1D2024-1786

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In the First District Court of Appeal

Rapid Surplus Refund LLC

Appellant

v.

Southeast Property Acquisitions LLC

Appellee

Appeal from the Final Order for the Circuit Court for the Fourteenth Judicial Circuit in and for Bay County, Florida

L.T. # 23-CA-26

INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The underlying case in the trial court was a routine foreclosure of a first and second mortgage. The trial court only began to err post final judgment when it was time to disburse the surplus funds from the foreclosure sale.

The Plaintiff below, Peggy Bowling, ("Plaintiff"), held a first and second mortgage on the property. [R.6] When the loans went into default Plaintiff filed a lis pendens and corresponding mortgage foreclosure action on January 11, 2023 [R.6 and R. 61] against Thomas David Vaughn ("Foreclosed Owner") and his co-owner Jimmie H. Hall, Jr., who each owned a ½ or 50% interest in real property located in Bay County, Florida. [R. 70, Exhibit "A"]

On October 23, 2023 the trial court entered a final judgment of foreclosure [R. 63-66] containing a sale date of November 30, 2023. After the foreclosure sale, the clerk retained $78,004.93 in surplus sale proceeds. [R. 99-103]. Fifty (50%) percent went to the co-owner Jimmie H. Hall, Jr. which left $39,002.36 for Foreclosed Owner. [R. 110-113].

On November 22, 2023, three (3) business days before the foreclosure sale, Foreclosed Owner executed a quit claim deed to

Southeast Property Acquisitions, LLC, a Delaware limited liability company ("QCD Grantee") for at most $100.00. [R. 84, Exhibit "A"]. The $0.70 in documentary stamp shown at the top of the deed represents consideration of between $0.00 and $100.00. § 201.02(1)(a), Fla. Stat. (2023)

The generic quit-claim deed fails to disclose any information required by § 45.033(3), Fla. Stat. (2023). The omitted disclosures were the assessed value of the property, a statement that the assessed value may be lower than the actual value of the property, the approximate amount of any debt encumbering the property, and the approximate amount of any equity in the property.

The quit claim deed is dated November 22, 2023 and QCD Grantee filed its motion for surplus on January 15, 2024 [R. 99-103]. If it took 3 months[1] for QCD Grantee to receive the surplus funds, its return on investment would be 155,600%.[2] If it took until March 1, 2024, QCD

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[1] There is slightly over 3 months from the date of the sale on November 30, 2023 until February 1, 2024. QCD Grantee should have been able to have a hearing and obtain disbursement by February 1, 2024.

[2] https://www.calculatorsoup.com/calculators/financial/simple-interest-plus-principal-calculator.php. Select "solve for R". Using principal + interest (amount) = $39,000; principal $100; and a time frame of 3 months, then 4

Grantee's return on investment would be 116,700%. If one looks only at the time from acquisition of title to the sale date, 8 days**, the return on investment is 1,774,812%.** For purposes of this brief, QCD Grantee's return on investment/profit will be referred to as 100,000+%

On December 26, 2023 Foreclosed Owner executed a proper Agreement and Assignment of Interest to Rapid Surplus Recovery ("RSR") [R. 70, Exhibit "B"]. The Assignment, includes a financial disclosure that specifies the assessed value of the property, a statement that the assessed value may be lower than the actual value of the property, the approximate amount of any debt encumbering the property, and the approximate amount of any equity in the property, the foreclosure sale price and the amount of the surplus, as required by § 45.033(3), Fla. Stat. (2023) **RSR's fee is 12%**

The outcome of the trial court's order is that one homeowner received $34,320[3] and the other at most $100.

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months, then 8 days. Several other interest rate calculators would not work saying to use "reasonable" figures.

[3] This amount is $39,000 less an assignee's 12% fee.

JURISDICTION

The lower court rendered the Order on Motion to Intervene and Disburse Surplus Funds and Motion to Vacate Agreed Order Granting RSR's Motion to Intervene and Disburse Surplus Funds on June 14, 2024. [R. 110-113]. Appellants timely filed their notice of appeal within thirty days of that order on July 15, 2024. [R. 114-120]. This Honorable Court has jurisdiction. Rule 9.110(b), Fla. R. App. P.

SUMMARY OF ARGUMENT

This is a case of first impression interpreting § § 45.033(5) and 45.033(7) Fla. Statutes (2023) concerning the distribution of surplus funds from a foreclosure case.s Two other cases[4] mention § 45.033(5) Fla. Stat. (2023).

Prior to the 2006 enactment of § 45.032 and § 45.033, Fla. Statutes, the common law provided that the owner of property at the time of the foreclosure sale was entitled to the surplus. Several abuses arose

[4] *National Equity Recovery v. Midfirst Bank,* 8 So.3d 406, 408 (Fla. 4th DCA 2009) and *Estate of Enemencia de los Santos v. National Equity Recovery*, 208 So.3d 1268, concurring opinion (Fla. 3rd DCA 2017)

concerning surplus funds where foreclosed owners lost substantial equity to companies that obtained quit-claims deeds shortly before a foreclosure sale. Thus, the legislature created § 45.032 and § 45.033, Fla. Statutes (2006). § 45.032(2), Fla. Stat., (2023) states "It is the intent of the Legislature to abrogate the common law rule that surplus proceeds in a foreclosure case are the property of the owner of the property on the date of the foreclosure sale." Yet, the trial court awarded the surplus funds to QCD Grantee who acquired title three (3) business days before the foreclosure sale for no more than $100.00. So for the 3 business days that QCD Grantee held title it made over a ONE HUNDRED THOUSAND percent (100,000+%) profit. In including § 45.033(5), Fla. Stat., (2023), the section relied upon by the trial court, permitting discretionary awards to non-owners, a trial court cannot ignore the spirit of the law of fair disclosure and a 12% fee cap.

If the trial court is somehow correct that using a practice that the legislature stated was one of the three common abuses concerning surplus funds still permits a discretionary award, then the trial court is still mandated to order the clerk to pay the entity with a valid assignment. § 45.033(4), Fla Stat. (2023). Payment per § 45.033(5), Fla. Stat., (2023) which the trial court relied upon to award QCD Grantee the entire surplus is

discretionary. Payment per § 45.033(4), Fla. Stat. (2023) to an entity with a valid assignment of rights is mandatory.

ISSUES ON APPEAL

(1) Does § 45.033(5), Fla. Stat., (2023) allow a non homeowner surplus claimant avoid the fairness disclosures and fee cap requirements of § 45.033(3), Fla. Stat., (2023) which were enacted to stop abuses in foreclosure surplus matters by using a practice that the legislature stated was one of three primary methods of abusing foreclosed homeowners to obtain over a 100,000+% profit?

(2) Can a court ignore § 45.033(4), Fla. Stat. (2023) which states "The court shall honor a transfer or assignment that complies with the requirements of subsection (3), in which case the court shall order the clerk to pay the transferor or assignee from the surplus."?

ARGUMENT

There is no transcript of the hearing in the lower court. No stipulated statement pursuant to Florida Rule of Appellate Procedure 9.200 is necessary as the trial court's order is fundamentally erroneous on its face

and statutory construction is *de novo.* Both issues on appeal involve statutory construction so are reviewed *de novo.*

First, the issue of statutory construction is *de novo.* *Levy v. Levy*, 326 So.3d 678, 681 (Fla. 2021). The primary issue is whether § 45.033(5) Fla. Stat. (2023)[5] can be used to disregard everything these statutes were created to protect against or is it to cover innocent or simple mistakes in complying with § 45.033(3) Fla. Stat. (2023). For example, § 45.033(5) Fla. Stat. (2023) could cover situations where the assignee disclosed the amount of surplus before the bank/plaintiff requested additional interest or fees/costs; the assignee made a typographical error or the assignee filed a claim beyond the 60 day time period.

In *National Equity Recovery v. Midfirst Bank,* 8 So.3d 406 (Fla. 4th DCA 2009) a dispute arose between an assignee of the surplus and the

[5] § 45.033(5) Fla. Stat. (2023) ”If the court finds that a voluntary transfer or assignment does not qualify under subsection (3) but that the transfer or assignment was procured in good faith and with no intent to defraud the transferor or assignor, the court may order the clerk to pay the claim of the transferee or assignee after payment of timely filed claims of subordinate lienholders”.

surplus trustee[6]. The trial court disbursed 10% of the surplus funds between the two disputing parties with 90% going to the homeowner. The assignee appealed. The Fourth District held that because the assignee had not obtained its assignment within the statutorily required 60 days the trial court was not mandated to award it any money. However, citing to § 45.033(5) (2023) the Court upheld the discretionary award to the assignee.

Second, the trial court erred in finding that the property owner had nothing to assign because the quit-claim deed predated the assignment. §§ 45.032(2), 45.033(1) Fla. Stat. (2023) specifically state that they are abrogating the common law rule that surplus proceeds in a foreclosure case are the property of the owner of the property on the date of the foreclosure sale. Instead, § 45.032(2),Fla. Stat. (2023) states:

> There is established a rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim. A person claiming a legal right to the surplus as an assignee of the rights of the owner of record must prove to the court that such person is

[6] The current version of the statute eliminates surplus trustees.

entitled to the funds. At any hearing regarding such entitlement, the court **shall consider the factors set forth in s. 45.033** in determining whether an assignment is sufficient to overcome the presumption. [emphasis added]

§ 45.033(2),Fla. Stat. (2023) states:

The presumption may be rebutted only by:

(a) The grantee or assignee of a voluntary transfer or assignment establishing a right to collect the surplus funds or any portion or percentage of the surplus funds by proving that the transfer or assignment **qualifies as a voluntary transfer or assignment as provided in subsection (3).** [emphasis added]

Thus, the issues for a trial court to decide in a surplus case, are (1) who owned the property when the lis pendens was filed, not who owned it at the time of the sale; (2) is anyone other than that owner claiming the surplus; and if so (3) did that third person comply with § 45.033(3) Fla. Stat. (2023) to overcome the presumption that the foreclosed homeowner is entitled to the surplus? Even persons claiming the surplus by virtue of a

deed must comply with § 45.033(3) Fla. Stat. (2023) per § 45.033(7) (2023) Fla. Stat. [7]

In the instant case, in evaluating QCD Grantee's claim, the trial court could not consider any of the fairness disclosures in § 45.033(3) Fla. Stat. (2023) as none existed. Yet, the trial court was mandated to consider these fairness disclosures plus the fee cap. Where there are no fairness disclosures and the fee earned is 100,000+% greater than the maximum allowed by the statute, the trial court should deny that claimant's request, if not sanction the claimant.

Third, the trial court erred in saying there was no evidence of bad faith instead of making the statutorily required finding of good faith with no intent to defraud. Under either standard, QCD Grantee cannot meet its burden of proof. Holding that over a 100,000+% profit is good faith is

[7] § 45.033(7) Fla. Stat. (2023) "This section does not apply to a deed, mortgage, or deed in lieu of foreclosure unless a person other than the owner of record is claiming that a deed or mortgage entitles the person to surplus funds." "Owner of record" means the person or persons who appear to be owners of the property that is the subject of the foreclosure proceeding on the date of the filing of the lis pendens." § 45.032(1)(a) Fla. Stat. (2023)

fundamentally erroneous. Finding that failing to fully inform the Foreclosed Owner that he was giving up $39,000 for at most $100 is not "intent to defraud" is fundamentally erroneous. Awarding approximately $34,000 to one homeowner while awarding less than $100 to the other is fundamentally erroneous.

Fourth, the trial court ignored § 45.033(4) Fla. Stat. (2023) which states "The court shall honor a transfer or assignment that complies with the requirements of subsection (3), in which case the court shall order the clerk to pay the transferor or assignee from the surplus." [emphasis added] *see National Equity Recovery v. Midfirst Bank*, 8 So.3d 406, 408 (Fla. 4th DCA 2009) (payment per § 45.033(4) Fla. Stat. (2023) is mandatory while payment per § 45.033(5) Fla. Stat. (2023) is discretionary). Assuming that QCD Grantee's over 100,000+% profit was in good faith with no intent to defraud, RSR presented the trial court with a valid assignment that complied with § 45.033(3) Fla. Stat. (2023). Nothing in the statute prevents a homeowner from assigning their rights to two separate entities just as nothing prevents a person from hiring two different attorneys and paying them both.

The analysis required to expound upon these arguments above involve the following:

- History of foreclosure surplus abuses
- Good faith vs. lack of bad faith
- Statutory construction

History of foreclosure surplus abuses

While the trend in appellate review is to adhere to the supremacy-of-the-text principle and to not argue legislative history[8] in the instant case, one factor in the trial court's decision is "good faith with no intent to defraud". Good faith is not defined in this chapter unlike other chapters. Why these statutes were enacted is necessary to apply the statute's "good faith and with no intent to defraud" requirement to the QCD Grantee's actions.

The House of Representatives Staff Analysis for House Bill 2006-65 which created § §45.032 and 45.033 Fla. Statutes stated that the bill was to stop abuses relating to handling surplus funds from foreclosures.

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[8] Nicholas P. McNamara, What the Textualist Revolution in Florida Jurisprudence Means for Practitioners, Florida Bar Journal Vol. 98, No. 3, May/June 2024, Page 44

House of Representative's Staff Analysis - Substantive Analysis

(B) Background

It has been reported that, with the growing number of foreclosures that may result in a surplus, there is a growing number of entrepreneurs who are offering services to property owners subject to foreclosure. Some of these entrepreneurs are receiving significant profits while the property owners they contract with receive little of their equity in the property. Some of the common means are:

• A lawyer, or a person claiming to be a lawyer, will offer to file the legal papers required to obtain the court order required for the clerk to distribute the surplus to the now (or soon to be) former property owner. The fee arrangement may be a contingency fee. The property owner does not realize that the paperwork is basic enough that most lay persons could easily complete the paperwork.

• The entrepreneur offers the property owner a small sum of cash in exchange for an assignment of the surplus.

• **The entrepreneur offers the property owner a small sum of cash for a quitclaim deed to the property, thereby obtaining the legal right to the surplus**.

[emphasis added]

One of the three common abuses was obtaining a quit-claim deed from the owner in foreclosure for a small fee thereby obtaining the right to the surplus. This is exactly what happened in the trial court. Per the documentary tax stamps on the deed QCD Grantee could not have paid more than $100 for this deed a few days before a sale that netted it $39,000. The trial court's holding permits companies to completely disregard the statute that spells out what should be a fair fee (12%) versus over a 100,000+% return. In a lending situation an interest rate more than 45% per year is considered a felony and the debt completely unenforceable[9].

[9] Criminal Usury; Loan Sharking. § 687.071(3), Fla. Stat. (2023) and § 687.071(7), Fla. Stat. (2023)

Incorrect Legal Standard – lack of bad faith vs. good faith

The trial court used the incorrect legal standard in its order.[10] The trial court found there was no evidence of bad faith instead of finding good faith. However, there is no need to remand the case for further proceedings as even using the correct legal standard, the facts do not support any award to QCD Grantee. While good faith or bad faith seems to be "I know it when I see it"[11] it is impossible to find good faith in this case. In the instant case, QCD Grantee received in excess of a one hundred thousand percent (100,000+%) return on its investment. Criminal usury is

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[10] § 45.033(5) Fla. Stat. (2023) requires a finding that "the transfer or assignment was procured in good faith and with no intent to defraud…"

[11] "I know it when I see it" was first mentioned by Justice Potter Stewart's concurring opinion in *Jacobellis v. Ohio*, in stating what pornography is. 378 U.S. 184 (1964) It has since been used in almost every scenario from equitable estoppel; *Ryan v. Gonzalez*, 841 So.2d 510, J. Gross concurring opinion (Fla. 4th DCA 2003); to excessive fee awards, *Zuckerman v. Hofrichter*, 676 So.2d 41 (Fla. 3rd DCA 1996); and even whether an attached porch is a "dwelling", *Morlas v. State*, 211 So.3d 286 (Fla. 4th DCA 2017)

45% and the maximum fee for assisting in recovery of surplus funds is 12% per § 45.033(3)(d) Fla. Stat. (2023).

§ 45.033(3) Fla. Stat. (2023) provides the requirements to overcome the presumption that the homeowner is entitled to the surplus. These requirements are:

(a) The transfer or assignment is in writing and the instrument:

1. If executed prior to the foreclosure sale, includes a financial disclosure that specifies the assessed value of the property, a statement that the assessed value may be lower than the actual value of the property, the approximate amount of any debt encumbering the property, and the approximate amount of any equity in the property. If the instrument was executed after the foreclosure sale, the instrument must also specify the foreclosure sale price and the amount of the surplus.

2. Includes a statement that the owner does not need an attorney or other representative to recover surplus funds in a foreclosure.

3. Specifies all forms of consideration paid for the rights to the property or the assignment of the rights to any surplus funds.

(b) The transfer or assignment is filed with the court on or before 60 days after the filing of the certificate of disbursements.

(c) There are funds available to pay the transfer or assignment after payment of timely filed claims of subordinate lienholders.

(d) The total compensation paid or payable, or earned or expected to be earned, by the transferee or assignee does not exceed 12 percent of the surplus.

The trial court correctly found "There is no question that the quit claim deed transferring the interest in the property from Vaughn does not meet all of the requirements of § 45.033(3)," [R. 110-113] The record shows that QCD Grantee paid at most $100 in exchange for $39,000 approximately 3 months later. These facts do not and cannot show good faith. These facts are more aligned with intent to deceive, bad faith, and unclean hands. Thus, even if the trial court applied the correct legal standard, QCD Grantee would receive nothing.

The legislative history here tells us that § § 45.032 and 45.033 Fla. Statutes where enacted to stop people from obtaining quit-claim deeds

from homeowners in foreclosure and taking all their equity from surplus funds. Given that the QCD Grantee took all the equity and did not give Foreclosed Owner a SINGLE factual requirement contained in § 45.033(3), Fla. Stat. (2023) to help him make an informed decision, it is entitled to nothing. Had QCD Grantee provided Foreclosed Owner with the approximate amount of equity as required by § 45.033(3)(a)(1) Fla. Stat. (2023) Foreclosed Owner would not have signed the QCD. When properly informed of the surplus by RSR, Foreclosed Owner elected to use RSR's services. The key is to educate, not hoodwink, distressed homeowners and allow them to make an informed decision.

Statutory Construction

The trial court's ruling essentially puts form over substance. Can an invalid assignment/transfer become valid because of the form used? The answer is no. Using the statutory construction guidelines promulgated by this Court and the Florida Supreme Court to give meaning to all parts of the statute, § 45.033(5) Fla. Stat. (2023) does not allow someone who fails to provide any of the statutory fairness disclosures to a homeowner to receive 100,000 times more than the statutorily capped rate of 12%. Even if QCD

Grantee had provided all of the fairness disclosures, its fee could not exceed 12%.

"In determining the meaning of statute, we adhere to the supremacy-of-the-text principle—a principle recognizing that '[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means. [internal cites omitted] . Consequently, we 'strive to determine the text's objective meaning through '**the application of [the] text to given facts** on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.' '..." *Levy v. Levy*, 326 So. 3d 678, 680 (Fla. 2021). [emphasis added]

The Fourth District in *Quality Holdings v. Selective Invs*., IV, 25 So.3d 34, 36 (Fla. 4th DCA 2009) in discussing the appropriate appellate review standard under a similar lack of record said:

> If a trial court ruled solely on the basis of a written record and arguments made by lawyers and made no findings of fact, an appellate court reviews the record as the trial court did. [internal cites omitted] (stating that if a trial court's findings are based on affidavits rather than live testimony, the presumption of

> correctness given to a trial court's rulings is lessened because the appellate court has everything the trial court had before it). Here, the record on appeal is inadequate because the record before the trial court was inadequate. The trial court's order is fundamentally erroneous on its face because, in light of the conflicting affidavits, the trial court had absolutely nothing before it that could have justified its order of the second escrow disbursement. Having concluded that Applegate does not prohibit our consideration of this appeal, pursuant to Town of Jupiter and Ciba-Geigy, we apply a standard of review more akin to de novo than to a review for abuse of discretion.

The record discloses the maximum $100 consideration paid for the deed; anything else would have just been argument of counsel, not evidence, and contradicted by the documentary stamp tax. Thus, this Court's review can be more akin to de novo review for the trial court's finding of lack of bad faith with no intent to deceive if this Court reaches that issue.

The language of paragraph § 45.033(2)(a) Fla. Stat. (2023) is instructive. It does not talk about transfer of title as the statute was

designed to abolish the practice of third parties obtaining a deed and receiving all the equity. The statute instead focuses on the right to collect the surplus. § 45.033(2)(a) Fla. Stat. (2023) provides:

> The presumption may be rebutted only by:
>
> (a) The grantee or assignee of a voluntary transfer or assignment **establishing a right to collect the surplus funds** or any portion or percentage of the surplus funds by proving that the transfer or assignment qualifies as a voluntary transfer or assignment **as provided in subsection (3);** [emphasis added]

Ownership after filing the lis pendens is irrelevant. The issue is who has the right to collect the surplus. The trial court erred in finding there was nothing to assign due to the quit-claim deed transferring title as the trial court focused on the abrogated common law principle of ownership; not the statutory mandate of determining who is entitled to the surplus. ("[S]tatutes in derogation of common law. . . must be strictly construed, and if any doubt exists as to the legislature's intent, the doubt should be interpreted in favor of the injured party."). *See, e.g., McGraw v. R & R Invs., Ltd.*, 877 So. 2d 886, 890 (Fla. 1st DCA 2004). Here the injured

party is the Foreclosed Owner who lost $39,000 in equity. The trial court's focus should have been on who properly informed the Foreclosed Owner of the facts and who limited their fee to 12%?

A statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts' and is not to be read in isolation, but in the context of the entire section." *See Florida Dep v. Contractpoint Florida Parks*, 986 So.2d 1260, 1265 (Fla. 2008). In other words, the big picture controls over form; whether the person claiming the surplus is using a deed or an assignment of rights; the homeowner must still receive all the good faith disclosures required by § 45.033(3) Fla. Stat. (2023) and not pay more than 12% for assistance. § 45.033(5), Fla. Stat. (2023), relied on by the trial court, does not permit someone claiming the surplus via a deed obtained after the lis pendens to receive over a 100,000+% profit. Even through QCD Grantee used one of the abusive practices the legislature wanted to eliminate, it is not without recourse to obtain its maximum $100 consideration. If its transfer is set aside § 45.033(6) Fla. Stat. (2023) allows it to seek repayment.

Further, the trial court ignored § 45.033(4) Fla. Stat. (2023) which mandates that a claimant who follows the statutory requirements of fair disclosure is entitled to payment. Applying the principals of § 45.033, Fla.

Stat. (2023) to the facts of this case, QCD Grantee did not comply any of the fairness disclosures and wants significantly more than 12% so is not entitled to receive any of the surplus. This would allow Foreclosed Owner to obtain his equity less RSR's fee.

CONCLUSION

This Court should reverse the trial court's incorrect finding that § 45.033(5), Fla. Stat. (2023) eliminates the fairness and informed decision disclosures required by § 45.033(3), Fla. Stat. (2023) and permits 100,000+% profit to QCD Grantee. Additionally, if this Court upholds the discretionary award to QCD Grantee, it should require the trial court to honor the Agreement and Assignment of Interest to Rapid Surplus Recovery and award RSR it's mandatory fee per § 45.033(4), Fla. Stat., (2023).

Respectfully Submitted,

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I HEREBY certify that a true and correct copy of the Initial Brief was electronically filed through the Florida Courts E-Filing Portal and that the Portal has been used as a means of e-service to the following on September 30, 2024:

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CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY the foregoing initial brief has been computer generated in Arial 14-point font and does not exceed 13,000 words or 50 pages (excluding words in a caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, or signature block) in compliance with the applicable font and word count limits of Fla.R.App.P. 9.210

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