IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

CASE NO. 4D23-0675
L.T. No.: 502017CA003673

NICOLE GOODMAN

Appellant,
vs.

JOHN STUART LEVIN, D.P.M., KEVIN SHORT, D.P.M.; CASEY BOWLES, D.P.M.; and JFK MEDICAL CENTER LIMITED PARTNERSHIP d/b/a JFK MEDICAL CENTER,

Appellees.

On Appeal from the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

APPELLANT'S REPLY BRIEF

Jason L. Odom, Esq.
David M. Carter, Esq.
Gould Cooksey Fennell, P.A.
979 Beachland Boulevard
Vero Beach, FL 32963
(772) 231-1100
dmc-eservice@gouldcooksey.com
jlo-eservice@gouldcooksey.com
Trial Counsel for Appellant

Andrew A. Harris, Esq.
Grace Mackey Streicher, Esq.
HARRIS APPEALS, P.A.
5220 Hood Road/Suite 201
Palm Beach Gardens, FL 33418
(561) 867-9500
andrew@harrisappeals.com
grace@harrisappeals.com
eservice@harrisappeals.com
Appellate Counsel for Appellant

By: /s/ Grace Mackey Streicher
GRACE MACKEY STREICHER
Florida Bar No. 9360

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ARGUMENT

I. JFK's question improperly impugned both Dr. Zelen and Plaintiff's counsel and should have warranted a new trial.

A. JFK's question implicated both Plaintiff's counsel and Dr. Zelen.

Dr. Levin criticizes Plaintiff of "comingling" her argument that JFK's counsel impugned the credibility of Dr. Zelen and Plaintiff's counsel, but this is because JFK's question implicated both Dr. Zelen and Plaintiff's counsel. Levin AB at 27. Nowhere does Dr. Levin defend the propriety of JFK's question to the extent that it did, in fact, implicate Plaintiff's counsel. He simply (but wrongly) argues that it did not.

To the contrary, JFK's question implicated and impugned **both** Dr. Zelen and Plaintiff's counsel.[1] As a reminder, when examining the defense expert, Dr. Carson, about Plaintiff's use of a thermal injury case study as a comparison to Nicole's case, JFK asked Dr. Carson:

[1] And Plaintiff's Initial Brief correctly separated out the authority relative to impugning an attorney versus criticizing experts. IB at 35-36.

> Would you consider, you, personally, consider trying to utilize this situation as somewhat misleading in terms of what this case is about?

Dr. Carson responded that he was "not going to talk about anyone's motives." T.2274.

By asking the defense expert whether he "personally" would "consider trying to utilize" the case study to mislead as to "what this case is about," JFK's question implicated not only Dr. Zelen, but also Plaintiff's counsel, in an alleged attempt to mislead. The words "trying to utilize" suggested a deliberate, strategic effort to mislead, and the words "in terms of what this case is about" connected the attempt to mislead to the very core of this case. These words inescapably implicated Plaintiff's counsel, who were the ones trying to prove Nicole's case. They were the ones who used the case study photographs with Dr. Zelen on the stand. From the jury's perspective, it was Plaintiff's counsel who presented the case study photographs for Dr. Zelen to "misleadingly" comment on. Dr. Zelen was there on Plaintiff's behalf, retained by Plaintiff's counsel.

In denying that JFK's question implicated Plaintiff's counsel, Dr. Levin argues that Plaintiff's real-time objection at trial was on the

grounds that the question accused Dr. Zelen of being misleading, not Plaintiff's counsel. AB at 34-45; T.2271-74. But Dr. Levin ignores that Plaintiff's motion for new trial explicitly argued that "JFK's question indirectly accused Plaintiff's counsel of misleading the jury, because it was Plaintiff's counsel that first used the two photographs with Dr. Zelen during his testimony." R.13166. The question inescapably implicated Plaintiff's whole trial team.

B. JFK's question was not proper impeachment or a proper comment on credibility.

Refusing to acknowledge that JFK's question implicated Plaintiff's counsel, Defendants devote themselves to defending JFK's question as if it only implicated Dr. Zelen. They claim that it was proper for JFK to impeach Dr. Zelen by showing that the case study was misleading, and that attorneys are permitted to comment on a witness's credibility if supported by the record. These are straw man arguments that miss the point. The question was neither proper impeachment nor a supported comment on the evidence.

First, Plaintiff agrees that the Defendants were allowed to impeach Dr. Zelen as to the applicability of the case study to Nicole's

case (which is why Plaintiff did not object to JFK's questions to Dr. Zelen as to whether the study could be seen as misleading, except for an objection to the gratuitous comment "misleading as heck"). But that is not what JFK's question did.[2] JFK's question went beyond challenging Dr. Zelen's opinions as to the suitability of the case study as a comparison to Nicole's case and attacked his (and, unavoidably, Plaintiff's counsel's) underlying motivations for using it. There is a difference between (properly) undermining the content of witness's opinions and (improperly) impugning the witness's integrity for holding those opinions. *See, e.g.*, *Jackson v. State*, 89 So. 3d 1011, 1022 (Fla. 4th DCA 2012) (noting the difference between improperly commenting on a witness's truthfulness, honesty, or credibility, versus properly commenting on the factual background relevant to the witness's testimony).

Defendants next argue that attorneys may properly question the credibility of a witness as long as it is supported by the record.

[2] For this reason, JFK's argument that Plaintiff failed to preserve this issue is wrong. Plaintiff is not challenging JFK's questioning of Dr. Zelen, she is challenging its question to Dr. Carson. Plaintiff immediately objected to and moved for a mistrial based on the question to Dr. Carson.

Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1028 (Fla. 2000)). But again, while Plaintiff agrees with that general proposition as far as it goes, it doesn't help Defendants here, because JFK's question was **not** supported by the record.

There was no record evidence that Dr. Zelen (or Plaintiff's counsel) deliberately tried to use the case study to mislead the jury. Indeed, Defendants do not (and cannot) point to anything—other than the parties' mere disagreement about the relevance of the case study—to support an attack on Dr. Zelen's motivations for using it. Dr. Levin's Answer Brief makes this clear. He argues that:

> From Defendants' perspective, the Case Study and Plaintiff's theory of causation were incomparable, and Dr. Zelen's use of the case Study to "provide additional support…for [his] causation opinions" (R. 9953) was indeed "misleading."

Levin AB at 27; *see also id.* at 36 (pointing to the "disparate nature" of the case study photographs versus Nicole's injury as the justification for challenging Dr. Zelen's credibility).

Defendants were entitled to scrutinize the differences between the case study and Nicole's case and to argue that the jury should not believe Dr. Zelen's testimony that the case study was a relevant

or useful comparison to Nicole's case. But mere "discrepancies in the evidence" do not give attorneys license to impugn the integrity of their opponents. *Owens-Corning Fiberglas Corp. v. Crane*, 683 So. 2d 552, 555 (Fla. 3d DCA 1996). In other words, the mere existence of a basis on which an expert might be impeached does not translate into a basis on which an expert's integrity may be attacked.

Florida Peninsula Ins. Co. v. Nolasco, 318 So. 3d 584, 589 (Fla. 3d DCA 2021) exemplifies this. In *Nolasco*, the insured's counsel elicited testimony from the insurance company's expert witness that he worked 90 percent of the time for insurance companies. *Id.* at 587-88. The insured's counsel then parlayed this testimony to argue in closing that the expert was a "liar" and a "hired gun." *Id.* Despite this record evidence that the expert worked 90 percent for insurance companies (which could constitute impeachment evidence showing bias), the Third DCA held that the comments calling the expert a "liar" and a "hired gun" were "not supported by record evidence" and "constituted fundamental error" warranting a new trial. *Id.* at 588-89. *Nolasco* thus demonstrates that the mere existence of

impeachment evidence against an expert does not translate into record evidence supporting an attack on the expert's integrity.

Similarly, in *Lewis v. State*, 780 So. 2d 125, 130 (Fla. 3d DCA 2001), the court explained that, "[a]lthough the prosecutor [was] free to suggest to the jury that defendant's testimony was not credible, if the record evidence suggests that it was not, he was not free to opine that defendant's lack of candor was scripted by defense counsel." Like *Nolasco*, *Lewis*, too, shows that a proper challenge to a witness's credibility does not provide grounds for challenging the calling counsel's integrity.

Here, however, JFK used a mere ground to impeach Dr. Zelen or undermine the weight of his testimony regarding the case study as a justification to cross the line into attacking his integrity and motivations in using the case study. JFK's attack on Dr. Zelen's (and Plaintiff's counsel's) motivations for using the case study was based on nothing more than a divergence between Plaintiffs' and Defendants' views on the relevance of the case study. This mere dispute about the evidence was for the jury to resolve and did not

entitle JFK to suggest that Dr. Zelen or Plaintiff's counsel were deliberately trying to mislead the jury.

"There is no question but that counsel is permitted to demonstrate inconsistencies between witnesses' testimony and within a witness's own testimony. But lines have been drawn as to what constitutes proper comment and what is egregious." *Kaas v. Atlas Chem. Co.*, 623 So. 2d 525, 526 (Fla. 3d DCA 1993) (holding that it was "fundamentally incorrect for counsel to attempt to impugn the integrity of a witness by calling him a liar"). Here, JFK's question crossed the line. Because the question impugned Dr. Zelen and Plaintiff's counsel without any support in the record, the question was fundamentally improper and requires reversal. *See Nolasco*, 318 So. 3d at 589; *Johnnides v. Amoco Oil Co., Inc.*, 778 So. 2d 443, 444 (Fla. 3d DCA 2001) (condemning baseless attacks not only on the integrity of counsel, but on "any other player in the case"); *Venning v. Roe*, 616 So. 2d 604, 604 (Fla. 2d DCA 1993) (reversing for new trial based on defense counsel's comments that plaintiff's medical expert "prostitute[d] himself" for the benefit of lawyers, had a "special relationship" with plaintiff's counsel, and essentially orchestrated

plaintiff's case with plaintiff's counsel; holding that such comments were not confined to the evidence and improperly "accuse[d] the medical expert of perjury and accuse[d] opposing counsel of unethically committing a fraud upon the court").

And JFK's question was not harmless. Courts have observed that "untoward practices," including improperly attacking an expert's credibility, "can be very effective in medical malpractice cases, which always involve a 'battle of the experts.'" *Manhardt v. Tamton*, 832 So. 2d 129, 132 (Fla. 2d DCA 2002) (holding that trial court abused its discretion in denying plaintiff's motion for new trial based on improper attack on plaintiff's expert's credibility, among other errors); *Caban v. State*, 9 So. 3d 50, 54 (Fla. 5th DCA 2009) (defense counsel's failure to object to improper questioning of expert "was prejudicial in this circumstantial evidence case where expert opinion testimony was crucial to both sides."); *Myron By & Through Brock v. Doctors Gen. Hosp., Ltd.*, 704 So. 2d 1083, 1092 (Fla. 4th DCA 1997) (refusing to find harmless error where the expert testimony was the focal point of trial and all experts were extensively credentialed and

offered reasonable explanations for their opinions; thus, "any attack on these experts was extremely important").

Nor was the harm of JFK's question mitigated by the fact that Dr. Carson never gave a "yes" or "no" answer to it. "**Questions** that seek to elicit an opinion of the witness critical of the validity of the opinions by the opposing party's expert are improper." *Caban*, 9 So. 3d at 53; *see also Sullivan v. State*, 751 So. 2d 128, 130 (Fla. 2d DCA 2000) (recognizing that a **question itself** may lead the jury to believe a witness is lying). Here, Dr. Carson's response that he was "not going to talk about anyone's motives" only highlighted that JFK was implicating Plaintiff's "motives" for using the study as "misleading." T.2274. *See Manhardt*, 832 So. 2d at 132 ("a question asked during a trial may convey prejudicial information even though the answer is excluded") (citation omitted).

In short, JFK's question was improper, harmful, and requires a new trial.

II. Defendants' improper bolstering of Dr. Levin should have warranted a new trial.

Regarding Dr. Levin's testimony that he practiced with one "one of the premier orthopedic groups" in Palm Beach County, Dr. Levin argues that his testimony was proper because it was merely his own opinion, unlike cases where the doctors testified that they were voted a "top doctor" by a local magazine or industry publication. While it is true that many improper bolstering cases refer to bolstering by way of authoritative publications or other expert's opinions, the rationale behind the impropriety of such bolstering is that it amounts to "opinion testimony by consensus[, which] is essentially immune to challenge." *Gutierrez v. Vargas*, 239 So. 3d 615, 627 (Fla. 2018). Here, Dr. Levin's comments communicated to the jury that his practice group was regarded as one of the "premier" groups by consensus of the Palm Beach County community, and that community consensus was not subject to examination at trial.

Further, in *Maksad v. Kaskel*, 832 So. 2d 788, 792 (Fla. 4th DCA 2002), one of the cases Plaintiff cites where the doctor testified that he was voted a "top ten doctor," no independent third-party publication or voting body was identified. *Id.* at 792. Similarly, here,

Dr. Levin never clarified that it was merely his opinion that his practice group was a "premier" practice group in Palm Beach County. He told the jury that "if you lived in Palm Beach County, you would know them." T.2524-25.

For its part, JFK tries to distinguish *Maksad* by arguing that the improper bolstering in that case occurred during direct examination rather than in closing argument, "in contrast to this case." JFK AB at 22. This argument is puzzling, because here, like in *Maksad*, the improper bolstering occurred both during direct examination (Dr. Levin's "premier" comments) and in closing argument (JFK's argument that Dr. Levin was "the best"). JFK thus fails to distinguish *Maksad* from this case.

Regarding JFK's closing argument comment that Dr. Levin was "the best," notably, neither Defendant actually defends JFK's use of that word. They instead gloss over it and argue that JFK's closing argument about Dr. Levin's general expertise was supported by the evidence. But no witness testified that Dr. Levin was "the best." That comment was a hyperbolization of Lisa and Nicole Goodman's testimony about what Dr. Moyles had told them of his opinions of Dr.

Levin: that he was a "good, awesome" surgeon whom Dr. Moyles felt would be better at performing Nicole's surgery than himself.

On this point, Dr. Levin again needlessly rebuts a straw man argument that Plaintiff never made: he argues that Plaintiff failed to preserve her purported argument that Lisa Goodman's testimony about what Dr. Moyles told her about Dr. Levin's qualifications was hearsay. But Plaintiff is not arguing that there was an error in admitting hearsay from Lisa Goodman about what Dr. Moyles said. Plaintiff is simply arguing that JFK's characterization of Dr. Levin as "the best"—already an exaggeration of what Dr. Moyles said—was also based on hearsay, and so it cannot be considered a proper comment on the evidence. Of course, Plaintiff **did** contemporaneously object to JFK's closing argument calling Dr. Levin the "best."

Dr. Levin ultimately relies on the adage that attorneys have "wide latitude" in closing argument to defend JFK's comment here. While that adage may be true, it is cabined by the principle that attorneys must also "remain within the limits of the record." *Bryant v. State*, 302 So. 3d 995, 999 (Fla. 1st DCA 2020). "Arguing facts that are not supported by the record is clearly improper." *Gooden v.*

State, 266 So. 3d 858, 863 (Fla. 4th DCA 2019) (citation omitted). Here, JFK's closing argument the Dr. Levin was the "best" was not a fact that was supported by the record, and it was therefore improper.

It cannot be said that this improper comment was harmless here, where Dr. Levin was a defendant, the primary surgeon in this case, and key witness whose credibility was paramount. And the improper bolstering occurred both during his direct examination and in closing argument. *See, e.g.*, *Browne v. State*, 132 So. 3d 312, 319 (Fla. 4th DCA 2014) (finding harmful error where erroneously admitted testimony bolstered the victim's credibility, which was a crucial issue at trial, and was featured in the state's closing argument). The improper bolstering here was critical, and the trial court should have granted a new trial.

III. JFK's improper comment that Dr. Levin's practice was shut down and his patients weren't getting surgery should have warranted a new trial.

First, Plaintiff did not waive her "financial impact" objection to JFK's closing argument comment about Dr. Levin's practice being shut down and his patients not getting surgery by purportedly failing to obtain a ruling on it. As Dr. Levin admits, Plaintiff explicitly argued

that JFK's comment was an improper financial impact argument. The trial court sustained that objection, but attached a different label to it: that the comment was based on facts not in evidence, which was also true. Plaintiff then moved for a mistrial.

This is not a case where the trial court neither sustained nor overruled a party's objection, but instead asked the objecting party to clarify his argument, making it unclear whether the court had issued a ruling. *See, e.g.*, *Wheeler v. State*, 4 So. 3d 599, 609 (Fla. 2009). Here, the trial court understood Plaintiff's objection and issued a ruling. Whether the record is interpreted as the trial court effectively overruling Plaintiff's "financial impact" objection in favor the "facts not in evidence" objection, or as the trial court sustaining the objection while attaching a different label to it, the result is the same: the objection was preserved, and Plaintiff's motion for mistrial was denied.

Even if this Court determines that the specific "financial impact" ground was not preserved and that Plaintiff abandoned it in favor of the trial court's "facts not in evidence" objection, the objection is still preserved based on that latter ground. Either way, the improper

comment placed matters before the jury that it should not have been considering. The comment encouraged the jury to decide the case based on sympathy for Dr. Levin and his patients based on matters that were not in evidence, and in all likelihood were not even true. There was no support for the insinuation that Dr. Levin's patients were not getting the care they needed while he was in trial.

Neither Defendant defends JFK's comment on this basis. Both Defendants focus on the "financial impact" comment and related caselaw. And while Plaintiff stands by that objection, as noted in her Initial Brief, it was even worse for JFK to suggest that Nicole's trial had hindered Dr. Levin's patients from getting medical care, particularly without any evidence to that effect.

Notably, Dr. Levin cites *Hollenbeck v. Hooks*, 993 So. 2d 50, 51 (Fla. 1st DCA 2008), as potentially "the only case comparable to this present appeal." Levin AB at 54. But he then attempts to distinguish *Hollenback* on the basis that it involved an attempt to misrepresent and mislead the jury regarding the facts, as if the same thing did not happen here. *Id.*

In *Hollenback*, the First DCA reversed for a new trial where defense counsel, who had been hired by the individual defendant's insurance company, characterized himself as a "consumer justice attorney" representing the named individual defendant, "not some fancy company, not some conglomerate." *Id.* at 50. But because he had been retained by an insurance company, that statement was not true. *Id.* at 50-51. Although the trial court denied plaintiff's motion for a mistrial and new trial, finding that the dense attorney's comment had "no visible impact on the jury," the First DCA reversed, finding that the attorney's misleading statement indirectly but inappropriately injected his status into the case and appealed to the jury's sympathy. *Id.* at 51.

Similarly, here, JFK misrepresented the facts and misled the jury by arguing that Dr. Levin's practice was "shut down" and that his "patients obviously were not getting surgery during this time." There was no evidential support for that argument, and it was likely not even true. Presumably, Dr. Levin had accounted for his absence and ensured that his patients would get whatever care they needed while he was in trial. While it was obvious to the jury that Dr. Levin

was not performing surgery while he was sitting in court, the jury did not know what provisions Dr. Levin had made for his patients or what afterhours work he may have performed during trial. While JFK was entitled to argue that the trial was important to Dr. Levin, its statement was a gratuitous appeal to the jury's sympathy for Dr. Levin's financial loss during the trial and, worse, his patients' lack of care during that time. Like in *Hollenback*, JFK's "statements were impossible to refute at trial," *id.* at 51, where testimony had already ended and, in any case, it would have been inappropriate for Dr. Levin to discuss his other patients' care to the jury. Also like in *Hollenback*, the statements were not harmless, where the liability issues were hotly contested and Dr. Levin's status as a defendant and the primary doctor who performed Nicole's surgery was a central issue in the case.

IV. The surprise changes in Dr. Ross's and Dr. Levin's trial testimony violated *Binger* and should have warranted a new trial.

A. Dr. Ross

On appeal, Defendants blame Plaintiff's counsel for Dr. Ross's changed testimony by arguing that Plaintiff's counsel didn't ask

specific enough questions during Dr. Ross's deposition. But in her deposition, Plaintiff's counsel broadly asked Dr. Ross whether she uses any type of thermal device for ankle joint debridement. That question was not limited to when or in what context (training, practice, etc.) she used the device; it should have elicited her use of the device in any context. Yet in response, Dr. Ross testified that she doesn't use the devices in her practice, but that she had used them in the past during her own fellowship and residency training. If she also used the devices to conduct training of residents, that would have been the time to disclose it. Instead, Dr. Ross omitted this information. Dr. Ross's non-disclosure cannot be blamed on Plaintiff's counsel, where the phrasing of counsel's question should have elicited the missing information.

Dr. Levin's argument that Dr. Ross's trial testimony did not change from her deposition testimony is only partly true. It is true that Dr. Ross consistently testified that she does not use thermal devices in her practice. But at trial, she **added on** the **new information** that she does use the devices to train residents. Dr. Levin admits this when he says that Dr. Ross "provided additional

information regarding her qualifications" at trial. Levin IB at 64. Again, Dr. Levin tries to mitigate this additional information by blaming Plaintiff's counsel for not bringing it out in deposition, but he does not deny that it was, indeed, additional. For the reasons above, Dr. Ross's non-disclosure cannot be blamed on Plaintiff, and her new, surprise testimony at trial violated *Binger.*

B. Dr. Levin

Defendants again try to blame the changes in Dr. Levin's testimony about what he discussed with Dr. Bowles on Plaintiff's counsel's questioning at Dr. Levin's deposition. Dr. Levin argues that he was deliberate in separating out the Epinephrine versus thumb pressure/blister issues when responding to Plaintiff's counsel's deposition questions that "comingled" those issues. But if Plaintiff's counsel's questions "comingled" the Epinephrine and thumb pressure/blister issues, then Dr. Levin's responses should also have addressed both those issues. Like Dr. Ross, Dr. Levin gave additional testimony at trial about what he did or did not tell Dr. Bowles that should have been disclosed in response to Plaintiff's deposition questions.

Finally, Defendants argue that Plaintiff was not prejudiced by any change in Dr. Levin's testimony in terms of establishing a case against Dr. Bowles because Plaintiff's expert testified that "the dye was cast" at the time of Nicole's surgery and an earlier diagnosis wouldn't have change the result. R.14423. But if the jury did not believe that the surgery was the cause of Nicole's injury—which Defendants vigorously contended it was not—then the jury could have found that earlier diagnoses and treatment **would** have changed the result. This could have provided Plaintiff with a separate basis for liability. The change in Dr. Levin's testimony did, therefore, prejudice Plaintiff's case.

CONCLUSION

Whether viewed individually or cumulatively, the improper comments, arguments, and rulings in this case prejudiced Nicole and deprived her of a fair trial. Plaintiff respectfully requests that this Court reverse and remand for a new trial.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on the 30th day of April, 2024, the foregoing was filed with the Florida Courts E-Filing Portal which furnished a copy via electronic mail to: **Andrew A. Rief, Esq.**, Billing, Cochran, Lyles, Mauro & Ramsey, P.A., 300 Avenue of the Champions, Suite 270, Palm Beach Gardens, FL 33418, E-service: wpb-pleadings@bclmr.com; Vivianr@bclmr.com (counsel for Appellees, JFK Medical Center/Bowles/Short); and **Wilbert R. Vancol, Esq.** and **Rafael E. Martinez, Esq.**, McEwan Martinez, Dukes & Hall, P.A., Post Office Box 753, Orlando, FL 32802-0753, E-service: NOS@mmdorl.com, wvancol@mmdorl.com; rmartinez@mmdorl.com (counsel for Appellee, John Stuart Levin, D.P.M.).

Jason L. Odom, Esq.
David M. Carter, Esq.
Gould Cooksey Fennell, P.A.
979 Beachland Boulevard
Vero Beach, FL 32963
(772) 231-1100
dmc-eservice@gouldcooksey.com
jlo-eservice@gouldcooksey.com
Trial Counsel for Appellant

Andrew A. Harris, Esq.
Grace Mackey Streicher, Esq.
HARRIS APPEALS, P.A.
5220 Hood Road/Suite 201
Palm Beach Gardens, FL 33418
(561) 867-9500
andrew@harrisappeals.com
grace@harrisappeals.com
eservice@harrisappeals.com
Appellate Counsel for Appellant
By: /s/ Grace Mackey Streicher
GRACE MACKEY STREICHER
Florida Bar No. 93601

CERTIFICATE OF COMPLIANCE OF TYPE SIZE & STYLE

Appellant hereby certifies that the type size and style of this Reply Brief is Bookman Old Style, 14-point Font and the word count does not exceed 4,000 words. Therefore, this document complies with Florida Rule of Appellate Procedure 9.210(a)(2)(B).

By: /s/ Grace Mackey Streicher
GRACE MACKEY STREICHER
Florida Bar No. 93601