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,

/

PETITIONERS' REPLY BRIEF ON THE MERITS

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

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IV. RESPONDENTS HAVE CONCEDED THAT THE FIFTH DCA'S OPINION IS IN ERROR AND THAT THE TRIAL COURT INDEED HAD JURISDICTION TO ENFORCE THE AMENDED SETTLEMENT AGREEMENT. ADDITIONALLY, RESPONDENTS DO NOT AND CANNOT CONTEST THAT PETITIONERS WILL PREVAIL ON THE MERITS AS SUCH MERITS WERE DETERMINED BY THE FIFTH DCA.

In their Answer Brief, Respondents have conceded that the Fifth DCA's opinion is in error regarding the certified question. Specifically, Respondents have admitted that, contrary to the Fifth DCA's ruling, the certified question should be answered in the affirmative. See page 2 of Respondents' Answer Brief.

Additionally, Respondents have effectively conceded that Petitioners should prevail on the merits. The Fifth District Court of Appeal ("Fifth DCA") found that the Florida Department of Environmental Protection ("FDEP") is the sole arbiter of the validity of the June 3, 1997, No Further Action ("NFA") letter.[1] Even if that determination is correct (and it is not), the FDEP, as will be discussed, has specifically found that the letter is invalid. Respondents have, accordingly, conspicuously failed to argue that the letter is invalid. Respondents' silence on this issue should be construed as an admission that Petitioners should also prevail on the merits, i.e., the June 3 NFA letter is invalid and Respondents are in breach of the Amended Settlement Agreement.

Based on the FDEP's determination, Respondents are relegated to arguing, without merit, that Petitioners have raised the FDEP's determination too late. Indeed, Petitioners have not raised the determination too late. As stated in Petitioners' Request for Judicial Notice, this Court has specifically ruled that it may take judicial notice of the files of the Secretary of State. See, Cherry Lake Farms v. Love, 176 So. 486 (Fla.

[1] The Fifth DCA's determination that the FDEP is the sole arbiter is incorrect. Petitioners shall later explain the error of that determination.

1937), and Schriver v. Tucker, 42 So.2d 707 (Fla. 1949). As such, this Court may take judicial notice at any time of an official action, such as the FDEP's determination and it is not too late to address this issue.

V. THIS COURT SHOULD ADDRESS THE MERITS OF THE FIFTH DCA'S OPINION AND REVERSE THE OPINION BECAUSE THE RULING ON THE MERITS IS DICTA AND ACCORDINGLY VOID. THE OPINION SHOULD ALSO BE REVERSED BECAUSE THE FIFTH DCA IMPERMISSIBLY RE-WEIGHED AND ADJUDGED THE QUALITY OF UNCONTESTED EVIDENCE.

A. THE FIFTH DCA'S OPINION ON THE MERITS IS DICTA AND ACCORDINGLY VOID.

Once the Fifth DCA ruled that the trial court had no jurisdiction, the 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.[2] **After finding that there was no jurisdiction, the Court wrongly discounted the finding of the trial court that was based upon the uncontroverted evidence (testimony of James Golden and Larry Nelson) submitted to the court. (S.Ct.R. 60-68) The Fifth DCA additionally ruled that the attorneys' fees award was unreasonable. (S.Ct.R. 60-68)**

Since the findings (which, as will be explained below, are clearly in error) go beyond the jurisdictional issue, they are merely dicta and have no effect under Florida law. As such, Petitioners respectfully request that this Court reverse those findings, declaring them null and void.

B. THE FIFTH DCA IMPERMISSIBLY RE-WEIGHED AND ADJUDGED THE QUALITY OF UNCONTESTED EVIDENCE.

As stated, the Fifth DCA ruled that Petitioners did not present sufficient evidence of the invalidity of the NFA letter in the trial court.[3] (S.Ct.R. 60-68) As detailed below, Petitioners presented testimony from their representative, Larry

[2] Respondents have conceded that this Court may decide issues beyond the certified question. See page 27 of Respondents' Answer Brief. As such, there is no question that this Court may address the Fifth DCA's findings on the merits.

[3] The Fifth DCA additionally ruled that the trial court's award of attorneys' fees and costs to Petitioners was unreasonable. (S.Ct.R. 60-68) Petitioners, in their Initial Brief on the Merits, have exhaustively detailed the errors in that ruling.

Nelson, and their expert hydrogeologist, James Golden, that the NFA letter was invalid. The Fifth DCA ruled that such evidence was insufficient even though Respondents not only failed to object to the sufficiency of the evidence presented to the trial court, they failed to even attend the hearing on Petitioners' Motion to Enforce Settlement Agreement. (S.Ct.R. 60-68) Florida law specifically prohibits the Fifth DCA's action.

This Court has ruled that an appellate court's independent judgment of the quality of uncontroverted evidence before the trial court is wholly impermissible. Specifically, in the case of Golden Hills Turf and Country Club, Inc. v. Buchanan, 273 So.2d 375 (Fla. 1973), this Court stated as follows:

> In the instant case, the District Court below determined that it could render an independent judgment on the facts, even though the evidence adduced below was not challenged. It also determined that certain unchallenged expert testimony was 'so unpractical that the trial court should have rejected such testimony. The inherent danger of this approach, of course, is that it weakens the appellate process by suggesting that deviation from neutral standards of appellate review is permissible if the appellate court is offended by evidence and testimony unchallenged by the litigants within the adversary process, and accepted by the trial judge.

In the present case, the Fifth DCA violated Golden Hills, and overstepped the legitimate bounds of appellate review. In particular, the Fifth DCA re-evaluated evidence (the testimony of Mr. Nelson and Mr. Golden), the sufficiency of which was never challenged in the trial court.

Additionally, even if Ms. Garfein's testimony and Mr. White's Memorandum had existed at the time of the hearing before the trial court (and they did not), Petitioners had no reason or obligation to present such matters (or any other matters). Petitioners introduced wholly sufficient evidence (the testimony of James Golden and Larry Nelson) that the NFA letter was invalid. Respondents, who did not attend the hearing (for which they have apologized to the Fifth DCA at Oral Argument), never contradicted the evidence. The evidence must accordingly be accepted as true. 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)(Undisputed evidence must be accepted as true, and finders of fact are not free to disbelieve such evidence and return findings contrary to it).[4]

The Fifth DCA has made critical errors not only in deciding the jurisdictional question (which Respondents have conceded in their Answer Brief), but also in the remaining issues of the case. It is accordingly imperative that this Court accept review of and reverse the entire Fifth DCA Opinion.

[4] As such, it is clear that Petitioners timely raised the determination of the FDEP. First, it did not exist at the time of the hearing before the trial court or in the appeal to the Fifth DCA. Second, Petitioners had no reason to present a determination by the FDEP because Respondents never argued to the trial court or the Fifth DCA that the FDEP was the sole arbiter of the validity of the NFA letter. In fact, the Fifth DCA only raised that issue for the first time in its August 10, 2001, which is the subject of this appeal.

III. THIS COURT SHOULD ADDITIONALLY REVERSE THE FIFTH DCA'S OPINION BECAUSE 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.

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 Respondents 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 Respondents 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 Respondents 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 as follows:

> 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 under 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, as will be shown, only applied to two wells on the Property.

Under Paragraphs 5 and 6 of the Amended Settlement Agreement, Respondents 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.[5]

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.

Despite the extensive clean-up plan, a valid NFA letter still does not exist <u>on the entire Property</u>. Indeed, as stated, the Petitioners presented ample and

[5] Contrary to Respondents' assertions, Petitioners are not for the first time raising the issue that the June 3 NFA letter did not apply to the entire Property. Petitioners have repeatedly asserted in both the trial court and the Fifth DCA that the NFA letter is invalid. It is clear that it is invalid because it did not cover the entire Property.

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 Petitioners 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). Respondents failed to present any evidence to contradict this testimony.

Second, the Petitioners' 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, Respondents 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. That confirmation shows that the testimony of Mr. Golden and Mr. Nelson was entirely correct (and sufficient). Since the Fifth DCA rendered its Opinion, the Petitioners have taken the deposition of Ms. Vivian Garfein, the District Director of the Central District of the FDEP. The Petitioners 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, Respondents' 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 particular area of the Property and not to the entirety of the Property.[6] **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?

[6] On December 18, 2001, Petitioners served their Motion to Relinquish Jurisdiction to the Trial Court and/or Request for Judicial Notice. In that Motion, Petitioners respectfully requested that this Court either: (1) relinquish jurisdiction to the trial court so that the trial court can appropriately consider (after Petitioners file an appropriate motion or the trial court takes judicial notice) Ms. Garfein's testimony and Mr. White's Memorandum, and/or (2) take judicial notice of those matters. Importantly, Ms. Garfein's testimony and Mr. White's Memorandum are not newly discovered evidence. They are simply matters that clearly show that the evidence presented to the trial court (the testimony of Mr. Nelson and Mr. Golden) was eminently sufficient and correct.

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 Petitioners presented to the trial court was not only sufficient, but wholly correct.

B. 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 at least 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.

IV. PETITIONERS ARE ENTITLED TO THEIR ATTORNEYS' FEES AND COSTS ARISING OUT OF RESPONDENTS' BREACH OF THE AMENDED SETTLEMENT AGREEMENT.

Respondents have attempted to play word games with the terms of the Amended Settlement Agreement to avoid their duties to pay Petitioners' attorneys'

fees and costs arising out of Respondents' breach. Specifically, Respondents claim that under the Amended Settlement Agreement, Petitioners may only recover attorneys' fees and costs in an action for breach. Respondents fail to recognize, however, that this is an action for breach.

Respondents do not and cannot deny that this is an action for enforcement of the Amended Settlement Agreement. Indeed, an action for enforcement of a contract is an action arising out of breach of that contract. In particular, it is black letter law that ". . .there is an election of remedies for breach of contract. . .So, where enforcement of the contract is sought, the complaining party in the dispute has an election of remedies." 17B C.J.S. §602 Contracts (1999). Simply put, when a party is seeking enforcement of a contract, that party is doing so because of a breach by another party.

This case is no different. Respondents have, as stated, breached the Amended Settlement Agreement. Petitioners accordingly brought an appropriate action to enforce that Agreement. As such, under the Agreement, Petitioners are entitled to their attorneys' fees and costs for such enforcement.

CONCLUSION

Based on the foregoing, the Fifth DCA's Opinion should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to Stephen Brannock, Esq., 400 N. Ashley Dr., 2300, Tampa, Florida 33601, this ____ day of March, 2002.

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CERTIFICATE OF COMPLIANCE WITH FLORIDA RULE OF APPELLATE PROCEDURE 9.210

I HEREBY CERTIFY that the foregoing Brief is typed in 14 point Times New Roman in compliance with *Florida Rule of Appellate Procedure* 9.210.

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