IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-210

ROTEMI REALTY, INC., et al.,

Petitioners,

-vs-

ACT REALTY CO.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

In this brief, the parties are referred to as they stood in the lower court, by proper name, or as appellant and appellee where appropriate. The symbol "T." followed by the volume number in roman numerals refers to the transcript of the proceedings below.[1] The symbol "App." refers to the appendix to this brief.

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[1]Volume I refers to that portion of the hearing which occurred on April 1, 2003, at 11:00 A.M., and Volume II refers to the portion of the proceedings which took place on April 2, 2002, at 10:30 A.M..

STATEMENT OF THE CASE AND FACTS

Act Realty owned a ten acre parcel of land (Tract 3) in Southwest Miami which was surrounded by a 50 acre tract on Miller Drive (Southwest 56th Street). They put the property up for sale in 1998 (T. VOL I, 28-29).

Act Realty's land was introduced to the Miami-Dade County School Board by attorney Michael Cease on **September 9, 1998**, in his letter to the School Board's Department of Site Acquisition and Leasing. The letter stated as follows:

> Dear Mr. Valentine[2]:
>
> Thank you for your recent inquiry regarding various properties in Section 20 and 29 (between Bird Drive, Sunset Drive, S.W. 157 Avenue and 162nd Avenue). I have been authorized by various clients to submit to you for DCPS's consideration the above referenced Parcels of 40 Acres and 50 Acres, respectively. My clients are the Owners or Contract Purchasers of all of Parcels 1 and 2.
>
> *Additionally, Tract 3 (10 Acres) in Section 29 is for sale by the Owner. It is possible to include this Tract as well, however, the "window of opportunity" is extremely short since this Tract is zoned and buildable and is being actively marketed.*

(App. 1) (emphasis added). This letter established that the availability and desirability of Tract 3 were presented to the School Board by Mr. Cease four and a

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[2]Leon Valentine was the director of the School Board's real estate department (T. VOL I, 2).

half months before the brokers entered the picture. Mr. Cease testified at the bench trial that he was the one who introduced Act Realty's property to the School Board (T. VOL I, 62). The only broker who had direct contact with the School Board during the transaction, Maria Martin-Hidalgo, also conceded that it was Michael Cease's letter of September 9, 1998, that introduced the property to the School Board (T. VOL II, 18).

In addition to the public policy question, a principal issue in this case, which the Third District Court of Appeal left unresolved, is whether the brokers were the procuring cause of the sale.

At trial, Kathryn Wilbur, District Director of Government Affairs and Land Use Policy and Acquisitions for the Miami-Dade School Board, explained the criteria used by the School Board in purchasing land. Land was acquired based on a five year plan which anticipated how many new schools would be needed (T. VOL I, 4). The Region Superintendent determined where relief was most needed. In this case, the Superintendent decided that a new high school had to be built near Miller Drive and Sunset Drive in Southwest Miami in order to avoid student overcrowding at Sunset and Braddock Senior High Schools (T. VOL I, 4-5).

In addition to considerations of overcrowding, the selection of a new school site had to comply with the School Board's regulations which mandated the

construction of new schools a mile in from the urban development boundary (T. 5). Based on the Board's criteria, the fifty (50) acres owned by Michael Cease's clients and Act Realty's ten (10) acres were the only suitable properties for school construction in that district (T. 10-11).

After the Regional Superintendent reviewed the 50 acre site, he was concerned because the land parcel was U shaped, exclusive of Act's ten acre share which completed the rectangle (T. VOL I, 6). Act Realty's land was also adjacent to Miller Drive, a major thoroughfare in Southwest Miami (T. VOL I, 7). They reasoned that it would be preferable to fill in the gap because it would resolve storm water retention problems. Thus the Regional Superintendent decided at that point to acquire the 50 acres *plus* Act Realty's 10 acre parcel (T. VOL I, 6-7). This decision was codified in a memorandum that was issued by Director Wilbur on October 27, 1998 (T. VOL I, 7-8) (App. 3-4). The memorandum outlined a number of properties in the region which the Board wanted to acquire, including the 50 acre site, which it was already negotiating for, and Act Realty's parcel.

Sen or High "PPP"	An approximate 50 acre site on the south side of Miller Drive and east of S.W. 162 Avenue (#17 on attached list). Since this is a U-shaped site, the Region would also prefer that the middle 10 acres be acquired, if possible. A portion of the 60 acres would be reserved as a future school site.

(App. 4).

District Director Wilbur testified that the authorization initiated a number of activities designed to purchase the two properties (T. VOL I, 8). First, a preliminary investigation of the properties was conducted. Then an appraisal of Tract 3 was ordered on January 19, 1999, two days before the brokers approached David Moliver, the president of Act Realty, and told him that they could use their influence to sell his property to the School Board (T. VOL I, 29).

Michael Cease stated that he knew the School Board needed the sixty (60) acre site (including Tract 3) based on the Board's land requirements (T. VOL I, 67). He also knew that his 50 acres and Act's 10 acres were the only viable parcels in the district and, therefore, the Board would have to negotiate with him (T. VOL I, 67). There were no alternative sites.

Mr. Cease began discussions with School Board officials about his 50 acres in August, 1998 (T. VOL I, 66). By that time, he and Mr. Perez-Urrutia had enjoyed a personal and business relationship that pre-dated this case (T. VOL I, 69). Mr. Perez-Urrutia had previously acted as a broker on several other real estate transactions involving Mr. Cease and was known as an experienced realtor who specialized in Southwest Miami properties (T. VOL I, 69).

According to Ms. Martin-Hidalgo, she went to see Leon Valentine at some

point in either November or December, 1998, in an effort to sell the School Board a twenty (20) acre property (T. VOL II, 3-4, 19). Mr. Valentine indicated that the parcel was too small. While sitting in his office, she noticed a map on the wall on which Michael Cease's 50 acres were highlighted (T. VOL II, 4). She asked Mr. Valentine about the 50 acres and he said that they were talking to the owners about purchasing the land (T. VOL II, 4). She also inquired about the 10 acres in the middle and he said that it would be nice to own them as well, but they were not necessary (T. VOL II, 4).

When she left the meeting with Mr. Valentine, she returned to her office and called Mr. Perez-Urrutia about Act Realty's property (T. VOL II, 5). He informed her that Michael Cease was involved with the 50 acres (T. VOL II, 8). He also told her that he knew Mr. Moliver and agreed to set up a meeting (T. VOL II, 5). The next day, they went to see Mr. Moliver.

There is a discrepancy in Ms. Martin-Hidalgo's time-frame because she maintained that she first learned about the School Board's interest in the properties when she saw the map in Mr. Valentine's office in November/December, 1998. She also asserted that she and Mr. Perez-Urrutia met with Mr. Moliver the day after she had seen the map. In actuality, the brokers did not meet with Mr. Moliver to discuss the sale of Tract 3 to the School Board until January 21, 1999.

When the brokers visited Mr. Moliver on January 21, they claimed to know school officials whom they could influence with respect to land purchases. They promised to introduce Tract 3 to the School Board and then, using their contacts, procure a purchase (T. VOL II, 29). Based on the brokers' pretensions, Mr. Moliver typed up a nonexclusive procurement contract and the parties signed it on the same day. The contract provided in pertinent part that:

> The commission agreement is only valid if the brokers are able to ***procure*** a sale with the School Board of Dade County Florida as the buyer.

(App. 6)[3] (emphasis added).

It is undisputed that the brokers' actual procurement of the sale was the condition precedent on which the contract rested (T. VOL II, 17).[4] Yet, when Act

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[3]The contract signed on January 21, 1999, was set to expire in ninety (90) days from its execution in the event a sale had not been completed. Mr. Moliver later agreed to extend the contract until August 30, 1999. (App. 7).

[4]When the trial court questioned Ms. Martin-Hidalgo about the contract, she affirmed that the brokers had agreed to act as the procuring cause of the sale:

> THE COURT: ...Would you agree under the contract you have to be the procuring cause in order to be entitled to the commission?
>
> [MS. MARTIN-HIDALGO]: Yes.

(T. II 17).

Realty entered into this arrangement, Mr. Moliver did not know that the School Board was already taking steps to purchase his land and had ordered an appraisal in preparation for its making an initial offer (T. VOL II, 46-49). Ms. Martin-Hidalgo claimed that she was also unaware of the School Board's intent to acquire the ten acres when she went to see Mr. Moliver (T. VOL II, 8-9). Hence, she did not disclose it when she and Mr. Perez-Urrutia interposed themselves in the negotiations with the School Board, which were imminent.

On January 21, 1999, the School Board received, by fax, an authorization letter from Ms. Martin-Hidalgo and a copy of the commission agreement (T. VOL II, 15) (App. 5). On redirect examination, Act Realty's attorney asked Ms. Wilbur whether on January 21, 1999, when the brokers transmitted their authorization letter, the Board was already in the process of purchasing Tract 3.

> [DEFENDANT'S ATTORNEY]: In light of the fact that prior to January 21, 1999, the property had been or you were directed by the regional superintendent to inquire about the ten acres, that the appraisal had already been ordered, is it fair to say this letter of January 21, 1999, did not introduce the School Board to the property?
>
> [MS. WILBUR]: *That's correct. In my belief, we were already pursuing this property. This was not something new we started on.*

(T. VOL I, 23) (Emphasis added).

The brokers' attorney, on re-cross examination, queried how the Board could have been pursuing the property if they did not know its value. In response, Ms. Wilbur gave the following explanation:

> [MS. WILBUR]: Again, sir, in the school system, before we take it to the Board for authorization, we need to know the price, but you still pursue property to determine whether it meets the other criteria. Is it in an area where you need relief. You know, what kind of property are you going to have to acquire. Is it for sale or other types of criteria. Just similar to the 50 acres, the property was being pursued. Had we determined that the price wasn't acceptable, the School Board staff may not have forwarded on or the School Board may not have chosen to move forward with it.

(T. VOL I, 24). She added that since appraisals were expensive, they were ordered only when the Board was seriously going after a piece of real estate (T. VOL I, 25).

Based on Ms. Martin-Hidalgo's testimony, the only discernable efforts the brokers made with respect to the School Board prior to the sale were as follows:

- On January 21, 1999, Ms. Martin-Hidalgo faxed the School Board's real estate department a letter of authorization and a copy of the contract indicating that she and Mr. Perez-Urrutia represented Act Realty.
- She later faxed the same letter to Ms. Tabitha Fazzino, who had replaced Leon Valentine in the real estate department (T. VOL II, 9-10)
- Ms. Fazzino sent her a copy of the agenda regarding the proposed

acquisition of the 60 acres which was going to be presented to the School Board at a preliminary hearing (T. VOL II, 10-11). Ms. Martin-Hidalgo faxed a copy of the agenda to Mr. Moliver.

- Ms. Martin-Hidalgo had a conversation with two of the School Board's appraisers.
- Ms. Martin-Hidalgo conveyed the School Board's initial offer of $80,000 to Mr. Moliver and he rejected the offer (T. VOL II, 13).

The above represents the sum total of activities outlined by Ms. Martin-Hidalgo in her direct testimony in connection with the sale. Significantly, she stated that the negotiations with the School Board were all conducted by Michael Cease, David Moliver and Mr. Perez-Urrutia (T. VOL II, 14). But Mr. Cease testified that Mr. Perez-Urrutia's only involvement with the negotiations consisted of telephonic updates from Mr. Cease (T. VOL I, 54).

During the course of the negotiations, Mr. Cease advised Mr. Moliver that they should negotiate the sale price together (T. VOL I, 53-54). Mr. Cease did this for two reasons. First, it was more efficient to bargain for a single rate per acre for all 60 acres, since the School Board was unlikely to pay a different rate for contiguous parcels of land. Secondly, Ms. Martin-Hidalgo had a "personality conflict" with one of the individuals at the School Board and Mr. Cease thought it

was better that Mr. Moliver deal with the Board instead of her (T. VOL I, 53-54). Mr. Moliver consented and from that point forward he and Mr. Cease negotiated jointly with the School Board.[5]

On June 24, 1999, Mr. Moliver sent the School Board a letter offering to sell the land for $135,000 per acre (T. VOL I, 33). The School Board made a counter-offer on June 25, 1999, and Mr. Moliver made a counter-counter offer of $127,000 (T. VOL I, 33-34). Finally, in late June, Mr. Moliver adopted the price that Mr. Cease had negotiated of $116,000 per acre (T. VOL I, 34).[6] The School Board accepted and submitted a contract directly to Mr. Moliver on July 26, 1999 (T. VOL I, 35) (App. 8). The brokers were not involved at all in the price negotiations which led to the sale (T. VOL I, 35).

After the sale price was settled and preparations were being made for the closing, something happened that aroused Mr. Moliver's suspicions about the brokers' forthrightness (T. VOL I, 30). In September, 1999, Mr. Cease informed him that Act Realty was responsible for a twenty thousand dollar share of the total

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[5]Contrary to the brokers' suggestion below, that Mr. Moliver tried to cut them out of the deal, Mr. Moliver supplanted Ms. Martin-Hidalgo on Mr. Cease's advice. Mr. Cease, who had enjoyed a long and friendly relationship with Mr. Perez-Urrutia, was not trying to cut his friend out of the deal when he asked Mr. Moliver to negotiate directly with the Board alongside himself.

[6]The School Board purchased the ten acres for $1,164,650.20.

fee that Cease had paid to a lobbyist (T. VOL I, 30-31). He added that the brokers had already agreed to have the fee deducted from their commission (T. VOL I, 30-31).[7] Mr. Moliver thus learned, for the first time, that a lobbyist had been at work behind the scenes (T. VOL I, 31). After hearing the news, he started inquiring about the role, if any, that the brokers played in procuring the sale.

Later, when Mr. Moliver refused to pay the brokers' commission on the grounds that they had not procured the sale, the brokers sued.

After a nonjury trial, the Circuit Court Judge found that the "brokers clearly established that they were the procuring cause of the sale and brought the parties together resulting in the sale of the real property." (App. 10). The trial court also determined that the brokers "initiated the negotiations, took affirmative action to bring the buyer and the seller together, and that the transaction was closed and they were entitled to the agreed commission in the sum of $144,650.50." (App. 10-11). The order of final judgment did not make any specific factual findings in support of the court's legal conclusions.

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[7]The lobbyist Mr. Cease had hired, without Mr. Moliver's prior knowledge, was Eston "Dusty" Melton, who, according to the MIAMI HERALD in 2002, had represented the second most clients in transactions with the School Board. *See* Charles Savage, *Cheating the Classroom: Stierheim Pushes Ethics Overhaul*, THE MIAMI HERALD, May 1, 2002.

SUMMARY OF THE ARGUMENT

I. The trial court's finding that the brokers were the procuring cause of the sale was unsupported by substantial, competent evidence. Act Realty's ten (10) acre parcel was introduced to the School Board by Michael Cease, four months before the brokers interjected themselves into the transaction. The School Board then decided to acquire Act Realty's property and took affirmative steps in that direction. Two days after the School Board had ordered a professional appraisal of the ten acres, the brokers visited the president of Act Realty, David Moliver, and told him that they could use their contacts inside the School Board to generate interest in his company's property. Based on these representations, Mr. Moliver executed a procurement agreement with the brokers. The brokers then had minimal contact with the School Board and were completely removed from the negotiations. The sale was negotiated primarily by Michael Cease and Mr. Moliver. It is thus apparent from the record that the brokers did not introduce the property to the School Board, were not the origin of the Board's interest in the property, did not engage in negotiations, and were not the proximate cause of the sale's consummation.

II. The Third District Court of Appeal correctly held that the contingency fee contract in this case was against public policy and thus unenforceable. Contingency

fee agreements for the procurement of public monies naturally tend to invite public corruption. Whether the subject matter of the contract is a professional service, or real estate, the dangers are identical. This Court's decision in *Robert & Co. v. Mortland* , 33 So. 2d 732 (Fla. 1948), which required proof of actual wrong doing before invalidating such contracts, was rejected by the Florida Legislature in 1973 when it enacted section 287.055(6)(b)-(c), Florida Statutes (1973). The Legislature criminalized the solicitation of contingency fees for the procurement of government contracts for professional services on a strict liability basis without the need for proof of actual wrong doing. The Third District Court in *City of Hialeah Gardens v. John L. Adams*, 599 So. 2d 1322, 1323 (Fla. 3d DCA 1992), implicitly found that section 287.055(6)(b)-(c), superceded *Mortland*. The Third concluded that these kinds of contingency fee contracts violated public policy because of "*the evil tendency of the contract and not its actual injury to the public that is determinative, as the law looks to its general tendency and closes the door to temptation by refusing to recognize such agreements.'" Id.* at 1323-1324 (quoting *Stearns v. Williams*, 72 Idaho 276, 240 P.2d 833, 837 (Idaho 1952)).

The Third District's order forfeiting part of Act Realty's compensation for the sale of its property and awarding those monies to the government was an unconstitutional forfeiture and must be overturned.

ARGUMENT

I.

WHERE THE BROKERS DID NOT INTRODUCE THE PROPERTY TO THE BUYER, DID NOT ENGAGE IN CONTINUOUS NEGOTIATIONS WITH THE BUYER AND WERE NOT THE PROXIMATE CAUSE OF THE TRANSACTION, THE TRIAL COURT'S FINDING THAT THE BROKERS WERE THE PROCURING CAUSE OF THE SALE WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

It is a fundamental principle of Florida Supreme Court jurisprudence that when the Court accepts review, on either a certified question or on a discretionary basis, the Court has jurisdiction to decide all the properly raised issues in the case. *See Kennedy v. Kennedy,* 303 So. 2d 629 (Fla. 1974); *Savoie v. State,* 422 So. 2d 308, 310 (Fla. 1982) ("[O]nce we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues properly raised and argued before this Court."); *Feller v. State,* 637 So. 2d 911 (Fla. 1994). It is appropriate for this Court to consider the procurement issue because it was briefed by the parties below and is dispositive of the case.

Standard of Review

The standard of review applicable to a trial court's factual findings is whether

they are supported by competent, substantial evidence. *See Hull v. Miami Shores Village*, 435 So.2 d 868 (Fla. 3d DCA 1983); *Laufer v. Norma Fashions, Inc.*, 418 So. 2d 437 (Fla. 3d DCA 1982). If the court's decision is against the weight of the evidence, or unsupported by competent substantial evidence, the reviewing court must reverse. *Randy Int'l Ltd. v. Am. Excess Corp.*, 501 So. 2d 667, 670 (Fla. 3d DCA 1987);*Design Eng'g Corp. of Am. v. Pan Aviation, Inc.*, 448 So. 2d 1112 (Fla. 3d DCA 1984); *Hull v. Miami Shores Village*, 435 So. 2d 868.

The Cause of Procurement Doctrine

The contract between the brokers and Act Realty was not a boilerplate listing agreement establishing a commission predicated on a percentage of the sale price. The contract specifically required the brokers to *procure* a sale of the ten acre parcel to the Miami-Dade County School Board and the brokers' commission was entirely contingent upon whether the School Board purchased the property for more than one million dollars.[8]

The record below lacks sufficient evidence to support the trial judge's finding that the brokers were the procuring cause of the sale of Act Realty's property to the Miami-Dade County School Board for a purchase price of over one million dollars. There is no evidence of a direct and proximate link between the

[8]The commission was any amount over one million dollars.

actions of the brokers and the consummated sale, or the final sale price.

The evidence does show, however, that the School Board's prior decision to purchase Act Realty's land and its directed actions towards the acquisition of the property created a fortuitous opportunity for the brokers to interject themselves into the process.

The law is clear that in order for a broker to be the procuring cause of a sale, "a broker must show that he called the potential purchaser's attention to the property and that it was through his efforts that the sale ... was consummated." *B&B Supermarkets, Inc. v. Metz,* 260 So. 2d 529, 531 (Fla. 2d DCA 1971); *see also M. Sanson v. Dutcher, Higginbotham and Bass,* 401 So. 2d 913, 915 (Fla. 4th DCA 1981) ("the parties must have been brought together and the sale consummated as a result of continuous negotiations of the broker."). The principal criterion for making this determination is whether the broker was the proximate cause of the sale.

The causation language used in this context is not philosophically different from the notion of proximate causation in cases involving negligence.

> **Procuring Cause.** The proximate cause, the cause originating a series of events, which, without break in their continuity, result in the accomplishment of the prime object. The inducing cause; the direct or proximate cause. Substantially synonymous with "efficient cause."

> A broker will be regarded as the "procuring cause" of a sale, so as to be entitled to commission, if his or her efforts are the foundation on which the negotiations resulting in a sale are begun. A cause originating a series of events which without break in their continuity result in accomplishment of prime objective of the employment of the broker who is producing a purchaser ready, willing and able to buy real estate on the owner's terms.

BLACK'S LAW DICTIONARY (6th ed. 1991).

> The term 'procuring cause', as used in describing a broker's activity, means more than 'but for' causation. *It refers to a cause originating a series of events which, without break in their continuity, result in accomplishment of the prime objective of employment of the broker,* which usually consists of procuring a purchaser ready, willing, and able to buy property on the owner's terms or of effecting a sale.

Marshall v. White, 245 F.Supp. 514, 517 (D.C. N.C. 1965) (emphasis added). In other words, the broker must be shown to be not only the *sine qua non* of the transaction, such that if the broker had not been involved in the process the sale would not have been consummated, but he must personally originate an unbroken series of events which culminate in a sale.

Courts look at a number of factors to determine the efficacy of the broker's actions relative to the completed transaction. A fundamental question is whether the broker introduced the property to the prospective buyer, or whether he

generated the initial interest in the property. Also significant is whether the broker engaged in unbroken negotiations which resulted in a sale. In *Whitehead v. Dreyer,* 698 So. 2d 1278 (Fla. 5th DCA 1997), for example, the evidence failed to show that the broker brought the seller and the buyer together and was the efficient cause of the transaction thus the broker was not entitled to a commission. "A broker, to be the procuring cause, must bring the parties together and effect a sale through continuous negotiations inaugurated by him." *Dreyer,* 698 So.2d at 1280. The negotiations must be continuous and the broker must be directly involved in the negotiations which lead to the sale, for "it is not enough for the broker to just have brought the buyer and seller together." *Siegel v. Landquest, Inc.,* 761 So. 2d 415, 417 (Fla. 5th DCA 2000). After introducing the property to the prospective buyer, bringing the parties together and engaging in continuous negotiations with the buyer, the broker "*must also actually effect the sale*..." *Leon Realty, Inc. v. Hough,* 310 So. 2d 767, 768 (Fla. 1st DCA 1975) (emphasis added). The requirement of actual, efficient causation is illustrated in *Barcelona West Investors, Ltd. v. Hold & Hooker, Inc.,* 545 So. 2d 342 (Fla. 5th DCA 1989). In that case, the evidence failed to establish that the broker causally effected the sale. Notwithstanding the broker's long term relationship with the seller and the fact that he acted as an agent for the sale of another property for the seller, the court held

that the evidence did not support the verdict.

The causal analysis that courts engage in places great emphasis on whether the broker was involved at the beginning of the process and whether he originated interest in the prospective buyer thereby giving rise to a chain of events which led to a sale. In this case, the brokers did not introduce the property to the School Board and were not the originating cause of the series of events which led to the sale. "In order to be the procuring cause of a sale, the broker must directly originate a series of events which directly result in the producing of a purchaser for the property."*Walker v. David Davies, Inc.*, 296 N.E.2d 691, 694 (Ohio App. 1972).

> To constitute himself the *causa causans*, the predominating effective cause, it is not enough that the broker contributes indirectly or incidentally to the sale by imparting information which tends to arouse interest. He must set in motion a chain of events, which, without break in their continuity, cause the buyer and seller to come to terms as the proximate result of his peculiar activities.

Sessions v. Pacific Improvement Co., 206 P. 653, 660 (Cal. App. 1922).

A broker may still be entitled to a commission, even though he did not physically introduce the property to the buyer, only if he was the *"pivotal"* cause of the buyer's interest in purchasing the property. In *South Pacific Enterprises,*

Limited Partnership v. Cornerstone Realty, Inc., 672 So. 2d 568 (Fla. 4th DCA 1996), Cornerstone Realty was contacted by Good Samaritan Hospital to help find a location suitable for the development of a satellite medical facility. In January 1991, the president of Cornerstone and a hospital representative met with Jess Santamaria, a partner in South Pacific Enterprises, and visited prospective sites. During the trip, the hospital representative expressed interest in a parcel of land owned by South Pacific. Santamaria submitted a development proposal to the hospital and Cornerstone and South Pacific entered into a brokerage contract. During this time, Daniel Catalfumo learned about the hospital's interest in South Pacific's property and contacted Santamaria, offering to purchase the land from him in order to develop it for the hospital. The ensuing negotiations between Santamaria, Catalfumo and the hospital intentionally excluded Cornerstone. The hospital later executed a development agreement with Catalfumo. The hospital also formed a partnership with a corporation owned by Catalfumo, Royal Palm West, for the express purpose of purchasing and developing the property. Santamaria then sold the land to the partnership which had been formed by, *inter alia*, Royal Palm West and the hospital, and cut Cornerstone out of the sale.

In awarding a commission to Cornerstone, the appellate court found that even though Cornerstone had not introduced the property to Catalfumo, it was

Cornerstone that originally got the hospital interested in South Pacific's parcel and introduced the hospital to the property. Moreover, the sale to Catalfumo's and the hospital's partnership was a transparent contrivance designed, in part, to avoid paying a brokerage commission to Cornerstone. The court thus reached the equitable conclusion that but for Cornerstone's actions in introducing the property to the hospital the sale would never have taken place.

> In this case, although Cornerstone may not have physically introduced South Pacific and Royal Palm West, the record is clear that Good Samaritan Hospital's interest in the property, the genesis for all subsequent dealings including the ultimate sale of the property, resulted from a trip initiated by Cornerstone. Accordingly, we find that, given Cornerstone's *pivotal role* in generating interest in the subject property, it is inapposite to suggest that Cornerstone be denied a commission merely because it did not introduce South Pacific and Royal Palm West.

South Pacific Enterprises, Limited Partnership, 672 So. 2d at 570 (emphasis added). Cornerstone did, in effect, introduce the property to the ultimate buyer, the hospital, because Royal Palm West had formed a limited partnership with the hospital in order to purchase and develop the property. Thus *South Pacific Enterprises* reaffirmed the concept that proximate causation is the central consideration for the determination of the cause of procurement.

In the present case, the chronology of events prior to the involvement of the

brokers is the key to understanding why they were merely peripheral to the sale and were not the procuring cause.

- Before September, 1998, Michael Cease negotiated with the School Board for the sale of 50 acres that were contiguous with Act Realty's 10 acres.

- September 9, 1998, Michael Cease sent a letter urging the School Board to purchase Act Realty's 10 acres.

- The Regional Superintendent reviewed the site and in a memo, dated October 27, 1998, the School Board decided to acquire Act Realty's property.

- A preliminary investigation of the property was conducted.

- On January 19, 1999, the School Board ordered an appraisal of the 10 acres in preparation for the negotiation of a sale price.

- January, 21, 1999, the brokers visited the president of Act Realty and obtained a procurement contract.

It is incontestable that Michael Cease's recommendation to the School Board was instrumental in the Board's decision to purchase the subject property. His letter triggered a series of events; the most immediate of which was the Regional Superintendent's inspection of the land and the decision, six weeks after Cease's letter, to acquire both the 50 acres belonging to Cease's clients and Act Realty's 10 acres.

Maria Martin-Hidalgo's story about how she learned of the Board's interest

in Tract 3 was both contradictory and improbable. She claimed that she first became aware of the ten acres when she saw the wall map in Mr. Valentine's office in either late November or early December. When she inquired about the ten acres, Mr. Valentine reportedly said that they were unnecessary. After October 27, 1998, however, Mr. Valentine knew, as head of the real estate department, that the decision to acquire the property had already been made. Thus Mr. Valentine's alleged response to Ms. Martin-Hidalgo's inquiry made no sense. Furthermore, Ms. Martin-Hidalgo said that she and Mr. Perez-Urrutia visited Act Realty the day after she saw the map on Mr. Valentine's wall. The visit to Act Realty took place on January 21, 1999. If, as she maintained, the map incident occurred just one day before her visit to Act Realty, then her story completely falls apart. For on January 20, 1999, Mr. Valentine must have known that an appraisal of Tract 3 had been ordered on January 19 and would not have told her that the School Board did not need the property. Coincidentally, the brokers sought out Mr. Moliver, President of Act Realty, just two days after the Board had ordered the appraisal.

Ms. Martin-Hidalgo stated that she told Mr. Moliver that the School Board was interested in his property. Mr. Moliver denied this and insisted that the brokers did not divulge that the School Board was already interested in the ten acres. He said that they claimed to know certain individual who worked for the School Board

and they could use those relationships to generate interest in the property. Despite this disagreement in the evidence, the issue is not what Mr. Moliver subjectively believed about the brokers, or what the brokers represented to Mr. Moliver. The cause of procurement analysis is objective in nature. The real question is whether the brokers were the actual cause of procurement, or not. One thing is clear, the brokers were not hired as mere agents to negotiate a sale on behalf of Act Realty, the contract required the brokers to *actually procure* a sale to the School Board.

The brokers' actions did not bring about the sale. The record shows that Ms. Martin-Hidalgo's actions prior to the sale consisted of transmitting a letter of authorization to the School Board, speaking to two appraisers and conveying the Board's initial offer to Mr. Moliver (T. VOL II, 9-13). She later had to terminate contact with the School Board because of an unspecified personality conflict, which apparently rendered her an obstruction to the negotiations, and Mr. Moliver directly negotiated the sale price himself. Her actions were inconsequential and did not give rise to the sale. As for Mr. Perez-Urrutia, who did not testify at the trial, his only involvement consisted of regular telephone calls to Michael Cease in order to find out what was happening. The record is devoid of any evidence demonstrating that he did anything to stimulate the sale.

The record, therefore, makes it obvious that the brokers were not active

agents in procuring the School Board as a buyer and inducing the Board to purchase Act Realty's property, nor did they engage in continuous negotiations leading to the consummation of the transaction.

II.

CONTINGENCY FEE BROKERAGE CONTRACTS FOR THE SALE OF PROPERTY TO THE STATE VIOLATE PUBLIC POLICY BECAUSE THEY ENCOURAGE CORRUPTION AND THE PAYMENT OF INEQUITABLE FEES. THUS THIS COURT SHOULD AFFIRM THE THIRD DISTRICT COURT OF APPEAL'S DECISION VOIDING THE CONTRACT.

In 1906, Justice Oliver Wendell Holmes addressed the invalidity of contingency fee brokerage agreements involving property sales to the government. Ironically, the case involved the sale of a parcel of land to Congress for the construction of a hall of records and the broker's commission, as in the case *sub judice*, was contingent upon a final sale amount exceeding the price set by the owner.

> [T]he validity of the contract depends on the nature of the original offer, and, whatever their form, the tendency of such offers is the same. ***The objection to them rests in their tendency, not in what was done in the particular case.*** Therefore a court will not be governed by the technical argument that when the offer became binding, it was cut down to what was done, and was harmless. The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear. *In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward. Marshall v. Baltimore & O. R. Co.* 16 How. 314, 335, 336, 14, L. ed. 953, 962, 963.

> The general principle was laid down broadly in *Providence Tool Co. v. Norris,* 2 Wall. 45, 54, 17 L. ed. 868, 870, that an agreement for compensation to procure a contract from the government to furnish its supplies could not be enforced, irrespective of the question whether improper means were contemplated or used for procuring it. *McMullen v. Hoffman,* 174 U. S. 639, 648, 43 L. ed. 1117, 1121, 19 Sup. Ct. Rep. 839. And it was said that there is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. 2 Wall. 55, 17 L. ed. 870. In *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 336, 14 L. ed. 953, 962, it was said that all contracts for a contingent compensation for obtaining legislation were void, citing, among other cases, *Clippinger v. Hepbaugh,* 5 Watts & S. 315, 40 Am. Dec. 519, and *Wood v. McCann,* 6 Dana, 366. *See also Mills v. Mills,* 40 N. Y. 543, 100 Am. Dec. 535. There are other objections which would have to be answered before the bill could be sustained, but that which we have stated goes to the root of the contract and is enough to dispose of the case under the decisions heretofore made.

George C. Hazelton v. Margaret R. Sheckels, 202 U.S. 71, 79 (1906) (emphasis added). As underscored above, the determinative question is not whether the parties engaged in improper or corrupt conduct, but the tendency of such contracts to invite corruption. The Third District Court of Appeal echoed this tenet when it held that contingency fee contracts for the procurement of public monies were against public policy and thus invalid *ab initio.* The court stated that "if [the

contract] is opposed to the interest of the public or has a tendency to offend public policy, it will be declared invalid, *even though the parties acted in good faith and no injury to the public would result in the particular instance.*" *City of Hialeah Gardens v. John L. Adams,* 599 So. 2d 1322, 1323 (Fla. 3d DCA 1992) (emphasis added). The court added that *"'it is the evil tendency of the contract and not its actual injury to the public that is determinative, as the law looks to its general tendency and closes the door to temptation by refusing to recognize such agreements.'" Id.* at 1323-1324 (quoting *Stearns v. Williams,* 72 Idaho 276, 240 P.2d 833, 837 (Idaho 1952)).

The Respondent agrees with the School Board that the contract between Act Realty and the brokers was against public policy and must be invalidated. The Respondent, nevertheless, disagrees with the Third District's *sua sponte* award of the $144,650.50 to the School Board. In subsection B of this brief, the Respondent will show that the lower court's bestowal of this gift on the School Board was tantamount to an illegal forfeiture. Furthermore, *Robert & Co. v. Mortland* , 33 So. 2d 732 (Fla. 1948), for the reasons explained below, should no longer be relied upon as a controlling authority.

A. <u>The Contingency Fee Procurement Contract Was Against Public Policy</u>

The facts of *Robert & Co. v. Mortland* are as follows: In 1938, the City of Tampa was planning to build a sewer system and estimated that the project would cost $4,000,000. J.A. Mortland, a local engineer, was interested in the project but lacked the financial backing to assume a task of that magnitude. He approached a large engineering firm in Atlanta, Robert & Co., Inc., and offered to help them secure the contract in exchange for a contingency fee. The firm accepted his offer. Mortland then lobbied the city and Robert & Co. was eventually awarded the contract. In 1947, due to financial difficulties, Tampa cancelled its contract with the engineering firm, but paid for the work that the firm had already completed. The firm, however, refused to pay Mortland his contingency commission and the latter filed suit. As a defense, Robert & Co. asserted that its agreement with Mortland was void because it violated public policy. This Court receded from *Wechsler v. Novak*, 26 So. 2d 884 (Fla. 1946), and held that these types of contingency fee arrangements were lawful unless they were induced by corrupt means.

In 1973, the Florida Legislature passed section 287.055(6), Florida Statutes, which prohibited certain kinds of professional service firms from negotiating with the state, through an agent who was not an employee of the firm, in order to obtain contracts. Moreover, the statute specifically prohibited contingency fees for the

procurement of government contracts.[9] The statute went so far as to criminalize the actions of those who offered to secure a government contract in exchange for a contingency fee and made it a first degree misdemeanor.

> **(6) Prohibition against contingent fees.**
>
> (a) Each contract entered into by the agency for professional services must contain a prohibition against contingent fees as follows: "The architect (or registered surveyor and mapper or professional engineer, as applicable) warrants that he or she has not employed or retained any company or person, other than a bona fide employee working solely for the architect (or registered surveyor and mapper, or professional engineer, as applicable) to solicit or secure this agreement and that he or she has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for the architect (or registered surveyor and mapper or professional engineer, as applicable) any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award or making of this agreement." For the breach or violation of this provision, the agency shall have the right to terminate the agreement without liability and, at its discretion, to deduct from the contract price, or otherwise recover, the full amount of such fee, commission, percentage, gift, or consideration.
>
> (b) Any individual, corporation, partnership, firm, or company, other than a bona fide employee working solely

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[9]*See* H.R. 309, 3rd Leg. (Fla. 1973), "Whereas, the legislature of Florida declares it is in the public interest to prohibit the payment of contingent fees or other considerations for obtaining state, municipal or other professional service contracts financed from public funds..."

> for an architect, professional engineer, or registered land surveyor and mapper, who offers, agrees, or contracts to solicit or secure agency contracts for professional services for any other individual, company, corporation, partnership, or firm and to be paid, or is paid, any fee, commission, percentage, gift, or other consideration contingent upon, or resulting from, the award or the making of a contract for professional services shall, upon conviction in a competent court of this state, be found guilty of a first degree misdemeanor, punishable as provided in s. 775.082 or s. 775.083.

The statute effectively superceded *Robert & Co. v. Mortland*'s narrow holding with respect to the brokering of engineering services to a municipality, which this Court had sanctioned. Today the contract would be illegal and the broker would face a potential jail sentence of up to one year. *Mortland's* broader holding, *viz.*, that contingency fee contracts in this context are valid in the absence of proof that improper means were actually employed, was notably rejected by the statute. Section 287.055(6)(b) created a strict liability crime. As a result, if anyone even attempts to solicit a contingency fee contract for the brokerage of professional services to a state agency, that person is guilty of a first degree misdemeanor regardless of whether improper influence, or corrupt means, were intended to be used.

The Third District Court of Appeal in *City of Hialeah Gardens*, 599 So. 2d 1322, adopted the rationale which sees contingency compensation agreements, in

the arena of governmental transactions with private parties, as *malum in se*. The court's holding was consistent with the spirit of section 287.055(6) and this Court's pre-*Mortland* decision in *Wechsler v. Novak*, 26 So. 2d 884.

In *City of Hialeah Gardens*, the city was seeking a grant of public funds for the expansion of 103rd Street in Hialeah Gardens. It entered into a contingency fee agreement with John Adams who stood to receive 2% of all monies awarded for the project by any governmental agency. The Florida Department of Transportation eventually did the work and no public funds were awarded to the city, thus the contingency was not met. The Third District Court of Appeal, nevertheless, addressed the public policy concerns regarding contingency fee arrangements for the procurement of public monies. The court reasoned by analogy that since lobbying agreements based on contingency fees contravened public policy, "there [was] no difference in principle between agreements to procure legislative favors and agreements to secure a governmental agency monetary funding award to a municipality."[10] *City of Hialeah Gardens*, 599 So. 2d at 1324. The court held that the contract was invalid based on the prevailing public

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[10]The court observed that it makes no principled difference whether the contingency fee contract is between a broker and a state entity, or between two private parties for the procurement of a monetary gain from the state. In both cases, the contracts are invalid because they involve the same danger for public corruption. *City of Hialeah Gardens,* 599 So. 2d at 326.

policy concerns.

> *The objective of the public policy is to eliminate improper influence, or the temptation to exert improper influence, in the obtaining of such project funding awards and to eliminate arrangements which encourage the payment of inequitable fees bearing no reasonable relationship to the services actually performed.*

City of Hialeah Gardens, 599 So. 2d at 325 (original emphasis). The court concluded its opinion with a warning to the judiciary about the dangerousness of these kinds of contingency fee contracts.

> We therefore reverse the final judgment with directions to dismiss the complaint, because of this latter ground. *But we do, by this opinion, call to the attention of the Bench and Bar of the State of Florida, the concerns that we have for the awarding of contingency fees for securing benefits from government, its various agencies, departments and branches, etc.*

City of Hialeah Gardens, 599 So. 2d at 1325-1326 (original emphasis; footnote omitted).

Although it is inconceivable that the Third District disregarded one of only two decisions by this Court in the last fifty years on this issue, *City of Hialeah Gardens* did not discuss the relationship between section 287.055(6) and *Mortland*. In fact, the decision cited *Mortland* only twice and treated it as though it was no longer binding. The first citation was an internal footnote within a

quotation from *Stearns v. Williams,* 240 P.2d 833 (1952). The other reference was in *dictum* for the proposition that if the contract in question was between private parties, then its invalidity may have to be raised as a defense by one of the parties. *City of Hialeah Gardens,* 599 So. 2d at 1325. The most likely explanation for the court's treatment of *Mortland* is that it surmised tacitly that *Mortland* was no longer good law. This is why the court did not discuss *Mortland* and instead relied on *Wechsler, supra;* otherwise, one would have expected the Third District to have certified the question of *Mortland's* legal status to this Court.

Wechsler v. Novak

During World War II, more than 70,000 trainees attending various service schools run by the Army Air Force were staying in hotel rooms in Miami and Miami Beach. In *Wechsler v. Novak,* 26 So. 2d 884 (1946), Ben and Bella Novak owned the Atlantis Hotel on Miami Beach, which had been leased to the United States Army, but by 1943 the Novaks' patriotism had waned and they decided that they wanted their hotel returned to civilian use. They contracted with Jack Wechsler to secure the return of the hotel and agreed to pay a contingency fee of $10,000 if the hotel was returned by a certain date. They also promised to pay him 10% of the gross profits from the date the hotel was returned, until January 15, 1944. Wechsler appeared before the United States Army Real Estate Board on

several occasions and within a few months succeeded in having the military release the hotel back to the owners. When the Novaks refused to pay the commission, Wechsler filed suit. This Court, after reviewing the case law on this issue going back to the Civil War, invalidated the contract as against public policy. *See Providence Tool Co. v. Norris,* 69 U.S. 45, 54 (1864) ("The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.").

There is no doubt that were this Court to authorize contingency fee contracts between real estate brokers and sellers in order to broker property sales to state agencies, it would open the door to the equivalent of insider trading, bribery, influence peddling, kick backs to government officials and other similar corrupt practices. It would be very easy for dishonest officials to leak information to brokers about an agency's future plans to acquire real estate in exchange for compensation. The brokers could then interject themselves into the sale by convincing prospective sellers that they could influence the agency's decision to purchase the property. The School Board's concerns about the temptations for corruption created by such arrangements is, therefore, well founded.

There is no principled difference between the danger for corruption posed by the brokerage of professional services to the state for contingency commissions

and the brokerage of real estate to the state on the same basis. Whether the substance of the contingency fee agreement is for engineering services or a parcel of land, the analysis should be the same. The prohibition of these kinds of brokerage arrangements only with respect to professional services and not with respect to real estate is thus incoherent and arbitrary.[11]

B. The Appellate Court's Award of $144,650.50 to the School Board was an Unconstitutional Forfeiture

The Respondent has never accused the brokers of having used, or having intended to use, corrupt means in order to secure the sale of the property. Act Realty's complaint, rather, was that the brokers were completely ineffectual and inconsequential to the sale. Moreover, the Respondent has not been accused of public corruption, or criminal conduct, nor is there any evidence suggesting that Act Realty violated the law, or even acted in bad faith.

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[11]In the Third District, the brokers argued that even if the contract was invalid, they should be allowed to recover based on *quantum meruit.* Since the brokers were not the cause of procurement, however, there is no *meruit* to *quantum*. Additionally, the public policy reasons invalidating the contingency fee contract would also preclude recovery under a *quantum meruit* theory, which is an equitable remedy. The deterrent effect of invalidating such contracts would be undermined if brokers could collect their commission under an alternative theory. Thirdly, *quantum meruit* is unavailable where an express contract between the parties exists which covers the subject matter at issue. "It is well settled that the law will not imply a contract where an express contract exists concerning the same subject matter." *Kovtan v. Frederiksen*, 449 So. 2d 1 (Fla. 2d DCA 1984); *Hoon v. Pate Constr. Co.*, 607 So. 2d 423, 427 (Fla. 4th DCA 1992).

The School Board incorrectly asserted in its *amicus* brief that the brokers' involvement in the transaction artificially inflated the price of Act Realty's property. This claim is easily refuted by the facts.

The School Board purchased 60 acres, of which Act realty owned only 10 acres, and *the Board paid the exact same price per acre for all 60 acres*.[12] Michael Cease, who collectively represented the owners of 50 acres, was the principal negotiator in this case and the properties were bought in a package deal. As the record clearly shows, Act Realty rode Michael Cease's coat tails in this transaction after Cease advised David Moliver to negotiate the sale price in conjunction with him in order to obtain a uniform price. Furthermore, it was Michael Cease who legally retained the services of a lobbyist, unbeknownst to Act Realty until after the final sale price had been solidified.

The School Board has not alleged that Michael Cease hoodwinked the Boards' members, or committed acts of public corruption. The Board paid $116,000 per acre mainly because it was the only suitable tract available for the construction of a high school and it was located in an area of South Miami which had undergone a tremendous amount of development. The Board negotiated a sale

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[12]The School Board paid $116,000 per acre to both Michael Cease and Act Realty (T. I 34).

price fair-and-square that was acceptable to all the parties. The School Board voted and approved the sale, with six of its nine members voting in favor of the acquisition. There was not a scintilla of evidence that the Board members who approved the sale did so for illicit reasons. Hence, the suspicion cast on Act Realty's conduct was undeserved.

When a contract is nullified because it violates public policy, it becomes unenforceable. Here, once the contract was invalidated, the brokers' claim to a commission was automatically revoked and the $144,650.50 in dispute should have been retained by Act Realty.

The Third District Court far exceeded its authority when it took the funds, which rightly belonged to Act Realty, and gave them to the government. The court's order was a *de facto* illegal forfeiture of private property.

The appellate court lacked the inherent authority to prosecute a civil forfeiture. In *Moakley v. Smallwood,* 826 So. 2d 221 (Fla. 2002), this Court addressed the limits of a court's inherent authority to sanction an attorney for the attorney's bad faith conduct. *Moakley* held that the exercise of this authority must be used with great caution. Furthermore, this Court required that the assessment of attorney's fees against an attorney "must be based on an express finding of bad faith conduct and must be supported by detailed factual findings describing the

specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorney's fees." *Id.* at 227. *Moakley* does not directly apply to this case because the funds were extracted, not from a member of the bar, but from a private party. However, even in the exercise of its sanctioning power against attorneys, courts are supposed to act with extreme circumspection. Yet, in the present case, the Third District's redistribution of Act Realty's money was extreme and baseless.

The appellate court's order was not predicated on a statutory provision, or other authoritative source. The Respondent was deprived of the panoply of procedural and substantive rights that Florida's forfeiture schemes provide. In Florida, as in all the states of the union, forfeiture is a creature of statute. The Florida Contraband Forfeiture Act, section 932.701, Florida Statutes (2004), requires the government to file a complaint against the subject property to be seized, the owner is entitled to prior notification, a preliminary adversarial probable cause hearing, and a full blown trial. Before the government can forfeit a person's property, it must prove that either the owner committed a criminal act, or that the property was either used in the commission of a crime, or was the fruit of a crime. This Court has held that "[b]ecause forfeiture actions are harsh and involve the state's abridgement of a person's property rights, a forfeiture action must satisfy substantive and procedural due process requirements."*Byrom v. Gallagher,* 609

So. 2d 24, 26 (Fla. 1992).

Clearly, there was no proof of criminality in this case and the appellate court lacked the inherent authority to forfeit, *sua sponte*, a significant portion of Act Realty's compensation for the sale of its property. Hence, the Third District's award of Act Realty's funds to the School Board must be overturned.

CONCLUSION

The Respondent requests this Court to affirm the Third District's holding that the contingency fee contract is against public policy and is therefore invalid. The Respondent further requests that this Court reverse the Third District's *sua sponte* forfeiture of Act Realty's $144,650.50. In the alternative, the Respondent requests that this Court reverse the trial court's order and find that the brokers were not the cause of procurement.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Respondent on the Merits was delivered by U.S. mail to Sheldon R. Rosenthal, 25 W. Flagler Street, Suite #1040, Miami, Florida 33130-1717; Jorge L. Gonzalez, 321 Palm Avenue, Hialeah, Florida 33010-4715; Henry T. Sorensen II, Brokers Legal Group, P.A., 32801 US Highway 19 N., Suite 100, Palm Harbor, Florida 34684-3123; Melinda L. McNichols, School Board of Miami-Dade County, 1450 N.E. 2 Avenue, Miami, Florida 33132-1308; David Moliver, president of ACT Realty, Inc., 9415 Sunset Drive, Suite #123, Miami, FL 33173; Alicia Trujillo, 1000 N.W. 111 Avenue, Room #6135, Miami, Florida 33172-5800, this 15th day of November, 2004.

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SILVIA M. GONZALEZ, ESQ.

CERTIFICATION OF FONT

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

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