IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,536

METROPOLITAN DADE COUNTY,

Petitioner,

vs.

CHASE FEDERAL HOUSING CORP., et al.,

Respondents.
_____/

ON PETITION TO INVOKE DISCRETIONARY JURISDICTION
TO REVIEW DECISION OF THE DISTRICT COURT
OF APPEAL, THIRD DISTRICT
CASE NOS. 97-49, 97-50, 97-857

ANSWER BRIEF OF RESPONDENTS, JAY M. GOTTLIEB AND NORTHERN TRUST BANK, N.A., CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF CHARLES GOTTLIEB

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STATEMENT OF THE CASE AND OF THE FACTS[1]

1. Dade County is a political subdivision of the State of Florida.

2. The Estate of Charles Gottlieb ("the Estate") is the owner of a section of the Suniland Shopping Center, located at 11701-11751 South Dixie Highway, Miami, Florida. The Estate has been the owner of its section in the Suniland Shopping Center since 1987. Prior to that time, said section of the Suniland Shopping Center was owned by Charles Gottlieb.

3. An independent entity has always leased space to operate a drycleaner business at the Suniland Shopping Center. Neither Charles Gottlieb, the Estate or the Personal Representatives participated in the operation of or had any ownership interest in any drycleaner business at the Suniland Shopping Center.

4. On November 12, 1991, Dade County, through the Department of Environmental Resources Management ("DERM"), issued the Personal Representatives an Emergency Order to Correct

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[1] On March 12, 1997, Petitioner, Metropolitan Dade County ("Dade County"), and Respondents, Jay M. Gottlieb and Northern Trust Bank, N.A., as Co-Personal Representatives of the Estate of Charles Gottlieb ("Personal Representatives"), stipulated to this Statement of Facts for the purpose of Dade County's appeal to the District Court of Appeal for the Third District, where the stipulation has been filed. The facts contained in paragraphs 2-6, 10-11 are also set forth in the affidavit of Jay Gottlieb (Record on Appeal, pp. 303-38), which was uncontroverted in the trial court. Contrary to Dade County's representations in footnote 3 of its Initial Brief to this Court, the Personal Representatives have not stipulated to any other facts except those set forth herein.

Sanitary Nuisance. The Emergency Order stated that toxic organic compounds had been discovered in a septic tank at the Suniland Shopping Center. Prior to receipt of the Emergency Order, the Personal Representatives did not know that dry cleaning chemicals had been discharged into a septic tank at the Suniland Shopping Center. At no time prior to issuance of the Emergency Order, did the Personal Representatives ever see, or hear about, a tenant or any other person improperly storing, handling, or disposing of drycleaning chemicals, or chemicals of any kind, at the Suniland Shopping Center.

5. After being notified by DERM about the contamination, the Personal Representatives retained environmental consultants to perform assessment and remediation work at the site. During initial assessment activities, the septic tank system at the Suniland Shopping Center was pumped out and the contents were properly disposed of by a licensed contractor. Following installation of a public sanitary sewer system at the site, the septic tank system structure and drainfield were removed from the ground and disposed of in accordance with applicable regulatory requirements. Additionally, a groundwater treatment system was designed and installed and has been operating to remediate the groundwater contamination since installation in 1993.

6. Between November 1991 and July 15, 1996, the Personal Representatives have spent in excess of $289,000.00 for the assessment and cleanup of the drycleaning chemicals contamination discovered at the Suniland Shopping Center. All phases of the

assessment and remediation have been performed with DERM's prior approval. The Personal Representatives continue to remediate the groundwater at the Suniland Shopping Center.

7. In 1994, the Florida Legislature enacted the Florida Drycleaning Solvent Contamination Cleanup Act, ("Drycleaning Act") Laws of Florida 94-355, which created a trust fund to be used for the assessment and cleanup of drycleaning contamination throughout Florida. As part of this statutory scheme, the Florida Legislature provided that eligible facilities could not be subject to administrative or judicial action by the State, local government, or third parties to compel the rehabilitation or pay the cost of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents. Fla. Stat. § 376.3078(3)(1994). The Drycleaning Act became effective on July 1, 1994.

8. On December 19, 1994, after the Drycleaning Act became effective, Dade County sued the Personal Representatives and others alleging that drycleaning chemicals had been detected on real property owned by the Personal Representatives, and real property owned by others, and as a result of the alleged drycleaning chemical contamination, Dade County incurred expenses in installing and servicing drinking water mains in the nearby neighborhood where the drycleaning chemicals were allegedly also detected. Dade County's Complaint contained four counts, all of which were based on provisions of Chapter 24, Dade County Code: injunctive relief (Count I), damages (Count II), civil penalties

(Count III), and attorney's fees and administrative costs (Count IV).

9. The Legislature amended the Drycleaning Act in 1995 by Chapter 95-239, Laws of Florida. Included in the 1995 amendments was an additional immunity provision which provided that a real property owner who, prior to or after October 1, 1995, conducts site rehabilitation in a manner consistent with state and federal laws, may not be subject to administrative or judicial action to compel the rehabilitation or pay the cost of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents, or to pay any fines or penalties regarding the rehabilitation. Fla. Stat. § 376.3078(9)(1995).

10. On or about March 19, 1996, the drycleaner tenant at the Suniland Shopping Center and the Personal Representatives jointly filed a Drycleaning Solvent Cleanup Program Application with the Florida Department of Environmental Protection ("FDEP") for eligibility under Florida Statute § 376.3078 et seq.

11. On July 12, 1996, FDEP determined that the Suniland Shopping Center was an eligible facility under the Drycleaning Act.

12. On July 31, 1996, the Personal Representatives filed their Motion for Final Summary Judgment based on the immunity provisions of Florida Statutes § 376.3078(3) and (9). (Record on Appeal, pp. 339-50).

13. On December 12, 1996, the Court entered Summary Final Judgment for Defendants the Personal Representatives based on the

immunity provisions of Florida Statute § 376.3078(3). (Record on Appeal, pp. 645-46).

14. On January 3, 1997, Dade County filed a Notice of Appeal of the Summary Final Judgment entered in favor of the Personal Representatives to the District Court of Appeal for the Third District. (Record on Appeal, pp. 468-72).

15. On January 28, 1998, the District Court of Appeal for the Third District affirmed the summary judgments entered in favor of the Personal Representatives and the other Respondents, holding that the immunity provisions contained in Florida Statutes § 376.3078(3) and (9) applied retroactively. Metropolitan Dade County v. Chase Federal Housing Corp., 705 So. 2d 674 (Fla. 3d DCA 1998). In its opinion, the District Court certified the following question of great public importance:

> ARE SUBSECTIONS 376.3078(3) AND 376.3078(9), FLORIDA STATUTES (1995), WHICH PROVIDE TO ELIGIBLE ENTITIES CONDITIONAL IMMUNITY FROM CERTAIN ADMINISTRATIVE AND JUDICIAL ACTIONS BY STATE AND LOCAL GOVERNMENTS AND AGENCIES, INTENDED BY THE LEGISLATURE TO APPLY RETROACTIVELY, THUS PRECLUDING ACTIONS AGAINST IMMUNIZED ENTITIES FOR THE RECOVERY BY A GOVERNMENT FOR ENFORCEMENT AND REHABILITATION COSTS EXPENDED PRIOR TO THE ENACTMENT OF THESE SUBSECTIONS?

Id. at 676.

16. On February 27, 1998, Dade County filed its Notice to Invoke Discretionary Jurisdiction.

17. On May 24, 1998, additional amendments to the Drycleaning Act became law.

SUMMARY OF THE ARGUMENT

The plain language of the immunity provisions of the Drycleaning Act bar Dade County's claims against the Personal Representatives and the other Respondents. The Drycleaning Act contains clear, express language showing that the Legislature intended for the Drycleaning Act to apply retroactively. The clear purpose behind the Drycleaning Act is to remedy problems created by past drycleaning solvent contamination. Moreover, eligibility under the Drycleaning Act is available regardless of when the contamination occurred. The most recent amendments to the Drycleaning Act confirm that the Legislature intended for the Drycleaning Act to be construed to protect real property owners such as the Personal Representatives and that the Drycleaning Act must be construed retroactively. Accordingly, the District Court of Appeal for the Third District correctly held that the Legislature intended for the Drycleaning Act to apply retroactively, and the question certified to this Court must be answered in the affirmative.

Moreover, the stringent general test for determining retroactive application of a statute, which was reluctantly applied by the Third District, need not have been used. Dade County, as a subdivision of the State of Florida, is subject to the will of the Legislature, and therefore cannot complain that its rights have been improperly taken away. If the Legislature has determined, as it has through the Drycleaning Act, that Dade County, and the State of Florida itself, have no cause of action

arising from drycleaning solvent contamination, Dade County must adhere to this dictate. Dade County does not possess any federal or state constitutional rights allowing Dade County to challenge application of the immunity provisions of the Drycleaning Act, and in fact, the Florida Constitution itself mandates that the Drycleaning Act is superior to Dade County ordinances. Accordingly, the presumption against retroactivity which applies in many cases is inappropriate here.

Additionally, this Court must reject Dade County's argument that the scope of the immunity afforded by the Drycleaning Act does not preclude Dade County's claims. All of Dade County's claims are encompassed by the language of the Drycleaning Act. In fact, Florida Statute § 376.3078(3) expressly states that the cost of replacing potable water cannot be recovered from parties such as the Personal Representatives.

Finally, while the trial court did not agree, the immunity provided by Florida Statute § 376.3078(9) also bars Dade County's claims against the Personal Representatives. Subsection (9) of the Drycleaning Act establishes immunity for real property owners who voluntarily conduct cleanup efforts on their property. This immunity precludes Dade County's action against the Personal Representatives, who have spent in excess of $289,000.00 to rehabilitate their property. Contrary to the reasoning of the trial court, the immunity of subsection (9) applies to real property owners who conduct cleanup efforts, not just those who have completed cleanup efforts. This interpretation is confirmed

by the 1998 amendments to the Drycleaning Act. Accordingly, this provision of the Drycleaning Act provides an alternative ground for this Court to affirm the opinion of the Third District and the Summary Final Judgment entered by the trial court.

ARGUMENT

In 1994, the Florida Legislature enacted the Drycleaning Act to address a significant threat to the ground waters and surface waters of Florida resulting from past drycleaning solvent contamination. Fla. Stat. § 376.3078(1)(a), (b)(1994). Through the Drycleaning Act, the Florida Legislature imposed a tax as of October 1, 1994 on the gross receipts of drycleaning facilities and the production or importation of perchloroethylene, a drycleaning solvent. Fla. Stat. §§ 376.70, 376.75. The funds collected through the tax are to be used by the State of Florida to remedy conditions created by environmental contamination resulting from the discharge of drycleaning solvents. Fla. Stat. § 376.3078(2).

Included within the Drycleaning Act, the Legislature granted immunity to all persons from suits to compel rehabilitation or to pay the costs of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents, as well as immunity to real property owners who conduct voluntary cleanup activities. As amended in 1995,[2] the first immunity provision of

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[2] The 1995 amendments to the Drycleaning Act became effective on October 1, 1995, before the Personal Representatives filed their Motion for Final Summary Judgment in the trial court.

the Drycleaning Act, which is contained in § 376.3078, now states:

> REHABILITATION LIABILITY. --
>
> In accordance with the eligibility provisions of this section, no real property owner or no person who owns or operates, or who otherwise could be liable as a result of the operation of, a drycleaning facility or a wholesale supply facility shall be subject to administrative or judicial action brought by or on behalf of any state or local government or agency thereof or by or on behalf of any person to compel rehabilitation or pay for the cost of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents. Subject to the delays that may occur as a result of the prioritization of sites under this section for any qualified site, costs for activities described in paragraph (2)(b) shall be absorbed at the expense of the drycleaning facility restoration funds, without recourse to reimbursement or recovery from the real property owner or the owner or operator of the drycleaning facility or the wholesale supply facility.

Fla. Stat. § 376.3078(3)(1995).

Dade County's lawsuit against the Personal Representatives and the other Respondents, which asserts claims for injunctive relief to compel rehabilitation activities and to recover the cost of rehabilitation in the form of reimbursement for installing public water mains to the Suniland area, (Record on Appeal, pp. 131-32), falls squarely within the immunity provided by § 376.3078(3).[3] Accordingly, the trial court and the District

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[3] The State of Florida has certified, and Dade County has stipulated, that the Personal Representatives' site has been determined eligible under the Drycleaning Act. (Record on Appeal, p. 305).

Court of Appeal for the Third District correctly held that this statute bars Dade County's action against the Personal Representatives.

Recognizing that its claims facially violate the plain language of § 376.3078(3), Dade County argued below, and continues to argue here, that the Drycleaning Act cannot be applied retroactively. As held by the Third District, this argument is incorrect.

I. THE QUESTION CERTIFIED BY THE THIRD DISTRICT MUST BE ANSWERED AFFIRMATIVELY BECAUSE THE LEGISLATURE CLEARLY INTENDED FOR THE IMMUNITY PROVISIONS OF THE DRYCLEANING ACT TO BAR CLAIMS RELATING TO PAST DRYCLEANING SOLVENT CONTAMINATION.

After holding that the Drycleaning Act barred Dade County's action against the Personal Representatives and the other Respondents, the Third District certified the following question of great public importance to this Court:

> ARE SUBSECTIONS 376.3078(3) AND 376.3078(9), FLORIDA STATUTES (1995), WHICH PROVIDE TO ELIGIBLE ENTITIES CONDITIONAL IMMUNITY FROM CERTAIN ADMINISTRATIVE AND JUDICIAL ACTIONS BY STATE AND LOCAL GOVERNMENTS AND AGENCIES, INTENDED BY THE LEGISLATURE TO APPLY RETROACTIVELY, THUS PRECLUDING ACTIONS AGAINST IMMUNIZED ENTITIES FOR THE RECOVERY BY A GOVERNMENT FOR ENFORCEMENT AND REHABILITATION COSTS EXPENDED PRIOR TO THE ENACTMENT OF THESE SUBSECTIONS?

Chase Federal Housing Corp., 705 So. 2d at 674. Based on the reasoning set forth in the Third District's opinion and the additional arguments set forth below, the certified question must be answered affirmatively.

A. The Third District Correctly Reasoned That The Drycleaning Act Applies Retroactively To Claims Arising From Past Contamination.

Reluctantly, the Third District applied the retroactivity analysis applicable to substantive statutes, which requires that a statute can only be applied retroactively if the legislative intent to do so is clearly expressed. Id. at 675; Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994). Under this test, the Third District correctly concluded that the Legislature intended for the Drycleaning Act to apply retroactively to claims arising from past contamination, thus barring Dade County's claims.

The Third District's conclusion that the Drycleaning Act applied retroactively was based on four stated reasons. First, the Third District stated that the Drycleaning Act was "a comprehensive act intended to resolve difficulties involved in eliminating environmental contamination from the multitude of drycleaning sources throughout the state, no matter when the contamination took place." Chase Federal Housing Corp., 705 So. 2d at 675 (emphasis added). Second, the Third District recognized that the Legislature established an alternative to lawsuits such as Dade County's action here, by noting that the Drycleaning Act sets up a cleanup fund, sets up a revenue source for the cleanup fund, encourages owners and operators to participate, and grants immunity to qualified applicants. Id. Third, the Third District noted that the immunity provided by the Drycleaning Act is comprehensive. Id. Finally and most

importantly, the Third District's conclusion was based on the fact that the "County's power to act against the immunized entities has been eliminated without a savings clause as to any administrative or judicial action no matter what its status." Id.

The Third District's stated reasons, which are derived solely from the express language of the Drycleaning Act, lead to the only logical interpretation of the Drycleaning Act: that the Drycleaning Act, which was designed to remediate past contamination, must provide immunity from claims arising from past contamination. As set forth below, the Third District's construction of the Drycleaning Act is supported by specific language contained within the Drycleaning Act.

B. The Language Of The Drycleaning Act Clearly Shows That The Legislature Intended For The Drycleaning Act To Apply Retroactively To Actions Arising From Past Contamination.

This Court need look no further than the "Findings" set forth in Florida Statute § 376.3078(1) to conclude that the Legislature intended the Drycleaning Act to apply retroactively:

> (1) FINDINGS.--In addition to the legislative findings set forth in s. 376.30, the Legislature finds and declares that:
>
> (a) Significant quantities of drycleaning solvents have been discharged in the past at drycleaning facilities as part of the normal operation of these facilities.
>
> (b) Discharges of drycleaning solvents at such drycleaning facilities have occurred and are occurring, and pose a significant threat to the quality of the groundwaters and inland surface waters of this state.

> (c) Where contamination of the groundwater or surface water has occurred, remedial measures have often been delayed for long periods while determinations as to liability and the extent of liability are made, and such delays result in the continuation and intensification of the threat to the public health, safety, and welfare; in greater damage to the environment; and in significantly higher costs to contain and remove the contamination.
>
> (d) Adequate financial resources must be readily available to provide for the expeditious supply of safe and reliable alternative sources of potable water to affected persons and to provide a means for investigation and rehabilitation of contaminated sites without delay.

(Emphasis added). Based on these Findings, it is clear that the Legislature enacted the Drycleaning Act to address problems created by past contamination, as exists here.

Additional language within Florida Statute § 376.3078 (1994) also shows the Legislature's intent for the Drycleaning Act to apply retroactively. Florida Statute § 376.3078(3)(a) states that

> any contamination by drycleaning solvents at such facilities shall be eligible under this subsection regardless of when the drycleaning contamination is discovered . . . .

(Emphasis added). Similarly, Florida Statute § 376.3078(3)(b) states that:

> such facilities shall be eligible under this subsection regardless of when the contamination was discovered . . . .

(Emphasis added).

Moreover, the 1995 version of Florida Statute § 376.3078

further shows the Legislature's intent to apply the Drycleaning Act retroactively. Section 376.3078(3)(o), which applies where a drycleaning facility operator has acted in a grossly negligent manner, states:

> A real property owner shall not be subject to administrative or judicial action brought by or on behalf of any person or local or state government, or agency thereof, for gross negligence or violations of department rules prior to January 1, 1990, which resulted from the operation of a drycleaning facility . . . .

(Emphasis added). Additionally, Florida Statute § 376.3078(9)(1995), which is discussed below in greater detail, provides immunity to real property owners who voluntarily conduct cleanup activities, regardless of "whether commenced before or on or after October 1, 1995 [the effective date of 1995 amendments to the Drycleaning Act]." (Emphasis added).

Recently, the Legislature provided additional expressions of its overriding intent in enacting the Drycleaning Act. The Legislature has enacted amendments to the Drycleaning Act, which show that the Drycleaning Act applies to past contamination and must be interpreted in favor of real property owners such as the Personal Representatives.[4] In the most crucial of the amendments, the Legislature added the following interpretation guideline to the Drycleaning Act:

> It is the intent of the Legislature to

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[4] These amendments to the Drycleaning Act, which are contained in Senate Bill 244, became law on May 24, 1998 and become effective on July 1, 1998.

> encourage real property owners to undertake the voluntary cleanup of property contaminated with drycleaning solvents and that the immunity provisions of this section and all other available defenses be construed in favor of real property owners.

Fla. Stat. § 376.3078(1)(e)(1998)(emphasis added). Based on this statement, it is clear that the Legislature intends for this Court to construe all of the Drycleaning Act's immunity provisions in favor of real property owners such as the Personal Representatives.

Also in the 1998 amendments, the Legislature has limited eligibility to those sites where contamination is reported by December 31, 1998. See Fla. Stat. § 376.3078(3)(a), (3)(b)(1998). As a result, the Legislature stated that "[f]or contamination reported after December 31, 1998, no costs will be absorbed at the expense of the drycleaning facility restoration funds." Fla. Stat. § 376.3078(3)(d)(4)(1998). By limiting eligible sites to those which are reported by the end of this year, the Legislature has confirmed its intent to have the Drycleaning Act apply to past contamination, rather than to sites contaminated in the future. Through these provisions, the Legislature has clearly expressed its intent for the Drycleaning Act to apply retroactively to actions arising from past contamination.

C. No Other Language Is Necessary To Impart The Legislature's Intent For The Immunity Provisions Of The Drycleaning Act To Apply Here.

It is beyond dispute that the Legislature has expressed its

intent for the Drycleaning Act to apply to past contamination. Dade County even admits to this legislative expression. (Dade County's Initial Brief, p.6). It is equally clear that the immunity set forth in subsection (3) of the Drycleaning Act states that no eligible real property owner shall be subject to lawsuits after the effective date of the Drycleaning Act, or July 1, 1994. From these clear expressions, the only logical conclusion is that any lawsuit against an eligible real property owner after July 1, 1994, arising from past contamination, is barred. Because the actions precluded by the Drycleaning Act are those pending after July 1, 1994, no other language is necessary to express the Legislature's intent that the immunity provisions of the Drycleaning Act bar Dade County's action here, which arises from past contamination and is pending, and in fact was filed, after the effective date of the Drycleaning Act.

D. Dade County's Arguments That The Drycleaning Act Does Not Apply Retroactively Must Be Rejected.

Recognizing that the plain language of the immunity provisions of the Drycleaning Act bars Dade County's claims, Dade County is forced to argue that the Drycleaning Act cannot be applied retroactively. But, Dade County's arguments are without merit for the reasons set forth below.

1. Dade County's Argument That The Third District Created A New Legal Standard To Support Its Holding Misconstrues The Third District's Analysis.

As set forth above, the Third District based its conclusion on the plain language of the Drycleaning Act. Dade County

argues in its Initial Brief to this Court that the Third District based its holding on a new legal standard, relying on implied preemption, to conclude that the Drycleaning Act is retroactive. This argument misconstrues the Third District's reasoning. While the Drycleaning Act clearly preempts Dade County's attempts to initiate enforcement actions against eligible facilities, preemption is not the basis for the Third District's opinion. Primarily, the Third District relied on the fact that the Drycleaning Act was intended to address drycleaning solvent contamination no matter when it occurred and that the Legislature did not enact a savings clause for causes of action which accrued prior to the effective date of the Drycleaning Act. The Third District derived the Legislature's intent from the plain language of the Drycleaning Act, not the preemptive effect of the immunity provisions.

2. It Is Beyond Dispute That The Drycleaning Act Supersedes Dade County Code Chapter 24.

Any conflict between the Drycleaning Act and Chapter 24 of the Dade County Code, the sole basis for Dade County's claims here, must be resolved in favor of the Drycleaning Act. The Florida Constitution expressly establishes the supremacy of Florida statutes over Dade County ordinances. Section 11 of Article VIII of the Florida Constitution of 1885, which remains in force, states:

> (6) Nothing in this section shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one

> or more counties of the state of Florida or to any municipality in Dade County and any or other one or more municipalities of the State of Florida relating to county or municipal affairs and all such general laws shall apply to Dade County and to all municipalities therein to the same extent as if this section had not been adopted and such general laws shall supersede any part or portion of the home rule charter provided for herein in conflict therewith and shall supersede any provision of any ordinance enacted pursuant to said charter and in conflict therewith, and shall supersede any provision of any charter of any municipality in Dade County in conflict therewith.

(Emphasis added).

The Drycleaning Act, as an enactment of the Florida Legislature, is superior to an ordinance of Dade County. Accordingly, any conflict between the two must be resolved in favor of the Drycleaning Act. See Metropolitan Dade County v. City of Miami, 396 So. 2d 144, 146-47 (Fla. 1980)("Numerous decisions have invalidated Dade County ordinances and parts of the Dade County Charter, however, because of impermissible, unauthorized conflict with the state constitution or with general state law."); Rinzler v. Carson, 262 So. 2d 661, 668 (Fla. 1972)("A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden."); Board of County Commissioners of Dade County v. Boswell, 167 So. 2d 866, 867 (Fla. 1964)(holding that Dade County ordinance which conflicted with state law was invalid); Dade County v. Mercury Radio Serv., Inc., 134 So. 2d 791, 795 (Fla. 1961)(holding that

state statute is dominant to Dade County ordinance); see also Farmer v. Broward County, 632 So. 2d 658, 659 (Fla. 4th DCA 1994)("A county ordinance cannot be inconsistent with general law."), rev. denied, 639 So. 2d 976 (Fla. 1994); Dade County v. Acme Specialty Corp., 292 So. 2d 378, 378 (Fla. 3d DCA 1974)(affirming invalidation of Dade County ordinance prohibiting the sale of sparklers where such sale was permitted by state statute).

Dade County argues that the Third District previously held that the Drycleaning Act does not directly or indirectly preempt or conflict with Dade County enforcement actions, citing Food Spot Corp. v. Renfrow, 668 So. 2d 1053 (Fla. 3d DCA 1996). Dade County's statement concerning the holding in Food Spot is wrong and is at odds with the express immunity provisions of the Drycleaning Act which clearly supersede the provisions of the Dade County Code. In Food Spot, the Third District per curiam affirmed an order of the circuit court affirming a magistrate's Report and Recommendation. Id. In the Report and Recommendation, the magistrate held that the Drycleaning Act did not grant immunity until eligibility had been determined and prioritization of sites had occurred. See Dade County Appendix, p. 55. The magistrate continued that "[u]ntil then, at the very least, the County retains enforcement authority." Id. Accordingly, the magistrate, and in turn the Third District, said nothing about conflict once eligibility and priority determinations have been made, which is the case here.

3. The Plain Meaning Rule Requires That The Drycleaning Act Be Applied Retroactively To Past Contamination.

Dade County argues that the plain meaning rule requires that the Drycleaning Act be applied prospectively only. This argument renders the immunity provisions of the Drycleaning Act meaningless. Dade County argues that, because the immunity granted to eligible sites is not effective until sometime in the future, the Drycleaning Act only has prospective application. No reasoning exists to support Dade County's conclusion. As previously stated, the Drycleaning Act was designed to remedy past contamination. There is nothing inconsistent with granting immunity from actions arising from sites contaminated prior to the effective date of the Drycleaning Act, even though this immunity is established sometime after the effective date of the Drycleaning Act.

Under Dade County's reasoning, no person would ever obtain immunity for a site contaminated prior to the effective date of the Drycleaning Act. This clearly is an improper interpretation of the immunity provisions of the Drycleaning Act. In fact, it gives no meaning at all to the immunity provisions. It is clear that the Legislature intended to grant immunity to owners and operators of eligible sites. Eligible sites obviously include sites contaminated prior to the effective date of the Drycleaning Act. Just because it takes time to determine who is eligible and who is afforded immunity does not mean that immunity does not apply to past events. Nothing contained in

the Drycleaning Act supports such a limited interpretation of the scope of the immunity provisions.

Dade County also argues that retroactive application of the immunity provisions encourages parties not to clean up their properties. This is not the case, as evidenced by the Personal Representatives who continue to conduct cleanup efforts on their property, even after being determined eligible. Real property owners have a financial incentive to clean up environmental contamination on their property to increase the property's value. This financial incentive negates the incentive to wait until the State of Florida determines the site's eligibility and conducts cleanup activities. Additionally, Florida Statute § 376.3078(9), which is discussed below in greater detail, expressly gives incentive for real property owners to voluntarily conduct cleanup activities, by granting immunity for these efforts. Accordingly, Dade County's argument that retroactive application of the Drycleaning Act discourages cleanup efforts is contrary to the facts here.

Dade County also argues that the retroactivity language in Florida Statute § 376.308(5), which is part of the petroleum program, shows that the Legislature did not intend for the Drycleaning Act to apply retroactively. Merely because the Legislature expressed a retroactive intent one way in one statute, does not preclude alternative methods to express such an intent in another statute. Moreover, the retroactivity statement in Florida Statute § 376.308(5) does not relate to

when a cause of action accrues, but rather to when a case is initiated or when a judgment is entered. Accordingly, the retroactivity language contained in Florida Statute § 376.308(5) is not necessary in the Drycleaning Act and does not help to determine whether the Drycleaning Act applies to causes of action which accrued prior to its effective date.

II. THE GENERAL RETROACTIVITY TEST USED FOR SUBSTANTIVE STATUTES DOES NOT APPLY TO THIS CASE.

Because Dade County is a political subdivision of the State of Florida, the general retroactivity analysis reluctantly applied by the Third District need not have been used.[5] Instead, the fact that the State of Florida has unbridled authority to eliminate Dade County's powers and rights should have completely resolved Dade County's appeal to the Third District. Moreover, Dade County does not possess any constitutional rights which would prevent retroactive application. Finally, the principles applicable to the elimination of penalties is more appropriate for this situation than the general retroactivity test.

A. The Legislature Has The Complete Authority To Abolish Powers And Rights Of Dade County.

1. Dade County Is Merely Exercising A Power, Not Enforcing Its Rights.

Importantly, the claims asserted against the Personal

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[5] Contrary to Dade County's representation in its Initial Brief, the Personal Representatives have never accepted that the general retroactivity test or the presumption against retroactivity apply here.

Representatives are not being pursued by a private party, but instead are being asserted by a political subdivision of the State of Florida. As recognized by the Third District, such a political subdivision is not pursuing its rights, but is exercising its powers, which can be eliminated by the Legislature at any time. Metropolitan Dade County, 700 So. 2d at 675 n.4; Sun Harbor Homeowners Ass'n, Inc. v. Broward County Dep't of Natural Resources, 700 So. 2d 178, 180-81 (Fla. 4th DCA 1997).

In Sun Harbor, the District Court of Appeal for the Fourth District addressed a situation similar to the instant appeal where Broward County claimed that its regulatory authority was improperly taken away retroactively. Factually, Broward County issued a notice of violation in March of 1995 to Sun Harbor pursuant to a county ordinance because Sun Harbor allegedly trimmed the tops of 80 mangrove trees and removed 10 other mangrove trees without a permit. Id. at 179. After the notice of violation was issued, the Legislature adopted the Mangrove Trimming and Preservation Act of 1995 ("Mangrove Act"), which is codified in Florida Statutes §§ 403.9321-403.9333, and became effective on June 15, 1995. Within the provisions of the Mangrove Act, the Legislature abolished regulation of mangrove trees by local governments:

> All local governmental regulation of mangrove, except pursuant to a delegation as provided by this section, is abolished 180 days after this section takes effect.

Fla. Stat. § 403.9324(3). Based on this provision, Broward County's power to regulate mangroves was abolished three days prior to the hearing on the notice of violation issued to Sun Harbor.

At the initial hearing, the hearing officer granted Sun Harbor's motion to dismiss the case due to Broward County's lack of regulatory authority. Sun Harbor, 700 So. 2d at 179. Broward County then filed a petition for certiorari to the circuit court seeking reversal of the dismissal. Id. Accepting arguments similar to those presented by Dade County here, the circuit court granted Broward County's petition, reasoning in part that the Mangrove Act affected substantive rights which could not be applied retroactively and that a contrary conclusion would immunize parties who violated the Broward County mangrove ordinance prior to the effective date of the Mangrove Act. Id. Sun Harbor then filed a petition for a writ of certiorari to the District Court of Appeal for the Fourth District, seeking reversal of the circuit court's order. Id.

Based on the "gravity of the circuit court's error," the Fourth District granted Sun Harbor's petition and quashed the circuit court's order. Id. at 180. The Fourth District first rejected the argument that Article X, Section 9, of the Florida Constitution, which states that the repeal of a criminal statute does not affect prosecutions for previously committed crimes, applied to administrative proceeding for civil penalties. Id. The Fourth District then reasoned that Florida Statute

§ 403.9324(3) eliminated a penalty and therefore applied from the time of its enactment to all pending actions. Id.

The Fourth District then rejected Broward County's argument that its substantive rights were affected. Id. at 180-81. Importantly, the Fourth District stated:

> In enacting and enforcing ordinances regulating persons and things within its orders, Broward County is not engaged in the pursuant of rights but, instead, in the exercise of governmental powers.

Id. (emphasis original). Reasoning that the Florida Constitution only permitted counties to have powers which were not inconsistent with general law, the Fourth District stated that

> if the legislature withdraws the authority of a county to exercise a power and in so doing abolishes existing ordinances purporting to exercise the power, the county cannot complain that its rights have been affected by the legislation - only its powers under article VIII, section 1(g) [of the Florida Constitution]. Thus, the county's characterization of its authority to regulate mangroves as a right led the circuit court to apply the wrong law.

Id. at 181 (emphasis original).

Lastly, the Fourth District addressed the circuit court's statement that the Mangrove Act was manifestly unjust. Id. In reasoning that failure to apply constitutional limitations would be unjust, the Fourth District stated:

> [a]s we have just seen, the constitution has established a general immunity against attempted county regulation when the legislature has repealed the authority to regulate. Some citizens may not approve of

> repealing local government control over certain environmental concerns, and many may enthusiastically support governmental regulation of mangroves. But judicial enforcement of a statute granting the state primacy over such regulation does not make the immunity from local regulations unjust.

Id.

The same issues addressed in Sun Harbor exist here. The immunity provided by the Drycleaning Act repeals Dade County's authority to regulate citizens under Dade County ordinances. Dade County lacks the authority to complain that its rights have been taken away. Moreover, there is nothing unjust or unfair about the Third District following the mandates of the Florida Constitution by holding that general law supersedes Dade County's enforcement powers.

2. Dade County Acts At the Will Of the Legislature.

The Third District's opinion below, as well as the Fourth District's opinion in Sun Harbor, are consistent with the well-established principle that a county's ability to act is dependent on the will of the Legislature. Weaver v. Heidtman, 245 So. 2d 295, 296 (Fla. 1st DCA 1971) ("At the outset, we observed that this is not a contest between a private citizen and the sovereign but is a contest between the sovereign and its child. The respective counties of this State do not possess any indicia of sovereignty; they are creatures of the legislature, created under Art. VIII, Sec. 1, of the State Constitution, F.S.A., and accordingly are subject to the legislative prerogatives in the conduct of their affairs."); see also Neu v.

Miami Herald Publ'g Co., 462 So. 2d 821, 825 (Fla. 1985)("The legislature has plenary constitutional authority to regulate the activities of political subdivisions . . . ."); Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933)("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."); Moses Lake School Dist. No. 161 v. Big Bend Community College, 503 P.2d 86, 91 (Wash. 1972)("[T]he United States Supreme Court makes it clear that political subdivisions of a state are created as convenient agencies for exercising such governmental powers of the state as may be entrusted to them. Thus, the state may, at its pleasure, modify or withdraw such powers, may take without compensation such property, hold it itself, or vest it in other agencies."); East Jackson Pub. Schs. v. State of Michigan, 348 N.W.2d 303, 306 (Mich. Ct. App. 1984)("School districts and other municipal corporations are creations of the state. Except as provided by the state, they have no existence, no functions, no rights and no powers. They are given no power, nor can any be implied, to defy their creator over the terms of their existence."). Accordingly, if the State of Florida has determined, as it has here, that Dade County, or any other county, cannot file an action to compel rehabilitation or require payment of the costs of rehabilitation relating to drycleaning solvent contamination, Dade County must follow this dictate.

The bottom line is that Dade County does not like the Drycleaning Act or its immunity provisions. However, it is not for Dade County, or even this Court, to determine whether the Legislature's enactment of the Drycleaning Act was prudent or unduly harsh as applied to Dade County. This Court has long adhered to this fundamental principle:

> In matters of state policy and law making, the Legislature has plenary powers, limited only by the Constitutions of the state of Florida and of the United States. If an act is regularly passed by the Legislature and there is no constitutional limitation upon the power of the Legislature to pass such an act, then the act is valid and binding, however harsh or oppressive it may seem. This court will never substitute its will for the will of the Legislature. There is no provision in the Constitution which would inhibit the passage of such an act by the Legislature; therefore the Legislature, under its general power, was the sole judge of whether it should enact such legislation.

Charlotte Harbor & N. Ry. Co. v. Welles, 82 So. 770, 773 (Fla. 1919); aff'd, 260 U.S. 8 (1922). This Court later continued:

> With the wisdom or policy of state statutes the courts have nothing to do. The mere fact that a law is absurd, whimsical, foolish, or unworkable in practice affords no ground for judicial interference with legislative action unless such interference is predicated upon the affording of judicial protection to some personal or property right with which the challenged statute unconstitutionally interferes.

Shelby v. City of Pensacola, 151 So. 53, 55 (Fla. 1933); see also Wait v. Florida Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979)("Courts deal with the construction and constitutionality of legislative determinations, not with their

wisdom."); Department of Community Affairs v. Holmes County, 668 So. 2d 1096, 1101 (Fla. 1st DCA 1996)("The courts of this state have no business enjoining the political decisions of the Congress or the state legislature unless a violation of a state or federal constitutional provision or principle is shown to have occurred."). Accordingly, whether Dade County is in favor of the Drycleaning Act, or whether the Drycleaning Act has harsh effects as applied to Dade County, is irrelevant to the question certified to this Court for determination.

3. Dade County Does Not Possess Any Constitutional Rights Which Prevent This Court From Enforcing The Will Of The Legislature Or Prevent Retroactive Application Of The Drycleaning Act.

Dade County does not possess any constitutional rights which would prohibit this Court from enforcing the immunity provided by the Legislature in the Drycleaning Act and extinguishing Dade County's claims against the Personal Representatives. See e.g. State of Florida v. City of Pensacola, 126 So. 2d 566, 570 (Fla. 1961)("In addition to the broad powers which the legislature has to select the subjects for taxation and exemption, its power with respect to municipalities is absolutely unlimited except as restrained by the state or federal constitutions. . . . [W]e are of the opinion that the 'equality' provisions of the Federal and State Constitutions do not constitute restraints upon the state in control of its own municipalities.")(citations omitted); Town of Palm Beach v. City of West Palm Beach, 55 So. 2d 566, 572 (Fla.

1951)("The power of the Florida Legislature with respect to its municipalities is absolutely unlimited except as constrained by the state or federal Constitution.").

The state and federal constitutions are the only limitations on enforcing the will of the Legislature. Moreover, the basis for preventing retroactive application of new statutes is to avoid violating constitutional due process rights. See Florida Patient's Compensation Fund v. Scherer, 558 So. 2d 411, 414 (Fla. 1990)("Due process considerations preclude retroactive application of a law that creates a substantive right.") However, these limitations do not help Dade County here. It is well established that Dade County, as a political subdivision of the State of Florida, does not possess any federal or state due process rights. Holmes County, 668 So. 2d at 1102 ("Being political subdivisions of the State of Florida, the Plaintiff Counties are not a 'person' entitled to protection under the due process clause of the federal or state constitution."). This Court has also adhered to this fundamental principle:

> It is an established principle of constitutional law that those constitutional restraints imposed by the Federal Constitution against state action do not apply against the state in favor of its own municipality, in so far as equal protection of the laws and due process of the law under the Fourteenth Amendment are concerned. See Trenton v. New Jersey, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A. L. R. 1471.
>
> As a protection of the liberty and property rights of persons against adverse legislative action on the part of the

> states, the clauses of the Fourteenth Amendment to the Constitution of the United States which declares that no state shall deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws, have never been held applicable to municipal corporations on the theory that such public corporations are "persons" within the purview of the language of the Fourteenth Amendment.

Shelby, 151 So. at 55 (emphasis original).

Federal courts have also followed this principle. In City of Safety Harbor v. Birchfield, 529 F.2d 1251 (5th Cir. 1976), the court held that a municipal government is not a "person" protected under the United States Constitution or Section 1983 of the Civil Rights Act. In so ruling, the court explained:

> Ever since the Supreme Court's landmark decision in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), it has been apparent that public entities which are political subdivisions of states do not possess constitutional rights, such as the right to be free from state impairment of contractual obligations, in the same sense as private corporations or individuals. Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state.

529 F.2d at 1254 (citation omitted); see also Randolph County v. Alabama Power Co., 784 F.2d 1067, 1072 (11th Cir. 1986)(Court held that "[C]ounty does not have any federally protected right against a state that takes public property without paying compensation."), modified on other grounds, 798 F.2d 425 (11th Cir. 1986), cert. denied, 479 U.S. 1032 (1987).

Accordingly, because Dade County does not possess any due process or other constitutional rights, it has no basis to challenge retroactive application of the Drycleaning Act. Accordingly, this Court must enforce the immunity provisions of the Drycleaning Act against Dade County.

B. The Drycleaning Act Has The Effect Of Eliminating Dade County's Ability To Impose A Penalty And Therefore Applies To All Pending Actions.

Because Dade County does not have a right to sue the Personal Representatives, but merely a power to regulate, the situation here is akin to the elimination of Dade County's ability to impose a penalty. See Sun Harbor, 700 So. 2d at 180-81 (treating Florida Statute § 403.9324(3), which abolished Broward County's regulatory power under a county ordinance, as the elimination of a penalty). It is well established that the elimination of a penalty by the Legislature applies to all pending cases from the moment it becomes effective, even on appeal. Pensacola & A. R. Co. v. State of Florida, 33 So. 985, 986 (Fla. 1903)("[T]he repeal of the statute imposing such [civil] penalty operates as a release or remission of such penalty where there is no saving clause as to past violations of such repealed statute, and, after the repealing takes effect, no further proceedings can be taken under the law so repealed to enforce the penalty . . ."); K.M.T. v. Department of Health & Rehabilitative Servs., 608 So. 2d 865, 871 (Fla. 1st DCA 1992)("If a statute imposing a penalty in a civil action is repealed or modified during the pendency of the action, thereby

eliminating the penalty, such penalty no longer has any force or effect on the action."); Fogg v. Southeast Bank, N.A., 473 So. 2d 1352, 1355 (Fla. 4th DCA 1985)("A statute which eliminates a penalty applies, from the moment it takes effect, to all pending proceedings."). Accordingly, the Drycleaning Act, including its immunity provisions, applies from the moment it became effective on July 1, 1994, before Dade County filed its lawsuit against the Personal Representatives and other Respondents.

C. Application Of The Drycleaning Act To Bar Dade County's Claims Does Not Impair Any Vested Rights.

The Drycleaning Act does not impair any vested right of Dade County, and therefore this Court must follow the Legislature's intent for the Drycleaning Act to apply retroactively. See Hernandez v. State of Florida, Dept. of State, Div. of Licensing, 629 So. 2d 205, 206 (Fla. 3d DCA 1993)(rejecting constitutional challenge to application of statute which revoked private investigator's license because no vested rights were impaired), rev. denied, 640 So. 2d 1107 (Fla. 1994). As discussed above, Dade County does not possess any constitutional rights. Moreover, Dade County's cause of action is not a vested right.

Dade County's claims here are not based on a contract, but rest solely on Metropolitan Dade County Code Chapter 24. This Court held in Clausell v. Hobart Corp., 515 So. 2d 1275, 1275-76 (Fla. 1987), cert. denied, 485 U.S. 1000 (1988), that a tort

claim prior to judgment is not a property right upon which constitutional protections are afforded. In holding that the deprivation of the plaintiff's tort claim did not violate due process, this Court stated:

> Several years ago in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88, 98 S. Ct. 2620, 2638, 57 L.Ed.2d 595 (1978), the United States Supreme Court noted that "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'" See also Ducharme v. Merrill-National Laboratories, 574 F.2d 1307, 1309 (5th Cir.), cert. denied, 439 U.S. 1002, 99 S. Ct. 612, 58 L.Ed.2d 677 (1978)("it is well settled that a plaintiff has no vested right in any tort claim for damages under state law"). More recently, in Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L.Ed.2d 265 (1982), the Court acknowledged that a cause of action is a species of property but pointed out that the state remained free to create substantive defenses or immunities for use in adjudication.

Clausell, 515 So. 2d at 1275-76; see also In re TMI, 89 F.3d 1106, 1113 (3d Cir. 1996)("[A] pending tort claim does not constitute a vested right."), cert. denied, 117 S. Ct. 739 (1997); Sowell v. American Cyanamid Co., 888 F.2d 802, 805 (11th Cir. 1989)("The fact that the statute is retroactive does not make it unconstitutional as a legal claim affords no definite or enforcible property right until reduced to final judgment"); O'Brien v. J.I. Kislak Mortgage Corp., 934 F. Supp. 1348, 1362 (S.D. Fla. 1996)(In applying 1995 Truth-In-Lending Act Amendments retroactively, court stated that "a mere legal claim affords no enforceable property right until a final judgment has

been obtained."). Because Dade County does not have vested rights in its claims against the Personal Representatives, it cannot prevent the Drycleaning Act from being applied retroactively.

III. DADE COUNTY'S ARGUMENT THAT THE SCOPE OF THE IMMUNITY AFFORDED IN THE DRYCLEANING ACT DOES NOT PRECLUDE ITS CLAIMS AGAINST THE PERSONAL REPRESENTATIVES MUST FAIL.

Dade County attempts to avoid the immunity of the Drycleaning Act by arguing that the immunity is limited to "site rehabilitation," and does not apply to "prohibit the recovery of funds expended to replace a drinking water source, or administrative costs and attorneys' fees." (Dade County's Initial Brief, p. 22). Because Dade County never raised this argument during the numerous hearings held by the trial court concerning the Drycleaning Act, Dade County is not permitted to raise this argument for the first time on appeal. Dober v. Worrell, 401 So. 2d 1322, 1324 (Fla. 1981)(It is "inappropriate for a party to raise an issue for the first time on appeal from summary judgment."). Accordingly, this Court should not consider Dade County's argument that the scope of the Drycleaning Act's immunity does not extend to Dade County's claims for the cost of installing public water mains, administrative costs, penalties and attorney's fees. In addition to being waived, Dade County's argument is incorrect and ignores the clear language of the Drycleaning Act.

A. The Express Language Of Chapter 376 Shows That Immunity Extends To Actions To Recover The Costs Of Replacing Potable Water.

Dade County is suing the Personal Representatives for the costs incurred when it was allegedly "forced to install and connect drinking water main[s]" as a result of the drycleaning solvent contamination. (Record on Appeal, p. 132). Dade County's argument that no part of the Drycleaning Act prevents recovery of these costs ignores the plain language of the immunity provisions.

Section 376.3078(3) states in part:

> Subject to the delays that may occur as a result of the prioritization of sites under this section for any qualified site, costs for activities described in paragraph (2)(b) shall be absorbed at the expense of the drycleaning facility restoration funds, without recourse to reimbursement or recovery from the real property owner or the operator of the drycleaning facility or the wholesale supply facility.

(Emphasis added). Included within the costs described in "paragraph (2)(b)" are "[e]xpeditious treatment, restoration, or replacement of potable water supplies as provided in s. 376.30(3)(c)1." Fla. Stat. § 376.3078(2)(b)(2). Florida Statute § 376.30(3)(c)(1)(a) states that "'replacement' means replacement of a well or well field or connection to an alternative source of safe, potable water." (Emphasis added). Moreover, "paragraph (2)(b)" includes the cost of investigation and assessment, also claimed by Dade County in this action. Fla. Stat. § 376.3078(2)(b)(1). Accordingly, § 376.3078(3)

expressly states that the grant of immunity extends to the costs of connection to safe potable water and costs of investigation and assessments, which shall not be recovered from real property owners such as the Personal Representatives.

B. The Immunity Of Section 376.3078 Is Not Limited To "Site Rehabilitation."

Dade County argues that the immunity provisions of § 376.3078(3) are limited to "site rehabilitation" because the 1996 amendments to Florida Statute § 376.301(36) set forth a definition for "site rehabilitation." The fact that the Legislature has defined "site rehabilitation" is irrelevant. As stated above, the immunity in Florida Statute § 376.3078(3) applies to the specific costs sought by Dade County. In fact, the term "site rehabilitation" does not appear in Florida Statute § 376.3078(3). Here, the Legislature instead afforded broad immunity from all actions for rehabilitation of environmental contamination, which expressly includes the costs of replacing a potable water supply, investigation and assessment.

Moreover, the Legislature's 1998 enactment of the following definition for "contaminated site" negates Dade County's argument:

> "contaminated site" means any contiguous land, sediment, surface water, or groundwater areas that contain contaminants that may be harmful to human health or the environment.

Fla. Stat. § 376.301(10)(1998)(emphasis added). Accordingly, a site extends beyond the limits set by property boundaries, as

does the immunity provided by the Drycleaning Act.

C. Dade County's Claims For Penalties And Attorney's Fees Are Barred By The Immunity Provided By The Drycleaning Act.

Dade County's argument that its claims for penalties and attorney's fees are not barred by the Drycleaning Act must also be rejected. These claims are derivative of Dade County's claim to compel rehabilitation and pay the costs of rehabilitation. See Israel v. Lee, 470 So. 2d 861, 862 (Fla. 2d DCA 1985)("The entitlement to attorney's fees is derivative in nature."). Because Dade County's main claim is barred, so too are Dade County's derivative claims for penalties and attorneys' fees. Any other result would defy logic.[6]

IV. FLORIDA STATUTE § 376.3078(9) ALSO PROVIDES IMMUNITY TO THE PERSONAL REPRESENTATIVES.

In their Motion for Final Summary Judgment, the Personal Representatives argued that the immunity afforded by Florida Statute § 376.3078(9)(1995) to real property owners who conduct voluntary cleanup efforts also bars Dade County's claims against the Personal Representatives. Reasoning that cleanup efforts had to be concluded before the immunity under Florida Statute § 376.3078(9) applied, the trial court denied the Personal

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[6] Dade County's claim for attorney's fees must also be rejected because Dade County Code Sec. 24-57(j), under which Dade County is claiming its attorney's fees, only authorizes the Director of DERM, and not Dade County, to recover attorney's fees. See Dade County v. Pena, 664 So. 2d 959, 960 (Fla. 1995)(It is a "well-established rule in Florida that statutes awarding attorney's fees must be strictly construed.")(internal quotations omitted).

Representatives' motion on this ground.

On appeal to the Third District, the Personal Representatives argued, as an alternative ground for affirmance, that the immunity provided by subsection (9) of the Drycleaning Act did not require completion of cleanup efforts as a prerequisite to immunity and therefore applied to bar Dade County's claims against the Personal Representatives.[7] The Third District's opinion did not address the Personal Representatives' alternative argument.

Nevertheless, the clear language of subsection (9) of the Drycleaning Act requires that this additional immunity be afforded to the Personal Representatives, who have spent in excess of $289,000.00 in remediation activities, all performed with DERM's prior approval. Florida Statute § 376.3078(9)(1995) states:

> (9) A real property owner is authorized to conduct site rehabilitation activities at any time pursuant to department rules, either through agents of the real property owner or through responsible response action contractors or subcontractors, whether or not the facility has been determined by the department to be eligible for the drycleaning solvent cleanup program. A real property owner or any other party that conducts site rehabilitation may not seek cost recovery from the department or the Hazardous Waste Management Trust Fund

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[7] The Personal Representatives raise this argument as an alternative ground supporting the affirmance of the District Court's opinion and of the trial court's entry of Summary Final Judgment. See Cunningham v. Lynch-Davidson Motors, Inc., 425 So. 2d 131, 133 (Fla. 1st DCA 1982), pet. for rev. denied, 436 So. 2d 99 (1983).

> for any such rehabilitation activities. A real property owner that voluntarily conducts such site rehabilitation, whether commenced before or on or after October 1, 1995, shall be immune from liability to any person, state or local government, or agency thereof to compel or enjoin site rehabilitation or pay for the cost of rehabilitation of environmental contamination, or to pay any fines or penalties regarding rehabilitation, so long as the real property owner:
>
> (a) Conducts contamination assessment and site rehabilitation consistent with state and federal laws and rules;
>
> (b) Conducts such site rehabilitation in a timely manner according to a rehabilitation schedule approved by the department; and
>
> (c) Does not deny the department access to the site. Upon completion of such site rehabilitation activities in accordance with the requirements of this subsection, the department shall render a site rehabilitation completion order.

(Emphasis added). This language clearly shows that immunity is provided to a real property owner who "conducts," not "completes," voluntary cleanup activities.

Moreover, the 1998 amendments to this subsection also show the Legislature's intent for this subsection to apply before cleanup activities are completed. The 1998 amendment adds the following sentence to this subsection, which will be renumbered to subsection (10) of the Drycleaning Act:

> This immunity shall continue to apply to any real property owner who transfers, conveys, leases, or sells property on which a drycleaning facility is located so long as the voluntary cleanup activities continue.

Fla. Stat. § 376.3078(10)(1998)(emphasis added).[8] Because this immunity can be transferred to a party who continues cleanup efforts, the immunity necessarily attaches prior to cleanup efforts being completed. Additionally, this interpretation promotes the Legislature's goal of interpreting the Drycleaning Act in favor of real property owners, especially real property owners who conduct cleanup efforts. See Fla. Stat. § 376.3078(1)(e)(1998).

Dade County also argues that cleanup efforts are not voluntary until a site has been determined eligible for the state program and the immunity provided by subsection (3) of the Drycleaning Act is established. This argument ignores the express language of subsection (9) and would render the voluntary cleanup immunity meaningless. Subsection (9) expressly states that a real property owner can undertake cleanup efforts "whether or not the facility has been determined by the department to be eligible for the drycleaning solvent program." Fla. Stat. § 376.3078(9). Moreover, if the immunity provision under subsection (3) has already been established, a real property owner would not need the immunity under subsection (9). Accordingly, Dade County's argument that the immunity provided by subsection (9) is conditioned upon obtaining immunity under subsection (3) is clearly incorrect.

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[8] The 1998 amendments to subsection (9) of the Drycleaning Act also change "as long as" to "as soon as" in the first paragraph of this subsection.

V. CONCLUSION

The Legislature clearly intended for the immunity provisions of the Drycleaning Act to preclude actions arising from drycleaning solvent contamination occurring prior to the effective date of the Drycleaning Act. Moreover, the Legislature has the complete authority to abolish Dade County's claims through the immunity established in the Drycleaning Act. Accordingly, the question of great public importance certified by the Third District must be answered in the affirmative and the Third District's opinion must be affirmed.

Respectfully submitted,

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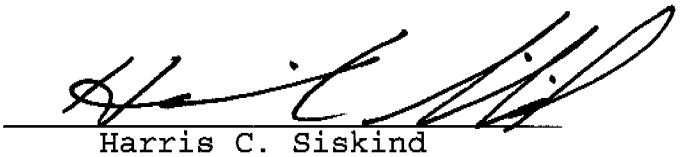
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondents, Jay M. Gottlieb and Northern Trust Bank, N.A., as Co-Personal Representatives of the Estate of Charles Gottlieb was served by U.S. Mail this 29th day of May, 1998 to Robert A. Duvall, Esquire and Thomas H. Robertson, Esquire, Assistant Dade County Attorneys, Attorneys for Metropolitan Dade County, Metro-Dade Center, Suite 2810, 111 N.W. First Street, Miami, FL 33128-1993; Kirk L. Burns, Esquire, BURNS & HALSEY, P.A., Attorneys for Suniland Associates, Southeast Financial Center, Suite 4980, 200 South Biscayne Boulevard, Miami, Florida 33131-5309; and Robert M. Brochin, Esquire, MORGAN, LEWIS & BOCKIUS, Attorneys for Chase Federal Housing Corp., 5300 First Union Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2339.



Harris C. Siskind

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