settlement to the tort claim. Zenith's argument ignores the fact that the agreement repeatedly states that it is made pursuant to the Workers' Compensation

Act, specifically the washout settlement provision. Zenith also largely ignores the fact that the settlement was submitted for court approval only in the workers compensation case, the fact that the settlement agreement required a dismissal of the workers compensation claim but did not require a dismissal of the pending tort claim, and the fact that the only consideration provided by Zenith for the settlement was the exact value of the remaining workers compensation benefits.

Instead, Zenith and its amici claim that the tort claim was released because Morales did not specifically exempt the tort claim from the settlement. However, this is contrary to both the law controlling statutory lump sum workers compensation settlements and the general law regarding the scope of releases and settlement. *See Borque v. Trugreen, Inc.*, 389 F.3d 1354 (11th Cir. 2004)(terms in a lump sum settlement under section 440.20(11) are narrowly construed as referring only to the worker's compensation claim); *Hurt v. Leatherby Ins. Co.*, 380 So.2d 432, 434 (Fla.1980) (unless a specific claim is unambiguously released in a settlement document, it will not be barred).

C. Even If Election Of Remedies Could Be Asserted In This Coverage Case, The Settlement Agreement Does Not Meet The Requirements For An Election Of Remedies Under Florida Law.

Zenith entirely fails to respond to the point that it cannot prove the elements of an election of remedies under Florida law.

D. The Agreement Cannot Be An Election Of Remedies As To The Coverage Case Because Morales Did Not Have A Coverage Claim At The Time Of The Settlement.

Zenith does not respond to this point.

E. Any Potential Settlement Defense is Limited to the Parties to the Settlement, and Zenith Cannot Demonstrate that the Settlement Complied with the Requirements for Settling Minors' Tort Claims.

Zenith does not respond to these points.

For the points on which Zenith did not respond, Morales relies on the Initial Brief.

For the foregoing reasons, this Court should answer the third certified question in the negative, and hold that the workers compensation settlement did not operate as a release or election of remedies as to this coverage case.

CONCLUSION

This Court should answer the first certified question in the affirmative, and find that the Estate does have standing to bring a coverage claim against Zenith. This Court should answer the second certified question in the negative, and find that the exclusion for "any objection imposed by workers compensation [] law" does not bar coverage for the tort judgment against Zenith's insured. This Court should answer the third certified question in the negative and find that the workers' compensation settlement does not operate as an election of remedies or release of this coverage claim against Zenith.

Respectfully submitted,

Tracy Raffles Gunn, Esq.
Fla. Bar. No. 984371
tgunn@gunnlawgroup.com
tbishoff@gunnlawgroup.com
Gunn Appellate Practice, P.A.
400 N. Ashley Dr., Ste. 2055
Tampa, FL 33602
(813) 254-3183 Telephone
Appellate Counsel for Appellants

Lee D. Gunn IV, Esq.
Fla. Bar. No. 367192
lgunn@gunnlawgroup.com
ssears@gunnlawgroup.com
Gunn Law Group, P.A.
400 N. Ashley Dr., Ste. 2050
Tampa, FL 33602
(813) 228-7070 Telephone
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2), and is formatted using Times New Roman 14-point font.

Tracy Raffles Gunn, Esq.
Fla. Bar. No. 984371
tgunn@gunnappeals.com
tbishoff@gunnappeals.com
Gunn Appellate Practice, P.A.
400 N. Ashley Dr., Ste. 2055
Tampa, FL 33602
(813) 254-3183 Telephone
Appellate Counsel for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was SERVED BY EMAIL on August 12, 2013 to the following: I. William Spivey, Esq., Greenberg Traurig, P.A., 450 South Orange Avenue, Suite #650, Orlando, FL 32801 spiveyw@gtlaw.com; Richard S. Maselli, Esq., Ogden & Sullivan, P.A., 113 South Armenia Avenue, Tampa, FL 33609-3307 rmaselli@ogdensullivan.com; Julissa Rodriguez, Esq. and Elliot H. Scherker, Esq., Greenberg Traurig, P.A., 333 S.E. Second Avenue, Suite #4400, Miami, FL 33131 rodriguezju@gtlaw.com scherkere@gtlaw.com miamiappellateservice@gtlaw.com; William H. Rogner, Esq., Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A., 1560 Orange Avenue Suite 500, Winter Park, FL 32789 wrogner@hrmcw.com; Katherine E. Giddings, Esq., and Nancy M. Wallace, Esq., Akerman Senterfitt, 106 East College Avenue, Suite 1200, Tallahassee, FL 32301; Katherine.giddings@akerman.com nancy.wallace@akerman.com martha.parramore@akerman.com; William W. Large, Esq., Florida Justice Reform Institute, 210 South Monroe Street, Tallahassee, FL 32301-1824 William@fljustice.org; Rayford H. Taylor, Esq., Casey Gilson, P.C., Six Concourse Parkway, Suite 2200, Atlanta, GA 30328 rtaylor@caseygilson.com

TRACY RAFFLES GUNN, ESQ.
Fla. Bar. No. 984371
tgunn@gunnappeals.com
tbishoff@gunnappeals.com
GUNN APPELLATE PRACTICE, P.A.
400 North Ashley Drive, Suite 2055
Tampa, FL 33602
(813) 254-3183 Telephone
(813) 254-3258 Facsimile
Appellate Counsel for Appellants

LEE D. GUNN IV, ESQ.
Fla. Bar. No. 367192
lgunn@gunnlawgroup.com
ssears@gunnlawgroup.com
GUNN LAW GROUP, P.A.
400 N. Ashley Drive Suite 2050
Tampa, FL 33602
(813) 228-7070 Telephone
(813) 228-9400
Counsel for Appellants