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IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA, by and through the State Attorney for the Twelfth Judicial Circuit, Appellant vs GENERAL DEVELOPMENT CORPORATION, a Delaware corporation authorized to do business in Florida, Appellee.	CASE NO. 65,191 DISTRICT COURT OF APPEAL 2nd DISTRICT-NO. 83-58

Appeal from the District Court of Appeal
of Florida, Second District

INITIAL BRIEF ON MERITS

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POINT ON APPEAL

THE SECOND DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA INCORRECTLY HELD THAT NEITHER THE STATE CONSTITUTION, NOR ANY STATUTE, NOR ANY CASE LAW GIVES A STATE ATTORNEY INDEPENDENT AUTHORITY TO COMMENCE, IN HIS APPROPRIATE JUDICIAL CIRCUIT AND ON BEHALF OF THE STATE, A CIVIL ACTION FOR DAMAGES AND PENALTIES UNDER CHAPTER 403, FLORIDA STATUTES.

STATEMENT OF THE CASE AND OF THE FACTS

Appellant is the State Attorney for the Twelfth Judicial Circuit of the State of Florida (hereinafter referred to as "State Attorney"). In the late Spring of 1982, the State Attorney became aware of the fact that Appellee, General Development Corporation (hereinafter referred to as "GDC"), had allegedly been engaged in dredging and filling activities in waters of the State without first obtaining permits required pursuant to Chapter 403, Florida Statutes, and Chapter 17-4, Florida Administrative Code.

Upon investigation, it was determined that since at least 1978, GDC has served as the contractor for the North Port Water Control District in the implementation of that District's Plan of Water Management For North Port Charlotte Drainage District. The purpose of the District and its Plan is to provide drainage for some 35,500 acres of property located in the City of North Port for subsequent development for residential use by GDC. Towards this end, since 1978, GDC has allegedly constructed, expanded, modified or caused to be constructed, expanded, or modified approximately 19.3 miles of waterways, canals, or impoundments, involving the removal of approximately 3 million cubic yards of earth. Appendix at p. 4-8.

A review of the official records of the Florida Department of Environmental Regulation (hereinafter referred to as "DER") revealed that said canals, waterways or impoundments

were constructed, expanded or modified without permits allegedly required by Chapter 403, Florida Statutes and the rules and regulations promulgated thereunder. The expansion, modification or construction of said canals, waterways or impoundments without appropriate and currently valid permits is prohibited by Chapter 403, Florida Statutes, and is actionable by civil, criminal and administrative remedies.

In addition to the allegedly unpermitted activities described above, GDC was found to have allegedly caused or contributed to violations of water quality standards established for waters of the State by Chapter 17-3, Florida Administrative Code. Appendix at p. 9-11.

Such violations were allegedly caused or contributed to by GDC's construction activities prior and subsequent to 1978. Said violations of water quality standards are also prohibited by Chapter 403, Florida Statutes, and are similarly enforceable.

Protection of the State's natural resources is of great importance to the people of this State. Indeed, FLA. CONST. art. II, §7 states, "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty". The Florida Legislature has declared:

> The pollution of the air and waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and other aquatic life, and impairs domestic, agricultural, industrial, recreational, and other beneficial uses of air and water....
>
> It is...the public policy of this state to conserve the waters of the state and to

> protect, maintain, and improve the quality thereof....
>
> The prevention, abatement, and control of pollution of the air and waters of this state are affected with a public interest....
>
> Control, regulation, and abatement of the activities which are causing or may cause pollution of the air or water resources of the state...be increased to insure conservation to insure conservation of natural resources, to insure a continued safe environment, to insure purity of air and water, to insure domestic water supplies, to insure protection and preservation of the public health, safety, welfare, and economic well-being...
>
> Section 403.021, Florida Statutes.

It was upon the basis of this strong legislative mandate that the State Attorney, as the legal representative of the State of Florida in the Twelfth Judicial Circuit, sought enforcement action against GDC for its alleged violation of the State laws designed to protect the quality of the State's water resources. Such enforcement action was initiated on September 27, 1982 by the State Attorney's filing of its Complaint For Damages and Civil Penalties Or Alternatively Petition For Enforcement. Appendix at p. 1-13. The State Attorney determined that its involvement was warranted since no other State agency had initiated a civil action for damages and civil penalties against GDC.

On October 26, 1982 GDC filed a Motion to Dismiss the State Attorney's action.

On November 9, 1982 GDC filed a Motion for Summary Judgment.

On December 1, 1982 a hearing on GDC's Motions was held

before Sarasota County Circuit Court Judge Paul E. Logan.

On December 22, 1982 the trial court entered its Order dismissing the State Attorney's Complaint on the grounds that Section 27.02, Florida Statutes does not authorize the State Attorney to "bring an action of this type". Appendix at p. 14-15.

A Notice of Appeal from the final Order of the Sarasota County Circuit Court dismissing Petitioner's action was filed January 5, 1983. Appendix at p. 16. Oral Argument before the District Court of Appeal, Second District was heard on September 7, 1983.

On March 23, 1984, the District Court of Appeal, Second District filed its Opinion affirming the Order of the Sarasota County Circuit Court. Appendix at p. 17-42.

The State Attorney seeks review of this March 23, 1984 Opinion.

Two points were raised on appeal by the State Attorney before the District Court of Appeal, Second District. The first point concerned a state attorney's authority to prosecute a civil action to remedy violations of the State's environmental laws under Chapter 403, Florida Statutes. The second point concerned a state attorney's authority to prosecute a petition for enforcement under Chapter 120, Florida Statutes, to enforce the State's environmental rules and regulations. In its Opinion filed on March 23, 1984, the District Court of Appeal, Second District affirmed the trial court's ultimate rulings, holding:

> [n]either the state constitution, nor any statute, nor any case law gives a state attorney independent authority to commence, in his appropriate judicial circuit and on behalf of the state, a civil action for damages and penalties under section 403.141(1) and/or institute an administrative action to enforce DER's related rules and regulations under section 120.69(1)(a). Appendix at p. 19.

The State Attorney has requested this Court to invoke its discretionary jurisdiction pursuant to FLA. CONST. art. V, §3(b)(3), to review that portion of the District Court of Appeal, Second District's Opinion which holds that a state attorney has no "independent authority to commence, in his appropriate judicial circuit and on behalf of the state, a civil action for damages and penalties under section 403.141(1)".

On July 18, 1984 this Court entered it Order Accepting Jurisdiction and Setting Oral Argument. Appendix at p. 43.

ARGUMENT

The State Attorney for the Twelfth Judicial Circuit of Florida initiated a civil action in the name of the State of Florida against GDC by filing a "Complaint For Damages and Civil Penalties or Alternatively Petition For Enforcement" in the Circuit Court in and for Sarasota County, Florida. Appendix at p. 1-13. The Complaint of the State Attorney alleged, inter alia, that GDC had committed violations of Section 403.161(1), Florida Statutes, and therefore, pursuant to Section 403.161(2), Florida Statutes, was "liable to the state for any damage caused and for civil penalties as provided in s. 403.141." Appendix at p. 1.

Section 403.141(1), Florida Statutes states:

> Whoever commits a violation specified in s. 403.161(1) is liable to the state for any damage caused to the air, waters, or property, including animal, plant, or aquatic life, of the state and for reasonable costs and expenses of the state in tracing the source of the discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters, and property, including animal, plant, and aquatic life, of the state to their former condition, and furthermore is subject to the judicial imposition of a civil penalty for each offense in an amount of not more than $10,000 per offense.

The State Attorney initiated this cause on behalf of the State of Florida on the basis of his authority to represent the State of Florida in all trial courts within his judicial circuit. Such authority is derived by virtue of the provisions of FLA. CONST. art. V, §17 and Section 27.02,

Florida Statutes.

In its decision affirming the Circuit Court's dismissal of the State Attorney's Complaint, the District Court of Appeal of Florida, Second District, stated,

> Article V, section 17 creates the office of a state attorney for each judicial circuit and defines his authority to act on behalf of the state. the relevant part of section 17 provides: "In each judicial circuit a state attorney shall be elected for a term of four years. He shall be the prosecuting officer of a trial courts in that circuit and shall perform other duties prescribed by general law...." (Emphasis supplied). We believe that the plain meaning of the emphasized sentence directly empowers a state attorney to independently bring appropriate criminal proceedings, including related proceedings, in his circuit on the state's behalf without further legislative approval. However, the provision does not give a state attorney the authority to initiate a cause of action created by statute in favor of the state to recover civil damages and penalties for violations of section 403.161(3). Rather, only a specific general law can grant him the power to file such a suit. Such construction of article V, section 17 is consistent with the scope of authority traditionally granted to and exercised by a state prosecuting attorney. (Footnotes deleted)

State v. General Development Corporation, 448 So.2d 1074, 1080 (Fla. 2nd DCA 1984). Appendix at p. 27-28.

To arrive at the holding expressed in the above-cited excerpt, the District Court of Appeal made two erroneous conclusions. First, it is apparent that the District Court of Appeal concluded that the term "prosecuting officer", as it appears in the Florida Constitution, refers only to criminal actions. Second, it is apparent that the District Court of Appeal has overlooked the fact that the office of the state attorney also has a civil tradition.

The term "prosecuting", and related terms such as "prosecute" and "prosecution", while admittedly having a criminal connotation, are equally applicable to civil actions. The Supreme Court of Virginia in Sigmon v. Commonwealth, 105 S.E.2d 171 (Va. 1958) noted, "In common and ordinary acceptation, according to the definition given by lexicographers, and authorities generally, the word 'prosecution' means the institution and carrying on of a suit or proceeding to obtain or enforce some right".

The Webster Reference Dictionary of the English Language defines the word "prosecute" as: "to seek to enforce or obtain by legal process, as a claim or right; to initiate legal proceedings against".

The Supreme Court of Arizona in State v. Dickens, 183 P.2d 148 (Az. 1947) stated, "It is true that the words 'to prosecute' and 'prosecution' usually have reference to criminal proceedings....But, 'to prosecute' can also mean to follow up or carry forward a judicial action, civil or criminal". (Emphasis Added).

Indeed, this Court has recognized the civil connotation frequently given to the word "prosecute" as evidenced by the Rule of Civil Procedure promulgated by this Court whereby a civil action may be dismissed "for failure to prosecute". Rule 1.420(e), Fla. R. Civ. P.

Thus, the term "prosecuting officer", as it appears in the Florida Constitution, may also have a civil connotation. The civil as well as criminal nature of the responsibilities of a prosecuting officer are reflected in definitions of the

term. Balentine's Law Dictionary, 3rd ed. "defines prosecuting attorney" as "a public officer elected or appointed, as provided by constitution or statute, to conduct suits, generally criminally, on behalf of the state in his jurisdiction". (Emphasis Added). See also, 42 Am.Jur. Prosecuting Attorney §2. The qualifier "generally", as used in this definition, reflects the fact that there are exceptions to the usually criminal duties of the prosecuting officer.

Thus, the District Court of Appeal's decision reflects that it has failed to consider the civil connotation applicable to the term "prosecuting", thereby overlooking the civil responsibilities inherent in the office of the prosecuting officer.

To bolster its interpretation that the phrase "prosecuting officer" only relates to criminal responsibilities, the District Court of Appeal has sought support in what it perceived to be the "traditional" authority of a state prosecuting attorney. The District Court of Appeal has, however, cited no cases which support its contention that the tradition of the office of state attorney is strictly criminal.

An analysis of the tradition of the office of state attorney begans in England with the origin of the office of Attorney General. The following excerpts from The Common Law Powers of the Attorney General of North Carolina, 9 N.C. Cent. L.J. 1,3-5 summarize the evolution of the office of Attorney General in England.

> As far back as the Middle Ages, the English Crown conducted its legal business through attorneys, serjeants, and solicitors....At

> that time, the Crown did not act through a single attorney at all. Instead, the King appointed numerous legal representatives and granted each the authority to appear only in particular courts, on particular matters, or in courts of particular geographical areas. Gradually, the number of attorneys representing the Crown decreased as individual attorneys were assigned broader duties. By the latter part of the fifteenth century, the title Attorney-General was used to designate one William Husee. It may have been as late as 1530, however, before the title of Attorney General was held by a single attorney....It was not until the seventeenth century that the office assumed its modern form and the Attorney General became, at least in practice, the preeminent legal representative of the Sovereign.... (Footnotes deleted)

The Supreme Judicial Court of Massachusetts in Commonwealth v. Kozlowsky, 131 N.E. 207 (Mass. 1921) noted that the first appointment of a "State" Attorney General in Colonial America occurred in 1686. That Court further noted that when established in America, the office of "State" Attorney General,

> [b]ecame endowed with the powers and duties appertaining to it at common law, so far as pertinent to the needs of the colony and province. It became one of the institutions of the common law brought by the early settlers to these shores, and its functions constituted a part of that body of common law generally recognized as a part of our jurisprudence.

In common law England, the Attorney General, as the Crown's chief law officer, "was delegated the duty to advise the Crown on all legal matters and to prosecute 'all suits, civil and criminal, in which the Crown was interested'". 18 S. Tex. L.J. 557,558. As the office of State Attorney General emerged in America, it retained these general common

law powers. 16 N.C.L.R. 282, 286. In addition to those powers enumerated above, the common law duties of a State Attorney General include, "authority to appear in the courts on behalf of public rights. He must prosecute all actions necessary to protect State property and revenue". (Emphasis Added). 34 Fla. B.J. 14,15.

It has long been recognized in Florida that such common law duties have devolved upon the Florida Attorney General. In State v. S. H. Kress & Co., 155 So. 823,827 (Fla. 1934) this Court stated,

> The Attorney General has the power and it is his duty among the many devolving upon him by the common law to prosecute all actions necessary for the protection and defense of the property and revenue of the state.

Beginning in 1796, some of the duties of the State Attorney General were shared by Assistant Attorneys General who were appointed to certain districts. People v. Tru-Sport Publishing Co., 291 N.Y.S. 449,459 (App. Div. N.Y. 1936). The Court in Tru-Sport further noted,

> The rise of the office of District Attorney is easily traceable as the outgrowth of these early offices of Assistant Attorneys General. The growth of population and general development of settlement and industry throughout the far flung protions of the state may be seen as the underlying cause for the later rise and establishment of the office of District Attorney. Id.

Also commenting on the development of the office of the District Attorney in New York, the U.S. Supreme Court in Spielman Motor Sales Co., Inc. v. Dodge, 55 S.Ct. 678, 679 (1935) noted that "he was charged with duties which pre-

viously had devolved upon an Assistant Attorney General". The Supreme Court further noted that despite the provision of local elections, "the district attorney in each county has been regarded as a state officer performing a state function and taking the place, in respect to his duties within the district or county, of the Attorney General, upon whom at the outset these duties had been laid". Id.

The Supreme Court of Illinois in People v. Shinsaku Nagano, 59 N.E.2d 96, 104 (Ill. 1945) similarly noted the traditional link between the the offices of State Attorney General and State Attorney. That Court stated,

> It thus appears from a rather extended line of cases by this court that we have always viewed a State's Attorney as a constitutional officer with rights and duties analogous to or largely coincident with the Attorney General, though not identical, and the one to represent the county or People in matters affected with a public interest.

It is often said that the office of the prosecuting attorney "was carved out of that of the common law office of Attorney General". State v. Daviess Circuit Court, 142 N.E.2d 626,628 (Ind. 1957); and 42 Am.Jur. Prosecuting Attorneys §2. In State v. Ellis, 112 N.E. 98,100 (Ind. 1916) the Supreme Court of Indiana stated that the office of prosecuting attorney "was carved out of that of the common-law office of Attorney General, who originally discharged all the duties now devolving on the two officers".

It should be noted that "the Attorney General in England acted freely in actions concerning the Crown with no distictions being drawn between civil and criminal powers.

So, too, in the United States. No jurisdictions acknowledging common law powers in that office expressly limit the same to either criminal or civil actions". 16 N.C.L.R. 282, 286. It is significant to note that no cases have been found which limit the common law powers devolving to the State Attorney from the State Attorney General to only those pertaining to criminal authority.

The common law roots of the office of the state attorney in Florida have similarly been recognized. See for example, Miller v. State, 28 So. 208,210 (Fla. 1900); and State v. Michell, 188 So.2d 684 (Fla. 4th DCA 1966).

Thus, since the common law office of prosecuting, district, or state attorney evolved from the common law office of State Attorney General, assuming locally those common law duties devolving to the State Attorney General, it may be seen that traditionally, the office of the state attorney had civil, as well as, criminal authority. Therefore, in view of the above, the District Court of Appeal's narrow interpretation of the Constitutional phrase, "prosecuting officer", is unsupported.

It is well-established that the principles governing the construction of statutes are generally applicable to the interpretation of a Constitutional provision. 10 Fla.Jur. 2d Constitutional Law §21. Two maxims of statutory construction are of particular relevance to our consideration of the meaning of that portion of FLA. CONST. art. V, §17 which states, "He shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties pre-

scribed by general law...." (Emphasis Added).

When construing a Constitutional provision, it must be presumed that the framers of the Constitution had a working knowledge of the English language and that they knew the ordinary rules of grammar and the meaning of words. Florida State Racing Commission v. Bourguardez, 42 So.2d 87 (Fla. 1949); and 30 Fla.Jur. Statutes §93. It must also be presumed that the framers were aware of the common law and that they intended to harmonize the Constitution with the common law unless otherwise specified. In Jones, Varnum & Co. v. Townsend, 2 So. 612,613 (Fla. 1887), this Court noted,

> [a]s a rule of exposition, statutes are to be construed in reference to the prinicples of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutly required. The law rather infers that the act did not intend to make any alteration other than what was specified, and besides what has been plainly pronounced. (Emphasis Deleted).

Employing these rules of construction to interpret the above-cited excerpt from FLA. CONST. art. V, §17, it should initially be noted that the phrase "prosecuting officer of all trial trial courts in that circuit", and the phrase "shall perform other duties prescribed by general law", are separated by the word "and". The word "and" is a "coordinating conjunction...used to connect words or phrases". Harbrace College Handbook, 8th ed. at 13. Thus, as punctuated by the framers of the Florida Constitution, the duties of the state attorney as prosecuting attorney are distinct from those duties prescribed by general law. This conclusion

is supported by the framers' use of the word "other" to modify the phrase "duties prescribed by general law".

Presuming that the framers of the Florida Constitution were cognizant of the common law duties of the state attorney, it is apparent that the phrase "He shall be the prosecuting officer of all trial courts in that circuit" is a recognition of those common law duties, and an attempt to harmonize the Constitution with the common law by requiring the state attorney to retain such duties. The phrase "and shall perform other duties prescribed by general law" is indicative of the framers' intention to allow the Legislature to expand the duties of the state attorney beyond those inherent duties devolved by common law.

This construction of FLA. CONST. art. V, §17 is consistent with the construction placed upon similar consitutional provisions pertaining to the duties of the office of State Attorney General in other jurisdictions. In Hunt v. Chicago Horse & Dummy Ry. Co., 13 N.E. 176,180 (Ill. 1887), for example, the Supreme Court of Illinois noted that its Constitution, upon establishing the office of Attorney General, provided that the Attorney General "shall perform such duties as may be prescribed by law". The Supreme Court of Illinois noted however, "There is nothing in our present Constitution or statutes which necessitates, in our opinion, a construction which would exclude the attorney general from the exercise of common law powers in addition to those conferred by statute". Id.

In Fergus v. Russel, 110 N.E. 130,145 (Ill. 1915), the

Supreme Court of Illinois further noted with reference to its Attorney General that, "By our Constitution we created this office by the common-law designation of Attorney General and thus impressed it with all its common-law powers and duties". Fergus v. Russel, at 144. While noting that the Illinois Constitution provided the Legislature with authority to proscribe additional duties for the Attorney General, the Illinois Supreme Court specifically held that the Legislature "cannot strip him of his timehonored and common-law functions". Id.

The Illinois Supreme Court in People v. Shinsaku Nagano, 59 N.E.2d 96,104 (Ill. 1945) similarly held with respect to its State's Attorney, a constitutional officer, that, "a legislative body may not strip a constitutional officer of his powers".

Referring to its constitutional officers, including the state's attorneys, the Supreme Court of North Dakota in Ex parte Corliss, 114 N.W. 962,964 (N.D. 1907) noted,

> If these constitutional offices can be stripped of a portion of the inherent functions thereof, they can be stripped of all such functions, and the same can be vested in newly created appointive officers, and the will of the framers of the Constitution thereby thwarted.

In State v. District Court In and For Ward County, 291 N.W. 620,625 (N.D. 1940), the Supreme Court of North Dakota specifically held that "The Legislature cannot strip from the office of state's attorney 'the important duties inherently connnected therewith'".

As a general proposition therefore, powers and duties

of the office of state attorney as prescribed by a State's constitution "may not be increased or diminished by the legislature, acting alone, except insofar as permitted by the constitution". 63A Am.Jur.2d Prosecuting Attorneys §20.

Since FLA. CONST. art. V, §17 provides no specific authority for the Legislature to restrict the inherent duties of the office of state attorney, one must conclude from a plain reading of that provision that, at the very least, the state attorney in Florida has those common law duties which have devolved to the office. As noted above, those common law duties include the duty to prosecute all suits, civil and criminal, on behalf of the State, where the State is interested, and to prosecute all actions, civil or criminal, necessary for the protection and defense of the property and revenue of the State.

Thus, by virute of FLA. CONST. art. V, §17, the State Attorney has civil, as well as criminal authority, independent of any statutory provision, to initiate an action on the State's behalf, pursuant to Sections 403.141(1) and 403.161(1), Florida Statutes, to protect the air, waters or property of the State. Indeed, the District Court of Appeal recognized the State Attorney's Constitutional authority to initiate such actions, independent of any statutory provision, but erroneously limited such authority to criminal proceedings. State v. General Development Corporation, 448 So.2d 1074,1080 (Fla. 2nd DCA 1984). Appendix at p. 27-28.

As noted at the outset, the State Attorney initiated this cause on the basis of his Constitutional authority, and

on the basis of Section 27.02, Florida Statutes. Section 27.02, Florida Statutes provides:

> The state attorney shall appear in the circuit and county courts within his judicial circuit and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party....(Emphasis Added).

The District Court of Appeal concluded that the State Attorney could only initiate a civil action if granted such authority by a "specific general law". State v. General Development Corporation, at 1080. Appendix at p. 28. Rejecting the State Attorney's contention that Section 27.02, Florida Statutes provides a basis for bringing suit under Sections 403.141(1) and 403.161(1), Florida Statutes, the District Court of Appeal held that Section 27.02, Florida Statutes, is not a such a "specific general law" which would authorize the State Attorney to initiate a civil action,

> [b]ut only broadly sets forth, as its heading indicates, a state attorney's general duties. It enables him to appear and represent the state before appropriate courts in all cases, whether criminal or civil, once the state is a party to a particular suit. This section alone does not give him standing to make the state a party to a statutorily-created civil action. State v. General Development Corporation, at 1080. Appendix at p. 28.

Assuming arguendo, that FLA. CONST. art. V, §17 alone does not provide the State Attorney with sufficient authority to initiate civil actions on behalf of the State, the issue before the Court is whether or not Section 27.02, Florida Statutes provides such authority. It should initially be noted that the language adopted by the Legislature in Section

27.02, Florida Statutes, is not unique to Florida. The legislatures of the following States have adopted language substantially similar to Section 27.02, Florida Statutes, when prescribing the duties of their state attorney, or functional equivalent, be it District Attorney, Prosecuting Attorney, Commonwealth Attorney, Solicitor, County Attorney, or otherwise: Alabama (Ala. Code §12-17-184); Arkansas (Ark. Stat. Ann. §24-139); Georgia (Ga. Code Ann. §24-2908); Idaho (Idaho Code §31-2604); Illinois (Ill. Ann. Stat. ch. 14 §5); Iowa (Iowa Code §331.756); Massachusetts (Mass. Gen. Laws Ann. ch. 12 §27); Mississippi (Miss. Code Ann. §25-31-11); Missouri (Mo. Ann. Stat. §56.060); Nebraska (Neb. Rev. Stat. §23-1201); New Hampshire (N.H. Rev. Stat. Ann. 7:34); New Mexico (N.M. Stat. Ann. §36-1-18); Oklahoma (Okla. Stat. Ann. tit. 19 §215.4); South Dakota (S.D. Compiled Laws Ann. §7-16-9); Utah (Utah Code Ann. §17-18-1); Washington (Wash. Rev. Code Ann. §36.27.020); West Virginia (W. Va. Code §7-4-1); and Wisconsin (Wis. Stat. Ann. §59.47).

In determining how Section 27.02, Florida Statutes is to be interpreted, it may be instructive to note how those provisions similar to that section have been construed by the various states. The Supreme Court of Idaho in State v. Fox, 594 P.2d 1093, (Idaho 1979) upheld the authority of the prosecuting attorney to initiate a civil action to establish public rights in privately owned waterfront property. Citing the Idaho statute which is substantially similar to Section 27.02, Florida Statutes, the Court held,

> We are of the opinion that the legis-

> lative grant of authority to the prosecuting attorney to prosecute actions in which "the people are interested" amounts to a statutory grant of standing in the instant case. The statute empowers the prosecuting attorney to call upon the courts of this state for vindication of public rights which for all practical purposes would otherwise go unprotected.

The Supreme Court of South Dakota in Beck v. Bossingham, 152 N.W. 285 (S.D. 1915) upheld the authority of the state's attorney to maintain a civil action in the name of the State to abate a public nuisance. The defendant in that case had contended that "the state's attorney is not authorized by law to commence a civil action in the name of the state to abate a public nuisance". Id. at 285. Referring to language contained in a statute substantially similar to Section 27.02, Florida Statutes, the Supreme Court of South Dakota held,

> No distinction is made between actions on behalf of the state or county nor between civil and criminal actions. So long as the state or county is interested, it is his duty to prosecute or defend. Id. at 286.

In Dolezal v. Bostick, 139 P. 964 (Ok. 1914), the Supreme Court of Oklahoma considered the authority of county attorney to initiate a civil action to prevent the misapplication of public funds pursuant to a statute substantially similar to Section 27.02, Florida Statutes. The Court held that, upon the sole authority of the statute providing for the duties of the county attorney, "the county attorney may, upon his own initiative, in the name of the territory or the

state, bring suit to enjoin territorial or state officers... from misapplying public funds". Id. at 968.

The Attorney General of the State of Wisconsin in 25 Op. Att'y Gen. 549 (1936) construed a Wisconsin State statute substantially similar to Section 27.02, Florida Statutes. In his Opinion, the Wisconsin Attorney General noted,

> The present section is very broad and all-inclusive. The district attorney is not only the criminal prosecutor for the state and county, but he is also the representative of the state and county in civil matters in which either of these municipalities is interested or a party. Id. at 550.

In Powers and Duties of the Prosecuting Attorney: Quasi-Criminal and Civil, 25 J. Crim. L. & Crimin. 21,30 the commentator noted, "The laws of most of the states contain general sections making it the duty of the prosecuting attorney to prosecute or defend all actions, civil or criminal, in which the state or county is a party or is interested". The commentator further noted that, "such provisions are broad enough to allow, in fact in most instances to require the prosecuting attorney to prosecute or defend all civil actions which are now part of his duties". Id.

In support of its contention that Section 27.02, Florida Statutes does not, in and of itself, provide the State Attorney with any civil authority, the District Court of Appeal has cited over twenty specific general laws which, the Court claims,

> [h]ave explicitly given a state attorney the authority to independently initiate civil suits on behalf of the state in

> other areas concerning the health, safety, and welfare of Florida's citizens and environment.

State v. General Development Corporation, 448 So.2d 1074, 1080 (Fla. 2nd DCA 1984). Appendix at p. 28-29.

The following comments contained in The Prosecuting Attorney, 24 J. Am. Inst. Crim. L. & Crimin. 1025,1026,1034 should serve as a guide by which to weigh the relevance of the existence of the statutes identified by the District Court of Appeal:

> The statutes of every state have dozens of provisions concerning specific powers or duties of the prosecuting attorney but in almost every case one of these sections deals generally with the functions of the prosecutor. To a large extent the specific provisions which are found throughout the statutes are superfluous and their subject matter is covered in the general section. The Michigan statutes contain the following general statement of the powers and duties of the prosecuting attorney:
>
> > "The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all courts of the county, all prosecutions, suits, applications and motions, whether civil or criminal, in which the state or county may be a party or interested."
>
> There are few duties which might be given to the prosecuting attorney which this section does not confer and, in general, it may be taken as typical of the powers and duties almost universally given.... Almost every one of the scores of provisions particularizing the duties of the prosecuting attorney is stated positively as a duty and practically none implies that the prosecutor has any discretion toward the specified offense. In very few cases, if any, does the enactment of such a provision add to the powers

> of the prosecuting attorney. It merely makes it more clear that the prosecutor has violated his oath of office if he fails to prosecute the particular offense in question.

The Wisconsin Attorney General cataloged the several Wisconsin State statutes which specifically stated duties or requirements appertaining to the district attorney. Section 59.47, Wisconsin Statutes, it will be recalled, is a statute generally providing the duties of the district attorney in language similar to Section 27.02, Florida Statutes. The Wisconsin Attorney General in 25 Op. Att'y Gen. 549,561 (1936) stated,

> It will be noted that in almost all of these provisions particularizing his duties the district attorney has no discretion in the matter but he has a positive duty to perform. Furthermore, in most cases there is no addition to his duties or powers, in view of the general requirements of subsecs. (1) and (2) of sec. 59.47, Stats.; but the specific sections do make it more clear that the district attorney has violated his oath of office if he fails to perform the particular duty in question.

A review of the statutory provisions cited by the District Court of Appeal in a footnote to its decision reveals that the vast majority of those statutes merely impose a mandatory duty upon the state attorney by stating he "shall" act in a specified manner.

The two statutes discussed by the District Court of Appeal in the body of its decision are not representative of the over twenty specific general laws cited by the Court. Sections 60.05(1) and 380.11, Florida Statutes, for example,

are representative of the small minority of cases cited by the District Court of Appeal which do not impose a mandatory duty.

The wrongs sought to be remedied by these statutes do not, however, affect the State as a whole, or the general public. Instead, they are applicable to a limited geographical region, or affect an isolated segment of the public. A public nuisance, for example, affects only those citizens within the immediate sphere of influence of the nuisance. It therefore cannot be said that the State as a whole is affected by the nuisance.

Thus, the State may not be a party affected by the nuisance, and therefore, Section 27.02, Florida Statutes, arguably may not be sufficient authority to institute a civil action for injunctive relief. If however, the public nuisance affected State property, the State would be an affected party, and therefore, Section 27.02, Florida Statutes would be sufficient authority for the State Attorney to institute a civil action, not only for injunctive relief, but also for damages.

As noted above, the District Court of Appeal erroneously concluded that Section 27.02, Florida Statutes "alone does not give [the state attorney] standing to make the state a party to a statutorily-created civil action". State v. General Development Corporation, 448 So.2d 1074,1080. Appendix at p. 28. The basis for this conclusion appears to be the statement immediately preceeding the one just quoted. The District Court of Appeal stated that Section 27.02,

Florida Statutes enables the state attorney "to appeal and represent the state before appropriate courts in all cases, whether criminal or civil, once the state is a party to a particular suit". Id.

Apparently, the District Court of Appeal has interpreted Section 27.02, Florida Statutes as restricting the state attorney to only those actions where a civil or criminal proceeding against or by the State has already been initiated. Stated differently, it appears that the District Court of Appeal has concluded that the state attorney does not have any authority pursuant to Section 27.02, Florida Statutes to initiate an action on behalf of the State.

Two key terms, "prosecute" and "party", contained in Section 27.02, Florida Statutes need to be considered to determine the validity of the District Court of Appeal's interpretation of that statute. As noted above, The Webster Reference Dictionary of the English Language defines the word "prosecute" as: "to seek to enforce or obtain by legal process, as a claim or right; to initiate legal proceedings against". (Emphasis Added). As the underlined portions of the definition reveal, the act of prosecuting includes the institution of the cause. The Supreme Judicial Court of Massachusetts in Inhabitants of Clinton v. Heagney, 55 N.E. 894 (Mass. 1900) stated,

> As applied to proceedings upon the civil side of a court, the ordinary meaning of the word "prosecution" includes the institution of a suit, and it is not confined to the mere pursuit of a remedy after proceedings have been instituted.

Similarly, definition of the word "party" is not necessarily restricted to the sense of "plaintiff" or "defendant" in a civil or criminal action. Black's Law Dictionary, 5th ed. defines the word "party" as, "A person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually". In State v. Dougherty, 216 S.W.2d 471 (Mo. 1949), the Supreme Court of Missouri defined the word "party" as "one concerned in an affair". In Frazee v. Citizens Fidelity Bank & Trust, 393 S.W.2d 778 (Ky. 1964), the Court held that the term "party" means "one who has a beneficial interest".

It is obvious from a review of these definitions of the word "party" that there are generally accepted connotations in addition to the sense of plaintiff or defendant in a legal proceeding. Common to each of the above-noted definitions is the concept of an affected interest. Thus, a State is a "party" when a public interest is involved.

Applying these definitions of the terms "prosecute" and "party" to Section 27.02, Florida Statutes, it is apparent that the State Attorney has the authority to initiate a civil or criminal action whenever the interests of the State are involved. The interests of the State are involved whenever injury or harm is threatened or occurs to the property or revenue of the State, or where a violation of State law has occurred. Such an interpretation is consistent with the Florida Constitution, and with public policy. It is also consistent with the traditional duties of the office of the state attorney as it evolved from common law times.

In its decision, the District Court of Appeal stated,

> [s]ection 403.161 sets forth the violations; section 403.141 creates the civil liability in favor of the state; and section 403.121 empowers the DER alone to sue for civil damages and penalties.

State v. General Development Corporation, 448 So.2d 1074,1082 (Fla. 2nd DCA 1984). Appendix at p. 32.

Section 403.121(1), Florida Statutes merely enables the Florida Department of Environmental Regulation (DER) to inititate judicial enforcement of violations of State environmental laws included in Chapter 403, Florida Statutes. The relevant provisions of Section 403.121(1), Florida Statutes state:

> (a) The department may institute a civil action in a court of competent jurisdiction to establish liability and to recover damages for any injury to the air, waters, or property, including animal, plant, and aquatic life, of the state caused by any violation.
>
> (b) The department may institute a civil action in a court of competent jurisdiction to impose and to recover a civil penalty for each violation in an amount of not more thatn $10,000 per offense.

The above quoted provisions provide the DER, an administrative agency, with authority to initiate civil actions to enforce violations of Chapter 403, Florida Statutes. It should be noted that "administrative agencies have only those powers which are legally conferred upon them by the statutes of the state". 1 Fla.Jur.2d Administrative Law §20. Without the specific authority provided by Section 403.121(1), Florida Statutes, the DER would have no legal authority to enforce the State's environmental laws.

Contrary to the holding of the District Court of Appeal, there is no language contained in Section 403.121, Florida Statutes, nor anywhere else within Chapter 403, Florida Statutes which states that the DER may "alone" sue for civil damages and penalties. If such language did exist, the expression would be contrary to the legislative intent as stated in Section 403.161(5), Florida Statutes wherein it was noted that the enforcement remedies are intended "to insure immediate and continued compliance with this act". If the DER were truly the only entity empowered to enforce the provisions of Chapter 403, Florida Statutes, and if the DER failed to act, the legislature's intent would be thwarted.

The Legislature is not unmindful of the fact that the DER is an Executive Branch agency whose Secretary is an appointee of the Governor. It is entirely conceivable that the DER could fail to respond to a violation of Chapter 403, Florida Statutes for some political reason. There is certainly precedent for political influence in environmental enforcement at the federal level. It is perhaps with this reality in mind that the Legislature enacted Section 403.412, Florida Statutes. Pursuant to the provisions of that statute, even a citizen may maintain a civil action in circuit court to enforce the State's environmental laws when the DER has failed to act.

Certainly, if under appropriate circumstances, even a citizen can enforce the provisions of Chapter 403, Florida Statutes, it cannot be said that the DER "alone" may exercise such rights. Indeed, only an opinion which recognizes the

authority of the State Attorney to initiate a civil action pursuant to Sections 403.141(1) and 403.161(2), Florida Statutes would be consistent with the District Court of Appeal's recognition that the State Attorney has authority to initiate enforcement proceedings pursuant to Section 403.161(3), Florida Statutes. State v. General Development Corporation, 448 So.2d 1074,1082 (Fla. 2nd DCA 1984). Appendix at p. 27-28.

In State of Florida v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976), the United States Court of Appeals, Fifth Circuit was faced with issues of standing similar to the case at bar. In that case, Florida's Attorney General prosecuted an anti-trust action against seventeen major oil companies. "Among the preliminary questions raised by the defendants was the right of the Attorney General, under Florida law, to initiate this action without explicit authorization from other departments, agencies, and political subdivisions of the state". Id. at 267.

Holding that the Attorney General is clothed with the Constitutional and statutory authority to litigate matters in which the State is a party or otherwise interested, the U.S. Court of Appeals held that the Attorney General could bring the action even if such action could have been brought by the appropriate agencies. The Court further stated,

> There is no evidence in the record before us of any objection on the part of the government bodies which allegedly have been injured by the defendants' business practices. And, as a practical matter, it is difficult to imagine such objections. The individual government instrumentalities

> involved have something to gain from this suit, and nothing to lose but their causes of action. Id. at 273.

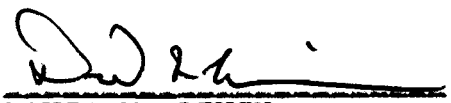
For similar reasons, the State Attorney has Constitutional and statutory authority to prosecute all civil actions on behalf of the State where State law has been violated, where a civil cause of action has been established on behalf of the State, and where such action is necessary for the protection of the health, safety, welfare, property and revenue of the State.

CONCLUSION

For the foregoing reasons, Appellant, State of Florida, by and through the State Attorney for the Twelfth Judicial Circuit submits that the judgment of the District Court of Appeal, Second District, should be reversed and a new trial granted.

Respectfully submitted,

JAMES A. GARDNER
STATE ATTORNEY

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Appellant's Initial Brief on Merits has been furnished by hand to:

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