IN THE SUPREME COURT OF THE STATE OF FLORIDA
SUPREME COURT CASE NO.: SC01-2346
JENO F. PAULUCCI and
LOIS PAULUCCI,
Petitioners,
vs.
GENERAL DYNAMICS CORPORATION,
STROMBERG-CARLSON CORPORATION,
SIEMENS COMMUNICATIONS, L.P.,
and SIEMENS COMMUNICATION SYSTEMS, INC.,
SIEMENS STROMBERG-CARLSON,
and GPT (USA), INC.
Respondents,

INTIAL BRIEF

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DALE T. GOBEL
FLORIDA BAR NO.: 980439
DANIEL J. O'MALLEY
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STATEMENT OF FACTS AND OF THE CASE

In 1990, Petitioners, Jeno F. Paulucci and Lois Mae Paulucci (hereinafter collectively referred to as "the Pauluccis"), discovered that the warehouse property that they owned at 2380 West 25th Street, Sanford, Florida ("the Property"), had been contaminated by the prior tenants on the Property – the Respondents in the appeal (hereinafter referred to as "Defendants"). Over the course of five years, the Pauluccis negotiated with the Defendants for the cleanup of the Property. When the negotiations were fruitless, the Pauluccis filed suit in 1996.

On November 19, 1996, the Pauluccis filed an Amended Complaint in the Circuit Court for the Eighteenth Judicial Circuit, in and for Seminole County, Florida, against the Defendants. (R. 150-205)

[1]. The Pauluccis filed the action seeking damages for Defendants' willful and intentional contamination of the Pauluccis' property, which occurred while the Defendants were leasing that property from the Pauluccis.

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[1] The Pauluccis will make all cites to the following records as follows: (1) trial court record sent on June 8, 2000, to the Fifth District Court of Appeal and certified by the Fifth DCA to have been transmitted to this Court, "(R.);" (2) supplemental trial court record sent on September 28, 2000, to the Fifth District Court of Appeal and certified by the Fifth DCA to have been transmitted to this Court, "(Supp. R.);" and record sent from the Fifth DCA to this Court in December 2001, "(S.Ct. R.).

In 1997, after diligent effort and huge expense to clean up the Property, the Pauluccis applied for and obtained a "No Further Action" ("NFA") letter from the Florida Department of Environmental Protection. ("FDEP").

[2] This NFA letter, as more fully explained *infra*, applied only to one specific area of the Property that had been tested. Specifically, the letter only applied to the area outside the warehouse near certain spray paint booth vent exhausts. The letter did not apply to the rest of the Property, nor to any further contamination found on the Property.

In January of 1998, the Pauluccis and Defendants entered into a partial settlement agreement wherein Defendants admitted that they had caused the pollution to the Property, the amount of damages was capped, and Defendants and agreed to pay some of the damages incurred by the Pauluccis. Before trial, in May 1998, however, the Pauluccis learned that the Property was contaminated in other areas and thus was even more contaminated as a result of Defendants' actions. (R. 1475).

On July 24, 1998, with the recently found contamination in

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[2] Generally, an NFA letter is a statement from the FDEP that based upon the information available at that time, and for a certain area, the owner of the premises will not be required by FDEP to undertake further clean-up activities on the property.

mind, the Pauluccis and Defendants entered an Amended Settlement Agreement in this matter. (R. 1475). On July 29, 1998, the trial court entered a final judgment relating to the Amended Settlement Agreement. (R. 1170-72). The final judgment incorporated the Amended Settlement Agreement by reference and specifically retained jurisdiction for the trial court to enforce that agreement. (R. 1170-72). The Amended Settlement Agreement, by its own terms, called for the trial court to retain such jurisdiction, as follows:

> . . .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) and the Court shall retain jurisdiction for the purpose of enforcing this Settlement Agreement.

(R. 1547).

The Amended Settlement Agreement additionally required, among other things, that the Defendants ensure that a valid NFA letter be in place <u>on the subject Property</u> within fifteen (15) months of July 24, 1998. In particular, Paragraph 5 states:

> 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 [(No Further Action Letter)] 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 <u>with regard to the property in question</u>, 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. The parties recognize that the current space and term rented is $4.50 per square foot, and the value may be increased or decreased in accordance with the CPI for similar rental facilities. (emphasis added.)

(R. 1545).

Additionally, Paragraph 6 specifically defines "Environmental Condition." It states:

> For purposes of this Settlement Agreement, the term "Environmental Condition" shall mean any environmental pollution or contamination described in the Hartman Associates, Inc., reports of November 1992, December 1995, and May/June of 1998, any additional investigations conducted by Defendants and/or requested by any governmental agencies on the property up to the obtaining of the NFA letter.
>
> (R. 1545)(emphasis added).

Accordingly, under Paragraphs 5 and 6, Defendants were obligated to promptly contact the Florida Department of Environmental Protection ("FDEP") regarding the contamination, obtain a valid NFA letter on the entire Property (including the warehouse contamination and other other contamination detailed in the stated reports under Paragraph 6), and clean up the Property as required by the FDEP. If no valid NFA letter was in place by October 24, 1999, Defendants were specifically obligated under Paragraph 5 to begin paying the Pauluccis for the rental value of the Property. As such, the whole purpose of having Defendants contact the FDEP to begin clean-up was so that a valid NFA letter could ultimately be issued on the Property.

Additionally, Paragraph 4 of the Amended Settlement Agreement provides that the Pauluccis were entitled to participate in and be advised regarding any efforts that the Defendants take in connection with the clean up of the Property. (R. 1476). Specifically, Paragraph 4 states:

> **Plaintiffs shall have the absolute and unfettered right to have representatives attend, monitor, and be kept advised of all of Defendants' environmental clean up and remediation activities, including but not limited to attendance at all meetings with governmental entities.** Plaintiffs **may participate** (including accurately and fully responding to any requests), and in all events shall fully cooperate with Defendants as they work with any governmental agency, media representative, or any other person or entity, directly or indirectly, regarding past or future site investigations, selection, implementation or completion of any and all investigations, remedial actions on the property that may be conducted by the Defendants. Defendants agree they will act reasonably, in good faith and with due diligence in any investigation, selection, implementation or completion of any and all investigations, removal actions or remedial actions concerning the property.

(R. 1544-45)(emphasis added).

Accordingly, the Pauluccis had the unfettered right to participate in the cleaning up of the Property. Any actions by Defendants regarding the clean up without the full knowledge of and participation from the Pauluccis would violate the Amended Settlement Agreement.

Defendants, from the outset, failed to comply with Paragraphs 4 and 5 of the Amended Settlement Agreement.

Defendants' initial failure led to continued violations that the Pauluccis necessarily, through much effort and expense, have tried to prevent. Defendants' violations have further led to the Property remaining contaminated even today. As such, there is no valid NFA letter being on the Property.

From the very beginning, Defendants, in contravention of Paragraph 5, failed to promptly contact the FDEP. (R. 208). The Pauluccis, therefore, had no choice but to file a Motion for Default on September 14, 1998, in order to enforce their rights under the Amended Settlement Agreement. (R. 1173-1175).

On November 19, 1998, the trial court held a hearing on the Pauluccis' Motion for Default. There were two issues raised by the Pauluccis' Motion for Default. The first issue was whether Defendants had violated the Amended Settlement Agreement by failing to "promptly" contact the FDEP concerning the contamination on the Property. (R. 1173-75). The second issue was the amount of the damages to which the Pauluccis were entitled based upon Defendants' failure to promptly contact the FDEP. (R. 1173-75).

The first of those issues was, in fact, the only issue addressed by the trial court under the Motion for Default in the November 19, 1998, hearing. In connection with that issue, counsel for Defendants admitted that Defendants had failed to contact the FDEP as of November 19, 1998. Defendants' counsel admitted (nearly four (4)

months after the date of the Amended Settlement Agreement that required them to contact the FDEP "promptly") that Defendants had yet to contact the FDEP.

After the November 19, 1998, Motion for Default hearing, the trial court issued a ruling in an Order dated December 15, 1998. The trial court ruled that Defendants had materially breached the terms of the Amended Settlement Agreement by failing to promptly contact the FDEP. (R. 1220).

On January 11, 1999, the trial court heard the Pauluccis' Motion to Set Hearing on Damages and/or for Clarification, which related to the Motion for Default and the December 15, 1998, Order. After hearing argument and thoroughly considering the matter, the trial court ruled in its January 11, 1999, Order that Defendants' failure to promptly contact the FDEP was a "material breach" of the Amended Settlement Agreement. (R. 1224). In the January 11, 1999, Order, the trial court also required that the Defendants notify the FDEP of the existing contamination on the Property within twenty-one (21) days. (R. 1224).

The Pauluccis later learned that, despite the Pauluccis' clear right to participate in the clean-up process and in any contact with the FDEP pursuant to Paragraph 4 of the Amended Settlement Agreement, Defendants secretly and improperly contacted the FDEP. Specifically, Defendants contacted the FDEP

through their expert, Nick Albergo ("Albergo"), by letters dated October 13, 1998, and November 13, 1998. (R. 1486-1506). Albergo forwarded those letters to the FDEP without the knowledge of or input from the Pauluccis. (R. 1477).

The dates of the Albergo letters to the FDEP directly contradict the representations made by Defendants' counsel during the November 19, 1998, hearing on the Pauluccis' Motion for Default. Specifically Defendants' counsel plainly admitted that Defendants had not contacted the FDEP. Such statement is plainly contrary to the fact that Defendants had, as of November 13, 1998, sent at least two letters to the FDEP.

Albergo, in his ex parte correspondence, admitted to the FDEP that violations of drinking water standards still existed on the Property. (R. 1496). He went on, however, to try and convince the FDEP that, despite the fact that the Property remained polluted, Defendants should not have to clean it up. He did so by specifically suggesting that the Property was a candidate for "natural attenuation." (R. 1496-1502). Natural attenuation is the process of letting the pollution dissipate by itself over a period of time. Albergo, in his ex parte attempt to persuade the FDEP to accept "natural attenuation," argued that nothing further had to be done to clean up the Property. (R. 1496-1502).

Albergo made these statements to the FDEP ex parte, despite

the fact that Paragraph 4 of the Amended Settlement Agreement requires the Pauluccis to be fully apprised of the clean up process. (R. 1544-45). Nowhere does Paragraph 4 or 5 of the Agreement permit Defendant to initiate ex parte contacts with the FDEP to convince that agency that Defendants should be permitted to simply sit on their hands and do nothing about the contamination on the Property.

Based upon Defendants' willful and repeated violations of the Amended Settlement Agreement, on March 19, 1999, the Pauluccis filed their Supplemental Motion for Default and Damages. (R. 1226-63). In that Motion, the Pauluccis alleged counts for post-settlement violations of the Amended Settlement Agreement, i.e., Breach of Settlement Agreement (Count I) and Violation of Chapter 376, Florida Statutes (Count II). The Pauluccis sought damages for Defendants' failure to promptly contact the FDEP, Defendants' unauthorized ex parte contact with the FDEP, and Defendants' failure to clean up the Property. (R. 1226-63). The Pauluccis also requested a jury trial in that Motion. (R. 1232).

On or about August 30, 1999, Defendants filed their Motion to Strike the Pauluccis' Count II and Jury Trial Demand in Plaintiffs' Supplemental Motion for Default and Damages, Plaintiffs' Notices for Jury Trial, and Plaintiffs' Notice of Hearing Concerning Punitive Damages, and Motion to Strike Matter

from Jury Trial Docket. (R. 1295-1373). The trial court heard that Motion and on November 4, 1999, issued its Order on Defendants' Motions to Strike Count II and Jury Trial Demand in Plaintiffs' Supplemental Damages, Plaintiffs' Notice for Jury Trial and Motion to Strike Matter from Jury Trial Docket. (R. 1457-62).

In its November 4, 1999, Order, the trial court made the distinction that damages provided for in the Amended Settlement Agreement could be obtained in this action, while damages not specifically described in the agreement must be pursued in a new action. In particular, the trial court found that the "... parties specified the calculation of damages should the Defendants fail to timely satisfy their obligations under the Settlement Agreement." (R. 1460). The trial court also ruled that "(s)hould Plaintiffs desire damages other than those provided for in the Settlement Agreement that, too, must be brought in a separate action." (R. 1461). The trial court struck Count II (damages for violations of Chapter 376) and struck the Pauluccis' Demand for Jury Trial.

The trial court, however, specifically permitted Count I, the Pauluccis' action for damages for breach of the Agreement to proceed in this action. The court ruled that ". . .Plaintiffs may bring a motion to enforce the Settlement Agreement now that the time period provided for Defendants to obtain an NFA letter

has expired." (R. 1461). As such, the Pauluccis' claim for enforcement of the Amended Settlement Agreement in this action survived the November 4 Order, and the trial court continued its jurisdiction over that claim in this action. (R. 1457-62)

In accordance with the trial court's November 4, 1999, Order, the Pauluccis, on February 4, 2000, filed their Motion to Enforce Settlement Agreement Dated July 24, 1998. (R. 1507-10). In that Motion, the Pauluccis sought enforcement of Defendants' obligations under Paragraph 5 of the Amended Settlement Agreement. (R. 1507-10). Paragraph 5 plainly required Defendants to begin paying rent as of October 24, 1999, if there was not a valid NFA letter on the Property. (R. 1545).

The Pauluccis set the hearing on their Motion to Enforce Settlement Agreement for February 9, 2000. The Pauluccis' counsel properly coordinated the time of such hearing with Defendants' counsel's office.[3] (Supp. R. 57). Defendants' counsel did not attend the February 9, 2000, hearing, apparently because Defendants had no valid defense to the payment of rent.

At the February 9, 2000, hearing, the Pauluccis presented uncontroverted evidence that Defendants were in violation of

[3] Counsel for Defendants have apologized to the Court for not attending the hearing before the trial court. At Oral Argument before the 5th DCA, Defendants abandoned any claim that relates to scheduling of the hearing.

the Amended Settlement Agreement. Larry Nelson, a representative of the Pauluccis, who participated in the negotiations regarding the Amended Settlement Agreement, testified regarding Defendants' lack of compliance with such agreement.

Mr. Nelson first testified about Defendants' obligations to clean up the Property. Specifically, Mr. Nelson testified that under Paragraph 5 of the Amended Settlement Agreement Defendants were obligated to clean up the Property by October 24, 1999. (Supp. R. 60-61). Mr. Nelson specifically testified that it was his understanding that there was no valid NFA letter on the Property as of October 24, 1999, because the Property had yet to be cleaned up. (Supp. R. 62). Mr. Nelson also testified that he understood there to remain exceedances of the Maximum Contamination Levels ("MCL's") on the Property. (Supp. R. 62). He additionally testified that, as a representative of the Pauluccis, he considered Defendants to be in default under the Amended Settlement Agreement. (Supp. R. 62). Finally, Mr. Nelson testified that, given the facts that the Property had not been cleaned up and that no valid NFA letter existed on the Property, Paragraph 5 of the Amended Settlement Agreement dictated that Defendants owed the Pauluccis $96,731.96, in past due rent through February 2000. (Supp. R. 62-63).

Mr. Nelson further testified as to the Pauluccis' entitlement to attorneys' fees arising out of Defendants' default. Mr. Nelson testified that the Pauluccis had incurred attorneys' fees in enforcing the Amended Settlement Agreement. (Supp. R. 64). He also testified that Paragraph 10 of the Amended Settlement Agreement permits the Pauluccis to recover attorneys' fees in the event of Defendants' failure to comply with the agreement. (Supp. R. 64). Paragraph 10 of the Amended Settlement Agreement states 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) and the Court shall retain jurisdiction for the purpose of enforcing this Settlement Agreement. (R. 1546).

At the February 9, 2000, hearing, James Golden, a hydrogeologist and professional geologist, also testified as an expert witness regarding there being no valid NFA letter on the Property. Mr. Golden testified that he has monitored the clean up of the Property. (Supp. R. 66). He testified that after the Amended Settlement Agreement was entered on July 24, 1998, there were exceedances of the MCL's over what is permitted under Florida law. (Supp. R. 67). Mr. Golden further testified that, to his knowledge, there was not a valid NFA letter on the Property. (Supp. R. 67.) Defendants, as stated, failed to appear at the February 9,

2000, hearing. As such, they wholly failed to rebut any of the evidence offered by the Pauluccis or preserve any objections to that testimony.

After the February 9 hearing, Senior Judge Hall ruled that Defendants were in "material default" under the Amended Settlement Agreement. (R. 1512). Senior Judge Hall also awarded the Pauluccis the sum of $96,731.96, plus prejudgment interest. (R. 1512). He further ordered Defendants to pay the monthly sum of $21,371.34 (to be adjusted with the Consumer Price Index) until a valid NFA letter is obtained. Finally, Senior Judge Hall found that, due to Defendants' material breach and default, the Pauluccis were entitled, in accordance with Paragraph 10 of the Amended Settlement Agreement, to attorneys' fees and costs. (R. 1512).

On April 7, 2000, the trial court conducted a hearing on the Pauluccis' Motion to Tax Attorneys' Fees and Costs, relating to the fees awardable arising out of the **December 15, 1998, January 11, 1999, and February 9, 2000, Orders**. (Supp. R. 201). At the April 7 hearing, William Osborne testified as an expert on the amount of fees that the Pauluccis expended in order to compel Defendants to comply with the Amended Settlement Agreement. (Supp. R. 212). Mr. Osborne specifically testified as to the attorneys' fees incurred by the Pauluccis relating to Defendants' defaults under the

December 15, 1998, January 11, 1999, and February 9, 2000, orders. Mr. Osborne is Board Certified by the Florida Bar in civil trial litigation and business litigation. (Supp. R. 212-13).

Mr. Osborne testified about Defendants' violations of the Amended Settlement Agreement. He testified that Defendants had violated the agreement in the following three respects: (1) Defendants failed to promptly contact the FDEP (Supp. R. 218); (2) Defendants improperly contacted the FDEP without the knowledge of or input from the Pauluccis (Supp. R. 218); and (3) Defendants failed to pay rent when no valid NFA letter existed on the Property (Supp. R. 220).

With respect to the first area of breach, Mr. Osborne testified as follows:

1)Defendants' first duty was to promptly contact the FDEP to begin the clean up process because the Amended Settlement Agreement required that the Property be cleaned up within fifteen (15) months (Supp. R. 218);

2)Defendants did not promptly contact the FDEP (Supp. R. 218); and

3)The Pauluccis were compelled to move for a default of Defendants' obligations under the agreement because of the Defendants' failure to promptly contact the FDEP (Supp. R. 218).

With respect to the second area of violation of the Amended Settlement Agreement, Mr. Osborne testified as to the following facts:

1)Defendants violated the Amended Settlement Agreement by secretly communicating with the FDEP without the knowledge of the Pauluccis (Supp. R. 218);

2)The Defendants secretly communicated with the FDEP by sending letters to the FDEP without sending copies to the Pauluccis (Supp. R. 218-19); and

3)Defendants' letters were attempts to influence the FDEP to rule that the Property was a candidate for natural attenuation, so that Defendants would basically do nothing more to clean up the Property (Supp. R. 219);

Mr. Osborne testified regarding the extensive efforts exerted by the Pauluccis' attorneys to try to remedy those first two areas of violation by Defendants. In particular, he testified as to the following facts:

1)The Pauluccis had to engage in exhaustive measures to monitor the clean up of the Property due to Defendants' obstructive behavior (Supp. R. 219);

2)Defendants' obstructive behavior is evidenced by the fact Plaintiffs were obligated to go through the exercise of bringing the Defendants' actions before the lower court so as to compel Defendants' cooperation under the Amended Settlement Agreement (Supp. R. 219);

3)Defendants' failure to promptly contact the FDEP and their engaging in ex parte communications with the FDEP compelled the Pauluccis to seek court intervention that would not have otherwise been necessary. (Supp. R. 219); and

4)Court intervention was accordingly necessary because of Defendants' actions (Supp. R. 219).

As such, all of the fees and costs requested by the Pauluccis were a direct result of Defendants' breaches of the Amended Settlement Agreement (that had been found to exist by the trial court).

Mr. Osborne also testified about Defendants' third violation of the Amended Settlement Agreement. He testified that, since no valid NFA letter was in place as of October 24, 1999, Defendants were obligated to pay the Pauluccis the rental value of the Property, which Defendants failed to do. (Supp. R. 220).

Mr. Osborne thereafter testified as to the reasonableness of the time spent and the rates for the Pauluccis' attorneys for their efforts in attempting to bring Defendants in compliance with the Amended Settlement Agreement. Mr. Osborne testified as follows:

1)The hours expended by David Simmons, given his legal experience, at $295 per hour were reasonable. (Supp. R. 221).

2)The hours expended by Dale Gobel, given his experience, at $200 per hour, were reasonable. (Supp. R. 221).

3)The hours expended Daniel O'Malley, given his legal experience, at $175 per hour were reasonable. (Supp. R. 221-22).

Mr. Osborne detailed the factors that he considered in determining the reasonableness of attorneys' fees.

Specifically, he testified as follows:

1)The Pauluccis' attorneys mitigated their risk of nonpayment in this matter, by agreeing to a guaranteed fee (Supp. R. 274);

2)The present action has been attorney and expert time-intensive (Supp. R. 275);

3)This action has involved "massive amounts of time" to deal

with complex issues (Supp. R. 275);

4)The amount of time spent by the Pauluccis' attorneys (Supp. R. 275);

5)The amount of time that this action took the Pauluccis' attorneys away from other matters (Supp. R. 275);

6)The results obtained (Supp. R. 275);

7)The reasonable hourly rate for the Pauluccis' attorneys (Supp. R. 275); and

8)The type of fee arrangement (R. 275).

Mr. Osborne testified regarding the total amount of attorneys' fees that were due to the Pauluccis' attorneys. He stated as follows:

1)Using normal hourly rates, the Pauluccis' attorneys would be due $123,630.50 (Supp. R. 225);

2)Applying the multiplier, given its reduction for the modified contingency agreement, $192,456.16 would be a reasonable attorneys' fee in this matter (Supp. R. 225).[4]

Mr. Osborne additionally testified about the reasonableness of the Pauluccis' employment of experts to monitor the clean up process. Specifically, he testified as follows:

1)It was necessary for the Pauluccis to hire James Golden and his firm, Hartman and Associates in response to Defendants' actions (Supp. R. 226); and

2)The Pauluccis' need to hire the experts to monitor the clean-up of the Property was directly related to Defendants' various defaults under the Amended Settlement Agreement (Supp.

[4] The Pauluccis do not, by this appeal, seek a reversal of the Fifth DCA's ruling regarding the Pauluccis' entitlement to a contingency multiplier.

R. 226).

At the April 7, 2000, hearing on the Pauluccis' Motion to Tax Attorneys' Fees and Costs, Bruce LaFrenz, a senior geologist for Environmental Sciences and Technologies, and a professional geologist, testified that all of the fees incurred by Hartman and Associates in connection with the clean up of the Property were reasonable. Defendants failed to present any witnesses or other evidence, whatsoever, to rebut the testimony of Mr. LaFrenz or Mr. Osborne.

After the April 7, 2000, hearing, the trial court issued its Order on Plaintiffs' Motion to Tax Attorneys' Fees and Costs. The trial court ruled in pertinent part as follows:

(1)The 599.5 hours of time expended by the Pauluccis' attorneys was reasonable (R. 1620);

(2)$ 295 per hour was reasonable for David Simmons, $ 200 per hour was reasonable for Dale Gobel, and $ 175 per hour was reasonable for Daniel O'Malley (R. 1620-21);

(3)The reasonable amount of attorneys fees, based upon the hours expended, i.e., the "lodestar" figure, equals $ 123,630.50 (R. 1621);

On May 31, 2000, the trial court heard Defendants' Amended Motion for Protective Order and Costs, Amended Motion to Strike, and for Relief from Order. Defendants, by that motion, basically asked the trial court to overturn the February 9, 2000, Order. During the May 31, 2000, hearing, the trial court engaged in the following exchange with

Defendants' counsel:

THE COURT: Well, it seems to me like since I've been assigned to this case I made a determination that the situation on that property was –it was still polluted, right? It still is today.

MR. BECKHAM: There is still action being—remedial action being taken.

THE COURT: How do you get by hiding behind an NFA letter? Everybody in this room knows the property is polluted.

. . . .

THE COURT: How can you claim that this is a valid no further action letter when everybody here knows that this property is polluted? How can it be valid?

MR. BECKHAM: If it is a matter of stated record and has not been invalidated, Your Honor, it's our contention that it's valid. . . .

(Supp. R. 400-401).

The trial court then denied Defendants' Motion. (Supp. R. 401).

Defendants appealed both the trial court's February 9, 2000, Order and its April 24, 2000, Order, to the Fifth District Court of Appeal ("Fifth DCA"). On August 10, 2001, after briefing and oral argument, the Fifth DCA entered its Opinion in this matter.

In the Fifth DCA's Opinion, the Court ruled that the trial court did not have jurisdiction to enforce the Amended Settlement Agreement (and order Defendants to make rental payments) because the parties had not requested such relief in their pleadings. (S.Ct. R. 60-68)

[5]. The Fifth DCA, in spite of having so ruled, certified the following question (based on both direct conflict and great public importance) to this Court:

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?

(S.Ct. R. 60-68).

Although it ruled that the trial court had no jurisdiction to enter its Orders, the Fifth DCA went on to make two additional rulings. First, the Fifth DCA found that the Pauluccis did not present sufficient evidence that a valid NFA letter did not exist. The Court stated that only the FDEP's opinion regarding whether a valid NFA letter existed on the Property was permissible evidence. (S.Ct. R. 60-68) Second, the Fifth DCA ruled that the trial court's award of attorneys' fees and costs was not reasonable and that the Pauluccis were not entitled to a multiplier. With respect to the attorneys' fees, the Fifth DCA stated that the awarded fees were unreasonable because ". . .(m)any of the hours considered and all of the costs involved related to the Pauluccis' monitoring of GDC's clean up efforts." (S.Ct. R. 60-68).

On August 27, 2001, the Pauluccis filed their Motion for

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[5] According to the Record on Appeal in this matter, the Fifth DCA's Opinion goes from pgs. 60-68, a range of nine pages. The Opinion, however, is only eight pages. The Pauluccis will accordingly cite to it as "S.Ct. R. 60-68."

Rehearing and Rehearing *En Banc* of the Fifth DCA's Opinion. On September 28, 2001, the Fifth DCA entered an Order denying that Motion.

Petitioners have now obtained the FDEP file and the sworn testimony of the FDEP that no valid NFA letter exists on the Property.

[6] The FDEP, through its Central Florida District Director, Vivian Garfein, specifically explained an October 9, 2001, explanatory Interoffice Memorandum from John White, the Environmental Specialist at FDEP, describing the June 3, 1997, NFA letter. She, on behalf of the FDEP, testified that the June 3, 1997, NFA letter applied only to two specific monitoring wells on the site, and that upon discovery of further contamination on the property, no valid "No Further Action" letter existed on the entire property. In particular, Ms. Garfein testified as follows:

> Q: So did the June 13 (sic), 1997 letter only apply to the area of the property impacted by the spray paint booth vents?
>
> A: According to John's letter - - I believe that's what he is saying the memorandum of explanation, Exhibit 2.
>
> . . . .
>
> Q: . . . . So Ms. Garfein, what specifically did the June 13 (sic), 1997 letter apply to, with respect to what area of the property?

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[6] Plaintiffs are separately filing a Motion to Relinquish Jurisdiction to the Trial Court, Motion for Leave to Supplement the Appellate Record, and/or Request for Judicial Notice. In that Motion, Plaintiffs request, among other things, that this Court take judicial notice of the deposition transcript and testimony of Ms. Garfein and the October 9, 2001, Interoffice Memorandum from John White, the FDEP employee who has administered this matter.

A: In my discussions with John White [a DEP employee who was directly involved in the ongoing cleanup of the property], he explained to me that this letter referred only to those wells in that area as he has explained them in Exhibit 2.

Q: Okay. So then if there was additional contamination that was found on the property at 2380 West 25th Street in Sanford, Florida, that would have to be addressed separately?

A: That's my understanding, yes.

. . . .

Q: If there was additional contamination that was found on the property at 2380 West 25th Street in Sanford, Florida, after June 13(sic), 1997, would the June 13(sic), 1997 letter apply to that contamination?

A: No.

. . . .

Q: So would there be a valid no further action in place with regard to the entirety of the property in question?

A: Again, not according to Exhibits 1 and 2. They are limited to a certain area of the property.

Q: Is it the Department of Environmental Protection's policy to issue a no further action letter when there are known exceedences of the maximum contamination levels found on the property?

A: No. The Department would not and should not issue a no further action letter if there are exceedences on a – on a property. If I can elaborate, you may not like this but this initial letter should have been more specific. It should have been specific as to the wells for which it was being written. And we'll be more careful about that in the future.

. . . .

Q: So it [the June 3, 1997, NFA letter] didn't apply to any other further contamination that was found on the property?

A: Correct.

. . . .

Q: With respect to the additional contamination that was found on the property, it would simply be incorrect to state that the June 3, 1997 letter from John White that's been marked as Plaintiffs' Exhibit 1 would apply to that additional contamination?

A: That's correct.

Ms. Garfein explained that, based upon FDEP records, even as of October 10, 2001, there was still not a valid no further action letter in place with respect to the entire property:

Q: So with respect to the items that are detailed in the . . . October 10, 2001 memorandum, . . . was there a valid no further action letter in place with regard to those wells?

A: No, there was not.

This testimony confirms the uncontradicted evidence that was presented to the trial court that there was no valid NFA letter on the entire property as of October 24, 1999. Further, Ms. Garfein has confirmed that even as of November 21, 2001, there is no valid NFA letter on the property. As such, after all of the Pauluccis' extraordinary efforts and expenses incurred to ensure that Defendants' complied with the Amended Settlement Agreement, Defendants still have not complied with the Agreement.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's ("Fifth DCA") Opinion

dated August 10, 2001, is entirely in error. First, the certified question should be answered in the positive because a trial court inherently retains jurisdiction to enforce any settlement agreements that it approves. The authority relied upon by the Fifth DCA in ruling that the trial court was without jurisdiction should be rejected as inimical to both judicial efficiency and good judicial sense; i.e., the Fifth DCA's approach requires the filing of a brand new lawsuit simply to enforce a settlement agreement.

The Fifth DCA, without authority, made additional rulings. Those rulings are merely dicta, without force and effect.

Even if the Fifth DCA had authority to make additional rulings, this Court may address and reverse those rulings. The Pauluccis respectfully submit that this Court should do so.

First, the Fifth DCA erred by finding that the Pauluccis did not present sufficient evidence to the trial court to support the ruling that the NFA letter was invalid. The Court ruled that only the FDEP could determine the validity of the NFA letter.

The Pauluccis presented uncontroverted evidence to the trial court from their representative and their expert witness that the NFA letter was invalid as to the subject contamination on the Property. Defendants failed to appear at the hearing on the validity of the NFA letter and accordingly presented no contrary

evidence. The FDEP has plainly confirmed the sufficiency and accuracy of the Pauluccis' evidence by declaring the invalidity of the NFA letter as to the subject contamination.

Florida law specifically required the Fifth DCA to accept the uncontroverted evidence regarding the validity of the NFA letter. The Fifth DCA's failure to do so and its re-weighing of the evidence were contrary to the law of Florida.

The Amended Settlement Agreement does not delegate the responsibility for determining the validity of the NFA letter to the FDEP. By incorrectly interpreting the agreement in that way and ruling that only the FDEP could determine the validity of the NFA letter, the Fifth DCA incorrectly delegated its judicial power to rule on the validity of the letter.

The Fifth DCA additionally erred by ruling that the attorneys' fees and costs awarded by the trial court were unreasonable. All of the fees and costs were awardable under the Amended Settlement Agreement because they were related to the Pauluccis' efforts to continually deal with Defendants' violations of the Amended Settlement Agreement that were specifically found by the trial court in orders dated December 15, 1998, January 11, 1999, and February 9, 2000.

ARGUMENT

I. THE TRIAL COURT HAD JURISDICTION TO ENTER ITS FEBRUARY 9, 2000, ORDER AND ITS APRIL 24, 2000, ORDER, BECAUSE JURISDICTION INHERENTLY REMAINS IN A TRIAL COURT TO

ENTER ORDERS TO ENFORCE ITS JUDGMENTS. THE FIFTH DCA'S OPINION SHOULD BE REVERSED, AND THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE POSITIVE.

In reversing the trial court, the Fifth DCA certified the following question to this Court:

> 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?
>
> (S.Ct. R. 60-68).

As stated, the Fifth DCA certified the question based both upon great public importance and direct conflict.

With respect to the direct conflict, the Fifth DCA stated that there was a conflict on the certified issue between the case of Wallace v. Townsell, 471 So.2d 662 (Fla. 5th DCA 1985), and Buckley Towers Condominium v. Buchwald, 321 So.2d 628 (Fla. 3d DCA 1975). The Fifth DCA, apparently believing Wallace is in error

[7], still felt compelled to follow Wallace.

The Wallace case was wrongly decided, is contrary to sound judicial sense, and is inimical to judicial efficiency. This Petition requests that this Court enter an Order that both rejects the reasoning and holding of Wallace and provides a uniform law regarding the jurisdiction of trial courts to enforce settlement agreements reached in litigation.

In Wallace, a grantor filed an action to cancel a deed. The grantee in Wallace claimed that she had made improvements to the subject land. The trial court then cancelled the subject deed and ruled that the grantee was entitled to the value of her improvements, while deferring the determination of that value. Id., at 663.

The parties in Wallace subsequently entered a settlement agreement regarding the remaining issues in the matter. The trial court then entered judgment "in accordance with the

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[7] The Fifth DCA apparently realized that Wallace is an incorrect statement of the law. In particular, in reversing the trial court, the Fifth DCA initially questioned whether the trial court did indeed have jurisdiction by asking the following question: "Can it not be said that the settlement agreement approved by the court and adopted as part of the final judgment together with the agreement of the parties that the court can enforce the agreement, in effect, "amended" the initial pleadings and waived any claim for a jury trial?" The Fifth DCA then specifically stated that it was reversing the trial court "(b)ecause we feel bound by ***Wallace***." It then certified the subject question to this Court, giving this Court the opportunity to overrule Wallace in favor of Buckley Towers Condominium v. Buchwald, 321 So.2d 628 (Fla. 3d DCA 1975).

settlement agreement and ordered the parties to abide by its terms and conditions." Id., at 664. The trial court subsequently entered orders that ordered compliance with the settlement agreement and ordered the grantee to show cause as to why she should not be held in contempt for failure to comply with the settlement agreement. Id., at 664.

Based upon the novel notion that a circuit court's jurisdiction is somehow perpetually in a case defined by the pleadings, the Fifth DCA ruled that a trial court has no jurisdiction to order parties to comply with their settlement agreement unless the settlement agreement falls within the ambit of the Plaintiff's complaint. Id., at 665. The Court stated that:

> (w)hile the circuit court also has subject matter jurisdiction to adjudicated damages for breach of contract, **such subject matter jurisdiction to enforce the settlement agreement was not properly invoked in the pleadings in this case** . . . Id., at 665 (emphasis added).

Simply stated, the Fifth DCA has ruled that, unless the parties to an action specifically request specific performance of their settlement agreement in their pleadings, the trial court cannot enforce their settlement agreement.

Buckley Towers stands in stark contrast to Wallace. In Buckley Towers, unit owners of Buckley Towers Condominium became dissatisfied with the management contract within the declaration of condominium and sued the condominium's developer to cancel

the contract. Id., at 628. The parties thereafter entered a settlement agreement regarding that claim and had it approved by the trial court. Id., at 628.

The developer subsequently filed a motion to compel enforcement of the settlement agreement. The court then entered an order requiring the parties to comply with the settlement agreement. Id., at 629. In rendering its opinion, the Third DCA stated that even when there is no express reservation of power to enforce, jurisdiction **inherently** remains in a trial court to enforce its own judgments. Id., at 629.

The analysis in Buckley Towers is eminently reasonable and has been followed by other courts in Florida.

[8] Wallace, however, is inimical to the broad jurisdiction held by circuit courts and equally inimical to judicial efficiency.

First, according to the Supreme Court of Florida, Florida circuit courts have broad jurisdiction and

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[8] Numerous other Florida cases have also specifically permitted trial courts to enforce settlement agreements without reference to the pleadings. *See*, State Dept. of Health and Rehabilitative Services v. Schreiber, 561 So.2d 1236 (Fla. 4th DCA 1990)(courts have jurisdiction to enforce court-approved settlements of litigation); Sun Microsystems of California, Inc. v. Engineering and Mfg. Systems, C.A., 682 So.2d 219 (Fla. 3d DCA 1996)(trial court has inherent authority and jurisdiction to enforce court-approved settlement agreements); Treasure Coast, Inc. v. Ludlum Const. Co., Inc., 760 So.2d 232 (Fla. 4th DCA 2000)(settlements are highly favored and will be enforced when possible); MCR Funding v. CMG Funding Corp., 771 So.2d 32 (Fla. 4th DCA 2000)(if litigants present settlement to a judge, who in then incorporates it or relies on the agreement, the litigants may subsequently file a motion seeking enforcement of the agreement).

powers. Specifically, Florida courts:

> . . .are superior courts of general jurisdiction, subject to the appellate and supervisory powers vested in the Supreme Court by the Constitution, and as a general rule it might be said that nothing is outside the jurisdiction of a superior court of general jurisdiction except that which is clearly vested in other courts or tribunals, or is clearly outside of and beyond the jurisdiction vested in such circuit courts by the Constitution and the statutes enacted pursuant thereto. . .
>
> State ex rel. B.F. Goodrich Co. v. Trammell, 192 So. 175 (Fla. 1939).

As such, according to this Court, nothing relating to the present case was outside of the jurisdiction of the circuit court. This certainly includes enforcement of the Amended Settlement Agreement that the trial court had already specifically retained jurisdiction to enforce.

In Wallace (and in the present case), the Fifth DCA states that a trial court's subject matter jurisdiction to enforce a settlement agreement is limited to what is alleged in the pleadings of the case. Id., at 665. That position is simply an impermissible attempt to carve out an exception to the broad jurisdiction of the trial court. Such position has been expressly rejected by this Court in Trammell,

Second, public policy and judicial efficiency dictate that this Court should follow Buckley Towers. Following the reasoning of Wallace, the Fifth DCA's Opinion in this matter requires that the Pauluccis bring a new claim in a completely separate lawsuit (but in the same court) to enforce their rights under the Amended Settlement Agreement. The Pauluccis would accordingly be required to bring such a new claim, likely before a different judge, in the very same circuit court that already has this matter before it.

Florida law clearly holds that where a court has jurisdiction over a matter, it is the court, and not the particular judges of that court, that has jurisdiction over a particular case. Kruckenberg v. Powell, 422 So.2d 994 (Fla. 5th DCA 1982). In the present case, because the circuit court

already has general jurisdiction over this matter, it is unnecessary and a waste of judicial time and labor to require that the Pauluccis bring a wholly separate claim and switch to another judge in a court that already has jurisdiction. Following Wallace requires such a waste; following Buckley would not. The certified question should be answered in the positive.

II. THE FIFTH DISTRICT COURT OF APPEAL'S RULINGS REGARDING THE VALIDITY OF THE NFA LETTER AND THE ATTORNEYS' FEES AWARD ARE MERELY DICTA, WITHOUT FORCE AND EFFECT.

Once the Fifth DCA ruled that the trial court had no jurisdiction, that Court should not have gone further to issue an opinion on the underlying merits. In fact, any statements by a court after jurisdiction is found to be lacking are simply dicta, without force or effect, and do not constitute the law of the case. Continental Assurance Co. v. Carroll, 485 So.2d 406 (Fla. 1986) (any statements in an appellate decision beyond the simple finding of no jurisdiction were obiter dicta); Mann v. Merrill Lynch, Pierce, Fenner, and Smith, Inc., 488 F.2d 75 (5th Cir. 1973) (lack of jurisdiction renders a court powerless to make a decision on the merits).

The Fifth DCA nevertheless made additional rulings. After finding that there was no jurisdiction, the Court, in reversing the trial court, incorrectly discounted the finding of the trial court that was based upon the uncontroverted evidence (testimony

of James Golden and Larry Nelson) submitted to the trial court. The Fifth DCA additionally ruled that the attorneys' fees award was unreasonable.

As will be explained below, those findings are clearly in error. Since the findings have no effect under Florida law, however, the Pauluccis respectfully request that this Court reverse those findings, declaring them null and void.

III. EVEN IF THE FIFTH DCA HAD THE AUTHORITY TO MAKE THE ADDITIONAL RULINGS (AND IT DID NOT), THIS COURT MAY NEVERTHELESS ADDRESS AND REVERSE THOSE RULINGS AND ANY OTHER ERRORS IN THE COURT'S OPINION.

Florida law holds that once this Court accepts jurisdiction over an action, it may dispose of **all** questions involved in the matter appealed. Lawrence v. Florida East Coast Railway Co., 346 So.2d 1012 (Fla. 1977); Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So.2d 911 (Fla. 1995); Ocean Trail Unit Owners Assocciation, Inc. v. Mead, 650 So.2d 4 (Fla. 1995); Weiand v. State, 732 So.2d 1044 (Fla. 1999). As such, if this Court accepts jurisdiction, it may address all issues raised in the appeal to the Fifth DCA, and may certainly correct the rulings by the Fifth DCA regarding the NFA letter and the attorneys' fees (both of which rulings will be demonstrated, *infra*, to be clearly in error), as well as the jurisdictional issue (which will also be demonstrated, *infra*, to be clearly in error).

IV. THE FIFTH DCA INCORRECTLY FOUND THAT PETITIONERS DID NOT PRESENT SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL

COURT'S RULING THAT THE NFA LETTER WAS INVALID AND, AS SUCH, THE FIFTH DCA'S OPINION SHOULD BE REVERSED.

A. THE PRIOR NFA LETTER IS INVALID ACCORDING TO THE UNCONTROVERTED EVIDENCE PRESENTED TO THE TRIAL COURT AND ACCORDING TO THE FDEP.

By Order of February 9, 2000, the trial court properly found that the Defendants were in material default under both the terms of the Amended Settlement Agreement and the terms of the Final Judgment incorporating that Agreement because the Defendants had failed to obtain a valid NFA letter on the subject Property. (R. 1511-1512). A review of the pertinent terms of the Amended Settlement Agreement and of the uncontested evidence presented at the February 9 hearing make this clear.

The terms of the Amended Settlement Agreement show that the June 3, 1997, NFA letter did not apply to the contamination that was discovered under the warehouse on the Property in May of 1998. First, the Amended Settlement Agreement provides under Paragraph 5 that:

> **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** [(No Further Action Letter)] 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.** The parties recognize that the current space and term rented is $4.50 per square foot, and the value may be increased or decreased in accordance with the CPI for similar rental facilities.
>
> (R. 1545)(emphasis added).

As such, Paragraph 5 obligated Defendants to initiate contact with the FDEP regarding the "Environmental Condition" on the Property and to ensure that a valid NFA letter be in place with respect to such "Environmental Condition."

Additionally, Paragraph 6 specifically defines "Environmental Condition." It states:

> For purposes of this Settlement Agreement, the term "Environmental Condition" shall mean any environmental pollution or contamination described in the Hartman Associates, Inc., reports of November 1992, December 1995, and May/June of 1998, any additional investigations conducted by Defendants and/or requested by any governmental agencies on the property up to the obtaining of the NFA letter. (emphasis added.)(R. 1545).

The "Environmental Condition" of the Property per Paragraph 6 plainly included the contamination found under the warehouse that was detailed in the May/June 1998 report of Hartman Associates, Inc. As such, the "Environmental Condition" covered much more than the NFA letter of June 3, 1997, which applied only to two wells on the Property.

Under Paragraphs 5 and 6 of the Amended Settlement Agreement, Defendants were obligated to promptly contact the FDEP to ensure that the "Environmental Condition" on all of the

Property was cleaned up. As will be demonstrated, there has never been a valid NFA letter on the entire Property for the warehouse contamination.

On June 3, 1997, the FDEP issued an NFA letter on a small portion of the Property; i.e., only on two wells on the Property. After the issuance of that letter, however, significant additional contamination was discovered under the warehouse on the Property in May 1998. (R. 1475). Based upon this new information, the FDEP required the implementation of an extensive plan of monitoring and remediation that continues even at present.

Despite the extensive clean-up plan, a valid NFA letter still does not exist on the Property. Indeed, the Pauluccis presented ample and uncontroverted record testimony that no valid NFA letter existed on the Property.

First, James Golden, a Hydrogeologist and Professional Geologist, who testified on behalf of the Pauluccis at the February 9, 2000, hearing on their Motion to Enforce Settlement Agreement, specifically testified that no valid NFA letter exists. (Supp. R. 67). Mr. Golden further testified that after the Amended Settlement Agreement was entered on July 24, 1998, there were exceedances of the MCL's over what is permitted under Florida law. (Supp. R. 67). Defendants failed to present any evidence to contradict this testimony.

Second, the Pauluccis' representative, Larry Nelson, testified that the Property remained polluted and that a valid NFA letter did not exist on the Property. (Supp. R. 62). Once again, Defendants failed to contradict this testimony.

The FDEP has specifically confirmed that there has never been a valid NFA letter on the "Environmental Condition" of the contamination under the warehouse, showing that the testimony of Mr. Golden and Mr. Nelson was entirely correct (and sufficient). As stated, since the Fifth DCA rendered its Opinion, the Pauluccis have taken the deposition of Ms. Vivian Garfein, the District Director of the Central District of the FDEP. The Pauluccis took Ms. Garfein's deposition in a companion case (case number 00-CA-149-15W) in the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida. The companion case involves, among other things, Defendants' breach of the Amended Settlement Agreement based upon the trial court's ruling that damages for other breaches had to be brought in a separate action.

Ms. Garfein, specifically referring to an explanatory memorandum from John White regarding the June 1997 NFA letter, testified that the June 1997 NFA letter applied to one specific area of the Property and not to the entirety of the Property. In particular, Ms. Garfein testified as follows:

Q: So did the June 13 (sic), 1997 letter only apply

to the area of the property impacted by the spray paint booth vents?

A: According to John's letter - - I believe that's what he is saying the memorandum of explanation, Exhibit 2.

. . . .

Q: . . . . So Ms. Garfein, what specifically did the June 13 (sic), 1997 letter apply to, with respect to what area of the property?

A: In my discussions with John White [a DEP employee who was directly involved in the ongoing cleanup of the property], he explained to me that this letter referred only to those wells in that area as he has explained them in Exhibit 2.

Q: Okay. So then if there was additional contamination that was found on the property at 2380 West 25th Street in Sanford, Florida, that would have to be addressed separately?

A: That's my understanding, yes.

. . . .

Q: If there was additional contamination that was found on the property at 2380 West 25th Street in Sanford, Florida, after June 13(sic), 1997, would the June 13(sic), 1997 letter apply to that contamination?

A: No.

. . . .

Q: So would there be a valid no further action in place with regard to the entirety of the property in question?

A: Again, not according to Exhibits 1 and 2. They are limited to a certain area of the property.

Q: Is it the Department of Environmental Protection's policy to issue a no further action letter when there are known exceedences of the maximum contamination levels found on the property?

A: No. The Department would not and should not issue

> a no further action letter if there are exceedences on a – on a property. If I can elaborate, you may not like this but this initial letter should have been more specific. It should have been specific as to the wells for which it was being written. And we'll be more careful about that in the future.
> . . . .
>
> Q: So it [the June 3, 1997, NFA letter] didn't apply to any other further contamination that was found on the property?
>
> A: Correct.
> . . . .
>
> Q: With respect to the additional contamination that was found on the property, it would simply be incorrect to state that the June 3, 1997 letter from John White that's been marked as Plaintiffs' Exhibit 1 would apply to that additional contamination?
>
> A: That's correct.

Ms. Garfein further testified that even as of October 10, 2001, there was still not a valid NFA letter in place with respect to the entire property:

> Q: So with respect to the items that are detailed in the . . . October 10, 2001 memorandum, . . . was there a valid no further action letter in place with regard to those wells?
>
> A: No, there was not.

As such, Ms. Garfein's testimony confirms the testimony presented to the trial court, i.e., there was <u>not</u> a valid No Further Action letter on the Property fifteen (15) months after the date of the Amended Settlement Agreement. As such, the testimony that the Pauluccis presented to the trial court was not only sufficient, but wholly correct.

B. FLORIDA LAW SPECIFICALLY REQUIRED THE FIFTH DCA TO ACCEPT AS TRUE AND SUFFICIENT THE PAULUCCIS' EVIDENCE PRESENTED TO THE TRIAL COURT BECAUSE (1) IT WAS UNCONTROVERTED, AND (2) DEFENDANTS' NEVER OBJECTED TO ITS ADMISSIBILITY AND, AS SUCH, DID NOT PRESERVE ANY CLAIM THAT THE TESTIMONY WAS INCOMPETENT. THE FIFTH DCA'S FAILURE TO DO SO AND ITS RE-WEIGHING OF THE EVIDENCE WERE CONTRARY TO THE LAW. ITS OPINION SHOULD ACCORDINGLY BE REVERSED.

Florida law specifically provides that undisputed evidence must be accepted as true, and finders of fact are not free to disbelieve such evidence and return findings contrary to it. *See*, Florida East Coast Railway v. Michini, 139 So.2d 452 (Fla. 2d DCA 1962); Roach v. CSX Transportation, Inc., 598 So.2d 246 (Fla. 1st DCA 1992). In the present case, both Larry Nelson, the Pauluccis' representative, and James Golden, the Pauluccis' expert hydrogeologist, testified that as of the time of the February 9, 2000, hearing, there was not a valid NFA letter on the Property (evidence later confirmed by Ms. Garfein). Defendants, who failed to appear at that hearing, presented absolutely no evidence to the contrary.

Also, Defendants never objected to the testimony as being inadmissible. As such, any such objection was also waived. *See*, Jarksey v. Daniels, 58 So.2d 516 (Fla. 1952); Railway Express Agency, Inc. v. Fulmer, 227 So.2d 870 (Fla. 1969).

Even if the Defendants had offered contrary evidence (which they did not), the Fifth DCA was not permitted to re-weigh the

evidence presented. Specifically, the Supreme Court of Florida has held that an appellate court may not substitute its judgment for that of a trial court by reevaluating evidence. Delgado v. Strong, 360 So.2d 73 (Fla. 1978), citing Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972).

The Fifth DCA, however, did exactly what this Court has prohibited it from doing – by ruling that only a determination from the FDEP was sufficient evidence, it re-weighed the evidence. As such, the Fifth DCA not only failed to recognize that the Pauluccis' uncontroverted evidence must be taken as true; the Court went so far as to actually re-weigh the evidence. Florida law prohibits the Fifth DCA's actions.

C. THE FIFTH DCA INCORRECTLY RULED THAT THE PARTIES AGREED THAT THE FDEP WOULD BE THE SOLE ARBITER OF THE VALIDITY OF THE NFA LETTER.

The Fifth DCA specifically ruled that, based upon the language of the Amended Settlement Agreement, only the FDEP could decide whether the June 3, 1997, NFA letter was invalid. In particular, the Court stated in pertinent part as follows:

> . . .We believe that the parties by their agreement intended that the DEP would determine the validity of its NFA letter. . .
>
> (S.Ct. R. 60-68).

That ruling is simply incorrect for two reasons.

First, the parties did not delegate to the FDEP the authority to determine the validity of the NFA letter.

Delegation "involves the appointment of another to perform one's duties." JOHN D. CALAMARI and JOSEPH M. PERILLO, THE LAW ON CONTRACTS, § 254 (1970). Additionally, delegation is defined as ". . .(t)he transfer of authority by one person to another. . ." BLACK'S LAW DICTIONARY 426 (6th Ed. 1990). In the present case, there is simply no language in the Amended Settlement Agreement transferring authority to or appointing the FDEP as the entity responsible for determining the validity of the NFA letter.

Second, the Fifth DCA had no authority to delegate the responsibility to the FDEP to determine the validity of the NFA letter. It is settled law in Florida that the judicial power of the circuit and appellate courts are not delegable and cannot be abdicated in whole or in part by such courts. In re Alkire's Estate, 198 So. 475 (Fla. 1940).

The case of Cove Cay Village IV Condominium Association, Inc., 561 So.2d 307 (Fla. 2d DCA 1990), which is consistent with the ruling of In re Alkire's Estate, is particularly germane to this case. In Cove Cay Village, the trial court entered a final judgment that created a constructive trust in favor of a condominium association for a piece of property owned by the developer of the condominium. Id., at 307-308. The trial court, however, delegated the responsibility of determining the size and legal description of the trust property to a county zoning division, a non-judicial body. Id., at 308. The Second

DCA ruled that such delegation was an impermissible delegation of authority to a non-judicial body.

Similarly, in the present case, the Fifth DCA has ruled that only the FDEP can determine the validity of the NFA letter. Just as in Cove Cay, that is an impermissible attempt to delegate the decision-making authority of the trial court to a non-judicial body, the FDEP.

The rulings in In re Alkire's Estate, and Cove Cay are logical. This is because it is not clear how it would be determined as to what evidence from the FDEP would be the final word on the validity of the NFA letter. In other words, it is unclear as to which employee(s) at the FDEP would be the one(s) most capable of testifying as to the validity. That is why, consistent with In re Alkire's Estate, and Cove Cay, the trial court is permitted to weigh the testimony of the FDEP as one possible witness in a whole range of possible witnesses that can testify about the validity of the NFA letter. Two of those possible witnesses, Mr. Nelson and Mr. Golden plainly testified that the NFA letter was invalid. Indeed, the FDEP has since confirmed, through the testimony of Ms. Vivian Garfein, that Mr. Nelson and Mr. Golden were wholly correct and that such evidence was entirely sufficient. The trial court, as was its function, properly weighed this testimony and ruled that the NFA letter was invalid.

V. ALL FEES AND COSTS AWARDED BY THE TRIAL COURT WERE RELATED TO THE PAULUCCIS' ATTEMPTS TO ENFORCE THE SETTLEMENT AGREEMENT AND THE DEFENDANTS' BREACHES OF THAT AGREEMENT, WHICH BREACHES WERE ADJUDICATED IN TWO SEPARATE RULINGS BY THE TRIAL COURT. SUCH FEES AND COSTS WERE ACCORDINGLY REASONABLE AND NOT EXCESSIVE.

Paragraph 10 of the Amended Settlement Agreement provides for the recovery of all fees and costs related to the Pauluccis' attempts to enforce the Amended Settlement Agreement relating to Defendants' breaches of that agreement. That provision states as follows:

> [I]n 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. 1546) (emphasis added.)

At the outset, it is clear that the Fifth DCA's Opinion specifically stated that many of the Pauluccis' fees were unreasonable because they related to the monitoring of Defendants' clean up efforts. (S.Ct. R. 60-68). In other words, according to the Fifth DCA, the Pauluccis would only be entitled to fees relating to the failure to pay rent after 15 months passed without a valid NFA letter in place. That is wrong.

The terms of the Agreement are plain: in any action (including the present action) for breach of the Agreement, the Pauluccis are entitled to such fees. It is clear that every effort expended by the Pauluccis, their attorneys, and their experts was related to Defendants' obstructive behavior. Such obstructive behavior amounted to a series of violations of the Amended Settlement Agreement. The Pauluccis and their attorneys have fought Defendants for more than two years to bring Defendants into compliance with the Agreement. A simple review of Defendants' behavior and the Paulucci's required responses bears out the fact that all of the Pauluccis' fees have been incurred as a result of and in an effort to forestall Defendants'

continuous violations of the Agreement.

Given the clear language of the Agreement, the Pauluccis sought attorneys' fees not only for the failure to pay rent that was ruled upon in the February 9, 2000, Order. The Pauluccis also sought attorneys' fees for the defaults arising out of Defendants' failure to promptly contact the FDEP and to clean up the Property, as found in the trial court's December 15, 1998, and January 11, 1999, Orders.

It is clear that a substantial portion of fees incurred by the Pauluccis related to the need to seek court intervention against Defendants because of Defendants' breaches; i.e., failure to promptly contact the FDEP and clean up the Property in accordance with the December 15, 1998, and January 15, 1999, Orders. The Pauluccis' expert regarding attorneys' fees, William Osborne, made this clear when he testified as follows:

1) Defendants' first contractual duty, which they violated, was to promptly contact the FDEP to begin the clean up process(Supp. R. 218);

2) The Pauluccis were compelled to move for a default of Defendants' obligations under the agreement because of the Defendants' failure to promptly contact the FDEP (Supp. R. 218).

Mr. Osborne continued by testifying to the following facts:

1) The Pauluccis had to engage in exhaustive measures to monitor the clean up of the Property due to Defendants' obstructive behavior (Supp. R. 219);

2) Defendants' failure to promptly contact the FDEP and their engaging in ex parte communications with the FDEP compelled the Pauluccis to seek court intervention that would not have otherwise been necessary. (Supp. R. 219);

To ensure that the Defendants could not avoid cleaning up the Property, the Pauluccis also had no choice but to employ experts. In fact, cleaning up toxic substances, such as the TCE

on the Property, is a very expert-intensive endeavor. (Supp. R. 220). The Pauluccis' experts were forced to submit reports to the FDEP so as to ensure that Defendants were complying with the Amended Settlement Agreement. (Supp. R. 220). Those experts also had to spend substantial amounts of time reviewing the reports that Defendants' experts were submitting to the FDEP. (Supp. R. 292). The Pauluccis' experts, in fact, had to spend massive amounts of time inspecting the Property while Defendants' experts were testing the Property. (Supp. R. 292). Ultimately, the Pauluccis presented evidence that their experts had to work approximately 540 hours because of Defendants' actions. (Supp. R. 293). Defendants presented no testimony to rebut such evidence.

The Paulucci's attorneys' were very involved in the activities of the experts in connection with Defendants' defaults found in the December 15, 1998, January 11, 1999, and February 9, 2000, Orders. In fact, the Pauluccis' attorneys had to spend a substantial amount of time in connection with the preparation and submission of reports to the FDEP. (Supp. R. 220).

Even though the Pauluccis had to obtain a court order (and expend substantial fees in so doing) to force Defendants to promptly contact the FDEP and scrutinize every action that Defendants took with respect to the Property, Defendants still

had not cleaned up the Property or obtained a valid NFA letter by March 19, 1999. The Pauluccis, whose Property remains today unrented and polluted, had no choice but to seek damages for Defendants' failure to abide by the Amended Settlement Agreement.

As of October 24, 1999, Defendants had yet to clean up the Property or obtain a valid NFA letter for the Property. Once again, the Pauluccis had no choice but to seek court relief. Paragraph 5 of the Amended Settlement Agreement specifically states that if there is not a valid NFA letter on the Property by October 24, 1999, Defendants shall begin paying the Pauluccis substitute rent. (R. 1545). The lower court found on February 9, 2000, that Defendants were in "material default" under the Agreement. (R. 1512). The court further found that the Defendants owed the Pauluccis $96,731.96 in back rent and ordered Defendants to pay $ 21,371.34 monthly until a valid NFA letter was in place. (R. 1512). The lower court finally found that the Pauluccis were entitled to all attorneys' fees and costs under Paragraph 10 of the Agreement. (R. 1512).

Defendants, still avoiding their clean up responsibilities, then filed its Amended Motion for Protective Order and Costs, Amended Motion to Strike, and for Relief from Order. The lower court denied that Motion.

On April 7, 2000, the trial court held its hearing on the

attorneys' fees due to the Pauluccis arising out of Defendants' defaults as found in the December 15, 1998, January 11, 1999, and February 9, 2000, Orders. The lower court, after Defendants failed to present any testimony in rebuttal of that presented by the Pauluccis, awarded the Pauluccis $245,341.28 in attorneys' fees, expert fees, and costs.

[9]

The Fifth DCA has incorrectly ruled that the Pauluccis are only entitled to fees related to the failure to pay rent. Under the clear terms of the Amended Settlement Agreement, the Pauluccis are entitled to all of their attorneys' fees and costs in any action due to Defendants' defaults. (R. 1547). The Fifth DCA never ruled that the defaults found in the December 15, 1998, and January 11, 1999, Orders were in error. As such, those Orders remain viable and, since they find Defendants in default, the Pauluccis are entitled to all attorneys' fees related to those defaults as well as the default for failure to pay rent.

The Pauluccis, by this Petition, specifically and respectfully request that this Court reverse the Fifth DCA's August 10, 2001, Opinion. If this Court affirms that Opinion, the Pauluccis respectfully request that this Court permit the Pauluccis to proceed in a separate action for Defendants' violations of the Amended Settlement Agreement.

CONCLUSION

Based on the foregoing reasons, the Fifth DCA's August 10,

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[9] The Pauluccis presented clear expert testimony at the hearing that their attorneys generated attorneys' fees of $123,630.50 (before application of a multiplier) and $52,885.28 in costs and expert fees. Defendants presented no evidence contradicting the Pauluccis' expert.

2001, Opinion should be reversed in its entirety.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Rory C. Ryan, Esq., P.O. Box 1526, Orlando, Florida 32802-1526, this ____ day of December, 2001.

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I HEREBY CERTIFY that the foregoing Brief is typed in Courier-New, 12 point font in compliance with *Florida Rule of Appellate Procedure* 9.210.

_____
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