IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
SECOND DISTRICT

TERRANCE & LISA O'HARA,

Appellants,

CASE NO: 2D22-444
L.T. CASE: 2021-CA-3198

v.

HERITAGE PROPERTY& CASUALTY INSURANCE COMPANY, INC.,

Appellee.
_____/

INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT
TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Constitutional Provisions

INTRODUCTION AND QUESTIONS PRESENTED

This appeal is about the retroactivity of a new bill under well-settled principles of statutory construction. Appellants Terrance and Lisa O'Hara filed suit against their homeowner's insurance provider, Appellee Heritage Property and Casualty Insurance Company. The trial court dismissed the suit for failure to comply with the pre-suit notification requirement in Section 627.70152(3), Florida Statutes. Section 627.70152 was enacted as part of Chapter 2021-77, Florida Laws, a comprehensive set of changes to Florida's first-party property regime. Chapter 2021-77 has an effective date of July 1, 2021, after the loss and after Heritage and the O'Haras entered the contract of homeowners' insurance.

The questions presented in this appeal are:

(1) Did the Florida Legislature clearly express an intent that Chapter 2021-77, Florida Laws, should apply retroactively to contracts of insurance executed before the effective date?

(2) If so, does Florida's Constitution permit Chapter 2021-77, Florida Laws, to be applied retroactively?

STATEMENT OF THE CASE AND FACTS

I. Background: the Legislature passes Chapter 2021-77 effective July 1, 2021, after Heritage sold the O'Haras the insurance policy.

After the O'Haras bought their insurance policy from Heritage on September 30, 2020 (R. 60), the Florida Legislature passed Chapter 2021-77, Florida Laws. As Heritage acknowledges, the legislation "is a comprehensive act relating to insurance that enacts legislation for the purpose of implementing an overall scheme that includes the efficient handling and resolution of all claims and avoidance of unnecessary litigation." (R. 46). Newly enacted section 627.70152 radically changes first party property insurance law in Florida by:

- Requiring a notice of intent to sue from the insureds 10 business days before filing, § 627.70152(3)(a);
- Where the notice is provided following acts or omissions by the insurer other than denial of coverage, requiring the insured to make a presuit settlement demand including attorney fees, §§ 627.70152(2)(d), 627.70152(3)(a)(5);
- Requiring insurers to develop a procedure for the prompt investigation, review, and evaluation of the notices, and respond in writing within 10 business days, § 627.70152(4);

- Granting insurers, in addition to the ten-day investigation period, the option to claim an additional 14-day period to reinspect the property (if coverage was denied) or 90-day period to complete alternative dispute resolution proceedings (if coverage was not denied) before suit can be filed, § 627.70152(4)(a-b);

- Limiting the amount of attorney fees recoverable by the insured unless the insured recovers at least 50% of the disputed amount, § 627.70152(8); and,

- Mandating dismissal without prejudice of any suit filed before the notice is served or before the relevant pre-suit time periods expire, § 627.70152(5).

Section 13 of Chapter 2021-77 creates another notice requirement in Section 627.70153, which requires notice if more than one suit is brought on the same residential property insurance policy.

Additionally, Section 9 of Chapter 2021-77 amends Section 627.428(1), which no longer governs attorney's fees in any suit "arising under a residential or commercial property insurance policy not brought by an assignee." At the time the O'Haras entered the insurance policy, Section 627.428 granted reasonable attorney fees to insureds for any action on an insurance contract, without regard to the amount of recovery. Section 6 similarly amends Section 626.9373(1) with respect to attorney's fees in suits brought on policies issued by a surplus lines insurer. New section

627.70152(8)(b) provides that, if a suit is dismissed for failure to give the pre-suit notice, "the court may not award to the claimant any incurred attorney fees for services rendered before the dismissal of the suit."

Chapter 2021-77 also prohibits certain actions by contractors and public adjusters and creates new penalties. Section 1 enacts Section 489.147, Florida Statutes, which creates new restrictions on advertising by contractors, and provides for fines and disciplinary proceedings. Section 5 amends section 626.854 to prohibit contractors from soliciting or handling public adjuster services, and creates penalties for certain actions by public adjusters in new section 626.852(20).

Finally, section 10 of Chapter 2021-77 amends Section 627.70132 to shorten (from three years to two) the time for presenting the property insurance claim to the insurer. The two-year period applies to all claims and reopened claims, not merely windstorm or hurricane claims as under the old version.

II. The trial court dismissed the O'Haras' suit for failing to comply with the new presuit notification requirements in Section 627.70152.

The O'Haras' home was damaged by a wind and hail event around November 11, 2020, before Chapter 2021-77 created Section 627.70152. (R. 2). They brought suit on July 28, 2021, alleging that Heritage either denied coverage or underpaid the resulting claim. (R. 1). The O'Haras did not file the presuit notice contemplated in Section 627.70152(3).

In its motion to dismiss, Heritage admitted that it faced a retroactivity issue in applying Section 627.70152(3) to the O'Haras, who purchased their insurance contract before July 1, 2021. Nevertheless, according to Heritage the new law cleared the two-prong threshold for retroactive application, i.e. legislative intent and constitutionality.

First, Heritage argued that section 627.70152 was merely procedural, and therefore not subject to the presumption against retroactive application. (R. 42-43). According to Heritage, "[t]he presuit notice requirements does not [sic] change any substantive right," and "does not alter the right of the insured to file a lawsuit." (R. 43). Instead, Heritage argued that the presuit notice "merely

changes the procedural [sic] and method by which an insured can achieve the substantive right to file a lawsuit." (*Id.*). Additionally, Heritage contended that the law worked no substantive change because the insured would be required to disclose the same facts required in the presuit notice during litigation. (*Id.*). Finally, Heritage argued that "it is further required in the contract itself, via the Loss Settlement provision which mandates that payment is not due or owing until there is a sworn proof of loss and an agreement of the parties." (*Id.*).

According to Heritage, the legislation applied retroactively simply because it was procedural. (R. 43).

In the alternative, Heritage argued that the statute should be applied retroactively "due to the clear legislative intent of the bill that created the statute," (R. 43), as evidenced by the language and structure of the bill. (R. 45). Heritage also noted that the Senate deleted clear anti-retroactivity language from the House Bill counterpart.[1] (R. 46). Heritage further argued that applying the

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[1] The deleted language, which clearly precluded retroactive application of the legislative reforms, read:

statute retroactively would provide "immediate relief to Florida insureds and insurers by providing simple processes to expedite settlement of claims," thereby fulfilling the purpose of the statute. (*Id.* at 51).

In response, the O'Haras explained that there was no positive evidence of clear legislative intent to apply the statute retroactively; therefore, the statute could not be interpreted to apply to contracts of insurance entered into before its effective date of July 1, 2021. (R. 143-44). Legislative intent could not be deduced from the mere fact that retroactive application would further the purpose of the legislation. (R. 144-45 (citing cases)). Similarly, mandatory authority also held that deleting anti-retroactivity language from a previous version of the bill meant nothing. (R. 145-46) (quoting *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n., Inc.*, 67 So 3d 187, 197 (Fla. 2011)). Therefore, Heritage failed to carry its initial burden to show retroactive intent. (R. 146).

This section applies exclusively to all suits arising under a residential or commercial property insurance policy not brought by an assignee which is issued or renewed on or after July 1, 2021.
(*See* R. 46).

Heritage proceeded to the second stage of the retroactivity argument: whether the Constitution of Florida would permit retroactively applying section 627.70152 to apply retroactively. (R. 46). According to Heritage, "the only two substantive issues in a first party property insurance case such as this are coverage and damages." (R. 48). In response, (R. 147-50), the O'Haras pointed to *Menendez v. Progressive Express Insurance Co.*, which held that the presuit notice provision contained in a similarly comprehensive bill reforming Florida's no-fault auto insurance regime could not be applied retroactively. 35 So.3d 873, 78-80 (Fla. 2010) (concluding that "the statutory presuit notice provision [in Section 627.7015] is not 'procedural' and should not be given retroactive application").

Nevertheless, the court's order finds that "*Menendez* is distinguishable to the factual and legal issues present here and that the legislature could not have been more clear when it indicated that the newly-enacted statute applies to '**all suits**'." (R. 121) (emphasis in original). The suit was dismissed without prejudice and without leave to amend. (*Id.*).

The O'Haras appeal.

SUMMARY OF ARGUMENT

The Supreme Court has made it clear that, to pass a retroactive substantive law, the Legislature must clearly and unambiguously state that the law will apply retroactively. Like the PIP reform at issue in *Menendez*, Chapter 2021-77 is a comprehensive bill that works major changes to an entire area of law, including the availability of attorney fees. It is a substantive bill. As to retroactivity, it is silent at best, and that should end the matter. Assuming it is appropriate to delve further, mandatory authority establishes that the legislative history and the statutory purpose of Chapter 2021-77 are insufficient as a matter of law to clearly express any legislative intent for retroactive application.

This is not to say that the Constitution would permit retroactivity here. Chapter 2021-77 affects a host of substantive rights that the O'Haras enjoyed under her insurance policy when they signed it. Moreover, the Florida Constitution guarantees that no "law impairing the obligation of contracts shall be passed," and the laws that Chapter 2021-77 changed are treated as terms of her insurance policy. The Legislature would have overstepped its limits if it had sought to make Chapter 2021-77 retroactive.

However, there is no need for this Court to decide a constitutional issue or strike down the statute when the better reading of the statute – prospective application only – avoids the constitutional issue entirely. The Court should reverse and remand.

STANDARD OF REVIEW

The Court reviews an order granting a motion to dismiss *de novo*. *Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009). Retroactivity of a statute is a purely legal issue also reviewed *de novo*. *Smiley v. State*, 966 So. 2d 330, 333 (Fla. 2007)

ARGUMENT

The provisions of the insurance code are an implicit part of every insurance policy issued in Florida. *State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993). Unless the Legislature clearly and constitutionally mandates retroactivity, "the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract." *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996). Here, the Legislature did not signal retroactivity in any way, shape, or form. In an abundance of caution, however, Appellants will address the constitutional issue as well.

I. There is no clear, unambiguous evidence that the Legislature intended Chapter 2021-77 to apply retroactively to existing insurance contracts.

Heritage argued below that the statute's text, purpose, and history show a legislative intent to apply Section 627.70152 retroactively. It is wrong: the text is silent at best as to retroactivity, and the history and purpose offer no help.

But Heritage faces an additional hurdle: well-settled rules of statutory construction create a presumption against retroactive application of new substantive laws. To overcome this presumption of prospective application only, there must be a "clearly expressed legislative intent for retroactive application." *Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 196 (Fla. 2011); *see also Walker LaBerge, Inc. v. Halligan*, 344 So. 2d 239, 242 (Fla. 1977) (reversing where statutory language provided no "clear legislative mandate" for retroactive application). This rule has been established in Florida since at least 1887. *Id.*at 194-95 (citing cases); *see also U.S. Fid. & Guar. Co. v. United States*, 209 U.S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.").

The presumption against retroactivity is a vital element of American democracy. It coincides with well-established legislative and public expectations of fairness. *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 425 (Fla. 1994) (quoting *Landsgraf v. USI Film Prods.,* 511 U.S. 244, 272-73 (1994)). The rule also promotes the respective institutional roles of the judiciary and the legislative branch. In terms of inter-branch relations, the presumption against retroactivity keeps the authority to make laws in the legislature. *Id.* It furthers legislative accountability and promotes judicial review of constitutional issues by requiring an unambiguous threshold showing that the legislature did its job: to "affirmatively consider[] the potential unfairness of retroactive application and determine[] that it is an acceptable price to pay for the countervailing benefits." *Id.* And as a well-settled rule, it "has the additional virtue of giving legislators a predictable background rule against which to legislate." *Id.*

Thus, Heritage must show that its reading is unmistakably correct, not merely permissible. It cannot make this showing, and its retroactivity argument therefore fails with no need to consider whether retroactivity is constitutional here.

A. Chapter 2021-77 alters substantive rights and is therefore presumed to apply prospectively only.

"[S]ubstantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights." *Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 254 (Fla. 2002). Substantive law is "that part of the law which creates, defines, and regulates rights." *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969). "When deciding whether a new law is substantive, it is appropriate to consider the effect of the amendments and new provisions as a whole." *Mendendez v. Progressive Exp. Ins. Co.*, 35 So. 3d 873, 878-80 (Fla. 2010) (looking beyond presuit notification requirement in 627.736(11) to conclude that "the [amended] statue, when viewed as a whole, is a substantive statute" (emphasis added)); *Devon Neighborhood Ass'n*, 67 So. 3d at 191 (analyzing totality of amendments to section 627.7015).[2]

Chapter 2021-77 creates, defines, and regulates substantive rights. It creates a safe harbor by giving insurance companies a ten-

[2] Heritage conceded that courts look beyond the specific subsection at issue by arguing accordingly in its motion to dismiss below. (R. 49-50).

day period to reconsider their decision, along with additional time to either reinspect the property (where coverage was initially denied) or, where an insured alleges other acts or omissions, to evaluate a settlement demand and make a counteroffer or invoke alternative dispute resolution procedures. Safe harbor provisions are substantive. *Menendez*, 35 So. 3d at 879. Chapter 2021-77, Florida Laws also affects the statutory right to attorney fees, a recognized substantive right. *Id.* at 878-79 (citing cases). The amendments also toll the statute of limitations. *Id.* at 878. Indeed, they also impact the statute of limitations for property insurance claims in Section 10, which imposes deadlines for reporting a claim to an insurer. Finally, Sections 1 and 5 of Chapter 2021-77 create a new system of rules and penalties for contractors and public adjusters. In sum, Chapter 2021-77, Florida Laws "substantially alters the landscape" of first party property insurance litigation. *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 109 (Fla. 1996) (citing *Gupton v. Village Key Saw Shop, Inc.*, 656 So. 2d 475 (Fla. 1995)).

When viewed as a whole, Chapter 2021-77 affects substantive rights. What's more, the amendments are materially

indistinguishable from the amendments in *Menendez*. A presumption against retroactivity applies, and cannot be overcome.

B. The text, purpose, and legislative history of the statute provide no evidence of legislative intent to apply the notice requirements retroactively.

In our system of government, a key requirement of effective interbranch relationships "is that Congress be able to legislate against a background of clear interpretative rules, so that it may know the effect of the language it adopts." *Finley v. United States*, 490 U.S. 545, 556 (1989) (Scalia, J. for the majority). To rule for Heritage would be to sow confusion in the Legislature by muddying the standard for signifying that a bill applies retroactively. The Court should maintain the existing rule, which does not in any way impair the Legislature's ability to announce a retroactive law.

The rule that applies here is exceedingly simple for the Legislature. "Substantive statutes are presumed to apply prospectively absent clear legislative intent to the contrary." *Bionetics Corp. v. Kenniasty*, 69 So. 3d 943, 948 (Fla. 2011) ("The general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively."). The Legislature is perfectly

capable of expressing retroactive intent by simply using language already construed. *Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324, 330 (Fla. 3d DCA 2008) (finding clear evidence of intent where statutory text provided clearly that "the presuit demand requirements shall apply to actions filed on or after the effective date of the act"), *quashed on different grounds*, *Menendez*, 35 So. 3d 875; *see also Patronis v. United Ins. Co. of Am.*, 299 So. 3d 1152, 1158 (Fla. 1st DCA 2020) ("The amendments in this act are remedial in nature and apply retroactively.") (citing Ch. 2016-219, § 2, Laws of Fla.); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 60-61 (Fla. 1995) (finding clear retroactive intent where statue declared itself remedial and retroactively applicable to all causes of action accruing on a date before it became effective). There is no such clear statement here. *See*, *e.g.*, *Carr v. U.S.*, 560 U.S. 438, 450 (2010) ("Given the well-established presumption against retroactivity . . . it cannot be the case that a statutory prohibition set forth in the present tense applies by default to acts completed before the statute's enactment.").

And the presumption against retroactivity is not Heritage's only obstacle, either. Courts have long considered the presence of an

effective date as an indication to apply the statute prospectively only. *Devon Neighborhood Ass'n*, 67 So. 3d at 196 ("[T]he Legislature's inclusion of an effective date for an amendment is considered to be evidence rebutting intent for retroactive application of a law.") (citing *State, Dept. of Rev. v. Zuckerman-Vernon Corp*, 354 So. 2d 353, 358 (Fla. 1977)). Here, Section 15 of 2021-77, Florida Laws, provides only that "This act shall take effect July 1, 2021," which indicates it should not apply to claims arising under policies of insurance issued before that date. Moreover, there is only one effective date for the entire statute, which fails to show any "careful thought by the Legislature as to when the various amendments would be given effect." *Devon Neighborhood Ass'n*, 67 So. 3d at 196. The Court should take the Legislature's inclusion of effective date language as a clear sign of intent to apply Section 2021-77 prospectively only. *Shapiro v. United States*, 335 U.S. 1, 16 (1948) (explaining that, when language construed by an earlier decision is included in a new statute, the language should be given the same construction as in the earlier decision).

As for the argument to purpose: The purpose of any statute would be furthered by applying it retroactively, regardless of fairness

or settled expectations. Accordingly, it is well-settled that "the mere fact that 'retroactive application of a new statute would vindicate its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity.'" *Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 499-500 (Fla. 1999) (quoting *Landsgraf v. USI Film Products*, 511 U.S. 244, 286 (1994)). Moreover, Heritage was wrong to imply in the motion to dismiss that Governor DeSantis is empowered to declare policy as it relates to Chapter 2021-77, Florida Laws. (R. 51). This case turns on legislative intent. To consider a governor's public statement on signing would disrupt the interbranch relations necessary for a functioning democracy.

Finally, mandatory authority precludes any argument based on earlier versions of Chapter 2021-77. Heritage argued below that some inference should be drawn from the removal of language that the bill applied only to suits on policies "issued or renewed on or after July 1, 2021." (R. 46). As a matter of law, removal of an anti-retroactivity provision is not positive evidence of legislative intent. *Devon Neighborhood Ass'n.,* 67 So. 3d at 197 (explaining that deletion of language cannot provide requisite "clear evidence of legislative intent for retroactive application of a statute"). Indeed, the

amendment history means the Legislature obviously considered the issue, but nevertheless declined to insert the clear language mandating retroactivity that Florida law requires. We can only speculate on the reason the language was removed, and speculation is no basis for statutory interpretation.

With no evidence of retroactive intent in the text, purpose, or history of the statute, Heritage could not satisfy its burden at the first stage of the retroactivity analysis even if it had no presumption to overcome. The Court need not proceed further. This case should be reversed and remanded.

II. The Florida Constitution prohibits applying the Chapter 2021-77 amendments to suits on insurance contracts entered into before its effective date.

Nevertheless, in an abundance of caution Appellants will briefly explain why Florida's Constitution guarantees that the Chapter 2021-77 amendments will not be applied retroactively.

"Generally, due process considerations prevent the state from retroactively abolishing substantive rights." *Metro. Dade Cty.*, 737 So. 3d at 503. Even if legislative intent for retroactivity exists, substantive laws like Chapter 2021-77, Florida Statutes, cannot be applied retroactively. As in *Menendez*, here the new law includes provisions that "(1) impose a penalty [i.e., dismissal of a suit and professional and financial consequences for violation of the new advertising rules], (2) implicate attorneys' fees, (3) grant an insurer additional time to pay benefits, and (4) delay the insured's right to institute a cause of action." 35 So. 3d at 878. Additionally, the new law requires insurers to create a review procedure to facilitate their obligation to respond within ten business days to any notice of intent to file suit. It follows that Chapter 2021-77, Florida Statutes cannot be applied retroactively, because it alters substantive duties and rights of Florida's citizens. *Id.* at 880 (reasoning that, because the

amending bill was substantive, section 627.736(11) did not apply retroactively).

There exists another constitutional problem with Heritage's arguments: the prohibition on laws impairing the obligation of contract. Fla. Const. Art. I § 10; *see Menendez*, 35 So. 3d at 877 n.4 ("Retroactivity will also be rejected where a statute impairs the obligation of contracts in violation of article I, section 10, of the Florida Constitution."). The principles of statutory incorporation make the governing statutes an implicit part of every contract of insurance. *State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830, 832 (Fla. 1993); *see also Found. Health v. Westside EKG Assocs.*, 944 So. 2d 188, 195 (Fla. 2006) (citing cases for the proposition that "the statutory limitations and requirements surrounding traditional insurance contracts may be incorporated into an insurance contract for purposes of determining the parties' contractual rights."). To change those rights – i.e., to bring suit without notice and to obtain reasonable attorney fees where any recovery is had – is to run afoul of the rule that "virtually no degree of contract impairment is tolerable in this state" under Florida's Constitution. *Searcy, Denney, Scarola, Barnhart & Shipley v. State*, 2019 So. 3d 1181, 1192 (Fla.

2017) (quoting *Pomponio v. Claridge of Pompano Condominium*, 378 So. 2d 774, 780 (Fla. 1979)).

Again, there is no need for the Court to address whether Section 627.70152 can be applied retroactively, because there is no evidence the Legislature intended it. Nevertheless, because retroactivity would violate the Constitution even if the Legislature had spoken clearly, another reason exists for the Court to interpret the statute to apply prospectively only. *E.g.*, *Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 810 (Fla. 2005); *State v. Giorgetti*, 868 So. 2d 512, 518 (Fla. 2004); *Carlson v. State*, 227 So. 3d 1261, 1268 (Fla. 1st DCA 2017).[3] Because the Legislature did not clearly and unambiguously direct courts to apply the statute retroactively, the Court should adopt a construction that does not raise a constitutional issue.

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[3] The notice requirements in Rules 1.071 and 9.425 do not apply because there is no need to strike the entire statute as unconstitutional. *See Lee Mem. Health Sys. v. Progressive Select Ins. Co.*, 260 So. 3d 1038, 1042 (Fla. 2018). Instead, it can be saved with a constitutional interpretation of its temporal scope.

CONCLUSION

There is no evidence that the Legislature intended Chapter 2021-77 or Section 627.70152(3) to apply retroactively. In fact, the only recognizable indicia of legislative intent – inclusion of an effective date – counsels prospective application only. In any event, the at-best-ambiguous statute can easily be interpreted to avoid unconstitutional retroactivity. The Court should reverse and remand for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this notice of appearance has been furnished via through the Florida courts eportal to:

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This 25th day of April, 2022.

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Bookman Old Style 14-point font in compliance with Florida Rule of Appellate Procedure 9.045(b) and contains fewer than 13,000 words in compliance with 9.210(a)(2).

/s/ Gray R. Proctor