IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2346

JENO F. PAULUCCI and
LOIS MAE PAULUCCI,

Petitioners,

vs.

GENERAL DYNAMICS CORPORATION;
STROMBERG-CARLSON CORPORATION;
SIEMENS COMMUNICATIONS, L.P.;
SIEMENS COMMUNICATIONS SYSTEMS,
INC.; SIEMENS STROMBERG-CARLSON;
and GPT (USA), INC.,

Respondents.

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

RESPONDENTS' ANSWER BRIEF

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INTRODUCTION

This case is before the Court on discretionary review of a question certified by the Fifth District Court of Appeal. The certified question concerns whether a trial court can retain and exercise jurisdiction to enforce a settlement agreement that has been approved and incorporated into the court's final judgment. There appears to be no dispute on this point. The Petitioners, Respondents, and the Fifth District panel all agree that a court has the power to enforce a settlement agreement that has been made a part of the court's final judgment.

The real dispute in this case is whether this case should be before this Court at all. As we demonstrate below, this case should be dismissed as moot. No matter which way this Court rules on the certified question, Respondents win. This Court should be cautious about exercising its certified question jurisdiction over an academic question concerning which there is no disagreement, in a case that is otherwise moot.

Petitioners response to the suggestion of mootness has been to press this Court to revisit the merits of the Fifth District's decision. Indeed, not only have Petitioners sought to revisit the merits, they ask this Court to reverse the Fifth District based on "new" facts and arguments "discovered" after the Fifth District's decision below. Petitioner's remarkable request should be rejected. The issues raised on the merits do not belong in this Court. Petitioners merely attack the Fifth District's application of long-established law to the facts. The issue of whether

Respondents breached the contract, although important to the parties, has absolutely no significance beyond the boundaries of this case. To be sure, this Court has the discretion to address issues beyond the certified question, but that discretion is rarely exercised and Petitioners have demonstrated no reason, let alone a compelling reason, why this Court should do so in this case.

Moreover, Petitioners' attempt to retry this case in this Court based on new facts is completely unprecedented. If this Court were inclined to tackle the merits of the contract dispute between the parties, that review must be on the record created in the trial court and the arguments raised in the courts below. There is no authority permitting Petitioners to raise new facts and arguments for the first time in this Court. If Petitioners truly believe they have "new" facts, their remedy is a motion for relief from judgment under Rule 1.540 Fla.R.Civ.P., not the equivalent of a new trial in this Court.

Accordingly, the petition should be dismissed as moot. If this Court is inclined to reach the certified question, that question should be answered in the affirmative and the case affirmed in accordance with the Fifth District's alternative holding. This Court should decline Petitioners' request for a new trial in this Court and leave Petitioners' to their traditional post-judgment remedies below.

In the unlikely event this Court decides to reach the merits of the parties' contract dispute, the Fifth District's holding that Respondents established no right to liquidated damages should be affirmed. As the Petitioners implicitly have

conceded by their attempt to retry this case on new facts, they did not meet their burden of proof below. To prove entitlement to liquidated damages under the Settlement Agreement, Petitioners needed to prove that a valid No Further Action (NFA) issued letter by the Florida Department of Environmental Protection (FDEP) was not in place on October 24, 1999. However, as recognized by the trial court in a previous order, there was already a valid June 3, 1997 NFA letter in place that was never rescinded by the FDEP. Respondents were not in breach.

STATEMENT OF THE CASE AND FACTS

The facts relevant to the certified question are taken from the Fifth District's opinion below and can be briefly stated. The Petitioners, Jeno F. Paulucci and Lois Mae Paulucci, sued Respondents, General Dynamics Corporation; Stromberg-Carlson Corporation; Siemens Communications, L.P.; Siemens Communications Systems, Inc.; Siemens Stromberg-Carlson; and GPT (USA), Inc. (n/k/a Marconi Communications Ltd.) (collectively, "GPT"), claiming that GPT had caused environmental contamination of the Paulucci's property. The parties settled their dispute. Under the terms of the settlement, GPT immediately paid the Pauluccis $3,000,000 (R. 1171)[1]. GPT then undertook the responsibility to remediate the environmental contamination of the property. GPT was required to ensure that the property was in compliance with Florida Department of Environmental Protection Standards so that the Department's No Further Action (NFA) Letter issued previously could be maintained. GPT agreed that, if there was no valid NFA Letter in existence fifteen months from the date of the Settlement Agreement, GPT would be required to pay a specified increased rental for the property as liquidated damages.

By agreement between the parties, the trial court approved the agreement and incorporated it into the final judgment. The court retained "jurisdiction of this

[1] This brief will use the same references to the Record ("R.") and Supplemental Record ("Supp. R.") utilized by the Pauluccis in their initial brief.

matter in order to enforce, construe, interpret, and otherwise ensure compliance by the parties with the Settlement Agreement."

The Pauluccis later claimed that GPT was in breach of the Agreement in various ways. The Pauluccis filed several motions with the trial court, asking the court to determine that GPT was in breach and to award rental payments as a result of GPT's alleged non-compliance with the Agreement.

An issue arose concerning the trial court's jurisdiction to address the alleged breaches in the context of the original case. After considering *Buckley Towers Condominium Inc. v. Buchwald*, 321 So. 2d 628 (Fla. 3d DCA 1975) and *Wallace v. Townsell*, 471 So. 2d 662 (Fla. 5th DCA 1985), the trial court determined that it could "enforce" the contract within the existing action but that any claim for breach of the contract had to be brought in a separate and independent case. The trial court then purported to enforce the Settlement Agreement by awarding the Pauluccis the rent payments they requested.

On appeal, the Fifth District reversed, holding that the trial court did not have jurisdiction to enforce the Settlement Agreement because the remedy sought was outside of the relief requested by the original lawsuit. *General Dynamics Corp. v. Paulucci*, 797 So. 2d 18 (Fla. 5th DCA 2001). Although the Fifth District found the trial court's approach to be reasonable, the Fifth District felt bound by its decision in *Wallace*. The Fifth District interpreted *Wallace* to hold that the trial court's jurisdiction was strictly limited to that which was invoked by the initial

pleadings. Following its interpretation of *Wallace*, the Fifth District ruled that the trial court had subject matter jurisdiction only over the pollution action and that any action based on the Settlement Agreement would "have to be brought in a separate action, by complaint and not motion, giving the defendant the opportunity to plead his defenses and request a jury trial if appropriate." 797 So. 2d at 21.

Recognizing, however, that the parties had already expended much time and effort in briefing the merits of the case, and that the issues raised on the merits would inevitably re-appear before the court in any subsequent appeal after remand, the Fifth District issued an alternative holding reversing the trial court on the merits. Examining the record, the court determined that the Pauluccis did not establish a breach of the agreement giving them a right to receive rent. Accordingly, the court reversed the judgment in the Pauluccis' favor and also reversed the attorneys fees awarded to the Pauluccis based on the judgment.

Despite having otherwise resolved the case on the merits, the Fifth District certified the conflict between *Wallace* and *Buckley Towers* to this Court and also certified the following question of public importance:

> DOES A COURT WHICH APPROVES A SETTLEMENT AGREEMENT RETAIN JURISDICTION TO ENFORCE THE TERMS THEREOF EVEN IF THE REMEDY SOUGHT IS OUTSIDE THE SCOPE OF THE ORIGINAL PLEADINGS?

The Pauluccis then invoked this Court's discretionary review based on the certified conflict and certified question.

Motion History in this Court

GPT moved to dismiss the Petition as moot, pointing out that, no matter how this Court resolved the question, GPT prevails in light of the Fifth District's ruling on the merits. This Court postponed a decision on the motion until the time the Court determines oral argument. Order of December 20, 2001.

The Pauluccis then filed motions with this Court asking the Court to take judicial notice of "new" facts, detailed in the next section below, or alternatively, asking this Court to relinquish jurisdiction to the trial court to permit it to consider these new facts. GPT opposed the motions and renewed its motion to dismiss. As of the date of this brief, this Court had not yet ruled on these motions.

Facts Relevant to the Merits

The facts related to the merits require more detail. This case began in August, 1996, when the Pauluccis sued GPT, seeking to recover damages for GPT's alleged environmental contamination of property owned by the Pauluccis (R. 1). GPT leased real property from the Pauluccis (R. 152-55). The Pauluccis alleged that GPT caused environmental contamination of the property during its tenancy (R. 155).

In January, 1998 the Pauluccis and GPT entered into a partial settlement agreement. A dispute developed when the Pauluccis alleged that additional contamination had been found on the property. On July 24, 1998, the parties executed a mediated Settlement Agreement resolving their dispute (R. 1171).

Pursuant to a joint motion by the parties, the trial court entered a final judgment on July 29, 1998, incorporating by reference the Settlement Agreement and retaining jurisdiction to enforce the agreement (R. 1170-72). Under the Settlement Agreement, GPT paid the Pauluccis $3 million (R. 1178). Paragraph 5 of the Settlement Agreement also imposed the following obligations on GPT:

> Defendants shall at Defendants' sole cost and expense promptly initiate contact with the DEP concerning the Environmental Condition of the property to maintain the NFA or to obtain reissuance of the NFA, and, if required by the DEP for such purposes, will investigate and implement clean up, remediation, and monitoring activities. If after 15 months from the date of this Settlement Agreement, there is no valid No Further Action (NFA) letter in place with regard to the property in question, then Plaintiffs shall be entitled to and Defendants shall pay to Plaintiffs, monthly payments (paid on the first of each month) equal to the difference between the fair market value of the lease rate of the property and any current monthly rental for each month following the 15 month period until a valid NFA letter is issued.

(R. 1180).

At the time the parties signed the Settlement Agreement, there was a NFA letter on the property dated June 3, 1997[2] (Supp. R. 365-403 at Ex. A). GPT was to ensure that the NFA letter remained in place for the property, or, if necessary, was to obtain the reissuance of a valid NFA letter from the FDEP (R. 1180). If a valid NFA letter was in place fifteen months after execution of the Settlement Agreement – October 24, 1999 – then GPT's obligations to the Pauluccis were at an end (*Id.*).

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[2] The parties have occasionally erroneously referred to the date of the NFA letter as June 13, 1997.

If no valid NFA letter was in place as of that date, GPT was required to pay the Pauluccis liquidated damages equal to the amount of the fair market rental value of the property less any actual rent received by the Pauluccis until such time as GPT secured a valid NFA letter on the property (*Id.*). The Pauluccis retained ownership of the real property, but GPT was given by the Settlement Agreement "full, complete, and uninterrupted control over the Environmental Condition" of the property for the length of time necessary to complete any clean up, remediation, or monitoring required under Paragraph 5 of the Settlement Agreement (R. 1179).

On September 14, 1998, the Pauluccis filed a motion for default in the trial court contending that GPT was in default under the Settlement Agreement because it had failed to contact FDEP promptly to determine its clean up, remediation, or monitoring obligations as required by Paragraph 5 of the Settlement Agreement (R. 1173-75). The Pauluccis further contended that, as a result of GPT's failure to contact FDEP, the property had lain fallow causing the Pauluccis to lose rental income on the property for the 52 days that had elapsed since the date of the Settlement Agreement (*Id.*).

In November, 1998, the trial court heard the Pauluccis' motion for default, and, on December 15, 1998, issued its order on the motion (R. 1219-20). The trial court determined that the Settlement Agreement required GPT to notify FDEP promptly "concerning any environmental conditions in order to maintain the No Further Action Letter currently on the property" (R. 1219). The court recognized,

however, that the Settlement Agreement did not provide for the recovery of any damages until 15 months after the date of the Settlement Agreement, and then only if no valid NFA letter existed on the property (R. 1219-20). The court concluded that the NFA letter on the property remained valid. According to the order: "There is no showing that the No Further Action Letter on the property is invalid . . ." (R. 1220). The court found therefore that the Pauluccis were not precluded from renting the property and had failed to prove any damages resulting from GPT's failure to initiate contact with FDEP (*Id.*).

The Pauluccis then filed a motion to set a hearing on their claim for damages and/or for clarification of the court's December 15, 1998 Order (R. 1221-23). The Pauluccis contended that the court had granted them a continuance on the issue of damages and that they were entitled to reset the determination of damages for a subsequent hearing (*Id.*). The court granted the motion and set an evidentiary hearing on the issue of the Pauluccis' claim for damages (R. 1224-25).

The Pauluccis did not pursue the evidentiary hearing afforded by the court. Instead, the Pauluccis filed a Supplemental Motion for Default and Damages (R. 1226-63). In their supplemental motion, the Pauluccis reiterated their allegations regarding GPT's failure to contact FDEP, but also complained that GPT was in default under the Settlement Agreement because it had corresponded with FDEP without the knowledge or input of the Pauluccis (R. 1226-29). The Pauluccis asserted a claim for breach of the Settlement Agreement (Count I), as well as a

claim for statutory violations (Count II) (R. 1229-32). The Pauluccis demanded a jury trial and indicated their plan to assert a claim for punitive damages in connection with their statutory claim (R. 1232). On April 2, 1999, the Pauluccis noticed the supplemental motion for jury trial.

In response, GPT filed a motion to strike, raising the issue of the trial court's jurisdiction over alleged breaches of the Settlement Agreement. GPT argued that the trial court had jurisdiction only to enforce the Settlement Agreement (R. 1295-1373). GPT pointed out that the court lacked jurisdiction to consider by motion new claims arising out of the parties' dispute, to conduct a jury trial, or to award punitive damages (R. 1295-1300). Instead, GPT argued, the court was limited to enforcing the liquidated damages provision in the Settlement Agreement, which did not permit a claim for damages until after October 24, 1999, and then only in the absence of a valid NFA letter (*Id.*).

Recognizing that it had jurisdiction only to enforce the Settlement Agreement, the trial court granted GPT's motion by order dated November 4, 1999 (R. 1457-1462). The court explained that, while the Pauluccis could file a motion in the pending action to enforce the Settlement Agreement, they could not assert claims for breach of contract or statutory violations (R. 1460). The court ruled that those causes of action, assuming they are not barred by the Pauluccis' release of GPT in the Settlement Agreement, must be brought in a new and separate

lawsuit (R. 1460).[3] The court also rejected the Pauluccis' demand for a jury trial and for punitive damages because neither is available under the Settlement Agreement (R. 1461). The court effectively dismissed the Pauluccis' claims without prejudice to their right to file a motion to enforce the Settlement Agreement (R. 1460-61). The trial court denied the Pauluccis' motion for rehearing or clarification (R. 1466-67).

Although the court specifically stated in its order that the Pauluccis were precluded from asserting their breach of contract claim (Count I), the court's order reflected only a dismissal of the statutory claim (Count II) (R. 1460-61). As a result, the Pauluccis set the breach of contract claim in Count I for hearing on February 9, 2000. On January 24, 2000, GPT filed a motion to strike the breach of contract claim, pointing out that the Pauluccis' effort to have their breach of contract claim heard was at odds with the court's November 4, 1999 order prohibiting the breach of contract claim (R. 1468-73). GPT also pointed out that the Pauluccis had not filed a motion to enforce the Settlement Agreement – the appropriate remedy identified by the trial court (*Id.*).

On January 28, 2000, the Pauluccis filed a Renewed Supplemental Motion for Default and Damages (R. 1474-1506). Despite the court's previous refusal to

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3 In fact, the Pauluccis filed a new lawsuit against GPT in January, 2000, asserting, among other claims, a cause of action for breach of the Settlement Agreement. *See Paulucci v. General Dynamics, et al.*, Case No. 00-CA-149-15-B (Fla. 18th Judicial Circuit, Seminole County, Fla.).

entertain a cause of action for breach of contract, the Pauluccis again asserted a claim for breach of the Settlement Agreement (R. 1478). The Pauluccis alleged for the first time that GPT had breached the Settlement Agreement because no valid NFA letter existed on the property as of October 24, 1999 (R. 1477-78). One week later, on February 4, 2000, the Pauluccis for the first time filed a motion to enforce the Settlement Agreement (R. 1507-10). The Pauluccis set Count I of their supplemental motion for default, their renewed supplemental motion for default, and their motion to enforce the Settlement Agreement all for hearing on February 9, 2000.

Counsel for GPT informed counsel for the Pauluccis that neither he, nor the other attorneys familiar with the case, were available to attend the February 9, 2000 hearing (R. 1562 at Ex. H). GPT's counsel asked that the hearing be rescheduled (*Id.*). Counsel for the Pauluccis refused (*Id.*). On February 8, 2000, counsel for GPT filed a notice of conflict with the trial court, explaining that he was unable to appear at the February 9, 2000 hearing (R. 1562 at Ex. G).

Despite the efforts of GPT's counsel to secure a different hearing date, a substitute judge heard the Pauluccis' supplemental motion for default, renewed supplemental motion for default and motion to enforce the Settlement Agreement at the February 9, 2000 hearing (Supp. R. at 52-93). This substitute judge heard the testimony of witnesses and accepted evidence all without the presence of counsel for GPT (*Id.*). The substitute trial judge concluded that GPT had defaulted on its

obligations under the Settlement Agreement, accepting the Paulucci's argument that no valid NFA letter was in place (R. 1511-12). The Pauluccis did not reveal to the substitute judge the existence of the June 3, 1997 no action letter. Nor did the Pauluccis reveal to the substitute judge the previous December, 1998 ruling by the court that a valid NFA letter was, in fact, in place. The court awarded the Pauluccis liquidated damages in the amount of the rent and prejudgment and post-judgment interest, and determined that the Pauluccis were entitled to recover attorneys' fees and costs (R. 1512).[4]

On March 31, 2000, the Pauluccis filed a motion to tax attorneys' fees and costs (R. 1573-1619). Paragraph 10 of the Settlement Agreement provides in part that, "…in any action for breach of this Settlement Agreement, the breaching party shall be liable for all damages, costs, and expenses as may be incurred, taxable or otherwise, including court costs and attorneys' fees (at trial and appeal)…" (R. 1182). The trial court conducted an evidentiary hearing and awarded the Pauluccis a total of $245,341.28 in fees and costs (R. 1621).

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4 After entry of the trial court's order, GPT filed a motion with the trial court seeking relief from the order (R. 1562). GPT argued that the substitute judge should not have heard the Pauluccis' motions in the absence of counsel for GPT (R. 1567). The trial court heard GPT's motion for relief from the order on May 31, 2000 (Supp. R. 365-403). At that hearing, the trial judge heard argument on the merits of GPT's defense (*Id.* at 373-74; 367-69; 372-82; 398-400). At the conclusion of the hearing, however, the trial judge denied GPT's motion for relief (*Id*. at 400). GPT does not seek review of this ruling.

The Appeal

GPT timely appealed to the Fifth District which reversed. As discussed above, the Fifth District first addressed the trial court's jurisdiction. Perceiving itself to be bound by its decision in *Wallace v. Townsell*, 471 So. 2d 662 (Fla. 5th DCA 1985), the court held that the trial court had no jurisdiction to either enforce the settlement agreement or to entertain an action for breach because these claims went beyond the jurisdiction invoked by the original pleadings. The court then certified the question of the trial court's jurisdiction to this Court.

Recognizing that the case may well be returned to it, the Fifth District then issued an alternative holding on the merits of the case. The court determined that the Pauluccis had presented no evidence that the June 3, 1997 NFA letter was no longer in place and reversed the trial court's decision that GPT was in breach. The court also reversed the award of fees and costs observing that, even if the Pauluccis had prevailed, the agreement did not authorize the Pauluccis to recover fees for monitoring the FDEP's enforcement activity.

The Pauluccis' petition for discretionary review followed. While proceedings in this Court progressed, the Pauluccis and GPT continued to be involved in other litigation regarding the property. Discovery in this related litigation included a deposition of FDEP District Director Vivian Garfein on November 21, 2001 (after the Fifth District's reversal).

Ms. Garfein's testimony, along with an October, 2001 memorandum by John

White of the FDEP, forms the basis of the Pauluccis' motion to relinquish and motion to take judicial notice filed with this Court. In those motions, the Pauluccis ask this Court to reverse the Fifth District's decision on the merits based on this after-acquired hearsay testimony. The Pauluccis focus on a portion of her deposition where, in reliance on John White's memorandum, Ms. Garfein speculates that the 1997 NFA letter did not cover the whole property but only two wells on the property -- an argument not raised in the trial court and Fifth District below. The Pauluccis have not filed a Rule 1.540 motion for relief from the judgment below.

STANDARD OF REVIEW

All of the issues in this brief are matters of law and are reviewed *de novo.*

SUMMARY OF THE ARGUMENT

This Court should dismiss the Pauluccis' Petition for Discretionary Review as moot because its decision on the certified question will have no bearing on the outcome of the litigation. Regardless which way the Court rules, GPT prevails.

If this Court chooses to address the certified question, that question should be answered in the affirmative. It is well-settled that Florida courts have the power to enforce their judgments, including judgments that incorporate the terms of the parties' settlement. Once the parties settle, however, any claim alleging breach of the Settlement Agreement must be brought in a separate action and not by motion.

On the merits, the Fifth District correctly ruled that the Pauluccis had presented no evidence below that the NFA letter was no longer in place on October 24, 1999. Thus, the Pauluccis had no right to enforce the increased rent obligation pursuant to the Settlement Agreement. This Court should reject the Pauluccis' attempt to supplement the record with "new" facts "discovered" after the Fifth District issued its ruling. Review in this case is based on the appellate record already developed and the arguments made below. If the Pauluccis believe that they have "new" facts, their remedy is a Rule 1.540 motion in the trial court. not a retrial in this Court.

If this case is not dismissed as moot, the certified question should be answered in the affirmative and the case should be affirmed in accordance with the Fifth District's alternative holding on the merits.

ARGUMENT

This case does not belong in this Court. We begin our brief with a discussion of why the case is moot and why this Court should not exercise its discretion to decide the academic question presented – particularly when both the Pauluccis and GPT are on the same side of the question. Should the Court disagree, we follow with a discussion of the certified question, suggesting that it be answered in the affirmative.

The vast majority of the Pauluccis' brief goes beyond the certified question and asks this Court to second-guess the Fifth District's ruling on the contract issue based on "new" evidence and arguments never presented to the Fifth District. We discuss why this Court should decline to revisit the merits and should reject the "new" evidence offered by the Pauluccis. Because so much of the Pauluccis' brief reargues the merits, we feel compelled to conclude with a brief discussion of the merits demonstrating that the Fifth District's ruling that GPT had not breached the contract was correct. In the event this Court decides to exercise its discretion to reach past the certified question and decide the merits, the decision below should be affirmed.

I. THIS CASE SHOULD BE DISMISSED AS MOOT.

The question certified by the Fifth District to this Court has no practical relevance in this litigation. If this Court determines that the trial court had jurisdiction to enforce the Settlement Agreement, the Fifth District has already

resolved this case in favor of GPT by its holding that GPT did not breach the Settlement Agreement. If this Court determines that the trial court did not have jurisdiction, the Fifth District's decision must be affirmed on the jurisdictional ground articulated by the Fifth District. Put simply, no matter which way this Court rules, the Pauluccis' claim for breach in this lawsuit is dead.

Under Rule 9.030, Florida Rules of Appellate Procedure, this Court *may* review certified conflicts and certified questions. Thus, whether to accept a certified question or conflict for review is a matter solely within the sound judicial discretion of this Court. *See Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 596 (Fla. 1961). Exercising that discretion, this Court may dismiss a petition for review based on a certified question when the Court concludes "that the question answered was not essential to a determination of the case and is of such nature that no useful purpose would be served by rendering a decision." *Id*. at 597. *See Novack v. Novack*, 195 So. 2d 199 (Fla. 1967) (petition dismissed because answering the certified question was neither justified nor required).[5]

This Court should similarly decline to exercise its discretionary jurisdiction in this case. It is a fundamental principle that a court should restrict itself to deciding live cases or controversies. *See Babbitt v. United Farm Workers National Union*,

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[5] This Court can decline to address a certified question on any number of grounds. *See State v. Vazquez*, 718 So. 2d 755 (Fla. 1998) (declining to address certified question not ruled on by the court below); *State v. Sowell*, 734 So. 2d 421 (Fla. 1999) (dismissing a petition for discretionary review after determining that the question certified was not of great public importance).

442 U.S. 289, 298-99 (1979) (courts do not resolve abstract questions but should ensure that there is a real, substantial, controversy between the parties); *United States Parole Com'n v. Geraghty*, 445 U.S. 388. 396 (1980) (case or controversy requirement limits the business of federal courts to live controversies presented in the adversary context).

These important principles are often observed and enforced by this and other Florida courts. For example, in *DeHoff v. Imeson*, 15 So. 2d 258 (Fla. 1943), this Court was asked to review a final judgment arising out of an election controversy. The issue had become moot because of the passage of time and this Court dismissed of its own motion because "no practical result could be attained by reviewing the questions" presented by the appeal. *Id.* at 259. *See Sarasota-Fruitville Drainage District v. Certain Lands Within Said District*, 80 So. 2d 335, 336 (Fla. 1955) ("it is a fundamental principle of appellate procedure that only actual controversies are reviewed by direct appeal"); *Veal v. State*, 788 So. 2d 1103, 1103 (Fla. 5th DCA 2001) (declining to issue an advisory opinion on issues not yet ripe); *Gulf Life Insurance Co. v. Newell's, Inc.*, 226 So. 2d 858, 859 (Fla. 4th DCA 1969) (dismissing the appeal "where no practical result could be obtained by reviewing the question" presented by the appeal); *Vaughan v. Cates*, 141 So. 2d 316, 318 (Fla. 1st DCA 1962) (a court should not "declare rules of law that cannot affect the matter in issue in the case before it").

No doubt the Pauluccis will argue that there is a need to resolve the conflict

presented by the Fifth District. There are many important questions waiting to be resolved by this Court, but those questions must await the appropriate case. Thus, the question is not whether there exists a conflict to be resolved, but whether that conflict should be resolved in the context of this case, where the issue has become academic. This Court should not expend its resources deciding questions that have no practical relevance to the parties. *See DeHoff*, 15 So. 2d at 259 (dismissing the case because a favorable decision would avail the petitioner nothing).

Moreover, this case is a particularly inappropriate vehicle to resolve the certified question because there is no disagreement concerning its resolution. Both GPT and the Pauluccis agree that the trial court has jurisdiction to enforce a Settlement Agreement that has been incorporated into the final judgment. This Court should resolve questions only when there is a true controversy and the issue has been sharpened by the adversary process.

This case should be dismissed as moot.

II. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

As GPT has conceded throughout this case, a trial court retains jurisdiction to enforce the terms of a court-approved settlement agreement. This power stems from a trial court's inherent power to enforce its orders. As this Court has stated: "a trial judge has the inherent power to do those things necessary to enforce its

orders, . . ." *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co.*, 639 So. 2d 606, 608-09 (Fla. 1994).

Relying on this inherent authority, numerous courts have recognized a trial court's authority to enforce court-approved settlement agreements. For example, in *Buckley Towers Condo., Inc. v. Buchwald*, 321 So. 2d 628 (Fla. 3d DCA 1975), the parties entered into a written settlement agreement which was approved by order of the trial court. One of the parties later filed a motion to compel enforcement of the court-approved settlement agreement. The court rejected the argument that the trial judge had no jurisdiction to enforce the settlement agreement. The court recognized the trial court's inherent authority to enforce its order and ruled that the motion to enforce the settlement agreement was the proper pleading to institute the enforcement action. *Id.* at 629.

The Fourth District reached a similar result in *Broadband Eng'g, Inc. v. Quality RF Servs., Inc.*, 450 So. 2d 600 (Fla. 4th DCA 1984). In *Broadband*, the court held that the trial court had the inherent jurisdiction to enforce the court-approved settlement agreement. The court strongly rejected the suggestion that the trial court was without subject matter jurisdiction:

> To adopt appellee's contention that appellant's only recourse is to file a second lawsuit would substantially undermine the policy favoring settlements and, indeed, would make a mockery of the legal process.
>
> 450 So. 2d at 601.

See also, *Metropolitan Dade County v. Edol Corp.*, 661 So. 2d 422 (Fla. 3d

DCA 1995) (trial court had jurisdiction to enforce the parties' court-approved settlement agreement); *Molina v. Tradewinds Dev. Corp.*, 526 So. 2d 695 (Fla. 4th DCA 1988) (same).

The Fifth District panel below acknowledged the reasonableness of this authority but felt constrained by the Fifth District's earlier decisions of *Wallace v. Townsell*, 471 So. 2d 662 (Fla. 5th DCA 1985) and *George Vining & Sons, Inc. v. Jones*, 498 So. 2d 695 (Fla. 5th DCA 1986). These cases, however, do not present the conflict that the panel below feared. In *Wallace*, for example, the court was not faced with a simple motion to enforce a court-approved settlement agreement. Instead, both parties in *Wallace* contended that the other party had breached the settlement agreement. While the language in the opinion is broader than necessary to resolve the question before it, at bottom, *Wallace* stands for the proposition that a trial court does not retain jurisdiction to entertain an action for breach of the settlement agreement. As we discuss below, this conclusion was correct -- there is well recognized distinction in Florida law that permits a trial court to enforce a settlement agreement but prohibits a trial court from entertaining an action for its breach.

As noted above, *Wallace* does contain some broad language questioning the court's authority to order specific performance or to use its contempt powers to enforce the settlement agreement. This concern, however, does not appear to be based on the court's subject matter jurisdiction to enforce its orders. Rather, the

court seems concerned about granting greater enforcement powers over the breach of a settlement contract than the court would normally have in a typical breach of contract case. While an interesting issue, this question concerning the remedies available to a court when enforcing a court-approved settlement agreement is not at issue in this case. Rather, this case narrowly concerns the trial court's subject matter jurisdiction to entertain an enforcement action at all. On that point, the cases appear uniform.

Neither does the *George Vining & Sons* case present a clear conflict. In this case, as in *Wallace*, the court was addressing an action for breach of the settlement agreement, as opposed to a simple motion to enforce the agreement. Thus, *George Vining* is simply representative of the cases recognizing that a trial court does not have the power to entertain an action for breach of a settlement agreement. 498 So. 2d at 697. According to the court: "if and when the defendant breached the new agreement a new cause of action came into existence and the plaintiff should have instituted a new law action for money damages for breach of the new agreement." *Id.* at 698.

Thus, there is no clear authority in Florida holding that a trial court does not have the power to enforce a court-approved settlement agreement. For this reason, throughout these proceedings, GPT has conceded the trial court's power to enforce GPT's compliance with the Settlement Agreement. Thus, the trial court had the power to determine whether a valid NFA letter remained in place for the

purposes of determining whether GPT's obligation to pay rent had ripened. However, as the trial court correctly recognized, any action for an alleged breach of the Settlement Agreement had to be brought separately (R. 1460). *See e.g.*, *Buonopane v. Ricci*, 603 So. 2d 713, 714 (Fla. 4th DCA 1992).

The Pauluccis go beyond this authority and imply that the trial judge also has the authority to consider, by motion, claims that GPT had breached the Settlement Agreement. Initial Brief at 31-32. Here, GPT and the Pauluccis part company. As correctly recognized by the trial court and the Fifth District, there is no authority holding that a trial court may entertain an action for breach of the Settlement Agreement. There is much authority to the contrary.

For example, in *Davidson v. Stringer*, 147 So. 228 (Fla. 1933) this Court held that, once a matter has settled, the trial court "loses jurisdiction over the subject-matter of the suit" other than to see that the judgment is "properly enforced." *Id.* at 229. Considering this same issue, the Fourth District characterized the distinction between enforcement and breach as a matter of jurisdiction and authority:

> We emphasize that we are not free to vest courts with jurisdiction out of the blue. There is a substantial difference between an action for damages for breach of contract, and a motion to compel compliance with a court-sanctioned judgment or order. The trial court possesses broad authority to fashion a variety of remedies in the latter situation, and its authority to do so must be clear.

Buonopane, 603 So. 2d at 714. *See also, 84 Lumber Co. v.* Copper, 656

So. 2d 1297, 1298 (Fla. 2d DCA 1994) (once a case is dismissed pursuant to settlement, the court loses subject matter jurisdiction to adjudicate any new issues arising out of the case). *Grossman v. Selewacz*, 516 So. 2d 1136 (Fla. 4th DCA 1987) (court may enforce the settlement agreement but has no power to award damages for its breach); *Oceanair of Florida, Inc. v. Beech Acceptance Corp.*, 545 So. 2d 443 (Fla. 1st DCA 1989) (after the parties executed a joint stipulation for dismissal with prejudice, the trial court's jurisdiction was terminated and therefore, it could not act upon a motion for default of the settlement agreement); *Hopwood v. Revitz*, 312 So. 2d 516, 518 (Fla. 3d DCA 1975) (the trial court's jurisdiction is restricted to enforcing its judgment, the trial judge has no power to modify its original judgment by awarding additional relief).

In summary, the state of the law in Florida relating to the certified question is well-settled. The trial court always has the power to enforce its judgment, including a judgment that incorporates a settlement agreement by the parties. However, trial courts have no jurisdiction to consider an action for breach of the settlement agreement. The certified question should be answered in the affirmative.

III. ONCE THIS COURT DECIDES THE CERTIFIED QUESTION ITS LABORS ARE AT AN END.

As discussed in Section I above, GPT believes that this case should be dismissed as moot. If this Court is inclined to decide the certified question, that question should be answered in the affirmative and the case should be remanded to

the Fifth District for the court below to enter its provisional order reversing the trial court. This Court should decline the Pauluccis' invitation to revisit the Fifth District's decision on the merits.

Although this Court has the discretion to consider issues in the case beyond the certified question, this is not one of those rare cases where the exercise of that discretion is appropriate. The Fifth District's opinion below did nothing more than apply the undisputed facts of this case to long-settled law. Indeed, as discussed in more detail below, the Paulucci's attempt to retry this case with new facts and arguments not raised below is an implicit concession that the existing record can support only judgment in favor of GPT. This Court should rebuff the Pauluccis' attempt to make it the factfinder in this case and to address new arguments not raised below. *See Major League Baseball v. Morsani*, 79 So. 2d 1071, 1080 n. 26 (Fla. 2001) (declining to address issue outside the scope of the certified question noting that "[a]s a rule we eschew addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in Article V, Section 3, Florida Constitution"); *Provident Management Corp. v. City of Treasure Island*, 718 So. 2d 738, 740 (Fla. 1998).

IV. GPT DID NOT BREACH THE SETTLEMENT AGREEMENT.

The issue presented to the trial court was whether the Pauluccis were entitled to enforce the liquidated damages provision of the settlement agreement and receive rent as liquidated damages. The applicable provision of the settlement agreement is

straightforward. The Pauluccis were entitled to rent "if after fifteen months from the date of this settlement agreement, there is no valid No Further Action (NFA) letter in place with regard to the property in question" (R. 1545). Thus, the sole issue for determination by the trial court was whether an NFA letter was in fact in place within the meaning of the settlement agreement.

It is undisputed that a NFA letter regarding the property was issued by the FDEP on June 3, 1997. There is also no question that the 1997 NFA letter was never withdrawn or rescinded by the FDEP. In fact, in its December, 1998 order, the trial court had ruled that "there is no showing that the No Further Action Letter on the property is invalid preventing the and [sic] the Plaintiff from receiving any income on this property" (R. 220).

The parties themselves contemplated in the settlement agreement that the June 3, 1997 letter already in place could operate to satisfy GPT's obligations under the settlement agreement. Under paragraph 5 of the settlement agreement, GPT was to contact the FDEP to "maintain the NFA." That is just what GPT did. If the Pauluccis believed that the NFA was no longer valid, or failed to address all of the contamination issues, they could have easily asked FDEP to rescind the letter or issue a limitation of that letter. Certainly the Pauluccis knew as of December, 1998 – five months after execution of the settlement agreement – that the trial court ruled that the NFA letter was still valid and would preclude an award of damages if it remained in place.

At the hearing on the Pauluccis' motion to enforce the settlement agreement held in front of a substitute judge, the Pauluccis presented a bare bones case.[6] The Pauluccis' attorney and their expert hydrologist testified that, to their knowledge, there was no valid NFA letter on the property. *General Dynamics*, 797 So. 2d at 22. However, despite the trial court's December, 1998 acknowledgement of the validity of the June 3, 1997 NFA letter, these witnesses failed to address the undisputed existence of that letter. *Id*. Indeed, the Pauluccis never even informed the visiting judge of the June 3, 1997 letter or the trial court's December, 1998 ruling that the NFA letter was still valid.

The undisputed evidence, as noted by the Fifth District, proves that the NFA letter remained in place. Only the FDEP can rescind or withdraw an NFA letter. Here, the record contains an affidavit from an FDEP representative who testified that, when a NFA letter is determined to be invalid by the FDEP, the Department will rescind or withdraw the letter. *General Dynamics*, 797 So. 2d at 22 n.6. Despite this testimony, the Pauluccis presented no evidence that the June 1997 NFA letter was ever withdrawn or rescinded by the FDEP. *Id.* at 22.

Based on this very simple record, the Fifth DCA ruled that there was no evidence that the 1997 NFA letter was no longer in place. Thus, there was no evidence that GPT had breached the settlement agreement.

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6 As noted above, GPT's counsel was not present at the hearing because of a conflicting professional obligation.

The Pauluccis argued unsuccessfully to the Fifth District below that they had proven that GPT had breached the settlement agreement because "everyone knew" that the property was still polluted. To begin with, the Pauluccis ignore that there was a sharp dispute below over the level of contamination on the property and the appropriate remedy to address the problem (natural attenuation versus more aggressive measures). This dispute, however, is irrelevant. The Pauluccis' right to liquidated damages was not dependent on resolving a dispute between the parties over whether the property was polluted. For example, the parties could have made GPT's obligations dependent upon the finding of certain levels of additional contamination. The parties chose instead the existence of the NFA letter as their objective measuring stick of GPT's compliance. In light of the hotly disputed history of this case, this choice of a simple objective criteria for measuring GPT's compliance made perfect sense. In essence, the Pauluccis asked the Fifth District to enforce the settlement agreement they wish they had, instead of the settlement agreement they actually negotiated.[7]

Recognizing too late the inadequacy of the record to support their claim of breach, the Pauluccis ask this Court to relinquish jurisdiction or to take judicial

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[7] Perhaps the most incredible argument by the Pauluccis is their suggestion that GPT did not contest the evidence presented at the February 9, 2000 hearing. GPT did not contest the evidence because the Pauluccis exhorted the trial court to hold the hearing in GPT's absence. The more important point, however, is the Pauluccis' failure to provide any evidence that the June 3, 1997 NFA letter had been rescinded or withdrawn – even at an "ex parte" hearing.

notice of recent testimony from FDEP District Director Vivian Garfein concerning an October, 2001 memorandum by FDEP's John White.[8] The Pauluccis suggest that this testimony confirms that the 1997 NFA letter did not apply to the entire property at issue. Apparently, the Pauluccis seek to draw from this testimony the conclusion that there was, in fact, no valid NFA letter in place within the meaning of the Settlement Agreement.

There are several obvious problems with the Pauluccis' approach. First, this October, 2001 testimony is not part of the record. Apparently, the Pauluccis believe that the losing litigant may, in the middle of an appeal, ask the appellate court for an opportunity to improve the factual record.[9] It is far too late for new evidence to be introduced in this case now. *See Altchiler v. State Dept. of Prof. Reg.*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983) (it is "fundamental" that an appellate court review the determination of the lower tribunal based on the record established in the lower tribunal). The Pauluccis had their unfettered and unopposed chance to create their record at the hearing on the motion to enforce the Settlement Agreement. They must live with that record. A petition for discretionary review in this Court is not the appropriate forum for injecting new evidence and arguments not presented below.

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8 This testimony was taken in the Pauluccis' new lawsuit alleging GPT's breach of the Settlement Agreement. See note 3, *supra*.

9 Actually, the Pauluccis go even one step further. They suggest that these new facts can be considered in a petition for discretionary review, the second level of appellate scrutiny.

Second, the argument that the June 3, 1997 NFA letter only covered a portion of the property was never raised or argued before the trial court or the Fifth District. The Pauluccis may not raise new issues in this Court not considered below. *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999); *Dober v. Worrell*, 401 So. 2d 1322, 1323-24 (Fla. 1981).

To be sure, Rule 1.540 permits litigants, under rare circumstances, to seek relief from a judgment based on newly discovered evidence. These requests are rarely granted, however, because the litigant must not only show that the evidence was newly discovered, but that the evidence could not have been discovered prior to the trial. *See Brown v. McMillian*, 737 So. 2d 570 (Fla. 1st DCA 1999). Here, the Pauluccis came to the February 9, 2000 hearing on the motion to enforce knowing that the critical issue was whether a valid NFA letter was in place and knowing that the trial judge had previously ruled that the June 3, 1997 NFA letter was never shown to be invalid. The Pauluccis could have presented whatever testimony they wished from members of the FDEP on the status of the NFA letter at the time of the hearing. Instead, the Pauluccis chose to rely on conclusory statements by their lawyer and their expert that "to their knowledge" no valid NFA letter was in place – testimony that never addressed the uncontradicted existence of the 1997 NFA letter.[10] Having missed their opportunity to create their record in the

10 As noted above, the Pauluccis never even revealed to the substitute judge the existence of the 1997 NFA letter, or the earlier ruling of the trial court of the validity of the 1997 NFA letter.

trial court, it is too late to ask this Court to rectify any alleged mistake long after the fact.

If the Pauluccis wish to file a Rule 1.540 motion for relief from judgment, they are free to do so.[11] But there is no basis to suggest that this Court's review (which is based on the existing record on appeal) can be based on new facts and arguments never raised below.

Finally, even if this Court were inclined to permit the Pauluccis to supplement the record with new facts, the Pauluccis' "new" evidence changes nothing. The Pauluccis' theory appears to be that the June 3, 1997 NFA letter could not satisfy GPT's obligation under the Settlement Agreement because, in the Pauluccis' view, the NFA letter was of limited scope. This argument fails first because it is inconsistent with the Settlement Agreement. The Settlement Agreement clearly contemplates that GPT could comply with its obligations merely by maintaining the existing June 3, 1997 NFA letter. According to Paragraph 5 of the Agreement, "Defendants shall at Defendants' sole cost and expense promptly initiate contact with the DEP concerning the Environmental Condition of the property *to maintain the NFA* or to obtain reissuance of the NFA . . ." (emphasis supplied). If the Pauluccis believed that there was new contamination that rendered the previous

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11 GPT does not mean to suggest that such a Rule 1.540 motion would be meritorious. The Pauluccis will be unable to demonstrate why this evidence could not have been discovered before the February 9, 2000 hearing.

NFA letter irrelevant, it should have asked the FDEP to rescind or withdraw the letter. Having failed to do so, it is too late to complain now.

Second, there is nothing in the NFA letter that suggests that it is in any way limited. The letter states unambiguously that as of June 3, 1997, "no further action is required *at the former Stromberg-Carlson Site*, 2380 West 25th Street, Sanford, Florida" (emphasis supplied). Indeed, the NFA letter was issued in response to a request to John White by the expert environmental consultant to "grant a No Further Action status *to the subject site*" and to "allow approval and closure of this case." Motion to Relinquish, Exhibit 3 to Exhibit A at pp. 4-5 (emphasis supplied). Thus, contrary to the Pauluccis' argument, there was, in fact, a NFA letter "on the property."

Put simply, Ms. Garfein's hearsay testimony is irrelevant.[12] Garfein's testimony and John White's memorandum prove nothing more than the unremarkable proposition that an NFA letter can be rescinded or withdrawn if new contamination is found on the property. What is important here is that, as Ms. Garfein concedes, the NFA letter was never rescinded or withdrawn. Garfein testimony at 23. The parties had a settlement agreement that measured GPT's

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12 Even if Ms. Garfein's testimony were relevant, it is obviously inadmissible hearsay. Ms. Garfein's testimony is an apparent attempt to interpret a memorandum written by another FDEP employee, John White. If Mr. White's interpretation of the NFA letter were at issue, it is Mr. White, not Ms. Garfein, who should testify concerning that interpretation. Ms. Garfein admits that she is not personally familiar with the clean-up of the site. Garfein Testimony at 21.

compliance by determining whether GPT had successfully maintained the June 3, 1997 NFA letter. The record contains FDEP testimony that this letter was valid until rescinded or withdrawn. *General Dynamics*, 797 So. 2d 22 n.6. Because there is no evidence that the NFA letter was ever rescinded or withdrawn, the Pauluccis have no right to the liquidated damages they seek. Once again, the Pauluccis' attempt to enforce a settlement agreement that they wish they had drafted instead of the terms of the Settlement Agreement actually negotiated between the parties.

The Fifth District's determination that the Pauluccis had not proven entitlement to enforcement of the liquidated damages provision of the Settlement Agreement was correct and should be affirmed.

V. THE FIFTH DISTRICT WAS CORRECT TO REVERSE THE AWARD OF ATTORNEYS' FEES AND COSTS TO THE PAULUCCIS .

The Fifth District's opinion reversing the award of attorneys' fees and costs to the Pauluccis should also be affirmed. First, as determined above, the Fifth District was correct in ruling that the Pauluccis had not proven any entitlement to liquidated damages, thus, the Pauluccis did not prevail. But even if this Court were to reverse, the Pauluccis still have no right to fees because fees may be awarded only in the event of a breach of the contract. As discussed above, the trial court had no jurisdiction to consider any action for breach of contract. It had power only to enforce the Settlement Agreement.

The Settlement Agreement itself permits attorneys fees only in the context of an action for breach. Paragraph 10 of the Settlement Agreement provides in pertinent part that "in any action for breach of this settlement agreement, the breaching party shall be liable for all damages, costs, and expenses as may be incurred, taxable or otherwise, including court costs and attorneys' fees (at trial and appeal)…" (R. 1182). The Pauluccis' attempt to enforce the Settlement Agreement cannot be interpreted as the prerequisite action for breach required by the Settlement Agreement – if it were, the trial court would have been without jurisdiction. Indeed, the trial court specifically ruled that it could not consider this proceeding an action for breach of the Settlement Agreement. The court instructed that any action for breach of the Settlement Agreement must instead be brought as a separate action. As a result, the court erred by awarding fees to the Pauluccis in this case.

Again, the plain language of the settlement agreement controls on this point. The settlement agreement provides for fees incurred only in an action for breach of the settlement agreement. The trial court expressly ruled that the Pauluccis could not bring a cause of action for breach in this proceeding. Thus, the trial court erred in awarding the Pauluccis their fees relating to their enforcement of the liquidated damages provision.

Had the Pauluccis wished to secure the right to recover fees for any enforcement effort, they could have easily done so while negotiating the terms of

the settlement agreement. In fact, prevailing party fee provisions often provide for the award of fees incurred in connection with a party's effort to enforce an agreement. The language included in the settlement agreement in this case, however, contains no such broad language. The plain language of the parties' settlement agreement is quite clear. The Pauluccis were entitled only to fees incurred in an action for breach. As the trial court made quite clear, this enforcement proceeding is not an action for breach, nor could it be without exceeding the court's subject matter jurisdiction.[13]

The Fifth District's reversal of the attorneys' fee award was correct and should be affirmed.

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13 The Pauluccis also raise an argument regarding the amount of the fee award. The Fifth District correctly recognized that the Pauluccis had no right to recover fees for their monitoring of GPT's compliance. While the Settlement Agreement permits the Pauluccis to monitor the clean-up efforts, the Settlement Agreement does not entitle the Pauluccis to any fees incurred in that monitoring (R. 1179-80). At most, the Pauluccis could recover for their minimal costs in connection with the very short February 9, 2001 evidentiary hearing below. 797 So. 2d at 22-23.

CONCLUSION

For all the foregoing reasons, this Court should dismiss the Petition for Discretionary Review as moot. If this Court is inclined to address the certified question, it should answer the question in the affirmative and affirm in accordance with the Fifth District's alternative holding. If this Court reaches the merits, the judgment of the Fifth District Court of Appeal should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished via U.S. Mail to: **David H. Simmons, Esquire** and **Dale T. Gobel, Esquire,** Drage, deBeaubien, Knight, Simmons, Mantzaris & Neal, 332 N. Magnolia Avenue, P.O. Box 87, Orlando, Florida 32802, on this ____ day of February, 2002.

_____
Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Respondents certifies that this Answer Brief is typed in 14 point (proportionately spaced) Times New Roman, in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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