UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. No. 09-15162-B

RICHARD W. TROYANOS, JR.,
as personal representative of the estate of
RICHARD J. TROYANOS
Appellant,

vs.

JIM COATS,
in his official capacity as Sheriff of the Pinellas County Sheriff's Office,
RICHARD F. MILLER, D.O. and RAPHAELITA E. SIMON-ROBINSON, R.N.,
individually and in their official capacities as a doctor and nurse employed by the
Pinellas County Sheriff's Office.

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
CASE NO. 8:09 CV 1225-T23EAJ

INITIAL BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 to 26.1-3, Appellant, Plaintiff, RICHARD W. TROYANOS, JR., as Personal Representative of the Estate of RICHARD J. TROYANOS, certifies that the following represents a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable entities related to a party:

1. Richard W. Troyanos, Jr., Plaintiff, in his capacity as the Personal Representative of the Estate of Richard J. Troyanos

2. Robert B. Boyers, Esq., Hannon & Boyers, P.A., counsel for Plaintiff

3. Janpaul Portal, Esq., Hannon & Boyers, P.A., counsel for Plaintiff

4. Brett C. Powell, Esq., The Powell Law Firm P.A., co-counsel for Plaintiff

5. Michael S. Lamonsoff, Esq., Law Offices of Michael S. Lamonsoff, PLLC, participating/referral counsel for Plaintiff

6. Joy Carr, Esq., Carr and Carr, P.A., probate counsel for the Estate of Richard J. Troyanos

7. Sheriff Jim Coats, Pinellas County Sheriff's Office, Defendant

8. Richard F. Miller, D.O., Pinellas County Sheriff's Office, Defendant

9. Raphaelita Simon-Robinson, RN, Pinellas County Sheriff's Office, Defendant

10. Mark E. McLaughlin, Esq., Macfarlane, Ferguson & McMullen, P.A., counsel for Defendants

11. The Honorable Steven D. Merryday, United States District Judge

STATEMENT REGARDING ORAL ARGUMENT

Appellant, Richard W. Troyanos, Jr., as Personal Representative of the Estate of Richard J. Troyanos, requests oral argument in this case, as counsel believes oral argument will assist the panel in its determination of the issues on appeal.

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STATEMENT OF JURISDICTION

The trial court had jurisdiction over the instant case pursuant to 28 U.S.C. §§ 1331. Appellant appeals from a final order of the lower court that disposes of all parties' claims. This Court has jurisdiction to hear the instant appeal from the district court's order dismissing Plaintiff's Complaint with prejudice pursuant to Fed.R.Civ.P. 54(a).

The court's Order was entered on September 25, 2009. Appellant's Notice of Appeal was filed on October 7, 2009.

STATEMENT OF THE ISSUE AND QUESTION PRESENTED

The Due Process Clause of the Constitution guarantees pretrial detainees the right to basic necessities, including the right to medical, psychiatric and psychological care. In order to prove a deprivation of this right under 42 U.S.C. § 1983, a plaintiff must show that the defendant knew facts from which the defendant could infer that the detainee posed a substantial risk of harm to himself, but failed to adequately respond to that risk. Here, Plaintiff's complaint alleges that Defendants' knew that Troyanos posed a substantial risk of harm to himself, in that Defendants knew that Troyanos repeatedly and violently bashed his own skull into a cement wall while in the Defendants' care. Nevertheless, Defendants' failed to provide proper safety precautions or psychiatric medical care to prevent this harm. Given these allegations, did Plaintiff properly allege that Defendants violated Troyanos' constitutional right to basic necessities so as to state a claim under 42 U.S.C. § 1983?

INTRODUCTION

This appeal arises from the wrongful death of Richard J. Troyanos ("Troyanos" or "Decedent"). While under the supervision of the Pinellas County Sheriff's office as a detainee at the Pinellas County Jail, Troyanos was allowed to hang himself using the waistband of his pants, which he had cut using the jagged edge of a plastic cup that was left in his cell. Although Plaintiff Richard W. Troyanos, Jr., as personal representative of the Decedent's estate ("Plaintiff" or "Appellant"), properly alleged a deprivation of Troyanos' Fourteenth Amendment rights due to Defendants' deliberate indifference to Troyanos' health and safety, the trial court found that Plaintiff had failed state a cause of action under 42 U.S.C. §1983 and dismissed Plaintiff's original complaint with prejudice.

STATEMENT OF THE CASE AND FACTS

A. Background Facts.

On November 6, 2006, Richard Troyanos was enrolled at the Boley Center for Behavioral Healthcare, a psycho-social rehabilitation agency which provides residential psychiatric services for mentally ill adults in Pinellas County. (Doc. 1-p. 5). Mr. Troyanos had a significant history of mental illness including, but not limited to, depression, bipolar disorder and psychosis. (*Id*.). Mr. Troyanos had attempted suicide on multiple occasions and had been involuntarily committed for

psychological treatment as a danger to himself and others under Florida's Baker Act on at least six different occasions. (Doc. 1-p. 6).[1] On this evening, Troyanos was arrested by the Pinellas Park Police Department as a result of an alleged incident of domestic violence stemming from an argument Troyanos had with his girlfriend over prescription medication. (Doc. 1-p. 5).

At approximately 12:27am on November 7, 2006, Mr. Troyanos was booked into the Pinellas County Jail. (Doc. 1-p. 6). During this process, detention Deputy Donna L. Pecorelli observed, documented and photographed scars on both of Mr. Troyanos' inner wrists, caused by "multiple self-inflicted cuts." Detention Deputy Pecorelli informed screening nurse Samuel Ramos of the scars on Troyanos' arms and his admission that they were self-inflicted. (*Id*.). Nevertheless, Nurse Ramos cleared Troyanos to continue with the intake process. (*Id*.).

While being processed, however, Troyanos became uncooperative and agitated and had to be forcefully restrained by the detention staff. He was handcuffed and secured in a holding cell to be given time to "deescalate." (*Id*.). However, while in the cell and still handcuffed, Troyanos began to violently smash his head against the cell wall. (*Id*.).

By 6:55am, Troyanos was evaluated by Nurse Raphaelita Simon-Robinson, who noted that Troyanos had injured himself by banging his head against the wall.

[1] *See* Section 394.467, Florida Statutes.

(Doc. 1-p. 7). Robinson also noted that Troyanos was both "babbling" and "belligerent." Robinson, without reviewing Troyanos' medical chart or completing a mental-health screening, gave medical authorization for detention deputies to restrain Troyanos in a Pro-Straint chair. (*Id*.). This device secures the detainee's shoulders, waist and legs to the chair and prevents the detainee from moving. Troyanos was strapped to this chair and left unattended for approximately 3 ½ hours. (*Id*.).

Troyanos was subsequently placed in a holding cell with instructions for visual observation at 15 minute intervals, rather than the constant observation or video surveillance that would have been required under a suicide risk watch. (Doc. 1-p. 7-8).

Less than one hour after being released from the Pro-Straint chair, Troyanos was evaluated by Nurse Melinda Scott, who noted that he was extremely hyperactive and unable to hold still or focus. Scott noted that Troyanos was rambling, and his thought process was altered. (Doc. 1-p. 9).

At 2:38pm, Troyanos was evaluated by Dr. Miller. Miller noted that Troyanos was angry, agitated, hostile and verbally abusive. (*Id*.). Miller did not, however, take any steps to perform a mental-health assessment or screening of Mr. Troyanos. (*Id*.). Dr. Miller saw Mr. Troyanos again almost 2 ½ hours later, due to reports of Troyanos' escalating agitation. (*Id*.). Miller noted that Troyanos was

very disturbed, exhibited loud, rapid speech, was visibly shaking and was again beating his head against his cell's door and wall. (Doc. 1-p. 9). Miller further noted that Troyanos was delusional and disorganized, and diagnosed him with a psychotic disorder. (*Id*.). Miller ordered Troyanos sedated with a cocktail of Thiamine, Thorazine, Benadryl and Ativan. (*Id*.).

The following day, Troyanos once again became very agitated and out of control. This episode was marked by Mr. Troyanos again smashing his head, this time against a control room window outside the nurses' station at the detention center. (Doc. 1-p. 10). On this occasion Troyanos had to be physically restrained by detention staff, who tackled and handcuffed him. (*Id*.). This was the third occasion in which Mr. Troyanos attempted to physically injure himself by bashing his head against the walls or doors of the detention center.

After this incident, Dr. Miller visited Troyanos to perform another evaluation. However, Troyanos was asleep at the time and Dr. Miller chose not to wake him. Dr. Miller failed to return later that evening to complete his evaluation of Mr. Troyanos. (*Id.*).

On November 9—three days after Troyanos' initial arrest—Detention Deputies Jill Goldberg and Ronald Montgomery and Detention Deputy Recruit Joseph Sigmund were assigned to the wing of the detention center that housed Mr. Troyanos. (Doc. 1-p. 10). Montgomery and Sigmund noted that Troyanos

remained upset and was frustrated due to his inability to contact his son by telephone. (*Id*.). Montgomery also noted that he had observed Troyanos sitting on the floor throughout the day with his head in his hands. (*Id*.). Two inmates housed near Troyanos recalled Troyanos crying aloud and shaking the bars of his cell. (*Id*.).

Although Troyanos was to be observed in his cell every 15 minutes, the detention deputies did not check on Troyanos between 4:30pm and 5pm on November 9. (Doc. 1-p. 11). At 5:14pm Deputy Montgomery found Troyanos sitting with his back against the cell door; he was unresponsive. (*Id*.).

In the 44 minutes in which Troyanos was left unattended, and after three separate incidents of inflicting injury upon himself, Troyanos succeeded in cutting the waistband from his inmate uniform pants with the jagged edge of a plastic cup and using this material to tie a noose around his neck. (*Id*.). Troyanos had committed suicide by hanging himself from the bars of his cell. He was 44 years old. (*Id*.).

B. Procedural Background.

Because of the Defendants' failure to provide proper medical and psychiatric care to Mr. Troyanos and to properly protect him from self-inflicted harm as detailed above, Plaintiff filed suit against Sheriff Jim Coats, Dr. Richard Miller,

and Nurse Raphaelita Simon-Robinson, seeking redress under 42 U.S.C. §1983 for deprivation of Troyanos' 14th Amendment right to Due Process. (Doc. 1-p. 12-13).

Plaintiff alleged, *inter alia*, that Troyanos' suicide was reasonably foreseeable in light of Troyanos' repeated episodes of self-inflicted harm while in the Pinellas County Detention Center, as well as his documented mental health problems and previous suicide attempts. (Doc. 1-p. 13)

As to Sheriff Jim Coats, plaintiff alleged that, in his capacity as chief correctional officer. Coats had engaged in a "custom or policy of condoning the alleged improper treatment of mentally ill pretrial detainees, without taking appropriate action in respect to detention deputies, doctors, nurses, employees and/or agents, including the need to appropriately discipline, supervise, dismiss and/or retrain them." (Doc. 1-p. 13-17) Plaintiff also alleged that Coats had engaged "in a custom or policy of permitting and tolerating the failure of the detention deputies, doctors, [and] nurses... [to] protect and house mentally ill pretrial detainees to the extent it had become a *de facto* policy of the Pinellas County Sheriff's office to tolerate improper treatment, safety [procedures], and housing of mentally ill pretrial detainees like Richard J. Troyanos." (Doc. 1-p. 15)

Plaintiff cited these and other failures and claimed that "the deliberate indifference of Defendant Sheriff Coats violated the constitutional rights of all persons including, Richard J. Troyanos, for which 42 U.S.C. §1983 provides a

remedy." (Doc 1-p. 16). Plaintiff further alleged that "as a direct and proximate result of the deliberate indifference of Defendant Sheriff Coats to Richard J. Troyanos' taking his own life, Richard J. Troyanos committed suicide while in the custody of the Pinellas County Sheriff's office and at the Pinellas County Jail. As such, defendant Sheriff Coates is liable for the premature preventable death suffered by Richard J. Troyanos." (Doc 1-p. 16).

As to Dr. Miller, plaintiff alleged that "Dr. Miller had and/or reasonably should have had notice of Richard J. Troyanos' suicidal tendencies and the strong likelihood that Richard J. Troyanos would inflict harm on himself, including attempting to commit suicide.... defendant Dr. Miller breached his duty of care and was deliberately indifferent to the constitutional rights and privileges secured to Richard J. Troyanos under the Due Process Clause of the 14th Amendment to [the] United States Constitution." (Doc 1-p. 25).

Specifically, Plaintiff alleged that Dr. Miller failed to perform an adequate mental health screening, failed to provide Troyanos with appropriate psychiatric diagnosis, failed to provide adequate medication for Troyanos' psychiatric illness, failed to perform an adequate and appropriate suicide screening and failed to properly review Troyanos' medical chart and elicit an appropriate psychiatric history from him, which would have shown a high level of chronic as well as acute suicide risk. (Doc 1-p. 25). Further, Plaintiff specifically alleged that Dr. Miller

was liable under section 1983 in "Failing to adequately assess and treat Richard J. Troyanos' mental illness *in the face of mounting evidence of psychiatric distress*, which was a substantial cause of Richard J. Troyanos' death." (Doc 1-p. 25). [2]

Plaintiff alleged that Dr. Miller's actions and omissions constituted a course of conduct amounting to a deliberate indifference to Troyanos' rights, health, safety and welfare. Finally, Plaintiff alleged that, as a direct and proximate result of Dr. Miller's deliberate indifference, Richard J. Troyanos, committed suicide while in the custody of the Pinellas County Jail. (Doc 1-p. 26).

Count V of Plaintiff's initial complaint alleged that Nurse Simon-Robinson, while acting under color of state law in her capacity as an employee, agent, and/or servant of the Pinellas Sheriff's office, was aware of Troyanos' suicidal tendencies and the strong likelihood that he would inflict harm upon himself. (Doc 1-p. 27-28). Plaintiff further alleged that Simon-Robinson's failings constituted a course of conduct amounting to deliberate indifference to the rights, safety and welfare of Mr. Troyanos. (Doc 1-p. 29).

As set forth in the complaint, these failings included: 1) the failure to ensure that Troyanos was properly assessed by an individual with professional competence in the diagnosis of psychiatric disorders; 2) failing to recognize the chronic nature of Troyanos' observed headbanging behavior; 3) failing to properly

[2] Unless otherwise indicated, all emphasis is supplied by the undersigned.

review Troyanos' medical chart and elicit an appropriate psychiatric history; 4) failing to perform an adequate and appropriate suicide screening; 5) [i]mproperly providing medical authorization for Troyanos' placement in the Pro-Straint chair despite obvious changes in his mental status; 6) failing to assess and treat Troyanos' mental illness in the face of mounting evidence of psychiatric distress; and 7) failing to adequately assess Troyanos' suicide risk or to take adequate steps to protect him. (Doc 1-p. 29).

Plaintiff also asserted state court claims for medical malpractice and negligence arising from the wrongful death of Richard J. Troyanos against Sheriff Coats, premised upon his vicarious liability for his deputies and medical care providers employed at the detention center. (Doc. 1-pp. 17-24).

All three defendants moved to dismiss plaintiff's complaint on the grounds that the complaint failed to state a claim of deliberate indifference against them. (Doc. 4-p. 3).

Although recognizing that Plaintiff had asserted that Coats, Miller and Robinson were all deliberately indifferent to the rights of Mr. Troyanos, Defendants argued that "To establish deliberate indifference, three factors must be met: (1) subjective knowledge of risk of serious harm; (2) disregard for that risk; (3) by conduct that is more than negligence." (Doc. 4-p. 5). (Emphasis in original). Defendants further argued that Plaintiff would be unable to show that

the defendants had any subjective knowledge that there was a risk of serious harm to Troyanos. (Doc. 4-p. 5).

Next, Defendants argued that defendants Miller and Robinson were exempt from suit under the doctrine of qualified immunity because their conduct did "not violate a clearly established statutory or constitutional right, of which a reasonable person would have known." (Doc. 4-p. 8).

Finally, Defendants argued that, should the court determine that plaintiff failed to state a cause of action on his §1983 claim, the court should dismiss Plaintiff's pendant state court claims for lack of subject matter jurisdiction. (Doc. 4-p. 9).

Plaintiff responded by pointing out that the complaint alleged "that the acts and omissions of each of the defendants constitute a course of conduct and/or failure to act amounting to a deliberate indifference to the rights, health, safety and welfare of Richard J. Troyanos and those similarly situated, resulting in the deprivation of his constitutional rights under state and federal law." (Doc. 12-p. 2). Plaintiff further pointed out that he had alleged that Sheriff Coats' custom or policy of condoning or ignoring repeat failures of the detention staff to enforce policies for the protection and medical treatment of the detainees created a de facto policy, which directly led to the death of Mr. Troyanos. Plaintiff argued that these allegations sufficiently placed Sheriff Coats actions within the purview of §1983.

(Doc. 12-p. 2-4). Finally, Plaintiff argued that the factual allegations (which must be taken as true for the purposes of a motion to dismiss) detailing the repeated failures of Dr. Miller and Nurse Robinson to respond to Troyanos' repeated and escalating self-destructive behavior, along with their failure to conduct adequate psychological screening or to review Troyanos' psychological records demonstrated these defendants' deliberate indifference to Troyanos' rights. (Doc. 12-p. 9-11).

The trial court entered its Order dismissing with prejudice Plaintiff's initial complaint on September 25, 2009. (Doc. 14-p. 11). Central to the trial court's determination that Plaintiff failed to state a cause of action under §1983 against Miller and Robinson was the court's reasoning that "even if Miller and Robinson concluded that Troyanos was a suicide risk, the defendants conduct during Troyanos' forty-eight hours in the Pinellas County Jail falls considerably short of gross negligence... Rather than deliberate indifference, the facts show that the defendants responded adequately to the perceived risk." (Doc. 14-p. 8).

As to Sheriff Coats, the trial court ruled that because, in the court's view, Plaintiff's claim against Coats alleged on only a single incident—Troyanos' suicide— "the plaintiff alleges no facts supporting the conclusion that a failure to train amounts to deliberate indifference." (Doc. 14-p. 11). Thus, the court granted Sheriff Coats' motion to dismiss as well.

Finally, the trial court ruled that it would decline jurisdiction over Plaintiff's state law claims. (*Id.*).

This appeal timely followed. (Doc. 15).

SUMMARY OF THE ARGUMENT

Contrary to the trial court's findings, Plaintiff/Appellant Richard W. Troyanos, Jr., properly stated claims against the Defendants for deprivation of Richard. J. Troyanos' Fourteenth Amendment rights under 42 U.S.C. Section 1983.

The facts as alleged demonstrate that Defendants had both the opportunity and the information available to them to recognize Troyanos' serious psychological illness, which posed a serious risk to his safety. The allegations also make clear that, despite Troyanos' obvious condition, Defendants failed to take reasonable steps to avoid that risk. Plaintiff's claims show that the Defendants chose merely to sedate Troyanos in order to manage his outbursts rather than attempting to effectively treat his illness and, thus, demonstrate a deliberate indifference to Troyanos' serious medical need. This Court should therefore reverse the trial court's order dismissing Plaintiff's claims against Dr. Miller and Nurse Robinson.

Plaintiff also properly alleged that, as demonstrated by the series of breaches in protocol by defendants Miller and Robinson, defendant Jim Coats was liable in his supervisory capacity for his failure to train, supervise and discipline his staff. Plaintiff alleged that these failures created a de facto policy of tolerance for indifferent care of the mentally ill, which resulted in the death of Mr. Troyanos. Thus, the trial court erred in dismissing Plaintiff's counts against defendant Coats and this Court should also reverse the trial court's order in this regard.

Finally, because the trial court declined to exercise jurisdiction over Plaintiff's state law claims as a result if its decision to dismiss Plaintiff's §1983 claims, and because the trial court erred in dismissing those claims, this Court should reinstate Plaintiff's state court claims as well.

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss de novo. *Belanger v. Salvation Army*, 556 F.3d 1153 (11th Cir. 2009)("We review the grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim de novo, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff.").

A motion to dismiss must be denied unless, under a review of the complaint in the light most favorable to the plaintiff, it is undeniable that the plaintiff will be unable to adduce facts to support his claim. *See Partridge v. Two Unknown Police Officers*, 791 F. 2d 1182, 1186 (5th Cir. 1986)("The district court styled its action as a dismissal under Fed.R.Civ.P. 12(b)(6). In reviewing such a dismissal, we may not go outside the pleadings. We accept all well pleaded facts as true and view them in the light most favorable to the plaintiff. We cannot uphold the dismissal 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CLAIMS AGAINST DEFENDANTS MILLER AND ROBINSON, BECAUSE THE ALLEGATIONS OF THE COMPLAINT MAKE CLEAR THAT THESE DEFENDANTS DEMONSTRATED A DELIBERATE INDIFFERENCE TO TROYANOS' SERIOUS MEDICAL CONDITION.

As discussed above, Plaintiff Richard W. Troyanos, Jr., alleged a deprivation of his deceased father's Fourteenth Amendment rights arising from the failure of the Defendants in this case to properly diagnose or treat the elder Troyanos' severe mental illness, or to prevent the recurring self-inflicted injuries that ultimately resulted in his death. In doing so, Plaintiff alleged facts demonstrating that Troyanos' medical care providers failed to properly treat his condition and instead chose only to manage his outbursts with physical restraint and chemical sedation. Plaintiff alleged that this failure to provide proper medical care in the face of obvious psychiatric distress and recurring self-inflicted physical abuse amounted to deliberate indifference to Troyanos' medical needs and safety.

Under the controlling case law, Plaintiff succeeded in stating a claim under 42 U.S.C. Section 1983. *See Belcher v. City of Foley*, 30 F. 3d 1390 (11th Cir. 1994)(Under the Eighth Amendment, prisoners have a right to receive medical treatment for illness and injuries . . . and a right to be protected from self inflicted injuries, including suicide."); *Rogers v. Evans*, 792 F. 2d 1052, 1058 (11th Cir. 1986)("Deliberate indifference to serious medical needs of prisoners violates the

eighth amendment prohibition of cruel and unusual punishment.... the indifference can be manifested by prison doctors in taking the easier and less efficacious route in treating an inmate."); *Mann v. Taser Intern., Inc.*, 2009 WL 4279713, *9 (C.A.11 Dec. 2, 2009)("As a pre-trial detainee, Melinda's rights exist under the due process clause of the Fourteenth Amendment rather than the Eighth Amendment. . . . Nonetheless, Plaintiffs' claims are subject to the same scrutiny as if they had been brought as deliberate indifference claims under the Eighth Amendment."), *citing Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir.1985)(holding that "in regard to providing pretrial detainees with such basic necessities as ... medical care[,] the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons.").

Nevertheless, Defendants moved the trial court to dismiss Plaintiff's complaint under Fed. R. Civ. P. 12(b)(6), arguing that "[T]here must be a strong likelihood rather than a mere possibility the prisoner will commit suicide. ... To establish deliberate indifference, three factors must be met: (1) subjective knowledge of risk of serious harm; (2) disregard for that risk; (3) by conduct that is more than negligence." (Emphasis in original). Defendants further argued that, despite at least three separate incidents identified in the complaint of Troyanos attempting to injure himself by smashing his head against the walls and doors of

the facility, Plaintiff would be unable to show that the defendants had a subjective knowledge that a risk of serious harm existed. (Doc. 4-p. 5).

Although the trial court properly rejected Defendants' incorrect argument that a strong likelihood that the decedent would *committed suicide* must be shown and properly recognized that the Plaintiff needed only show that a strong likelihood existed that the decedent would *injure himself*,[3] the court erroneously concluded that Plaintiff had alleged no facts to demonstrate this likelihood. Respectfully, the allegations contained in the complaint more than demonstrate the court's error in this regard.

First, it must be noted that the complaint filed in this case is premised upon Defendant Miller and Robinson's failure to properly treat Troyanos' severe medical condition, and thereby prevent his death by suicide. Plaintiff's complaint clearly alleges that these failures amounted to deliberate indifference and caused Troyanos' death. (Doc. 1-pp. 6-7; 8; 10; 11-12; 13; 14-15; 16; 24; 25; 26; 27; 28; 29). *See Mann v. Taser Intern., Inc.,* 2009 WL 4279713, *9 (C.A.11 Dec. 2, 2009)("To prevail on a deliberate indifference to serious medical need claim, Plaintiffs must show: (1) a serious medical need; (2) the defendants' deliberate indifference to that need; and (3) causation between that indifference and the

[3] *See Edwards v. Gilbert,* 876 F. 2d 1271, 1277 (11th Cir. 1989)("The deliberate indifference standard is met only if there were a 'strong likelihood, rather than a mere possibility,' *that self infliction of harm* would result.").

plaintiff's injury."). Thus, as explained by *Mann*, Plaintiff has alleged a cognizable claim assrting Miller and Robinson's deliberate indifference.

Specifically, Plaintiff alleged that Troyanos had a diagnosed medical condition requiring treatment in the form of "depression, bipolar disorder and psychosis." (Doc. 1-p. 6). Plaintiff further alleged that Troyanos' condition manifested itself in repeated incidents of self injury while in confinement, evidencing an obvious and demonstrable need for medical attention. These allegations are sufficient to claim that Troyanos did, in fact, have a serious medical need. *Mann*, 2009 WL 4279713, *9 (C.A.11 Dec. 2, 2009)("A serious medical need is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'); *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir.1994)(same), *overruled in part on other grounds by Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 2515, 153 L.Ed.2d 666 (2002).

In addition, Plaintiff alleged that Troyanos' mental condition, untreated by the Defendants, continued to deteriorate while in confinement, thus satisfying the alternative grounds for alleging a serious medical need. *See Mann*, 2009 WL 4279713 at *9 (C.A.11 Dec. 2, 2009)("In the alternative, a serious medical need is

determined by whether a delay in treating the need worsens the condition"); *Hill*, 40 F. 3d at 1188-89 (11th Cir.1994).[4]

Finally, Plaintiff alleged that Troyanos' condition posed a serious risk of physical harm, which ultimately resulted in his death. *See Farrow v. West*, 320 F. 3d 1235, 1243 (11th Cir.2003)("the medical need must be one that, if left unattended, poses a substantial risk of serious harm."). Thus, Plaintiff satisfied all pleading requirements indicating that Troyanos suffered from a serious medical condition

Next, Plaintiff claimed that Troyanos' severe psychological illness manifested itself in repeated instances of self-inflicted injury while in the Pinellas County Detention Center and that medical care providers Miller and Robinson failed to render appropriate care to Troyanos despite his obvious and serious medical need. Plaintiff's complaint alleges that this failure amounted to a deliberate indifference to Troyanos' serious medical needs, and that this failure directly caused Troyanos' death. Under controlling case law from this Court, this claim states a cause of action for deprivation of Troyanos' Fourteenth Amendment rights. *See Mann*, 2009 WL 4279713, *9 (C.A.11 Dec. 2, 2009)("To prevail on a deliberate indifference to serious medical need claim, Plaintiffs must show: (1) a

[4] Under even the harshest reading of the Complaint, Plaintiff alleges that Troyanos' escalating aberrant behavior began with an unreasonable lack of cooperation, progressed to head-banging, and ended in suicide.

serious medical need; (2) the defendants' deliberate indifference to that need; and (3) causation between that indifference and the plaintiff's injury."); *Rogers v. Evans*, 792 F. 2d 1052, 1058 (11th Cir. 1986)("[Deliberate] indifference can be manifested by prison doctors in taking the easier and less efficacious route in treating an inmate."). The trial court, therefore, erred in finding that Plaintiff had failed to state a claim for deliberate indifference to Troyanos' serious medical need.

Further, Defendants' argument (apparently adopted by the trial court) identifying the three elements that must be met to establish deliberate indifference reveals a fundamental flaw in their position: As noted by the defense, it is incumbent upon the plaintiff to show that the defendants had a *subjective* knowledge of a risk of serious harm, coupled by a disregard for that risk, under conditions that demonstrate more than simple negligence. Of course, subjective knowledge (i.e., what the defendants knew at the time) is a factual question to be determined by a jury after sufficient facts are adduced to make such a determination. *See Rodriguez v. Secretary for Dept. of Corrections*, 508 F. 3d 611 (11th Cir. 2007)("With regard to the subjective component of the Eighth Amendment claim, the Court in *Farmer* held that the prison 'official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.' 511 U.S. at 837, 114

S.Ct. at 1979. The Court also held: 'Whether a prison official had the requisite knowledge of a substantial risk is a *question of fact* subject to demonstration in the usual ways, including inference from circumstantial evidence.'"); *Goebert v. Lee County*, 510 F. 3d 1312, (11th Cir. 2007)("Whether a particular defendant has subjective knowledge of the risk of serious harm is a question of fact 'subject to demonstration in the usual ways, including inference from circumstantial evidence, and a *fact finder* may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.' *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S.Ct. 1970, 1981, 128 L.Ed.2d 811 (1994)(citation omitted). Disregard of the risk is also a question of fact that can be shown by standard methods. *Id*. at 846, 114 S.Ct. at 1983.'").

Thus, the trial court's determinations regarding the subjective mindset of the defendants is improper at this stage of litigation, and the court's determination to dismiss the complaint based upon its conclusion as to Defendants' subjective mindset renders the court's order erroneous from the outset.

Similarly, it is axiomatic that determinations of the existence *vel non* of negligence, deliberate indifference, etc., are uniquely factual questions appropriate for a jury determination and not appropriate for consideration of a motion to dismiss after an initial complaint. *See Greason v. Kemp*, 891 F. 2d 829, 835 (11th Cir. 1990)(Degree to which psychiatrist's care departs from the required standards

is a question for a jury); *Waldrop v. Evans*, 871 F. 2d 1030 (11th Cir. 1989)(summary judgment improper in §1983 claim where experts' affidavits presented differing opinions as to whether defendants' actions evince a deliberate disregard of decedent's medical needs); *Rogers v. Evans*, 792 F. 2d 1052, 1060 (11th Cir. 1986)("whether Dr. Smith's treatment was grossly incompetent is placed at issue in the psychiatric affidavit."). As with the question of these Defendants' subjective state of mind, the trial court erred in making a legal determination of this distinctly factual question.

Next, the trial court held that "the facts show that the defendants responded adequately to the perceived risk." (Doc. 14-p. 8). At the outset, it must be noted that this finding, like those above, is a factual determination which the trial court was not justified in making. *See Greason*, 891 F. 2d at 835 (11th Cir. 1990)(whether health care provider's care was adequate, inadequate or grossly negligent is a factual question properly decided by a jury).

Further, and contrary to the trial court's (procedurally improper) factual determination, there exists ample support in this complaint to justify the conclusion that the Defendants not only failed to adequately address the risk to Troyanos' health and safety, but that their failure to do so demonstrates their deliberate indifference to that risk. In this regard, *Brewer v. Perrin*, 349 N.W. 2d 198 (Mich. Ct. App. 1984) is instructive.

In *Brewer*, a minor was arrested as a result of a drunken fight with his brother. The minor had a history of "behavioral problems" and substance abuse, although the evidence did not demonstrate that the arresting officers were aware of either condition. *Id*. at 200.

While being taken to jail, the arrestee became belligerent and combative. *Id*. at 200-201. This belligerence continued after the arrestee was placed in a cell. As explained by the court:

> Gary was still combative and belligerent when defendants Tims and Sadowski placed him in his cell. Because during most of his stay in the jail, Gary was shouting and screaming so loudly that the noise disrupted the department's work, defendant Haber turned off the sound monitoring system for most of that time.
>
> During the 1½ hours that Gary remained alive in his cell, defendant Haber walked past his cell only once. He appeared to be sleeping then (5pm).
>
> About 15 to 30 minutes later, Gary was found to have hanged himself. The suicide had consumed enough time for Gary to rip up his shirt, tie a part of it over the crossbeam and attempt to hang himself, fail because the knot gave, and use a second knot to successfully hang himself.

Id. at 201. The trial court granted summary judgment to the defendants on all counts, including plaintiff's §1983 claim. The appellate court reversed, stating that the facts as detailed above could give rise to a claim of deliberate indifference to the detainee's medical needs:

> In the present case, we believe that a rational jury could infer from the record that Gary had serious medical needs that should have been

> recognized by defendants. Plaintiff's expert testified at his depositions that he believed that not only did Gary urgently and immediately need medical treatment while in custody but also that this need must have been sufficiently obvious to the police officers.

Id. at 203. Clearly, if a detainee's irrationally combative behavior over the course of 1½ hours of incarceration—without any threat or action to injure himself—is sufficient to present a jury question as to whether the detention staff was on notice that the detainee had serious medical needs (and therefore constitute a deliberate indifference to those medical needs), the facts of the present case undoubtedly demonstrate a deliberate indifference to the medical needs of Troyanos.

Unlike *Brewer,* where the detainee's aberrant behavior amounted to no more than challenging detention staff to fight and disruptive yelling, Troyanos repeatedly acted out violently and self-destructively. Indeed, whereas the *Brewer* decedent, at most, threatened the safety of others, Troyanos on several occasions *caused actual injury to himself* while in the Defendants' custody. There is no dispute that Troyanos repeatedly smashed his own head into the cement walls and metal doors of his confinement cell, and was chemically and/or physically restrained on more than one occasion. It is further established in the complaint that this sedation/restrain was ineffective to prevent a recurrence of these acts, and that Troyanos again engaged in this behavior. The Defendants had to know, because they had observed it, that Troyanos would hurt himself whenever he was given the opportunity.

Moreover, while the defendants in *Brewer* were afforded a total of 1 ½ hours to perceive and react to the decedent's medical condition and risk to himself, Troyanos' escalating condition and risk manifested itself before these Defendants over the course of days. These Defendants' failure to take the necessary steps to prevent the resulting self-inflicted injury (made clearly foreseeable by Troyanos' pattern of self-inflicted harm) demonstrates the Defendants' deliberate indifference to his safety. *See Greason v. Kemp*, 891 F. 2d 829, 835 (11th Cir. 1990)("We have said that a trier of fact can conclude that one who provides grossly inadequate care to a prison inmate is deliberately indifferent to the inmate's needs."); *Waldrop v. Evans*, 871 F. 2d 1030 (11th Cir. 1989)("Grossly incompetent or inadequate care can constitute deliberate indifference.").

In *Waldrop*, an inmate with a diagnosed mental illness committed several acts of self-mutilation while incarcerated in a Georgia detention center. *Id*. at 1032. Although the defendants (medical care providers at the facility) had attempted to treat the inmate's psychiatric disorder, the plaintiff alleged that the steps taken were grossly incompetent to meet the inmate's obvious needs and, thus, constituted deliberate indifference to those needs. *Id.*

Upon review of the trial court's denial of summary judgment to the defendants, this Court explained, "Grossly incompetent medical care or choice of an easier but less efficacious course of treatment can constitute deliberate

indifference..." *Id.* at 1035. Because the evidence was in dispute as to the degree to which the quality of the inmate's care deviated from the recognized standard, this Court held that summary judgment was improper. *Id*. at 1036.

The situation at bar is essentially the same as that presented in *Waldrop*. In *Waldrop*, the inmate had repeatedly inflicted injury upon himself as a result of his mental illness. So, too, did Troyanos engage in a pattern of self-inflicted injury as a result of his serious medical condition.[5] As did the defendants in *Waldrop*, Defendants Miller and Robinson did perform some medical evaluation, and prescribed some medications to control Troyanos' behavior. Unlike *Waldrop*, however, the defendants in the present case made no attempt to treat Troyanos' underlying medical condition, but only temporarily controlled his outbursts through the use of physical restraint and chemical sedation. This form of "medical treatment" can certainly be seen as "incompetent medical care or choice of an easier and less efficacious course of treatment" within the meaning of *Waldrop*. *See also Rogers v. Evans*, 792 F. 2d at 1058 (11th Cir. 1986)("[Deliberate] indifference can be manifested by prison doctors in taking the easier and less

[5] While the self–inflicted injuries alerting the *Waldrop* defendants to that inmate's serious medical condition were of a more serious nature than Troyanos' prior to his suicide, this is a difference of degree, rather than type. In both cases, these individuals repeatedly sought to inflict serious injury upon themselves using the methods available to them. In both cases, these attempts were known to the defendants, who did not take steps to prevent a reoccurrence of the injury.

efficacious route in treating an inmate."); *Greason v. Kemp*, 891 F. 2d 829 (11th Cir. 1990)(health care providers' care of a mentally ill inmate who took his own life may have been so incompetent as to amount to deliberate indifference where defendants failed to adequately respond to notice that the inmate posed a risk of harm to himself); *Burnette v Taylor*, 533 F. 3d 1325 1330 (11th Cir 2008)(plaintiff must show that the defendant knew facts from which the defendant could infer that the detainee posed a substantial risk of harm to himself, but failed to adequately respond to that risk).

The trial court seemed to believe that the Defendants could not have been deliberately indifferent to Troyanos' medical need because *some* level of care was administered. (Doc 14-p. 8). However, the complete deprivation of all medical care is not required in order to demonstrate deliberate indifference to a detainee's medical needs. All that must be alleged is that the detainee did not receive adequate care for a serious medical need under circumstances in which the defendants knew or should have known that such a medical need existed. *See Cabrales v. County of Los Angeles*, 864 F. 2d 1454, 1461 (9th Cir. 1988), *overturned on other grounds by County of Los Angeles v. Cabrelas*, 490 U.S. 1087 (1989)("The appellants also argued there was no showing of a policy of deliberate indifference to the decedent's medical and psychiatric needs as he was not denied *access* to medical and psychiatric help. They point to the uncontested evidence in

the record that the decedent was evaluated on several occasions by various medical personnel. The appellant's contention is without merit. As *Hoptowit* noted, access to medical staff is meaningless, unless that staff is competent and can render competent care.").

Indeed, this Court has explicitly held that defendant may be held liable under §1983 for a deprivation of a detainee's constitutional rights arising from a *single act* of gross conduct, even if the defendant had exhibited an overall pattern of proper care to the detainee. *See Rogers v. Evans*, 792 F. 2d at 1062 (11th Cir. 1986)("Even if Dr. Smith provided a period of attentive, competent care to Rogers, one episode of gross conduct would be sufficient for a jury to make a finding of deliberate indifference. '*Gamble* does not necessarily excuse one episode of gross misconduct, merely because the overall pattern reflects general attentiveness.'"), *quoting Murrell v. Bennett*, 615 F. 2d 306, 310 n. 4 (5th Cir. 1980).

Here, this is precisely what plaintiff has alleged—gross misconduct on the part of defendants Miller and Robinson in failing to take the necessary steps to provide Troyanos with proper medical care despite his ongoing and obvious mental distress. Because Miller and Robinson are alleged to have been deliberately indifferent to Troyanos' medical need, the fact that *some* medical services were provided is not relevant. Miller and Robinson may be held liable for their failure to provide adequate care under these circumstances.

Nor can the Defendants properly seek the protection afforded by the doctrine of qualified immunity. As recognized by the trial court, the qualified immunity defense insulates officials from personal liability for actions they take pursuant to their discretionary authority, where those actions do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800 818 (1982). Defendants Miller and Robinson argued that they were entitled to qualified immunity on the basis that they had not violated a "clearly established statutory or constitutional right of which a reasonable person would have known." (Doc. 4-p. 8). Defendant's argument must fail, however, because it has been established by this Court that "reasonable persons in appellant's positions [medical care providers in a correctional facility] would have known that providing an inmate with inadequate psychiatric care could violate the inmate's eight amendment right not to be subjected to cruel and unusual punishment." *Greason v. Kemp,* 891 F. 2d 829 (11th Cir. 1990). *See also Rogers v. Evans*, 792 F. 2d 1052 (11th Cir. 1986)("Failure to provide basic psychiatric and mental health care states a claim of deliberate indifference to the serious medical needs of prisoners."); *Belcher v. City of Foley*, 30 F. 3d 1390 (11th Cir. 1994)(same analysis and protections are afforded to pretrial detainees under the Fourteenth Amendment as those afforded to incarcerated prisoners under the Eighth Amendment).

Thus, because this Court has explicitly held that the right to adequate psychiatric care is sufficiently established that medical care providers in comparable positions to Defendants Miller and Robinson would be aware that providing inadequate care could violate Troyanos' constitutional rights, Defendants cannot be heard to argue that they are protected by qualified immunity on these grounds. The trial court erred in so holding.

Because Plaintiff properly alleged that defendants Miller and Robinson demonstrated a deliberate indifference to Troyanos' health and safety, Plaintiff properly stated a claim under 42 U.S.C. §1983. The trial court erred in dismissing these claims.

II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM THAT SHERIFF COATS' FAILURE TO ADEQUATELY TRAIN AND SUPERVISE HIS DETENTION CENTER EMPLOYEES CONSTITUTED A VIOLATION OF TROYANOS' FOURTEENTH AMENDMENT RIGHTS.

As noted above, the trial court ruled that Plaintiff had failed to state a cause of action against Sheriff Coats under §1983. This ruling was premised upon the court's rationale that Troyanos' suicide constituted a single incident, and that "no basis exists for an inadequate training claim if the plaintiff alleges only a single incident to support the claim," *citing City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821-824 (1985). (Doc. 14-p. 10). However, *Tuttle* has no application in this case because, contrary to the trial court's characterization, Plaintiff has alleged not

a single isolated incident, but a series of acts and omissions which demonstrate a pattern of improper training.

Tuttle involved a single, isolated incident of excessive force in which a police officer was alleged to have improperly shot a suspect without adequate justification. *Id*. at 811-812. The Supreme Court held that this single incident could not form the sole basis for concluding that the city had failed to adequately train its police recruits.[6] Indeed, the passage from *Tuttle* to which the trial court referred demonstrates the flaw in the trial court's reasoning:

> Respondent then proceeds to argue that the question presented by petitioner-*whether a single isolated incident of the use of excessive force* by a police officer establishes an official custom or policy of a municipality-is in truth not presented by this record because there was more evidence of an official "policy" of "inadequate training" than might be inferred from the incident giving rise to Tuttle's death. But unfortunately for respondent, the instruction given by the District Court allowed the jury to impose liability on the basis of such a single incident without the benefit of the additional evidence. The trial court stated that the jury could "infer," from "a single, unusually excessive use of force ... that it was attributable to inadequate training or supervision amounting to 'deliberate indiffernce' or 'gross negligence' on the part of the officials in charge." App. 44.
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> ***
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> The fact that in this case respondent introduced independent evidence of inadequate training makes no difference, because the instruction allowed the jury to impose liability even if it did not believe respondent's expert at all. Nor can we read this charge "as a whole" to

[6] It is worth noting that *Tuttle* was reviewed after a full trial in which discovery had been completed and a full record of facts and been developed. Therefore, application of *Tuttle* to the instant case on review from an order dismissing a complaint is of questionable value.

> avoid the difficulty. There is nothing elsewhere in this charge that would detract from the jury's perception that it could impose liability based solely on this single incident. Indeed, that was the intent of the charge, and that is what the Court of Appeals held in upholding it.

Id. at 821-822. Unlike *Tuttle*, Plaintiff did not allege a single act of improper conduct by one deputy, but rather alleged a series of improper actions and omissions taken by several different corrections department employees. The complaint alleged that, taken together, these acts and omissions demonstrate a pattern of improper conduct in the diagnosis, care and protection of mentally ill detainees. Plaintiff further alleged that these failures are attributable to inadequate training provided by Sheriff Coats, and that this inadequate training led directly to Troyanos' death. Contrary to the trial court's belief, this series of acts and omissions constitute a pattern of behavior capable of demonstrating deliberate indifference. *See, e.g. Rogers v. Evans*, 792 F. 2d at 1058-59 (11th Cir. 1986)("A series of incidents closely related in time may disclose a pattern of conduct amounting to deliberate indifference.").

For example, Plaintiff demonstrated deviations from proper protocol by Nurse Robinson in her failure to properly evaluate and screen Mr. Troyanos, in improperly authorizing Troyanos to be restrained in the Pro-Straint chair and left unattended for several hours, and in disregarding the strong likelihood that Troyanos would inflict harm upon himself in light of his increasingly agitated state and episodes of attempted self harm. (Doc. 1-pp. 6-8).

Similarly, Plaintiff identified multiple deviations from proper protocol by Dr. Miller occurring over the course of three days, and which included failing to perform adequate mental health screening, failing to review Troyanos' medical chart and elicit an appropriate psychiatric history from him, and in failing to provide Troyanos with appropriate psychiatric diagnosis and proper medication for his psychosis. Further it was alleged that these failures resulted in Miller's failure to recognize, despite repeated incidents of Troyanos attempting to injure himself, Troyanos' risks to himself. (Doc. 1-p. 25).

Further, Plaintiff alleged that detention center personnel failed to properly execute their assigned, albeit improper, supervision responsibilities in that they failed to check on Troyanos at the scheduled 15 minute intervals ordered by Nurse Robinson, and instead allowed a full 30 minutes to pass without observing Troyanos. (Doc. 1-p. 22). It was within these 30 minutes that Troyanos was alleged to have taken the sharp edges of a broken plastic cup, cut through the waistband of his pants and use the waistband to hang himself.

These facts clearly demonstrate a pattern of detention center employees failing to follow published procedures and statutory requirements, as alleged in the complaint. (Doc. 1-pp. 8; 20; 26; 29). These multiple, repeated failures, Plaintiff alleged, were the direct result of Sheriff Jim Coats' failure to adequately train or

supervise detention deputies, doctors, nurses and employees, and ignoring or condoning their substandard performance. (Doc. 1-p. 15).

In short, the trial court confused the concept of a single *incident* with that of a single *result*.[7] Here, Plaintiff alleged a series of improper acts by several members of the detention center staff, occurring over the course of days. The fact that these multiple incidents resulted in a single death does not, of course, transform the series of events into a single, isolated incident. The trial court's reliance on its stated grounds to support its ruling does not bear scrutiny.

III. PLAINTIFF'S STATE LAW CLAIMS FOR MEDICAL MALPRACTICE AND NEGLIGENCE SHOULD BE REINSTATED.

Finally, in Counts II and III of the Complaint, Plaintiff asserted state law claims for wrongful death arising from medical malpractice and negligence, respectively, against Sheriff Jim Coats. The trial court declined to exercise jurisdiction over Plaintiff's state law claims due to its decision to dismiss Plaintiff's §1983 claims.

Upon reinstatement of Plaintiff's §1983 claims, the trial court will have supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. §

[7] Imagine a fact pattern in which multiple detention staff members, over the course of days, repeatedly beat and otherwise abused a detainee, ultimately resulting in the detainee's death. Could it be reasonably argued that such a fact pattern demonstrated only a single incident because only a single death occurred?

1367(a). This Court should order the trial court to accept jurisdiction of Counts II and III of the Complaint for consideration along with the claims discussed above.

CONCLUSION

WHEREFORE, based upon the above cited facts and authorities, Plaintiff/Appellant Richard W. Troyanos, Jr. respectfully asserts that this Court should reverse the trial court's order dismissing Plaintiff's complaint with prejudice, and return this cause for further proceedings on all counts of Plaintiff's Complaint.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 7,856 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **December 21, 2009,** a true and correct copy of the foregoing was electronically filed with the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served on the following counsel of record via U.S. Mail and transmission of Notices of Electronic Filing generated by CM/ECF this **21st** day of **December, 2009** to: Mark E. McLaughlin, Esquire, Macfarlane, Ferguson & McMullen, *Attorneys for Defendants*, 201 N. Franklin Street, Suite 2000, Tampa, Florida 33602.

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