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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2168

MARIANNE EDWARDS,

Petitioner,

v.

THE SUNRISE OPHTHALMOLOGY ASC, LLC,

Respondent.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

AMICI CURIAE BRIEF OF THE FLORIDA MEDICAL ASSOCIATION AND AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Florida.

The Florida Medical Association (the "FMA") is a not-for-profit corporation, which is organized and maintained for the benefit of the licensed Florida physicians who comprise its membership. The FMA was created and exists for the purpose of securing and maintaining the highest standards of practice in medicine and to further the interests of its members. One of the primary purposes of the FMA is to act on behalf of its members by representing their common interests before the courts of the State of Florida.

The AMA and FMA join this brief on their own behalves and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent

the viewpoint of organized medicine in the courts. Amici's participation on behalf of their physician memberships will help educate the Court on the potential impact of this case on the practice of medicine in Florida.

INTRODUCTION AND SUMMARY OF ARGUMENT

Physicians facing medical malpractice claims must be held to the standards of care in the specialty for which they are qualified and trained. They should be judged by others who are trained in the same standards of care. This policy is required under Florida law, *see* § 766.102, Fla. Stat. (2009). It reduces the likelihood of unreliable testimony from experts with differing standards of care, and it assures consistency in standards in the courtroom and operating room.

Here, an ophthalmologist performed lower eyelid surgery (bilateral blepharoplasty) on Plaintiff, who allegedly developed an infection from the procedure. In initiating her medical malpractice claim against the ophthalmologist, Plaintiff was required under Florida law to submit a verified written medical expert opinion from a medical expert who specializes in the "same specialty" or "similar specialty" as the ophthalmologist. *See* § 766.102(5)(a) Fla. Stat. (2009). This law assures that physicians will be adjudged by those trained to the same standards of care and qualified to determine whether those standards of care were followed or breached. Yet, Plaintiff submitted a verified written statement from a specialist in infectious diseases, who did not possess the same or similar training or

qualifications as an ophthalmologist and did not provide ophthalmological services. As the Fourth District Court of Appeals found in excluding this proposed testimony: "Simply put, the infectious disease doctor is not an eye surgeon nor is the ophthalmologist an infectious disease doctor." *See Edwards v. Sunrise Ophthalmology ASC, LLC*, 134 So. 3d 1056, 1059 (Fla. 4th DCA 2013).

No person would go to an infectious disease expert for lower eyelid surgery. An infectious disease specialist does not have the "same" specialty as an ophthalmologist. An infectious disease specialist also does not have a "similar specialty" as an ophthalmologist as defined in the Florida code, which can include someone experienced in the "evaluation, diagnosis, or treatment" of the eye condition for which Plaintiff sought ophthalmological care. § 766.102(5)(a), Fla. Stat. (2009) (stating the criteria for medical experts in litigation). As this brief will demonstrate, affirming the ruling below is necessary for safeguarding the fairness and integrity of legal proceedings involving allegations of medical malpractice.

ARGUMENT

I. INFECTIOUS DISEASE SPECIALISTS AND OPHTHALMOLOGISTS ARE NOT TRAINED OR QUALIFIED IN THE SAME OR SIMILAR SPECIALTIES OR IN THE SAME STANDARDS OF CARE.

Plaintiff acknowledges this appeal is controlled by the version of § 766.102, Fla. Stat. (2009) in effect at the time of her surgery. *See* Pl. Br. at *7. This version of the statute requires that to give expert testimony on "the prevailing professional

standard of care" in a malpractice case, one must be an expert "in the same specialty" or "specialize in a similar specialty" as the health care provider against whom the malpractice is alleged. *Id.* This law is necessary in today's medical environment because medicine is highly specialized and requires physicians to continuously learn and develop new skills in treating patients. The American Board of Medical Specialties now issues certificates in thirty-eight specialties and 130 subspecialties.[1] These certifications, in addition to impacting a physician's "hospital privileges [and] peer and patient recognition," instruct physicians on "the standard of care" that physicians in a particular specialty or subspecialty owe to their patients. John J. Smith, *Legal Implications of Specialty Board Certification*, 17 J. Legal Med. 73, 74-75 (1996).

Defendant is a board certified ophthalmologist. Ophthalmologists must complete medical school, a one-year internship with direct patient care in ophthalmology, and an ophthalmology residency of three to four years. *See* Am. Bd. of Ophthalmology, *Board Certification Guidelines*, at 8-9 (Jan. 2014). They have to pass written exams on topics specific to ophthalmology, including optics and refraction, ophthalmic pathology, neuro-ophthalmology, eyelids, lacrimal system, and orbit, cornea and external disease, glaucoma, retina, vitreous, and

[1] *See* Am. Bd. of Med. Specialties, *Guide to Medical Specialties* (2013) (providing detailed descriptions of each specialty and subspecialty). Approximately 80 to 85 percent of all U.S. licensed physicians are Board Certified by an ABMS Member Board. *See* Am. Bd. of Med. Specialties, *Better Patient Care is Built on Higher Standards* (2012).

uvea. *See id.* at 12. They also must pass oral exams covering similar topics in a clinical scenario that requires them to demonstrate knowledge of "abnormalities and diseases that affect the eye, ocular adnexa and the visual pathways" and understand how to diagnose and treat these conditions. *See id.* at 17-18. The goal of this process is "to assess the knowledge, experience and skills requisite to the delivery of high standards of patient care in ophthalmology." *See id.* at 4.

To qualify as an expert in litigation against an ophthalmologist, the Florida statute requires the person to additionally have "devoted professional time during the 3 years immediately preceding" the incident to "active clinical practice of, or consulting with respect to, the same or similar specialty," to instructing "students in an accredited health professional school or accredited residency or clinical research program in the same or similar specialty," or to "[a] clinical research program that is affiliated with an accredited health professional school or accredited residency or clinical research program in the same or similar specialty." *See* § 766.102(5)(a), Fla. Stat. (2009). Florida law explicitly recognizes that "[t]he existence of a *medical injury* does not create any inference or presumption of negligence against a health care provider," and that the purpose of the requirements above is to assure that a claimant can prove the injury "was proximately caused by a *breach of the prevailing professional standard of care*." § 766.102(2)(b), Fla. Stat. (2009) (emphasis added).

Here, Plaintiff did not provide a verified written medical expert opinion from anyone who had the same or similar training, experiences or standard of care as her ophthalmologist. Rather, Plaintiff found someone with an entirely different specialty to provide that opinion: a specialist in infectious diseases. The two specialists have entirely different trainings and experiences. In contrast to an ophthalmologist, an infectious disease specialist must be certified by the American Board of Internal Medicine, which includes three years of residency in internal medicine, and pass written exams for bacterial diseases, AIDS/HIV, antimicrobial therapy, viral diseases, critical care medicine and surgery, mycobacteria, parasites, and fungi, among other topics. *See* Am. Bd. of Internal Med., *Policies & Procedures for Certification*, at 2 (Aug. 2014); Am. Bd. of Internal Med., *Infectious Disease Certification Examination Blueprint*, at 1 (July 2014). Plaintiff did not schedule eye surgery with an infectious disease doctor, nor would the infectious disease doctor hold himself out as qualified to perform eye surgery.

Nevertheless, Plaintiff asked the trial court, mid-level appellate court and now this Court to overlook these differences and the requirements of § 766.102 that her expert be of the "same or similar specialty" as her ophthalmologist. To be clear, the statute requires that if the expert is not of the same specialty, he or she must "*specialize in a similar specialty that includes* the evaluation, diagnosis, or treatment of the medical condition that is the subject of the claim."

§ 766.102(5)(a), Fla. Stat. (2009) (emphasis added). By adding this provision, which has since been stricken, the Legislature was not requiring the expert to specialize in the exact same specialty as the treating physician. The expert could have a similar specialty so long as he or she evaluated, diagnosed, or treated individuals for the medical condition for which the plaintiff sought the physician's services. This would allow the expert to attest to the standard of care for that specialty and whether the treating physician violated these standards. However, nothing in the record suggests that the Plaintiff's expert had experience, training, or skill in performing blepharoplasties.

For Plaintiff to prevail, the Court must misread this provision in two ways. First, the Court must give no meaning to the phrase "specialize in a similar specialty" (italicized above). Ignoring any words in a statute runs counter to canons of statutory construction. Here, there is a more fundamental issue: the requirement that the expert be of a similar specialty as the physician accused of malpractice is the primary requirement in that provision. The rest of the sentence, which comes after "that includes" (also italicized above), is nothing more than an explanatory clause contingent on the similar specialty requirement.

Second, Plaintiff requires the Court to misinterpret this explanatory clause. She suggests that the "condition that is the subject of the claim" need not be the condition for which the physician provided services (eye surgery), but the injury

from the alleged malpractice (infection). *See* Pl. Br. at *8. Again, this interpretation negates the "similar specialty" requirement and belies the purpose of the statute. As indicated above, Florida law is clear that the core inquiry in a medical malpractice claim is not merely to prove injury, but to show that the health care provider breached "the prevailing professional standard of care for that health care provider." *See* § 766.102(1), Fla. Stat. (2009). The verified medical expert requirement sets a minimal bar by assuring that at least one person in a "same or similar specialty" can assert that the Plaintiff's physician did not meet this standard of care. Plaintiff's reliance on an expert in her alleged *injury* does not satisfy the requirement to have an expert in the *standard of care* for ophthalmology.

Allowing this infectious disease expert to assess the standards of care of the treating ophthalmologist would undermine this law. Infections are among the greatest risks in surgeries of all kinds, occurring even when physicians diligently adhere to their standards of care. *See* Dale W. Bratzler & David R. Hunt, *The Surgical Prevention and Surgical Care Improvement Projects: National Initiatives to Improve Outcomes for Patients Having Surgery*, 43 Clinical Infectious Diseases 322, 322 (2006) ("Among the most common complications that occur after surgery are surgical site infections."); Suzanne M. Pear, *Patient Risk Factors and Best Practices for Surgical Site Infection Prevention*, Managing Infection Control, at 57 (Mar. 2007) (noting the rate of infections "[d]espite considerable research on best

practices and strides in refining surgical techniques, technological advances and environmental improvements in the operating room (OR), and the use of prophylactic preoperative antibiotics"). If Plaintiff's misinterpretation of the statute is adopted, infectious disease specialists would commonly be called upon to be experts for medical malpractice claims, regardless of whether the professional standards of care were that of an ophthalmologist, cardiologist, neurologist, orthopedist, or other specialists who perform surgeries. Creating a class of experts who can attest to the highly detailed standards of care of dissimilar specialties was the problem this legislation was intended to solve.

Further, if the infectious disease specialist is permitted to apply the standard of care for his specialty, not ophthalmology, a predicament will arise if the two specialties have inconsistent standards of care. The ophthalmologist may have met the prevailing professional standard of care for an ophthalmologist, but not for an infectious disease specialist. *See Edwards*, 134 So. 3d at 1059 (refusing to "impose the infectious disease doctor's expertise on a dissimilar eye-surgery specialist"). Allowing such testimony to be the basis for liability, even when the treating physician has met his or her standard of care, contradicts the statutory requirement the injury be caused "by a breach of the prevailing professional standard of care." *See* § 766.102(2)(b), Fla. Stat. (2009). The courtroom, like the emergency room, hospital room, or examination room, should reflect the reality of

the education and training involved in the practice of specialized medicine; this Court should reject Plaintiff's attempt to misread Florida law.

II. ALLOWING AN INFECTIOUS DISEASE SPECIALIST TO TESTIFY AGAINST AN OPHTHALMOLOGIST UNDER FLORIDA'S MEDICAL EXPERT STATUTE WOULD ENCOURAGE "EXPERT SHOPPING"

Perhaps in recognition of the weakness of her textual argument, Plaintiff urges the Court to "liberally construe" Florida's "similar specialist" requirement to allow an infectious disease specialist to adjudge the standard of care provided by an ophthalmologist. Pl. Br. at *9. Such an overly broad interpretation could lead to the exact problem the Legislature has sought to solve: expert shopping. The Legislature determined that if a Plaintiff cannot find a person of the same or similar specialty to attest to the breach of a physician's standard of care, they should not be able to shop for a "hired gun" to issue that testimony. Such expert shopping can denigrate the integrity of medical malpractice litigation.

Finding ways to enhance the reliability of expert testimony has been a source of boundless debate, both in Florida and around the country.[2] Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit summarized the concern: "There is a great deal of skepticism about expert evidence. It is well

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[2] For example, Florida courts have widely recognized that "a witness might be more likely to testify favorably on behalf of the party because of the witness's financial incentive." *See, e.g., Rosario-Paredes v. J.C. Wrecker Serv.*, 975 So. 2d 1205, 1208 (Fla. 5th DCA 2008) (citing *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 997-98 (Fla. 1999)).

known that expert witnesses are often paid very handsome fees, and common sense suggests that a financial stake can influence an expert's testimony, especially when it is technical and esoteric and hence difficult to refute in terms intelligible to judges and jurors. More policing of expert witnessing is required, not less." *Austin v. Am. Ass'n of Neurological Surgs.*, 253 F.3d 967, 973 (7th Cir. 2001).[3] Florida's statute § 766.102 is the Legislature's attempt to police expert testimony in this State. It should not be "liberally construed" so as to defeat its very purpose.

A. Florida's Medical Expert Law is Not So Broad as to Allow An Expert on a Treating Physician's Standard of Care to Have Dissimilar Training and Experiences From the Treating Physician

Florida courts have recognized the value of the Legislature's requirement that a plaintiff submit a "verified medical expert [report] as a prerequisite to file suit for medical malpractice." *Oken v. Williams*, 23 So. 3d 140, 147 (Fla. 1st DCA 2009), *rev'd on other grounds*, 62 So. 3d 1129 (Fla. 2011). The "purpose of requiring corroboration is to spare all parties (not to mention the judiciary) the time and expense of litigating spurious claims." *Archer v. Maddux*, 645 So. 2d 544, 546-47 (Fla. 1st DCA 1994) (internal quotation omitted). Requiring the specialties of the defendant doctor and the medical expert to be the same or similar helps "to prevent the filing of baseless litigation ... and to corroborate that the claim is

[3] *See* Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113, 1117 (noting the "poor use of scientific and other forms of specialized knowledge, at a high cost to the participants and to the legal system").

legitimate." *Id.* "No party should be called on to defend" allegations when no expert of the same or similar trainings and experience will support them. *Id.*

It has become accepted that the Legislature intended there to be an exact or close match between the specialties. *See* Mark R. Berlick & Brandon A. Blake, *No Longer Similar: Changes in Section 766.102(5)(a), Florida Statutes Create a New Challenge to Specialty Experts in Medical Malpractice Cases*, Trial Adv. Q. at 13 (Spring 2014) (highlighting the Legislature's emphasis on "similar" in the statute).[4] "When, as here, board certified physicians are involved, the standard is that recognized by reasonably careful physicians with the same board certification." *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr.*, Inc., 66 F. Supp. 2d 1247, 1255 n. 21 (N.D. Fla. 1999). Allowing generalists or those with other specialties to testify about the standard of care expected of a specialist in a different field would create the likelihood that all physicians could be deemed "an expert not only in their own field of medicine but in every field and specialty." *Oken*, 23 So. 3d at 150; *see also Barrio v. Wilson*, 779 So. 2d 413, 414 (Fla. 2d DCA 2000) (holding that a pulmonologist was not qualified to testify on whether an emergency room doctor breached his duty to provide the appropriate standard of care in an emergency room setting). As indicated above, this same concern applies to

[4] *See* Oxford Dictionaries, Definition of Similar (citing synonyms of "alike, (much) the same, indistinguishable, almost identical, homogenous, homologous").

infectious disease specialists who could testify on infections regardless of how contracted.

While some courts have struggled to identify the exact dividing line of which medical specialties are similar enough to meet the § 766.102 standards, it is clear that specialties as disparate as ophthalmology and infectious disease do not qualify. *See* Victor E. Schwartz & Cary Silverman, *Strengthening Florida's Civil Justice System: Lawmakers Should Build on a Decade of Progress*, James Madison Inst. Pol'y Brief, Apr. 2014, at 6; *Weiss v. Pratt*, 53 So. 3d 395, 401 (Fla. 4th DCA 2011) (discussing case law interpreting "similar specialty").

As the court below explained, although in some instances it may be proper for an emergency room physician to testify against an orthopedic surgeon, the testimony must be limited to procedures in which they have common training and experience. *See Edwards*, 134 So. 3d at 1058 (distinguishing the two cases); *see also Holden v. Bober*, 39 So. 3d 396, 402 (Fla. 2d DCA 2010) (ordering evidentiary hearing on whether an emergency room doctor is qualified to testify on the standard of care of a treating neurologist in an emergency capacity). Again, an infectious disease specialist does not have the training or experience to perform eye surgery on a patient.

The Legislature's intent that the "similar specialty" provision not be too broadly construed can be seen from the subsequent action the Legislature took

when it removed this clause in the 2013 legislative session.[5] No longer can an expert be of a "similar specialty" to testify in a medical malpractice case; he or she must be of the same specialty. This change was prompted by concern that the "similar specialty" language "was too broadly interpreted." *Governor Inks Expert Witness, Med Mal Bills*, Fla. Bar News (June 15, 2013). The court below put this legislative change in proper context. It stated that the Legislature "clarified the statute" to avoid any "confusion the statute's previous language had caused," but, regardless, specializing in infectious disease is not similar to specializing in eye surgery. *Edwards*, 134 So. 3d at 1059, n. 3.

B. The Public Policy of Limiting Expert Shopping Has Been Adopted by Other State Courts and Legislatures

Applying the same or similar specialty requirement fairly and accurately, and not overly broad, as Plaintiff urges, also is in concert with statutes, court rulings and public policies in other states. There has been a general movement toward limiting expert shopping and preserving the quality of expert testimony in order to facilitate proper outcomes in cases involving specialized knowledge.

For example, consider Florida's neighboring states. In Georgia, the comparable statute to § 766.102 does not require the expert to be of the "same"

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[5] The Legislature also deleted § 766.102(14), which gave courts discretion in admitting medical expert testimony. *See* S.B. 1792 Bill Analysis and Fiscal Impact Statement, at 6, 10 (Mar. 29, 2013) (stating that the bill "appears to remove the discretion of the court to qualify or disqualify an expert witness on grounds other than the specific qualifications specified in ss. 766.102(5)-(9), F.S.").

specialty, but also allows "a plaintiff to obtain an expert who has significant familiarity with the area of practice in which the expert opinion is to be given." *See Nathans v. Diamond*, 654 S.E.2d 121, 123 (Ga. 2007). In *Nathans*, the court held that a pulmonologist was not qualified to testify on the standard of care provided by an otolaryngologist performing surgery on a patient with sleep apnea. *Id.* It found that although the pulmonologist may have performed surgeries generally, "he does not state that he has performed surgeries like the one in question" and "does not state that the surgeries that he has performed involved risks that are similar to the risks involved in the surgery" at issue. *Id.* at 124. Simply being "familiar with the standard of conduct of the medical profession in question" is not sufficient. *Id.*

Mississippi also does not require the expert be of the same specialty as the treating physician, but does require sufficient familiarity with the standards of care at issue in a case. In *Troupe v. McAuley*, 955 So. 2d 848, 856 (Miss. 2007), involving a middle ear surgery, the Mississippi Supreme Court held that a neurosurgeon could not be an expert in an action against a neuro-otolaryngologist because the neurosurgeon "never conducted middle ear surgery, had never had privileges at any hospital to conduct middle ear surgery, and was not qualified to conduct middle ear surgery." Thus, he was not "sufficiently familiar with the standards of neuro-otolaryngology." *Id.* at 856.

In Alabama, the statute is comparable to the current Florida law; the expert must be certified in the same specialty as the treating physician and be able to "testify as a similarly situated health-care provider to the standard of care to which [the treating physician] was to be held." *See Hegarty v. Hudson*, 123 So. 3d 945, 951 (Ala. 2013).

Even absent a statute, the rule that expert witnesses must be qualified in the specialty upon which they are called to testify is grounded in traditional tort law principles. *See* Restatement (Second) of Torts § 299A, cmt. d (1965) ("A physician who holds himself out as a specialist in certain types of practice is required to have the skill and knowledge common to other specialists."); *see also* Restatement (Second) of Torts § 299, cmt. f (regarding requirement to exercise special competence). The Court should apply this reasoning to this case and hold that professionals must be held to the standard of care of their profession, and specialists within those professions should be measured against specialists of the same background, qualifications, training, and knowledge.

III. PATIENTS AND DOCTORS BENEFIT WHEN LITIGATION PROVIDES FAIR, ACCURATE RESOLUTIONS OF MEDICAL MALPRACTICE ALLEGATIONS

Assuring that specialists are judged in litigation based on their standards of care and by individuals trained and experienced in those standards of care will help protect the integrity of medical malpractice claims. Studies have shown that

lawsuits alleging medical malpractice are poor indicators of whether malpractice has actually occurred. *See* Barry F. Schwartz & Geraldine M. Donohue, *Communication Is Crucial in Practicing Medicine in Difficult Times: Protecting Physicians from Malpractice Litigation* 47, 69 (Jones & Bartlett Publishers, 2009) (concluding that communication, not actual malpractice, is the largest factor as to whether a patient will sue a doctor). Requiring a patient's claims to be validated by someone with similar training and experiences as their treating physician will help reduce meritless claims.

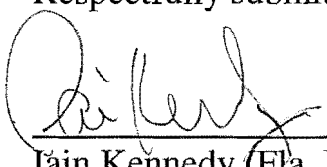
As the Florida Legislature has now determined twice, medical malpractice litigation in the state needs this protection. The cost of defending a medical negligence claim is substantial, even when a physician ultimately prevails. According to an AMA study, nearly two-thirds of medical negligence claims are ultimately dropped, withdrawn, or dismissed without any payment. *See* Jose R. Guardado, *Professional Liability Insurance Indemnity Payments, Expenses, Claim Disposition, and Policy Limits, 2003-12*, Pol'y Research Perspectives No. 2013-3, at 9 (Am. Med. Ass'n, 2013). Further, the average expense of defending a physician against a medical liability claim, regardless of whether the claim is successful, is $50,000. *Id.* at 7. This cost comes at the expense of affordable and available care. Increasing the accuracy of the liability system will attract "doctors to Florida, which increases Florida patients' access to care." Jim Saunders,

Florida House Gives Final OK to Medical Malpractice Bill, The Ledger, May 1, 2013, at B6 (quoting Florida Medical Association President Vincent DeGennaro).

CONCLUSION

For these reasons, the AMA requests the Court to affirm the decision below.

Respectfully submitted,



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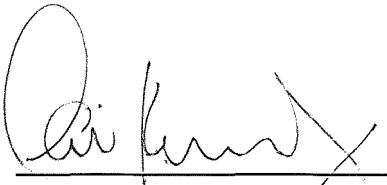
CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I hereby certify the foregoing Brief is submitted in Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure Rule 9.210(a)(2).



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CERTIFICATE OF SERVICE

I certify the foregoing Brief was filed electronically on September 30, 2014, in compliance with the Florida Rules of Administration and has been served via e-mail to the following recipients:

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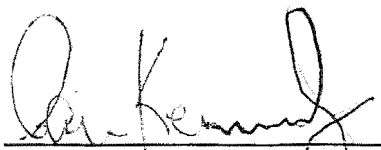

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