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IN THE DISTRICT COURT OF APPEAL
SIXTH DISTRICT, STATE OF FLORIDA

CASE NO.: 6D23-2853
L.T. CASE NO.: 2018-CA-013196-O

KRISTOPHER RICHARDSON,

Appellant,

v.

DAERI TENERY,

Appellees.

_______________________________/

REPLY BRIEF OF APPELLANT KRISTOPHER RICHARDSON

BOYD & JENERETTE, PA
KEVIN D. FRANZ
Florida Bar No.: 15243
kfranz@boydjen.com
1001 Yamato Road, Suite 102
Boca Raton, FL 33431
(561) 208-0708 – Telephone
Attorney for Appellant

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ARGUMENT IN RESPONSE AND REBUTTAL

I. DR. FREDERICK'S ATTACK OF DR. DEMERY REQUIRES A NEW TRIAL.

A. Tenery deflects from the issues on appeal.

Why Tenery moved to strike Dr. Demery is irrelevant (A.B., pp. 10-11) because the trial court denied Tenery's motion, and Tenery did not cross-appeal. Tenery objected to the issuance of a curative arguing that Dr. Frederick's attacks went to "weight, not admissibility." (TT. 2389; A.B., pp. 14, 30-31). She did not cross-appeal this ruling either. These arguments are not properly before this Court. State v. City of Weston, 316 So. 3d 398, 408 (Fla. 1st DCA 2021) ("Failure to cross-appeal also waives any challenge to adverse aspects of a lower tribunal's rulings.").

Additionally, *Tenery* moved to preclude criticism by one expert on the qualification of another—something she neglects to mention in the Answer Brief. (R. 2242, 2251). Complaining that her own relief was granted and enforced should fall on deaf ears.

B. Tenery's "weight" argument is incorrect.

Tenery seeks to excuse Dr. Frederick's attack by incorrectly claiming it went to "weight rather than admissibility." A.B., p. 12 (quoting R. 4435). The trial court correctly and expressly recognized that does not go to

weight; rather, it is "a gatekeeping issue for the Court." (TT. 2381, see also TT. 2385-86).

Whether Dr. Demery is qualified to opine on a subject is a gatekeeping question for the court. Dr. Frederick—prompted by a question from Tenery's counsel—testified psychologists "are never qualified to do such a thing[.]" (TT. 2378). This attack necessitates a new trial.

C. Tenery and Dr. Frederick knew not to criticize Dr. Demery; Dr. Frederick did it anyway.

Tenery *knew* not to criticize the ability of Dr. Demery to opine on brain injuries given the pre-trial rulings. Dr. Frederick knew not to criticize Dr. Demery's ability because he heard: (1) Richardson's objection to improper criticism of Dr. Demery at a side bar, (2) the ruling sustaining that objection, and (3) the curative. (TT. 2341-2344). Dr. Frederick still improperly testified that psychologists, like Dr. Demery, are "never qualified" to opine on brain injuries. (TT. 2378).[1]

---

[1] The trial court told Dr. Frederick during an earlier side-bar, "I'm going to mute *you* . . . . If we need you for anything, I'll unmute, but *you'll* just be muted for a little bit." (TT. 2323; emphasis added). Richardson interpreted this as the trial court muting Dr. Frederick. I.B., p. 4. The court, however, then said, "We can still hear you, though, so just be aware of that." (TT. 2323). To the extent that the trial court muted *itself* and not Dr. Frederick, Richardson retracts the first sentence at I.B. p. 4.

D. Richardson's motion for mistrial is preserved, and the disparaging testimony was incurable.

This objectionable question and answer on redirect (including the objection to issuance of a curative) is preserved. Richardson contemporaneously objected by asking for a sidebar and moving to strike the testimony as violating the Court's Daubert Order. (TT. 2378). As the objection was not immediately sustained, there was no requirement to immediately move for a mistrial. See Companioni v. City of Tampa, 51 So. 3d 452, 456 (Fla. 2010) (requiring motion for mistrial *after* objection sustained).

Richardson changed his request for a curative to a motion for mistrial before the trial court ruled after realizing the prejudicial nature of the incurable improper testimony. (TT. 2380-81). This "put [the trial court] on notice" that a mistrial was required because the "error [was] incurable[.]" Id. at 456. The trial court then sustained the objection, denied the motion for mistrial, indicated its intent to issue a curative, and inquired into appropriate language for the same. (TT. 2381-82).

Richardson neither withdrew his motion for mistrial nor his position that a curative could not "unring that bell." (R. 2381). The circumstances here are unlike Companioni where the City failed to move for a mistrial after the trial court sustained its objections. Id. at 453.

Tenery's reliance on Cosme-Sella v. State, 301 So. 3d 254 (Fla. 4th DCA 2020) is misplaced as the Defendant there never moved for a mistrial. This situation is unlike that in Nolan v. Kalbfleich, for a number of reasons: (1) Appellant did not argue that issuing a curative was insufficient to cure the prejudice; (2) the court immediately issued the curative *sua sponte* before Appellant moved for a mistrial; and (3) Appellant did not respond when the court stated, "I immediately cured the problem." 369 So. 3d 346, 346 (Fla. 5th DCA 2023).

Tenery's argument that Richardson wanted the curative is belied by the record, which clearly reflects that Richardson sought a mistrial *because* the testimony was incurable. The Court denied the motion for mistrial. (TT. (TT. 2382). Richardson sought a new trial on this issue, which the trial court denied. (R. 7268-73). The issue is preserved.

While juries are presumed to follow instructions, some errors cannot be cured. See Walt Disney World Co. v. Blalock, 640 So. 2d 1156, 1158 n.1 (Fla. 5th DCA 1994) ("You can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good.") (quoting O'Rear v. Freehauf Corp., 554 F. 2d 1304, 1309 (5th Cir. 1977)). Tenery does not address Fischman v. Suen, providing that a jury is unlikely to disregard highly prejudicial excluded evidence pursuant to an order in

limine. 672 So. 2d 644, 645 (Fla. 4th DCA 1996). See also Acosta v. State, 798 So. 2d 809, 810 (Fla. 4th DCA 2001) (holding error in allowing one witness to testify to the credibility of another was not "cured by the instruction.").

No instruction could cure Dr. Frederick's disparaging testimony. One expert's opinion that another expert lacks credibility or is unable/unqualified is so inherently prejudicial that it amounts to "clear error . . . [which] mandates reversal." Carver v. Orange County, 444 So. 2d 452, 454 (Fla. 5th DCA 1983).

E. The cumulative impact necessitates a new trial.

Richardson objected to Dr. Frederick testifying that Dr. Demery "refused" to perform a necessary step in evaluating answers to CME testing. (TT. 2341). Richardson requested and received a curative after the trial court sustained the objection. (TT. 2341-44). This issue is preserved. See R.J. Reynolds Tobacco Co. v. Neff, 325 So. 3d 872, 879 (Fla. 4th DCA 2021) ("Where, however, the trial court sustains an objection a party must request a mistrial ***or*** a curative instruction to preserve the issue for appeal.") (emphasis added; citing Companioni at 456).

"Further, in evaluating whether the errors were harmless, we may consider the cumulative effect of preserved and unpreserved error." Neff,

325 So. 3d at 879 (cleaned up). Dr. Frederick's testimony on direct that Dr. Demery refused to perform a certain test catapulted his conclusion on redirect that Dr. Demery was unqualified to opine on TBI. The cumulative effect disparaged Dr. Demery in the eyes of the jury beyond repair.

Tenery attempts to distinguish cases cited at pages 27-28 of the Initial Brief; she argues in those cases, the experts were improperly permitted to opine on the other experts' ability, while Dr. Frederick did not give his opinion. Her position is perplexing since Dr. Frederick was expressly asked whether "psychologists ["like Dr. Demery"] are permitted to determine whether or not an individual has a brain injury or not" and directly answered: "No, they are never qualified to do such a thing, even if they have specialty training in neuropsychology." (TT. 2378).

This violated the court's Daubert Order, the Order in Limine, and the Court's role as the gatekeeper. It eviscerated the qualifications and credibility of Dr. Demery beyond repair. A new trial is required.

II. IMPROPER ADMISSION OF DR. BIFULCO'S EVIDENCE ON FUTURE TREATMENT/EXPENSES REQUIRES A NEW TRIAL.

A. Identifying Dr. BiFulco as a treater is irrelevant.

In conclusory fashion, Tenery argues, "Dr. BiFulco was clearly not a retained expert in this case" in part, based on how he was disclosed. A.B., pp. 36, 46. Tenery does not address Pitts v. Neptune, cited in the Initial

Brief, which stands for the proposition that the substance of the physician's opinion—not the label given by the party—dictates whether the physician is an expert witness. 49 Fla. L. Weekly D 555, *2 (Fla. 1st DCA Mar. 6, 2024).

She also fails to alert this Court to the case of Tillman v. Sweat, 49 Fla. L. Weekly D 1287, 2024 Fla. App. LEXIS 4565 (Fla. 5th DCA June 12, 2024), which is shockingly similar to the present matter.

In Tillman, Morgan & Morgan identified four "treating physicians" to testify about Tillman's treatment and "'offer opinions on causation and/or damages . . . permanency . . . and relationship to past and future medical care.'" Id. at **1-2. Tillman objected to Boecher discovery claiming the physicians were treaters and not experts. Id. at *2. The Fifth District denied Tillman's petition seeking to quash an order compelling said discovery. Id. at *8. The Court determined Defendant was entitled to the Boecher expert discovery:

> In the case before us, the witnesses Tillman disclosed as "treating physicians" intend to offer opinion testimony exceeding the scope permissible for a fact witness treating physician. Tillman's expert disclosure itself makes this clear for two reasons.
>
> First, according to the expert witness disclosure, these physicians will offer testimony on their "care and treatment of [Tillman], *and* offer opinions on causation and/or damages, including, but not limited to, . . . impairment, permanency,

> disability . . . and relationship of past and future medical care." Such opinion testimony exceeds the scope of a fact witness treating physician whose testimony relates to diagnosis and treatment of injury or disease. This intended testimony addresses litigation-related issues.
>
> Further, according to Tillman's expert witness disclosure, these treating physicians will be called upon to offer testimony based in part on their review of "any and all medical records pertaining to the care and treatment received by [Tillman]." Testimony based on records not generated or relied upon in the care and treatment by each treating physician goes beyond the function of a fact witness treating physician and into the realm of an expert witness.

Id. at **6-7.

Morgan & Morgan's "Expert Witness Disclosure" of Dr. BiFulco here is identical to their disclosure of the physicians in Tillman quoted above. Compare id. at **2, 7 with (R. 435). Dr. BiFulco's opinions "exceed[ed] the scope permissible for a fact witness treating physician." Tillman at *6. They concerned "litigation-related issues." Id. at *7. Accordingly, Tenery's position that Dr. BiFulco was a treater only because he was identified as such (A.B. pp. 36, 39-41), falls flat.

B. Tenery confuses the issues on appeal.

Richardson does not appeal a discovery order. He sought to limit Dr. BiFulco's trial testimony *because* Tenery objected to producing expert discovery for Dr. BiFulco. (R. 2236). The scope and extent of his testimony rendered him an expert witness. See Tillman at **5-8 (relying on

Gutierrez v. Vargas, 239 So. 3d 615, 622-23 (Fla. 2018)). He was improperly permitted to offer this expert testimony at trial.

Tenery also misunderstands the importance of the $5,000 payment. It was evidence of Dr. BiFulco's true (expert) status to support exclusion of non-disclosed expert opinions. (R. 2236). Tenery's response was to essentially call Richardson a liar by claiming Richardson was "disingenuous" and "misleading" the trial court. (R. 4606). It was not until the trial court forced a post-trial explanation that Morgan & Morgan finally acknowledged paying Dr. BiFulco. The $5,000 payment is an important part of what occurred below, but the issue on appeal does not concern excluding evidence of that payment at trial.

C. The trial court abused its discretion in failing to exclude Dr. BiFulco's testimony under Binger.

Tenery unwittingly proves Richardson's point by relying on Clair v. Perry, 66 So. 3d 1078 (Fla. 4th DCA 2011). The appellate court found no Binger violation, in large part, because "Appellant was also provided with all of Dr. Theofilos's medical records, containing **all the data** upon which the doctor formed his permanency opinion." Id. at 1080 (emphasis added).

Here, Dr. BiFulco's records—subpoenaed five times by Richardson throughout litigation—contained **no data** regarding future medical costs. The first record with any costs data was the excel spreadsheet produced

during trial providing for $2,309,868 in future medical expenses. (R. 8098). Unlike Clair, this was trial by ambush, and the trial court abused its discretion in allowing said testimony under Binger.

Richardson explained why he was not required to depose Dr. BiFulco in the initial brief, but Tenery's repeated statements that Dr. BiFulco's records provided the scope of his future medical expense opinions warrant further discussion. Tenery's "Expert Witness Disclosure" as to Dr. BiFulco provides:

> This physician has rendered **reports** of his medical treatment . . . and Plaintiff defers to his reports and/or testimony as to a summary of the subject matter of their testimony, **as well as the substance of the facts and opinions this physician may have.**

(R. 435) (emphasis added).

First, not one record (or report) produced pre-trial includes the "substance of the facts and opinions" concerning the $2,309,868 in future medical expenses. (Id.). Richardson was ambushed at trial by these new opinions found nowhere in Dr. BiFulco's "reports of his medical treatment" to which Tenery "defer[ed]" for the substance of the opinions. (Id.).

Second, Tenery argues Dr. BiFulco "was not required by any Rule to give a report to Richardson." A.B., p. 46. But Tenery's *own* disclosure reflects that Dr. Bifulco "has rendered reports" as to "the substance of the

facts and opinions" he may have. (R. 435). Richardson sought Dr. BiFulco's records (which would include reports) throughout discovery.

Tenery was required to produce the reports identified in the disclosure. Had Dr. BiFulco created his life care plan earlier than *2 days before testifying,* he would have been required to produce the same. Failing to do so prejudiced Tenery under Binger.

Tenery downplays Dr. BiFulco's role by arguing he did not create a "formal life care plan." A.B., p. 46. Formality is irrelevant; what matters is that Dr. BiFulco admitted the information included in his "notes" was similar information to what he would include in a life care plan. (TT. 1297-98). It was the *substance* of the life care plan opinions that ambushed Richardson at trial—not the format. Additionally, a cursory review of the spreadsheet belies Richarson's claim that these were mere "notes." It was a 6 column, 32-page summary report reflecting the treatment (with costs) Tenery would need over her lifetime. Tenery describes these as "notes"—a juror described it as a life care plan. (TT. 2690).

D. The trial court abused its discretion in admitting into evidence the "Categories of Care" record.

Richardson's narrative/hearsay argument is preserved. He objected pre-trial to admission of any narrative report as hearsay under McElroy v. Perry, 753 So. 2d 121 (Fla. 2d DCA 2000). (R. 2240). This objection went

to the "Categories of Care" document as an inadmissible narrative report. See ITT/Palm Coast Utils. v. Douglas, 696 So. 2d 390, 390 (Fla. 1st DCA 1997) ("The documents in question--a medical narrative and separate addendum--are hearsay which does not fall within the exceptions set out in section 90.803(4) or (6), Florida Statutes (1995)).")

The prejudice stemmed not solely from introduction of the document, but also from Dr. BiFulco's 11th hour spreadsheet (i.e., 'informal' life care plan) used to associate costs with treatment in the categories of care document. Tenery claims any error was harmless as the information on the document was "cumulative" to Dr. BiFulco's testimony on future medical costs. That *is* the harm: both Dr. BiFulco's oral testimony and his categories of care document should have been excluded.

E. Tenery casts aspersions against Richardson (and counsel) by ignoring the facts and sequence of events.

Richardson (and undersigned) takes seriously Tenery's accusation of misrepresenting the facts of the $5,000 payment. Tenery deflects blame and fails to inform this Court of the following pertinent events:

- Dr. BiFulco's office creates invoice # 1967 on June 25, 2018, which provides "Expert analysis does not begin until payment is received" and "See Retainer Agreement (will be sent separately)." (R. 4428).

- Morgan & Morgan pays Dr. BiFulco that $5,000 invoice on July 31, 2018 as reflected on a document dated December 17, 2020. (R. 10264)

- On January 16, 2023, Richardson moves in limine telling the Court *and* Tenery (and Morgan & Morgan) that Morgan & Morgan paid Dr. BiFulco the $5,000. (R. 2235, 4427-28). Concerned Tenery would attempt to turn Dr. BiFulco into a "de facto" expert, Richardson seeks to limit Dr. BiFulco's testimony to his own specialty and his own medical records. (R. 2236, 4400-4407).

Tenery's counsel knew as early as December 17, 2020, and at least by January 16, 2023, that Morgan & Morgan *did* pay this invoice back in 2018. Yet neither Dr. BiFulco nor Tenery (nor Morgan & Morgan) admitted this occurred or, as Tenery claims, "immediately" took "steps to remedy that mistake." A.B., pp. 37, 53. Instead, Tenery doubled down:

- Tenery's March 8, 2023 response to the Omnibus Motion in Limine told the trial court: **"Defendant attempts to mislead this Court by claiming Dr. Bifulco was 'paid' by Plaintiff's attorney. This is inaccurate, disingenuous, and a clear attempt to mislead this Court once again."** (R. 4606).

- On March 17, 2023, Dr. BiFulco testifies at trial that (1) he typically requires a $5,000 retainer to testify as an expert and prepare a life care plan, (2) Tenery's bills should not be paid by her attorneys, and (3) he did not remember the source of the $5,000 payment. (TT. 1405-07, 1428).

- On April 7, 2023, Richardson moves for a new trial and outlines the $5,000 payment concerns. (R. 7264-78). Richardson cites Rule 4-1.8 prohibiting a lawyer from providing financial assistance to a client. (R. 7278).

- On April 17, 2023, the trial court orders Tenery to respond to the issues concerning Dr. BiFulco. (R. 7922-23).

- On April 27, 2023, Tenery—for the first time—files Affidavits of Ryan Rudd, Esq. and Dr. BiFulco on the $5,000 payment. (R. 7940-7945).

- Mr. Rudd attests he first learned of the inadvertent payment at trial. (R. 7941). Yet Mr. Rudd was told this a month earlier and still chastised *Richardson* as misleading the trial court. (R. 4606).

- Dr. BiFulco attests he learned the $5,000 was inadvertently paid by Morgan & Morgan during his testimony, even though he did not remember the source of the payment during his testimony. (R. 7944).

- The trial court agreed that Morgan & Morgan should not pay Tenery's bills: "So if the invoices and the payment history in fact reflected payment by Morgan & Morgan, which is something that really shouldn't be happening if it is a treating physician category." (SR. 11260).

If the trial court had not ordered Tenery to respond, it is unlikely that Tenery would have filed Affidavits of Mr. Rudd and Dr. BiFulco or that the $5,000 payment would have been remitted to Morgan & Morgan. Richardson did not create the problems regarding the $5,000 payment and certainly did not misrepresent any facts in the Initial Brief. Tenery's accusations of lack of candor and misrepresenting the facts is unwarranted. Tenery *wrongfully* accused Richardson once of "misleading" the (trial) court and being "disingenuous." (R. 4606). Her similar claim to this Court is equally mistaken.

III. <u>THE TRIAL COURT ABUSED ITS DISCRETION ON RULINGS REGARDING MS. BONAPARTE.</u>

The thrust of Tenery's response is that Richardson could challenge the reasonableness of past medical expenses in other ways without Ms.

Bonaparte's testimony. Tenery cannot dictate how Richardson defends this case. It is also irrelevant for purposes of admissibility. The issue is whether the expertise "will assist the trier of fact in understanding the evidence or in determining a fact in issue[.]" § 90.702, Fla. Stat. Expert testimony on billing reasonableness does just that. See Counts v. Altman Pollock & Daniels, No. 18-cv-1072, 2020 U.S. Dist. LEXIS 171745, **8-11 (M.D. Fla. Aug. 21, 2020) (admitting expert billing and coding testimony as the ordinary jury lacks knowledge regarding CPT coding and whether charges are usual, customary, and reasonable).

Tenery's discussion of Dungan v. Ford is incomplete and misleading. A *plaintiff* may establish the reasonableness and necessity of past medical bills through her own testimony. 632 So. 2d 159, 163 (Fla. 1st DCA 1994). But Dungan does not stand for the proposition that a Defendant is precluded from calling an expert to challenge reasonableness. In fact, a recent Order explains why and how it is appropriate for an expert to present counter-evidence as to reasonableness:

> The "kinds of evidence" relevant to determining reasonable pricing [of medical expenses] include "(1) an analysis of the relevant market for hospital services (including the rates charged by other similarly situated hospitals for similar services); (2) the usual and customary rate [the hospital] charges and receives for its hospital services; and (3) [the hospital's] internal cost structure."

. . . .

> When a party disputes the reasonableness and necessity of medical expenses, it is entitled to present evidence relevant to that determination. *Bowling*, 81 So. 3d at 541 (allowing expert testimony as to billing inaccuracies); *see also Giacalone*, 8 So. 3d at 1236 (holding that requests for information pertinent to a hospital's charges and pricing differentials were "reasonably calculated to lead to the discovery of admissible evidence.").

Neely v. Circle K Stores, Inc., No. 22-cv-2556, 2024 U.S. Dist. LEXIS 115695, **3-5 (M.D. Fla. June 28, 2024) (internal citations omitted). Accord Larrieux v. Old Dominion Freight Line, Inc., No. 18-cv-861, 2020 U.S. Dist. LEXIS 35341, *4 (M.D. Fla. Mar. 2020) ("As defendant points out, it cannot be that whatever plaintiff's medical providers charge is ipso facto reasonable.").

In conclusory fashion, Tenery argues the trial court treated Dr. BiFulco and Ms. Bonaparte equally in terms of whether their methodology was reliable enough to opine on the reasonableness of medical expenses. A.B., p. 57. Tenery's arguments cut against her position by pointing out that Dr. BiFulco did *less* than Ms. Bonaparte in terms of showing that Dr. BiFulco's opinions were "based on sufficient facts or data" and were "the product of reliable principles and methods." § 90.702, Fla. Stat. Dr. BiFulco uses reference materials and relies on CPT codes to prepare a life

care plan, reflecting his belief in the reliability of these methodologies. (TT. 1431-32).

Medical billing experts routinely rely on databases for the reasonable marketplace value of medical services and treatment. Henshaw v. Wal-Mart Stores E., LP, No. 23-cv-2388, 2024 U.S. Dist. LEXIS 190709, **2, 6 (M.D. Fla. Oct. 21, 2024) (recognizing Physicians' Fee Reference, Medical Fees from Context4Healthcare Inc., and Find-A-Code reliable). Ms. Bonaparte relied on six such sources including Physician Fee and Coding Guides and Findacode.com. (R. 2385-2386). No justification exists for the disparate treatment as to these experts.

Tenery was left unable to present expert testimony on unreasonable medical charges. See Gaspar's Passage, LLC v. RaceTrac Petroleum, Inc., 243 So. 3d 492, 501 (Fla. 2d DCA 2018) (citing Bowling and noting the right to call witnesses is one of a party's most important due process rights). Tenery distinguishes Bowling in an irrelevant way by arguing Ms. Bonaparte lacked "the necessary medical background to render an opinion on whether the *medical care* that the bills reflected were actually provided was reasonable or not." A.B., p. 59. (emphasis added). Ms. Bonaparte only sought to testify that some *charges* for the medical care were unreasonable.

Richardson's decision not to call Ms. Bonaparte *after* the Daubert ruling is irrelevant to whether the Daubert ruling was an abuse of discretion in the first place. Richardson did not call Ms. Bonaparte *because* the trial court gutted her testimony. She was to opine that the reasonable cost for Tenery's treatment was $125,556 rather than the requested $220,023.72. The jury awarded $220,100 in past medical expenses. There is a reasonable possibility that the Daubert ruling contributed to the verdict.

WHEREFORE, Appellant KRISTOPHER RICHARDSON requests that this Court reverse and remand for a new trial on all issues.

BOYD & JENERETTE, P.A.

/s/ Kevin D. Franz
KEVIN D. FRANZ
Florida Bar No.: 15243
kfranz@boydjen.com
1001 Yamato Road, Suite 102
Boca Raton, FL 33431
(561) 208-0708 – Telephone
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, a copy of the foregoing has been furnished via Florida Courts E-Filing Portal to Clerk of the Court and to: **Ryan Rudd, Esq. and Ravin J. Sahedeo, Esq.**, Morgan & Morgan, P.A., 20 N. Orange Avenue, Suite 1600, Jacksonville, FL, 32202, (rrudd@forthepeople.com; ckittle@forthepeople.com; eservicerudd@forthepeople.com; rsahadeo@forthepeople.com); **Jeffrey E. Bigman, Esq.**, and **Brooke M. Gaffney, Esq.**, Smith Bigman Brock, P.A, P.O. Box 15200, Daytona Beach, FL, 32115 (jbigman@daytonalaw.com; eserrvice@daytonalaw.com); **Brian J. Lee, Esq.,** Morgan & Morgan, 201 Riverside Avenue, Suite 1200, Jacksonville, FL 32202, (blee@forthepeople.com); on this 25th of November, 2024.

/s/ Kevin D. Franz
KEVIN D. FRANZ

CERTIFICATE OF COMPLIANCE

In accordance with Florida Rule of Appellate Procedure Rule 9.210(a)(2)(B), the undersigned counsel hereby certifies that this brief complies with the font and word requirements of the Rule: Arial 14-point font and does not exceed 4,000 words.

/s/ Kevin D. Franz
KEVIN D. FRANZ