IN THE SUPREME COURT
OF THE STATE OF FLORIDA



JAMES R. BURNS,

Petitioner,

vs. Case No. 66,999

GCC BEVERAGES, INC., a Florida corporation, d/b/a PEPSI-COLA BOTTLERS OF JACKSONVILLE,

Respondent.
_____/

# ANSWER BRIEF OF RESPONDENT GCC BEVERAGES, INC.

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## STATEMENT OF THE CASE

GCC Beverages supplements Burns' statement of the case by supplying the following additional information:

This action began with the filing of a two-count complaint by Burns alleging malicious prosecution in Count I and false imprisonment and arrest in Count II. [R:1-4]. GCC Beverages timely answered and denied Burns' allegations. [R:5-6]. In January 1984, GCC Beverages filed a motion for summary judgment, based in part on the Deposition of Burns and on a certified copy of Burns' Arrest Warrant. [R:14-15]. Burns filed two affidavits as well as other material in opposition to GCC Beverages' motion for summary judgment. [R:32-34; 35-62]. In an Order dated March 2, 1984, the trial court denied GCC Beverages' Motion for Summary Judgment. [R:72].

Subsequently, Burns took the depositions of Marie Smith, assistant controller of GCC Beverages and David Beckham, former general manager of GCC Beverages. In reliance upon the testimony of those two individuals, inter alia, GCC Beverages again moved for summary judgment. [R:73-74]. In opposition thereto, Burns filed a "Response" to GCC Beverages' motion. [R:97-98]. After hearing argument of counsel and being fully advised in the premises, the trial court granted GCC Beverages' Motion for Summary Judgment on Count I, the malicious prosecution count, in an Order dated April 25, 1984. [R:91-92]. Said Order stated, in relevant part:

> [I]t appears that there is no genuine issue of material fact relating to the issue of probable cause for the criminal proceedings against the plaintiff [Burns]. The Court finds that plaintiff's arrest warrant signed by Judge David C. Wiggins, and introduced into evidence, raised a presumption of the existence of probable cause which could only be overcome by proof of fraud or other improper means in securing the committal. The record contains no evidence of any such fraud or other improper means, and therefore there was no genuine issue as to any material fact on this point. Defendant [GCC Beverages] is therefore entitled to summary judgment as a matter of law.

[R:91]. Burns filed a motion for reconsideration of this Order [R:99-100], which was denied by the trial court. [R:96].

Burns then filed a notice of appeal to the First District. [Appendix 2]. Burns' sole argument on appeal to the district court was that the trial court erred in granting the summary judgment because he believed there were genuine issues of material fact on the probable cause issue. [Appendix 3].

After denying Burns' request for oral argument [Appendix 4], the First District issued an Order directing Burns to show cause why the appeal should not be dismissed as non-final and non-appealable, since the challenged summary judgment related to only one count of a two-count complaint. [Appendix 5]. Burns timely responded to the trial court's Order [Appendix 6] and GCC Beverages respectfully declined to file a reply concerning this issue. [Appendix 7]. Whereupon, without formally ruling on its show-cause order, the First District issued an Order dated January 15, 1985 that stated

that it determined to hear this case en banc. [Appendix 8]. That Order also invited the parties to submit supplemental briefs relating specifically to an attached proposed panel opinion and to the First District's proposed rescission from Pinkerton v. Edwards, 425 So.2d 147 (Fla. 1st DCA 1983). Burns submitted his supplemental brief but ignored any discussion of Pinkerton. [Appendix 9]. His brief, instead, again argued the propriety of the summary judgment; indeed, Burns began his supplemental brief with the statement that his appeal of the summary judgment was "an appeal on the facts and not the law." [Burns' Supplemental Brief at 1]. GCC Beverages, likewise, submitted a Supplemental Brief pursuant to the District Court's Order and appropriately argued that the court should recede from Pinkerton. [Appendix 10].

The First District then filed an en banc opinion in this cause, which is the opinion before this Court for discretionary review. Burns v. GCC Beverages Inc., 10 F.L.W. 954 (Fla. 1st DCA Apr. 19, 1985) [Appendix 1]. In an opinion authored by Judge Wigginton and concurred in by all members of the First District, the trial court's summary judgment was affirmed. The en banc opinion also receded from any language in Pinkerton that was contrary to the Burns holding. Finally, the en banc opinion certified a question as being one of great public importance:

> IN A SUIT FOR MALICIOUS PROSECUTION, DOES A PRESUMPTION OF THE EXISTENCE OF PROBABLE CAUSE ARISE FROM A MAGISTRATE'S FINDING OF PROBABLE CAUSE FOR AN ARREST WARRANT, THAT PRESUMPTION BEING CONCLUSIVE ABSENT PROOF OF FRAUD OR OTHER CORRUPT MEANS EMPLOYED BY THE PERSON INITIATING THE PROSECUTION?

10 F.L.W. at 955-56.

Burns then moved the First District to rehear or clarify its en banc opinion and argued, again, that there were disputed issues of fact. [Appendix 11]. GCC Beverages responded to Burns' Motion by proposing to the court that Burns' Motion was improper under any applicable appellate rule. [Appendix 12].

Without waiting for the First District to rule on his Motion for Rehearing and/or Clarification, Burns filed a Notice to Invoke Discretionary Jurisdiction of the supreme court. [Appendix 13]. According to that Notice, Burns sought this Court's jurisdiction on two grounds: (1) that the district court opinion passed upon a question certified to be of great public importance, and (2) that the district court opinion expressly and directly conflicted with decisions of other district courts or of the supreme court.

This Court then served upon both parties a Briefing Schedule, Rule Changes, and a document entitled "Certified Great Public Importance; Certified Direct Conflict." [Appendix 14]. Within the latter document was the statement to a petitioner that "[i]f you intend to argue conflict jurisdiction this should be included in your brief on the merits."

Burns then timely filed his Initial Brief in this cause. Subsequently, the First District denied Burns' motion for rehearing. [Appendix 15].

## STATEMENT OF THE FACTS

Pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure, GCC Beverages disagrees with all of that portion of Burns' Statement of the Case and Facts that discusses the "facts" of the instant case. Burns goes into great detail in his presentation to cite to the record before the trial court to establish the factual predicate of the district court opinion under review. However, Burns' "facts," for the most part, lie outside the permissible record before this Court and hence are improper. As stated in Commerce National Bank in Lake Worth v. Safeco Insurance Co., 284 So.2d 205, 207 (Fla. 1973), "[w]hen facts and testimony are set forth in a majority opinion, they are assumed to be an accurate presentation upon which the judgment of the court is based." Accordingly, GCC Beverages provides this Court with the facts of this case as accurately presented in the per curiam opinion of the First District below:

> In the instant case, appellee, appellant's employer, suspecting appellant of theft of company receipts, reported the matter to the police. With the information relayed to him by appellee, and with information gleaned from interviews, the investigating officer appeared before a county judge and swore under oath that he believed appellant had committed the crime of grand theft. Based upon the officer's affidavit, the judge found and certified that there existed probable cause to believe appellant had committed the offense alleged. On the basis of that judicial finding of probable cause, the judge issued a warrant for appellant's arrest. Appellant was thereafter arrested,

> tried, and found by a jury to be not guilty. Appellant then filed the instant suit alleging malicious prosecution.

10 F.L.W. at 955. Should this statement of the facts upon which the First District based its holding not be in sufficient detail for this Court, GCC Beverages quotes the listing of facts from Judge Zehmer's special concurring opinion below:

> Appellant Burns was a route salesman for appellee. The episode giving rise to this action began when appellee contacted one of its customers, Pit Stop Service Station, to inquire why its account was more than sixty days overdue. A Pit Stop employee stated that the check was in the mail, but when it did not arrive, appellee again contacted the customer. In the meantime, Pit Stop had acquired a new comptroller, who denied owing appellee for the merchandise invoices and accused appellant Burns of having taken the money after receiving payment from Pit Stop. Pit Stop employees insisted they had paid cash to Burns for the delivery, but appellee had no record indicating that Burns had taken any money belonging to it. Nevertheless, appellee's general manager testified that he confronted appellant with the accusation but that appellant avoided the question by changing the subject. Appellee's office of security advised the manager to turn the matter over to appropriate law enforcement authorities. At the manager's direction, one of appellee's employees, Marie Smith, contacted the state attorney's office and "told them that we had a customer who had complained and had accused the driver of taking the money, but we show the customer as a charge" (Smith deposition, pp. 27, 63). The state attorney's office told her she should report the matter to the police department, so Smith did so, and told Officer Stevenson that the customer's comptroller had accused Burns of receiving monies from his storekeeper for delivery of soft drinks (Smith deposition, p. 37). She also told

> Officer Stevenson that she had talked to the customer's manager and that he had told her that his employees had paid cash to appellant for the deliveries (Smith deposition, p. 37). She further told the officer that the settlement sheets showed the account as a charge account (Smith deposition, pp. 37-38). Smith never asked that appellant be arrested, but stated that she left the question of whether to arrest appellant up to Officer Stevenson (Smith deposition, p. 62). Officer Stevenson interviewed two Pit Stop employees. He then appeared before Judge Wiggins and swore under oath that he believed appellant had committed the crime of grand theft. Based upon Stevenson's affidavit, Judge Wiggins found and certified that there was probable cause to believe that appellant committed the offenses charged and issued an arrest warrant.

10 F.L.W. at 956 (Zehmer, J., specially concurring).

## ISSUES

I. WHETHER THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE INSTANT DECISION AND ANY DECISION OF THE SUPREME COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

II. WHETHER THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE BURNS HAS ALREADY HAD A FULL REVIEW OF THE SUMMARY JUDGMENT ISSUE BY THE FIRST DISTRICT SITTING EN BANC.

III. WHETHER THE FIRST DISTRICT SITTING EN BANC WAS CORRECT IN AFFIRMING THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT WHICH WAS BASED UPON THE GALLUCCI PRESUMPTION.

IV. WHETHER THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE THE CERTIFIED QUESTION HAS ALREADY BEEN ANSWERED PREVIOUSLY BY THIS COURT IN THE AFFIRMATIVE.

V. WHETHER THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE THE CERTIFIED QUESTION IS IN RESPONSE TO LANGUAGE IN WARD v. ALLEN THAT IS DICTA AS WELL AS A MISSTATEMENT OF THE LAW; PROMOTES A DISTINCTION WITHOUT A DIFFERENCE; AND HAS BEEN RESTRICTED BY LATER DECISIONS.

## SUMMARY OF ARGUMENT

I. THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE INSTANT DECISION AND ANY DECISION OF THE SUPREME COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

This Court should deny jurisdiction of this matter and dismiss the petition for review because there is no express and direct conflict between the Burns decision and the eleven cases cited by Burns in his Initial Brief.

II. THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE BURNS HAS ALREADY HAD A FULL REVIEW OF THE SUMMARY JUDGMENT ISSUE BY THE FIRST DISTRICT SITTING EN BANC.

This Court should deny jurisdiction of this matter and dismiss the petition for review because Burns appears to be attempting to "bootstrap" yet another review of the trial court's summary judgment order in his ostensible "certified question" review. On four occasions below (including rehearings and a direct appeal) a total of thirteen judges have ruled against Burns on the summary judgment issue. A further review by this Court would not be in harmony with this Court's own stated constitutional function.

## III. THE FIRST DISTRICT SITTING EN BANC WAS CORRECT IN AFFIRMING THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT WHICH WAS BASED UPON THE GALLUCCI PRESUMPTION.

Should this Court reach the merits of the summary judgment issue, it would see that Burns' argument is specious. The Gallucci rule is a presumption that changes the order of proof. As a presumption, it operates to relieve GCC Beverages of the necessity of proving probable cause, and puts the duty upon Burns to come forth with rebuttal evidence. As noted by all judges below, Burns did not, and therefore the summary judgment was proper.

## IV. THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE THE CERTIFIED QUESTION HAS ALREADY BEEN ANSWERED PREVIOUSLY BY THIS COURT IN THE AFFIRMATIVE.

This Court should deny jurisdiction of this matter and dismiss the petition for review because the certified question has already been answered in the affirmative by this Court in Rodgers and Colonial Stores. Another answer to the question by this Court is needless and a waste of judicial labor, especially in light of Burns' lack of real argument on the certified question.

## V. THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE THE CERTIFIED QUESTION IS IN RESPONSE TO LANGUAGE IN WARD v. ALLEN THAT IS DICTA AS WELL AS A MISSTATEMENT OF THE LAW; PROMOTES A DISTINCTION WITHOUT A DIFFERENCE; AND HAS BEEN RESTRICTED BY LATER DECISIONS.

This Court should deny jurisdiction of this matter and dismiss the petition for review because the certified question

was stimulated by language in Ward v. Allen. The Ward language was dicta and thus not a statement of law. The Ward language, moreover, was a misstatement of the law and an incorrect reading of Lewton v. Hower. The Ward language also promoted only a semantic and not meaningful distinction without a difference concerning probable cause. Finally, the Ward language has been restricted by later decisions of this Court so that it is not germane to the Gallucci presumption, and therefore the certified question is irrelevant.

## ARGUMENT

### I. THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN THE INSTANT DECISION AND ANY DECISION OF THE SUPREME COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

This Court should deny jurisdiction of this matter and dismiss the petition for review because there is no express and direct conflict between the instant decision and any decision of the supreme court or another district court of appeal on the same question of law. Given that Burns' "argument" on the certified question -- the other jurisdictional basis claimed by Burns -- is little more than filler or pap and in no sense meaningful, this Court lacks constitutional jurisdiction of this matter. Accordingly, the petition for review should be denied and jurisdiction discharged.

Burns has sought the discretionary jurisdiction of this Court on the grounds both of express and direct conflict of decisions as well as a certified question. This Court's document entitled "Certified Great Public Importance; Certified Direct Conflict" that was sent to all parties stated that if Burns intended to argue conflict jurisdiction, that conflict argument was to be included in his brief on the merits. This Burns has not done. Almost all of Burns' Initial Brief to this Court argues only the propriety of the lower court's granting of summary judgment in favor of GCC Beverages. Nowhere in his

Initial Brief does Burns argue conflict jurisdiction; in fact, the word "conflict" is nowhere to be found in all of Burns' brief.

If Burns were seeking the discretionary jurisdiction of this Court solely on decisional conflict grounds, he would have had to file a brief limited to the issue of this Court's jurisdiction and that brief could not have exceeded ten pages. GCC Beverages, as respondent, would then have had an opportunity to file its brief on jurisdiction in an attempt to show that the cases relied upon by Burns failed to rise to the level of express and direct conflict of decisions that is a predicate to this Court's jurisdiction. Since GCC Beverages argues later in this Brief that the certified question, under the posture and facts of this case, also should not be the basis for this Court's jurisdiction, GCC Beverages hereby responds to each and every case cited in Burns' Initial Brief in an attempt to show the lack of express and direct conflict.

## The Cases

1. Burns cites Gallucci v. Milavic, 100 So.2d 375 (Fla. 1958), and argues on pages nine and sixteen of his Initial Brief that the lower court misapplied Gallucci. Specifically, Burns argues that the Gallucci rule -- which holds that in a malicious prosecution suit a presumption arises from a magistrate's finding of probable cause which is conclusive, absent fraud or other corrupt means employed by the

person initiating the prosecution -- "is appropriate when dealing with a directed verdict. This rule, however, is too harsh a burden to be applied in a summary judgment proceeding against a non-moving party." [Initial Brief at 16]. Notwithstanding Burns' personal feelings on either the propriety or severity of the application of law to facts, there is no conflict between Gallucci and the instant en banc opinion. The instant opinion conforms to Gallucci and applies the Gallucci rule in a manner wholly consistent with both the intent as well as the holding of that case. Gallucci provides that "once a plaintiff fails to prove absence of probable cause, he loses his case." 100 So.2d at 378 (emphasis supplied). In the case sub judice, Burns failed to prove absence of probable cause and so the trial court held that he lost his case, i.e., the trial court granted summary final judgment to GCC Beverages. Further, as Gallucci summarizes in its conclusion:

> probable cause was presumed from the official action; the presumption was not overcome; and there was no evidence of fraud or corruption infecting the decision to hold the appellant for trial.

100 So.2d at 378. That conclusion is on all fours with the case below. As the en banc court noted, probable cause was presumed from Judge Wiggins' official action in signing the arrest warrant. That presumption was not overcome. Therefore, it noted, "we agree with the trial court's ruling that the

record contain no evidence of fraud or other improper means in securing appellant's committal." 10 F.L.W. at 955. Since the en banc court below wholly follows the Gallucci rule, it is patent that there is no conflict between its decision and Gallucci.

2. Burns cites Connell v. Sledge, 306 So.2d 194 (Fla. 1st DCA 1975), on page nine of his Initial Brief. Said case cannot be a basis for conflict jurisdiction since it is a First District case and thus not a decision of "another district court of appeal" on the same question of law. See Rule 9.030(a)(2)(iv), Florida Rules of Appellate Procedure.

3. Burns cites Holl v. Talcott, 191 So.2d 40 (Fla. 1966), on pages nine and thirteen of his brief. Holl stands for the proposition that the burden of proving the non-existence of genuine triable issues is on the moving party, and the burden of proving the existence of such issues is not shifted to the opposing party until the movant has successfully met his burden. There is no conflict with that proposition and the district court's opinion below. As the district court noted, the Gallucci presumption afforded GCC Beverages proof of the existence of probable cause and hence the non-existence of a genuine triable issue, and in response thereto, the burden of then proving the existence of a triable issue shifted to Burns. In that regard, the opinion states, Burns "failed to demonstrate the presence of a genuine issue of material fact

concerning the absence of probable cause." 10 F.L.W. at 955. Accordingly, the opinion below follows the Holl paradigm and there is no conflict.

4. Burns cites Pinkerton v. Edwards, 425 So.2d 147 (Fla. 1st DCA 1983), on page ten of his Initial Brief. Said case cannot be a basis for conflict jurisdiction since it is a First District case and thus not a decision of "another district court of appeal" on the same question of law. See Rule 9.030(a)(2)(iv), Florida Rules of Appellate Procedure.

5. Burns cites Rodgers v. W.T. Grant Co., 341 So.2d 511 (Fla. 1976), on pages ten and eleven of his brief. Yet proof of the lack of conflict between Rodgers and the opinion below is apparent from Burns' own brief. He states that "[t]he Florida Supreme Court refused to reconsider the Gallucci rule in Rodgers v. W.T. Grant Co. because the facts in the latter case did 'not fit within the standard Gallucci situation.'" [Initial Brief at 10]. That statement is eminently correct, and highlights the lack of conflict of decisions. Rodgers specifically stated that there was no judicial finding of probable cause in that case and thus it "is not governed by Gallucci." 341 So.2d at 513. In contradistinction, the First District expressly noted that there was a judicial finding of probable cause in its case and that its case is governed by Gallucci. Thus, the two cases are traveling on dissimilar factual foundations and hence are not in conflict.

6. Burns cites Kelly v. Millers of Orlando, Inc., 294 So.2d 704 (Fla. 4th DCA 1974), on pages eleven and twelve of his brief. The issue in Kelly, as noted by the Fourth District, was "whether the trial court erred in granting the appellee's motion for a directed verdict and entering final judgment thereon." 294 So.2d at 706. The holding in Kelly was that there was evidence to support the jury verdict in favor of the appellant and thus the trial court erred in directing the verdict. There is no conflict with that holding and the First District's en banc opinion below, which holds that the committing magistrate's finding of probable cause was conclusive since Burns failed to demonstrate fraud or other corrupt means in securing the committal. Hence, there is no express and direct conflict of decisions.

7. Burns quotes from Liabos v. Harman, 215 So.2d 487 (Fla. 2d DCA 1968), at pages twelve and thirteen of his brief for the definition of "probable cause" and cites that case for the view that when the facts on the probable cause issue are in dispute, their existence is to be determined by a jury. GCC Beverages finds no fault with this proposition, but states that that legal statement does not conflict at all with the First District's en banc opinion since the latter opinion specifically stated that it agreed with the trial court's ruling that the record below contained no evidence of fraud or other improper means in securing the committal. 10 F.L.W. at

955. The opinion below, then, was a situation where the facts on probable cause were not in dispute. There is thus no conflict between the instant opinion and Liabos.

8. Burns cites to Priest v. Groover, 289 So.2d 767 (Fla. 2d DCA 1974), at the bottom of page twelve of his brief for the same proposition as that found in Liabos: that if the facts on probable cause are in dispute, a jury determines their existence. While Burns may sincerely believe, as stated in his brief, that "[s]ince the facts on the probable cause issue are in dispute, a jury must determine whether Pepsi acted without probable cause," [Initial Brief at 12], it is not his personal belief but rather what is stated in the district court opinion that must be looked to in order to discern express and direct conflict. And, when one peruses the opinion below, it is distinct that the district court held that the facts on probable cause in this case were not in dispute. Therefore, applying a rule also mentioned in Priest -- that if the facts on probable cause are uncontradicted, its determination is solely a question of law -- the district court affirmed the trial court's granting of summary judgment as a matter of law. Priest, therefore, is not in conflict with the district court opinion below.

9. Burns cites to Johnson v. City of Pompano Beach, 406 So.2d 1257 (Fla. 4th DCA 1981), on page thirteen of his brief. He argues that in Johnson, there were two distinct

versions of the facts surrounding defendant's arrest and prosecution and thus, where the facts are disputed, the question must be submitted to the jury. Burns then comments, "[t]he same situation applies in the instant case." Unfortunately for Burns, the trial court as well as the en banc opinion held otherwise, and it is the latter that is germane to express and direct conflict. The en banc opinion, as noted above, stated that the record contained no evidence of fraud or other improper means in securing the committal. There can thus be no conflict.

10. Burns cites Wills v. Sears, Roebuck and Co., 351 So.2d 29 (Fla. 1977), on page thirteen of his Initial Brief. Wills is cited for the Holl v. Talcott proposition that is discussed under that case, above, and that discussion is incorporated herein.

11. Finally, the last case cited by Burns in his brief is Arias v. State Farm Fire and Casualty, 426 So.2d 1136 (Fla. 1st DCA 1983). Said case cannot be a basis for conflict jurisdiction since it is a First District case and thus not a decision of "another district court of appeal" on the same question of law. See Rule 9.030(a)(2)(iv), Florida Rules of Appellate Procedure.

Burns has cited eleven cases in his Initial Brief, none of which are in express and direct conflict with the en banc opinion of the First District below on the same question

of law.[1] Since it is argued by GCC Beverages, below, that jurisdiction should also be denied on the certified question, this Court should deny the petition for review and discharge jurisdiction.[2]

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[1]As stated in Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980):

> This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner."

[2]Should Burns attempt to argue conflict jurisdiction for the first time in his Reply Brief, GCC Beverages would have no opportunity to respond to whatever cases are offered by Burns as express and direct conflict cases. This would be antithetical to the spirit of Rule 9.120(d), Florida Rules of Appellate Procedure. Accordingly, should Burns in fact argue conflict jurisdiction for the first time in his Reply Brief, GCC Beverages requests this Court's permission to file a supplemental brief of ten pages length limited solely to the issue of the Supreme Court's jurisdiction as alleged in any such cases.

## II. THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE BURNS HAS ALREADY HAD A FULL REVIEW OF THE SUMMARY JUDGMENT ISSUE BY THE FIRST DISTRICT SITTING EN BANC.

This Court should deny jurisdiction of this matter and dismiss the petition for review because Burns appears to be attempting to "bootstrap" a fifth review of the trial court's order in the guise of a review of a certified question. Such procedure to indirectly do what one cannot do directly, should not be countenanced by this Court.

It is not disputed that the district court certified a question as one of great public importance. It is also undisputed that this Court may, in its discretion, refuse to grant review of that question and may discharge jurisdiction. This is what GCC Beverages argues below under Issues IV and V. Subject to that, GCC Beverages here argues that this discretionary review has really been offered to this Court by Burns as one of a review of a summary judgment, and again -- as stated by Burns in his Supplemental Brief to the First District -- is "an appeal on the facts and not the law." An appeal on the facts, however, properly belongs with the courts below and not with this Court. The powers of the supreme court to review decisions of the district courts are limited; it was never intended that the district courts of appeal would be intermediate courts. Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982). In addition, the supreme court now functions as a supervisory body in the judicial system,

> exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

409 So.2d at 21.

Burns appears to be pursuing his review of the district court's opinion solely on the issue of the error of requiring him to prove fraud or other corrupt means in response to a motion for summary judgment. Such is the first issue he discussed in his brief. His only other issue is a stating of the certified question -- ostensibly Burns' passport for this Court's review -- and a "discussion" of that issue that comprises but four sentences and is barren of any citation to any authority. In actuality, therefore, Burns appears to be attempting to seek yet another review of <u>facts</u> -- facts which already have been scrutinized on five previous occasions by the courts below on the exact same issue as Burns now, again, seeks review. As Burns states in his Initial Brief, his version of the facts is "distinctly different" from GCC Beverages [and the trial court's and the whole First District's] and thus he argues that summary judgment was improper due to these genuine issues of material fact. [Initial Brief at 16-17]. Burns then provided this Court with his own statement of the facts that contains information outside the facts as detailed by the First District in its opinion. Yet such a review of facts, as opposed to the law, is certainly not "essential to the

settlement of issues of public importance and the preservation of uniformity of principle and practice." What Burns appears to be doing by his injection of his own view of the facts is the seeking of a review by this Court of the transcript of the trial court's proceedings. Such review, however, cannot be the basis for this Court's jurisdiction. As noted in Register v. Gladding Corp., 322 So.2d 911 (Fla. 1975), this Court "will not treat the district courts as intermediate courts, or grant litigants two opportunities for full appellate review, by reanalyzing testimonial evidence to establish constitutional 'conflict.'" 322 So.2d at 912.

If in Register this Court would not allow a second appellate review, by what reasoning can it allow a fifth review? It should be remembered that the trial court initially passed upon the same argument that Burns now argues as his Issue 1 and ruled against Burns. Burns moved the trial court for rehearing and presented his "distinctly different" version of the facts again at that time. On this first review, the trial court ruled against Burns. Burns then argued the same factual issue in his initial and reply briefs to the First District. Burns then ignored the First District's later request for legal arguments on Pinkerton v. Edwards and argued instead, for the third time, the same factual issue in his Supplemental Brief to the First District. All twelve judges of the First District concurred in that portion of the majority en

banc opinion that affirmed the order granting the summary judgment in favor of GCC Beverages. Burns then argued, yet again, that "many facts are still in dispute" when he petitioned the First District for rehearing. The First District denied Burns' argument once again. Burns now wishes a fifth review of his "the-facts-are-in-dispute" argument.[3] GCC Beverages respectfully asks this Court just how many bites at the apple is Burns going to get in this case? GCC Beverages proposes that the four reviews below are sufficient to settle this issue of "public importance" and to preserve the uniformity of principle and practice in Florida. One trial judge and twelve appellate judges have all agreed that it was proper to grant summary judgment below. Certainly this issue has now been properly reviewed and decided.[4] Is it a proper application of judicial labor for seven more appellate judges to re-review this cause? GCC Beverages thinks not.

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[3]"The presence of factual issues will not bar summary judgment if they are not material to the controlling legal issues of the case." B.J. McAdams, Inc. v. Boggs, 439 F.Supp. 738, 742 (E.D. Pa. 1977).

[4]See Mystan Marine, Inc. v. Harrington, 339 So.2d 200, 201 (Fla. 1976), where this Court stated: "Article V uses the words 'direct conflict' to manifest a 'concern with decisions as precedents as opposed to adjudications of the rights of particular litigants.'"

## III. THE FIRST DISTRICT SITTING EN BANC WAS CORRECT IN AFFIRMING THE TRIAL COURT'S GRANTING OF SUMMARY JUDGMENT WHICH WAS BASED UPON THE GALLUCCI PRESUMPTION.

If for some reason best known only to it this Court decides to reach the merits of Burns' argument that the lower court erred by requiring him to prove fraud or other corrupt means at the summary judgment hearing, GCC Beverages proposes that Burns' argument is legally untenable. That being so, this Court should deny Burns' request to quash the granting of the summary judgment and instead approve the holding of the en banc district court opinion below.

If GCC Beverages understands Burns' argument, it is to the effect that the Gallucci presumption does not apply to a summary judgment motion but rather only applies to directed verdicts. Burns' reasoning is that if the presumption is applied during summary judgment, "the requirement of proof at the pre-trial level would shift the burden from the movant to the non-moving party." [Initial Brief at 14]. This Court is aware, of course, that Burns cites to no authority for that statement or for his strong belief that the Gallucci presumption is "too harsh a burden to be applied in a summary judgment proceeding against a non-moving party." [Initial Brief at 16].

Furthermore, Burns' argument shows a lack of awareness of the role of presumptions in legal proceedings. Presumptions, as has been noted, "assist the party entitled to

the benefit thereof by relieving him of the necessity at the outset of establishing the existence of the basic facts giving rise to the presumption." Locke v. Stuart, 113 So.2d 402, 404 (Fla. 1st DCA 1959).

> A presumption simply changes the order of proof to the extent that one upon whom it bears must meet or explain it away, and when such explanation is made, the duty is upon the [moving party] to take up the burden which the law has cast upon him and sustain the issue by a preponderance of the evidence.

Wasserburg v. Coastal Aluminum Products Construction Co., 167 So.2d 889, 891 (Fla. 2d DCA 1964).

A relevant case that highlights the effect of a presumption during a summary judgment proceeding is Berwick v. Prudential Property and Casualty Insurance Co., 436 So.2d 239 (Fla. 3d DCA 1983). In Berwick, Prudential's agent Kavanaugh told Berwick that Berwick's jewelry would be insured against theft if she would have the jewelry appraised by Balogh. Coverage would then commence upon Kavanaugh's receipt of the Balogh appraisal. Berwick had her jewelry appraised by Balogh and a copy of the written appraisal was sent by Balogh to Prudential and addressed to Kavanaugh's attention. Kavanaugh was away on a two-week vacation when the appraisal was done and claimed he never received the Balogh appraisal. Berwick's jewelry was stolen and Prudential denied coverage, claiming the appraisal had never been received.

The trial court granted summary judgment to Prudential but the Third District reversed and remanded with directions to enter summary judgment in favor of Berwick. The appellate court cited the well-known presumption that a letter properly addressed, stamped and mailed is presumed to have been received by the addressee. Berwick introduced evidence that the appraisal was mailed by Balogh to Kavanaugh, thereby giving rise to the presumption that Kavanaugh received the appraisal. Prudential failed to introduce contrary evidence during the summary judgment proceeding that the appraisal had not been received. "The presumption, therefore, remains." 436 So.2d at 241.

The Berwick court correctly noted that the presumption at issue was a "bursting bubble" presumption:

> Such a presumption requires the trier of fact to assume the existence of the presumed fact unless credible evidence sufficient to sustain a finding of the non-existence of the presumed fact is introduced, in which event the bubble bursts and the existence of the fact is determined without regard to the presumption.

436 So.2d at 240. The presumption at issue in the case below is also a "bursting bubble" presumption. The Gallucci rule is that a magistrate's finding of probable cause is presumed to be a conclusive finding of probable cause in a malicious prosecution suit, absent fraud or other corrupt means employed by the person initiating the prosecution. Just as Berwick introduced evidence that the appraisal was mailed by Balogh to

Kavanaugh, thereby triggering the presumption of receipt, GCC Beverages introduced the arrest warrant and its finding of probable cause by Magistrate Wiggins, thereby triggering the presumption of probable cause in the malicious prosecution suit. Just as Kavanaugh introduced no evidence to contradict receipt, Burns introduced no evidence to show fraud or other improper means in the securing of the arrest warrant. As the First District stated, "we agree with the trial court's ruling that the record contains no evidence of fraud or other improper means in securing [Burns'] committal." 10 F.L.W. at 955. Just as in Berwick the district court held that "the presumption, therefore, remains," the First District affirmed the trial court because the presumption, therefore, remained. Berwick, thus, mandates a clear upholding of the en banc opinion's twelve-to-zero vote that the granting of the summary judgment was proper.

It should be pointed out to this Court that there is no discussion in Berwick about the inapplicability of presumptions in summary judgment proceedings or the restriction of presumptions only to directed verdicts or the harshness of the burden born by the non-moving party when a presumption is at work. Presumptions facilitate determination of actions and thus are as applicable in summary judgment proceedings as in directed verdicts. Presumptions may lead to "harsh" burdens but they are no more harsh than the burden placed on any

party. Burns' argument concerning the restriction of presumptions to directed verdict cases and their inapplicability to summary judgments is, hence, specious.

In Mathor v. Lloyd's Underwriters, 174 So.2d 71 (Fla. 3d DCA 1965), summary judgment was granted to Lloyd's on the basis of a presumption that a foreign adjudication was valid on its face, absent a showing of fraud or prejudice. Lloyd's had issued certificates of coverage evidencing insurance on Mathor's cargo. The insurance stated that it covered loss due to confiscation only if the dispatch of the consignment was not contrary to the laws of the country in which it was traveling and that all necessary permits had been obtained. Mathor's cargo was confiscated by the Bolivian government on the basis of it being smuggled cargo in violation of Bolivian customs laws and lacking in proper permits. Testimony was heard in Bolivia and there was an adjudication by the Bolivian National Jury of Customs that the cargo was contraband.

Mathor instituted suit in Florida against Lloyd's for breach of the insurance contract. Lloyd's introduced the Bolivian adjudication and thus triggered the presumption of the validity of that foreign adjudication that showed the contraband nature of the cargo as well as the lack of proper permits. Mathor produced no evidence to show that the Bolivian adjudication was improper on its face, that due notice was not given, that the proceedings were otherwise irregular, or that

the adjudication was tainted with fraud or prejudice. The district court thus affirmed the trial court's summary judgment because Mathor "made no sufficient showing below to overcome the presumption of the validity of the foreign adjudication." 174 So.2d at 73.

The parallel between Mathor and the case below is obvious. GCC Beverages will not burden this Court with a drawing-out of that parallel but will instead state that based upon Mathor and similar cases, Burns' argument on the inapplicability of the Gallucci presumption to a summary judgment hearing is delusive. This Court should uphold the correctness of the en banc opinion below which affirmed the summary judgment that was based on the Gallucci presumption, since

> in Florida the presumption is regarded as a preliminary "rule of law" which may be made to disappear in the face of rebuttal evidence but which, in the absence thereof, compels a decision in favor of the one who relies on it.

Locke v. Stuart, 113 So.2d at 404 (emphasis supplied).

## IV. THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE THE CERTIFIED QUESTION HAS ALREADY BEEN ANSWERED PREVIOUSLY BY THIS COURT IN THE AFFIRMATIVE.

This Court should deny jurisdiction of this matter and dismiss the petition for review because the certified question has already been answered previously by this Court in the affirmative.

After this Court announced the Gallucci rule in 1958, it had opportunity on at least two subsequent occasions to discuss Gallucci. In both instances, this Court affirmed the rule that a committal order gives rise to a presumption of probable cause, which may be rebutted by proof that the complainant secured the order by fraud or other improper means. In Rodgers v. W.T. Grant Co., 341 So.2d 511 (Fla. 1976), a malicious prosecution suit arising out of a Jacksonville case, this Court had a question certified to it by the First District as one of great public interest. In the district court opinion, Rodgers v. W.T. Grant Co., 326 So.2d 57 (Fla. 1st DCA 1975), the lower appellate court cited Gallucci for the proposition that the presence of probable cause was adjudicated when the Justice of the Peace held the plaintiff should answer the charges and probable cause was presumed from that official action. Under the peculiar and inequitable facts before it, the court was bothered by the Gallucci rule. The First District, though, was Hoffman-bound to apply Gallucci and

did so. The First District, however, asked this Court to revisit the Gallucci rule and certified the question to the higher court. This Court again stated the Gallucci rule:

> a committal order gives rise to a presumption of probable cause, which may be rebutted by allegations and proof that the complainant secured the order by fraud or improper means.

341 So.2d at 512. This Court then declined to reconsider the Gallucci rule (because it held the unique facts of the case were not governed by Gallucci). Gallucci, of course, remained good law.

This Court again had an opportunity to discuss and reaffirm Gallucci in Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978), another Jacksonville appeal. The issue was whether the filing of an information by a state attorney raised any presumption of the presence of probable cause in a later malicious prosecution suit. The district court refused to extend the Gallucci presumption to prosecutors, and this Court agreed. This Court stated that a prosecutor's filing of an information is not the equivalent of a magistrate's finding of probable cause, since a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and disinterested magistrate. "[T]he magistrate's role, as a member of the judiciary, is to remain wholly disinterested -- to 'see both sides of the case,' with bias toward neither." 355 So.2d at 1185. This Court then reaffirmed the Gallucci rule:

> [I]n a malicious prosecution suit a presumption arises from a magistrate's finding of probable cause which is conclusive, absent fraud or other corrupt means employed by the person initiating the prosecution.

355 So.2d at 1184. (emphasis deleted). This Court concluded that "[t]his presumption applie[s] solely to a judicial determination of probable cause." 355 So.2d at 1185.

Accordingly, in two instances since this Court pronounced the Gallucci rule, it has cited that rule with approval. This Court has thus already answered the certified question in the affirmative and need not do so again, especially in light of Burns' lack of any real argument[5] on the certified question in his Initial Brief. This Court should deny jurisdiction of this matter.[6]

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[5]Concerning the total of four sentences on the certified question in Burns' Initial Brief, one wonders if there has been an "appropriate presentation" of this issue to this Court. See Taggart Corp. v. Benzing, 434 So.2d 964 (Fla. 4th DCA 1983).

[6]Assuming, arguendo, that this Court decides to decide the certified question, notwithstanding GCC Beverages' arguments, the question should be answered in the affirmative by this Court. GCC Beverages adopts the reasoning embraced by the First District sitting en banc in the Burns opinion below. See also Gerstein v. Pugh, 43 L.Ed.2d 54 (1975).

## V. THIS COURT SHOULD DENY JURISDICTION OF THIS MATTER AND DISMISS THE PETITION FOR REVIEW BECAUSE THE CERTIFIED QUESTION IS IN RESPONSE TO LANGUAGE IN WARD v. ALLEN THAT IS DICTA AS WELL AS A MISSTATEMENT OF THE LAW; PROMOTES A DISTINCTION WITHOUT A DIFFERENCE; AND HAS BEEN RESTRICTED BY LATER DECISIONS.

The First District's en banc opinion cites to Ward v. Allen, 11 So.2d 193 (Fla. 1942), and language therein that "proof of the issuance of an arrest warrant and the filing of an information, although tending to refute the absence of probable cause, does not conclusively establish its presence." [10 F.L.W. at 955]. That opinion then correctly concluded that the supreme court has receded from that language in Ward but the First District nevertheless certified a question of great public importance based upon Ward. It is submitted that the certification is unnecessary because the Ward language is dicta as well as incorrect. The Ward language also promotes a distinction without a difference and, finally, has been restricted by later decisions. The answering of a certified question to settle the present-day import of the Ward language is thus unnecessary and a needless producer of appellate litigation.

### A.

The First District's opinion cited Ward concerning the presence of probable cause. In order to fully understand the following argument, the complete paragraph in which the Ward discussion of probable cause is embedded is quoted in full:

> We might add that the malice alleged was not negatived by the acts of the officials in executing the warrant and information. Although the proof of the issuance of the warrant and the filing of the information did not conclusively establish the presence of probable cause that evidence did tend to refute the absence of it. Lewton v. Hower, supra.

11 So.2d at 195. The following is then apparent.

First, contrary to the First District's statement in its en banc opinion that "we have not overlooked the supreme court's decision in Ward v. Allen . . . holding that . . . ," 10 F.L.W. at 955, the cited language in Ward is clearly not the holding of that case but rather dicta. The cited language comes at the very end of the Ward opinion and is an observation or remark by the court concerning a principle not essential to the determination of the cause before it. An examination of Ward shows why this is so.

In Ward, the case went up on appeal pursuant to the granting of a motion for a directed verdict in favor of the defendant at the close of the plaintiff's case. The facts in Ward disclose that the defendant sheriff filed an affidavit before the county judge stating that the plaintiff willfully and maliciously burned down a bath house and dance hall. Pursuant to that affidavit, a warrant was issued for plaintiff's arrest by the county judge. The state attorney later filed an information against the plaintiff who was tried and acquitted by a jury.

The Ward court reiterated black-letter law that plaintiff's failure to establish any of the elements of the malicious prosecution cause of action is grounds for the granting of a motion for a verdict in favor of the defendant. The court then went through each of the malicious prosecution elements seriatim, finding that plaintiff had proven malice on the defendant's part as well as all the remaining elements except lack of probable cause. Given that the plaintiff failed to prove lack of probable cause, the Ward court affirmed the trial court's granting of the directed verdict in defendant's favor.

The actual holding in Ward is derived from the procedural posture of that case on appeal. Plaintiff rested his case before adequately proving the absence of probable cause. From the court's discussion, it is seen that plaintiff relied upon the fact of his acquittal in the criminal action as well as his proof of defendant's malice to provide proof of the absence of probable cause. The supreme court held that this was error on his part:

> He cannot rely upon the verdict of acquittal or upon a showing of malice to supply proof that there was no just reason to charge him with the crime.

11 So.2d at 195. The reasoning, of course, was that malice is not synonymous with absence of probable cause; similarly, an acquittal does not establish lack of probable cause because a criminal charge is based on probable cause while a conviction

requires proof beyond a reasonable doubt. 11 So.2d at 193. The holding in Ward, then, is that a plaintiff in a malicious prosecution action cannot rely upon a verdict of acquittal or upon a showing of malice to supply the proof to establish the requisite element of absence of probable cause. Given that legal holding, the supreme court affirmed.

Tacked onto the end of the Ward opinion is the short paragraph quoted in full above. It adds nothing to the opinion, is not necessary to the holding of that case, and is obiter dictum. This incidental paragraph not necessary for the determination of the cause only makes sense as an aside not for the benefit of educating the plaintiff but rather the defendant. What appears from the language is an answer to an argument apparently raised by the defendant. Apparently defendant had argued that his malice (which was held to have been proved by the plaintiff at the trial below) was rebutted by the issuance of the arrest warrant and the filing of the information. In this framework, the supreme court wrote that "[w]e might add that the malice alleged was not negatived by the acts of the officials in executing the warrant and information." 11 So.2d at 195 (emphasis supplied). It then cited Lewton v. Hower, 35 Fla. 58 (1895), for the language that the First District's en banc opinion has highlighted. The whole Ward paragraph, however, apparently directed to responding to an argument raised by defendant on the malice

issue, was dicta. For this Court to answer a question to clear up any confusion as to the meaning of this language, by definition dicta, is certainly an unnecessary waste of judicial resources. This Court need not respond to the certified question under these circumstances.

Second, even if this Court were not to agree that the incidental Ward language was dicta, it is apparent that the language is an incorrect statement of the law.

The Ward language noticed by the First District in the quoted paragraph cites to Lewton v. Hower as authority. An examination of the Lewton decision discloses that the Ward statement of the "law" is in error.

Lewton is the second of two appeals reaching the Florida Supreme Court relating to the same case. In the first appeal, Hower v. Lewton, 18 Fla. 328 (1881), it is disclosed that the plaintiff sued the defendant for the latter's falsely and maliciously charging the plaintiff with perjury and the defendant's causing the plaintiff to be arrested and brought before a United States Commissioner and caused to give bond. No indictment was returned against the plaintiff and he brought the malicious prosecution action against the defendant. Hower v. Lewton. In the first appeal, the defendant demurred to plaintiff's declaration upon the ground that it did not state a cause of action. The trial court sustained the demurrer, but then dismissed the action "for want of declaration." 18 Fla.

at 333. The supreme court held this was clearly error, in that the declaration was on file and of record. The supreme court stated that the correct ruling of the trial court should have been to overrule the demurrer and allow the defendant to plead.

Trial was then held and verdict was rendered in favor of the plaintiff. Defendant appealed solely on issues relating to jury instructions that were alleged to have been incorrectly given and other jury instructions that were alleged should have been given. 35 Fla. at 60. The supreme court explicitly stated that it would consider only those assignments of error actually raised and no others. Lewton v. Hower, therefore, is a jury-instruction case.

Of relevance to Ward is the last error assigned by the defendant, that the trial court erred in refusing to instruct the jury upon defendant's request that the action of the U.S. magistrate in finding probable cause to bind the plaintiff over for trial, contradicted the charge of malice. 35 Fla. at 64. The supreme court held the charge was not correct and thus the trial court was not wrong in refusing to give it. The supreme court stated that two malicious prosecution elements are malice in the prosecutor and want of probable cause. Then, the court noted,

> The fact that there was a committal or binding over, under the prosecution alleged to be malicious, is an important matter of defense, but such conviction or binding over does not negative the alleged malice of the prosecutor, but only the want of probable

> cause. One might be inspired by malice to prosecute a guilty person. The committal or binding over is not an adjudication upon the motive of the prosecutor, but only a determination that there was probable cause to hold the prosecuted.

35 Fla. at 64-65 (emphasis supplied).

This is the language that the Ward court had to be referring to when it cited Lewton for the proposition on probable cause, given that nowhere in the two Lewton opinions is there any other discussion of probable cause even remotely germane to Ward. As can be seen by comparing the Ward citation of Lewton with what Lewton actually says, the Ward court misquoted and misapplied Lewton. As the Lewton quote, above, states, a binding over for trial by a magistrate does not negative malice but rather negatives want of probable cause, or, as later put, it determines that there was probable cause.

Ward, however, cited Lewton not only for the correct language that malice was not negatived by the acts of officials in executing a warrant and information (which would answer the apparently-raised argument by the defendant that the binding over did, in fact, negative malice), but the Ward court then incorrectly cited Lewton for the remainder of its quoted paragraph. Nowhere in Lewton is there language that while the proof of the issuance of a warrant and the filing of an information refute the absence of probable cause, said actions do not conclusively establish the presence of probable cause. Where the Ward court got that language is unknown. What is

known, however, is that that language does not come from Lewton. The quoted language in Ward is an incorrect reading of what is clearly set forth in Lewton and hence invalid. Lewton is a malice case; insofar as Ward was concerned with the issue of malice, it also is a malice case. Dicta concerning the absence or presence of probable cause is thus irrelevant in Ward. For this Court to answer a certified question founded upon the suspect Ward language is quite unnecessary.

B.

Notwithstanding the above argument, the Ward language is, in essence, meaningless. What it promotes is a legal distinction without a difference, and this Court should not dignify such language with the honor of an answer to a certified question based upon it.

The Ward dicta states that while the proof of the issuance of an arrest warrant and the filing of an information tend to refute the absence of probable cause, they do not conclusively establish the presence of probable cause. The distinction, then, proposed by this language is the difference between refuting the absence of probable cause, and establishing the presence of probable cause. It is respectfully submitted to this Court that this is a distinction without a difference, given that the issue is a malicious prosecution suit.

It is well-settled law in Florida that, in order to maintain an action for malicious prosecution, a plaintiff must establish six elements:

> (1) The commencement or continuance of an original criminal or civil judicial proceeding.
>
> (2) Its legal causation by the present defendant against plaintiff who was defendant in the original proceeding.
>
> (3) Its bona fide termination in favor of the present plaintiff.
>
> (4) The absence of probable cause for such proceeding.
>
> (5) The presence of malice therein.
>
> (6) Damage conforming to legal standards resulting to plaintiff.

Tatum Bros. Real Estate & Investment Co. v. Watson, 92 Fla. 278, 288, 109 So. 623, 626 (1926). If plaintiff fails to establish any one element, his cause of action is destroyed. Phelan v. City of Coral Gables, 415 So.2d 1292, 1294 (Fla. 3d DCA 1982). If plaintiff fails to establish the absence or lack of probable cause, for example, he loses his case. The defendant, on the other hand, must show the opposite or negative of "absence or lack of probable cause." While Ward may hint that there is a distinction between the defendant's refuting the absence of probable cause and establishing the presence of probable cause, no such distinction exists in reality. For example, when moving for summary judgment, a defendant does not move for judgment in his favor on the issue

that there is a lack of the absence of probable cause. Rather, he moves for summary judgment alleging that there was, indeed, the presence of probable cause. Clearly, the opposite of "absence of probable cause" is not "lack of the absence of probable cause" but rather "presence of probable cause." In Central Florida Machinery Co., Inc. v. Williams, 434 So.2d 201 (Fla. 2d DCA 1983), for example, the defendant moved for and was granted summary final judgment in a malicious prosecution action, since the trial court found the presence of probable cause for filing an underlying wrongful death action. Defendant's affidavits and other proof posited the existence of his probable cause to file the underlying suit. They did not, as logically and procedurally they could not, posit the lack of the absence of probable cause. Given that defendant proved the presence of probable cause (the opposite of "absence of probable cause"), the trial court granted his summary judgment motion and the district court affirmed.

Plaintiff has the "difficult task of proving a negative, i.e., the lack of probable cause." Fee, Parker & Lloyd, P.A. v. Sullivan, 379 So.2d 412, 418 (Fla. 4th DCA 1980). Given that the required proof is of a negative, the opposite of that is a positive, i.e., the presence of probable cause. Even in the seminal Lewton v. Hower case, the court recognized the complete interchangeability of "presence of probable cause" and "lack of absence of probable cause." In

Lewton, the court stated that the binding over negatives the want of probable cause, and then later the court repeated that holding but in different terms: the binding over was a determination that there was probable cause. 35 Fla. at 65. Each statement says the same thing. In one, the wording is in terms of the negation of a negative; in the other, the wording is put in positive terms. For the Ward court, in dicta, to claim a distinction between the two forms of the same concept is to promote a distinction without a difference of the worst kind. For this Court to answer a certified question based on that distinction only continues that folly.

C.

The Ward language is legally irrelevant to the certified question since it has already been restricted to its facts by later decisions. Answering a certified question based on Ward, therefore, is completely unnecessary.

Ward was a case involving a sheriff filing an affidavit before a county judge and a prosecutor filing an information. Significantly, there is no mention in the Ward decision of any judicial finding of probable cause by the magistrate nor is there any mention that any type of hearing (ex-parte, adversary, or nonadversary) was ever held before either the arrest warrant was signed or the information issued. Only by the supreme court carefully reading the

testimony in the case did it conclude that there was no proof that there was lack of probable cause for the issuance of a warrant by the county judge or for the filing of an information by the state attorney. 11 So.2d at 194. Ward, therefore, was not a case where there was a stated judicial adjudication of the presence of probable cause either before an arrest warrant was issued or before an accused was bound over for trial. Ward quite properly is a case of an accused brought to trial on the strength of a prosecutor's information. In addition, Ward is, as discussed above, a malice case, where it was held that an acquittal and malice are not synonymous with lack of probable cause. 11 So.2d at 193. Later cases have so restricted Ward.

In Gallucci, Ward is cited only once, and for its malice holding. 100 So.2d at 378. The Gallucci court stated that the malicious prosecution plaintiff, the accused in the underlying action, had failed to prove absence of probable cause even if it were conceded he proved the presence of malice. Furthermore, Gallucci then formulated the rule that probable cause was presumed from the official action of a magistrate's finding of probable cause, a rule seemingly opposite Ward but in reality not so if Ward is properly viewed as only a malice case or a prosecutor's information case.

Likewise, the First District in Colonial Stores, Inc. v. Scarbrough, 338 So.2d 1119 (Fla. 1st DCA 1976), distinguished Ward by saying that it stood for the holding that

the filing of an information by a state attorney was evidence tending to show grounds for the prosecution, but did not rise to a presumption of probable cause. On further appeal, the supreme court in Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1977), affirmed the First District's holding. Specifically, this Court approved the restriction of Ward to a prosecutor-filing-an-information case, with no judicial finding of probable cause. Furthermore, it explicitly stated that it adhered to its earlier declaration in Ward that the filing of an information merely constituted evidence of reasonable grounds for the prosecution and was given no presumptive effect. 355 So.2d at 1185. As in Gallucci, the Scarbrough court then reaffirmed the rule that the magistrate's finding of probable cause was conclusive.

Accordingly, this Court has reaffirmed the Gallucci rule that a judicial finding of probable cause is elevated to the level of a presumption of the presence of probable cause. Language in Ward that intimated otherwise has not been cited by this Court with approval. Therefore, it is a logical conclusion that the Ward "probable cause" language, coming as it does in a case involving no magistrate's finding of probable cause (and hence dicta), has been implicitly receded from by this Court or otherwise held of no force and effect. The Ward language, then, is no impediment to the viability or scope of the Gallucci rule. This Court, consequently, need not answer a

question based upon the Ward language that is certified as one of "great" public importance. Clearly, it is not.

## CONCLUSION

GCC Beverages respectfully requests this Court to deny jurisdiction of this matter and dismiss the petition for review. Should this Court decide to reach the merits of this case, however, it is asked to approve the decision of the en banc First District below, and answer the certified question in the affirmative.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief and Appendix were furnished by mail to Gerald S. Bettman, Esquire, Jack W. Bettman, Esquire, 1027 Blackstone Building, Jacksonville, Florida 32202 this 21 day of June, 1985.

Jerry J. Waxman
Attorney