IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

FLO-SUN, INCORPORATED,
OKEELANTA CORPORATION,

Petitioners,

vs. CASE NOS. 95,044
& 95,045

FORMER GOVERNOR CLAUDE R. KIRK,
individually and in the name of the State of
Florida, et al.,

Respondents.
_____/

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

Respondents hereby certify that the type size and style used in this brief is 14 point Times New Roman.

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PREFACE

Respondents were the Plaintiffs and Appellants in the trial and appellate court and Petitioners were three of the Defendants and Appellees in the trial and appellate court, respectively. In this brief, the parties will be referred to as they appeared in the trial court. All emphasis in this brief is supplied by Respondents, unless otherwise indicated. "R" will denote the Record-on-Appeal; "IB" will denote the Initial Brief of Petitioners.

STATEMENT OF THE CASE AND FACTS

Plaintiffs brought suit against Defendants United States Sugar Corporation ("U.S. Sugar"), Flo-Sun, Incorporated ("Flo-Sun"), Okeelanta Corporation ("Okeelanta"), A. Duda & Sons, Inc., Sugar Cane Growers Cooperative of Florida ("SCGC") and QO Chemicals, Inc. ("QO") (R11-17).[1] The gist of the Amended Complaint was a suit for the abatement of nuisances pursuant to §60.05, Fla. Stat. (1995), and for damages resulting from the cultivation, harvesting and processing of sugar cane by all of the Defendants except QO. The complaint alleged that QO is a manufacturer of furfural, a substance produced as an agricultural by-product of sugar cane processing, and that it disposes of manufacturing waste by deep well injection which is carried out without a State of Florida Department of Environmental Protection ("DEP") permit. The complaint alleged that the Defendants' activities annoy, and injure the health of, the community at large and Plaintiffs individually (R11-17).

The complaint cited as examples of the annoying and injurious conduct of the Defendants the altering of the natural state of Lake Okeechobee, its tributaries

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[1]/The recitation of the Plaintiffs' names and capacities in the first paragraph of the Amended Complaint listed the Plaintiffs as follows: Former Governor Claude R. Kirk, Albert A. Peterson, Letitia Burchell Fowler, Kentron Fowler, Ola Day Smith, Frankie Day, Mary Lee Davis, Laurana Davis, Edleshia Davis, Vanesha Davis, Lee Perry, Lillie B. Day, Lily Parkhurst and Laura Regalado.

Only Flo-Sun, Okeelanta and SCGS are Petitioners in this Court.

including the Everglades which depend upon the flow of unpolluted water, by introducing into the environment a variety of toxins and pollutants in the form of chemical fertilizers which harm the quality of the air and water beyond the boundaries of the Defendants' own lands, by harvesting crops in a manner which damages air quality, including the use of intentionally-set fires which release vast quantities of smoke, soot and other particulate matter into the air, and by otherwise engaging in activities which affect the environment detrimentally and result in the loss of recreational opportunities and aesthetic enjoyment of public and private lands beyond the boundaries of the Defendants' own land (R14-15).

The complaint also alleged that government at all levels had "aided and abetted in the creation and maintenance of the nuisance complained of by failing to enforce existing laws prohibiting and regulating Defendants' offensive conduct and by providing direct and indirect economic subsidies to support the Defendants' offensive conduct...." (R15). The direct and proximate consequence of the Defendants' conduct has been past and continuing damage including but not limited to damage to the use and enjoyment of the Plaintiffs' property; personal discomfort, inconvenience and annoyance; devastation of air land and water quality; pollution of public lands including particularly the Everglades National Park and the Loxahatchee National Wildlife Refuge; interference with and injury to the population of native fish, reptiles, fowl and

other wildlife; bodily injury including skin lesions and respiratory ailments, and the fact that end stage renal failure is four times the national average in the Glades region (R16).

At the conclusion of their Amended Complaint, the Plaintiffs prayed for temporary and permanent injunctive relief against the maintenance of the nuisance, temporary and permanent injunctive relief against the operation and maintenance of any business or activity incident to the maintenance of the nuisance, compensatory damages and costs (R16-17).

Thereafter, the Defendants filed a Motion to Dismiss the Amended Complaint with supporting memoranda (R28-102; 103-118; 153-192; 207-230; 292-363). Plaintiffs then filed their Memorandum in Opposition to Defendants' Collective Motions to Dismiss (R193-206). In a lengthy order, the trial judge granted the defense motions.

In the Order on Defendants' Motions to Dismiss (R364-375), the court first agreed with the defense argument that all of the activities alleged by the Plaintiffs to have created a public nuisance are subject to the enforcement powers of the agencies of the executive branch. Consequently, because executive branch agencies are subject to review pursuant to the Florida Administrative Procedure Act ("APA"), pursuant to the primary jurisdiction doctrine, the complaint was dismissed with prejudice (R364-

373). The court also ruled that the nuisance statute does not apply to any matter or controversy relating to the alleged air or water pollution, because as to those subjects the nuisance statute had been superseded by Chapter 403, Fla. Stat. (1995), the chapter on environmental control (R373). The court also determined that the Plaintiffs lacked standing because they had not alleged injuries different in kind or degree from those of the community at large (R374).

On appeal, the Fourth District Court of Appeal reversed. KIRK v. U.S. SUGAR CORP., 726 So.2d 822 (Fla. 4th DCA 1999). Regarding the primary jurisdiction doctrine, the court held that the instant case involves the ultimate legal question of whether the Defendants' agricultural endeavors harmed Plaintiffs' health and can thus be considered a public nuisance, determination of which is historically a judicial function. Id. at 825. Moreover, the court emphasized that the posture of the case is on a motion to dismiss, and therefore taking Plaintiffs' allegations as true, as a court must on a motion to dismiss, the trial court erred in determining that the doctrine of primary jurisdiction applied to bar Plaintiffs' public nuisance suit at the present juncture. However, the court added that if the Defendants can later disprove Plaintiffs' allegations through record evidence, "then the doctrine of primary jurisdiction might serve as a basis for disposing of this case.... However, given a court's limited inquiry on a motion to dismiss and given the substance of Plaintiffs' allegations, dismissal on

the basis of the primary jurisdiction doctrine was inappropriate." Id. Regarding whether §823.05, Fla. Stat. (1995), of the Public Nuisances statute was superseded by environmental statutes, the court distinguished a First District Court of Appeal case relied upon by the trial court, and held that the nuisance statute was not superseded. Id. at 826.

Finally, on the issue of standing,[2] the Fourth District held that Plaintiff Claude Kirk need not show that he had sustained or will sustain any special injury because under §60.05, Fla. Stat. (1995), any citizen who sues in the name of the state to enjoin a public nuisance need not show that he or she has sustained or will sustain special damages or injury different in kind from injury to the public at large. As to the other Plaintiffs, who were suing in their individual capacities only, the court stated that while their alleged injuries are no different than those allegedly suffered by the general population, it is apparent that they could "easily amend their complaint to show special or peculiar injuries different in kind from injury to the public at large." Accordingly, the court held that the trial court had abused its discretion in dismissing the remaining Plaintiffs' complaint with prejudice for lack of standing without first providing them an opportunity to amend.

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[2]/Defendants apparently do not challenge the Fourth District's standing holdings.

This proceeding follows.

SUMMARY OF ARGUMENT

The Fourth District properly reversed the dismissal of the amended complaint on the basis of the primary jurisdiction doctrine. The Fourth District's opinion should be approved because the statutes at issue expressly preserve the availability of judicial redress outside of the administrative process. Further, nuisance actions have traditionally been available despite the existence of administrative machinery, especially where, as here, administrative action is inadequate or unavailable. The Fourth District's opinion properly accommodates the nuisance statute with the body of environmental legislation which has been enacted in recent years. When the Fourth District's opinion is properly understood, it is clear that Defendants' claim that the primary jurisdiction doctrine is dead in the Fourth District is incorrect.

ARGUMENT

THE FOURTH DISTRICT'S DECISION DID NOT VITIATE THE DOCTRINE OF PRIMARY JURISDICTION, BUT INSTEAD PROPERLY ACCOMMODATED THAT DOCTRINE TO THE LEGISLATURE'S DECISION TO MAINTAIN THE PUBLIC NUISANCE STATUTE ALONG WITH THE BODY OF ENVIRONMENTAL LEGISLATION. (Restated.)

Defendants' premise is that after its decision in KIRK v. UNITED STATES SUGAR CORP., 726 So.2d 822 (Fla. 4th DCA 1999), the primary jurisdiction doctrine applies in all of the appellate courts of Florida except the Fourth District. In so arguing, Defendants have ignored what the Fourth District actually did in this case, as well as the scope of its opinion. That is, the Fourth District recognized that the Legislature has decided to maintain the viability of the nuisance statute, Chapter 823, Fla. Stat. (1995), even after having enacted the broad body of environmental statutes now in effect. However, Defendants ignore the context of this case, an appeal from the granting of a motion to dismiss, and further ignore the Fourth District's conclusion that the trial court can still determine that the doctrine of primary jurisdiction applies.

In STATE EX REL. DEPARTMENT OF GENERAL SERVICES v. WILLIS, 344 So.2d 580 (Fla. 1st DCA 1977), the First District prefaced its discussion of primary jurisdiction and exhaustion of remedies with the statement that the general

power of circuit courts to enjoin administrative action continues "subject to judicial restrictions upon its use which require prior resort to an exhaustion of administrative remedies when they are available and adequate." Id. at 589. In the instant case, Plaintiffs specifically alleged as an issue of fact that existing laws prohibiting and regulating the Defendants' conduct which is causing the nuisance have not been enforced in the past, and are not being enforced now. It is axiomatic that a motion to dismiss must be considered in the light most favorable to the non-moving party. LAGUERRE v. CITY OF CORAL SPRINGS, 673 So.2d 60 (Fla. 4th DCA 1996). On appellate review of a dismissal, the appellate court confines its analysis to what appears within the four corners of the complaint, and must accept as true the well-pleaded allegations of the complaint. RUSHING v. BOSSE, 652 So.2d 869, 872 (Fla. 4th DCA 1995). The trial court must treat the factual allegations of the complaint as true, without regard to the issue of the pleader's ability to prove them. See LONDONO v. TURKEY CREEK, INC., 609 So.2d 14, 19 n. 4 (Fla. 1992); PROVENCE v. PALM BEACH TAVERNS, INC., 676 So.2d 1022 (Fla. 4th DCA 1996).

The bottom line in this case is that it should not have been disposed of without evidence being heard on Plaintiffs' allegation that existing laws are not being enforced (R14-15). There is no question that there is a complex panoply of statutes intended to deal with pollution of the Everglades. However, simply displaying an array of statutes

on a palette before the court is not a proper basis for final disposition of this lawsuit without meeting Plaintiffs' factual contention that those statutes are not being enforced, and a factual question such as that cannot be resolved on a motion to dismiss.

The companion doctrines of primary jurisdiction and exhaustion of administrative remedies are judicial creatures of self-limitation by which courts have attempted to mark the boundary lines between areas of administrative and judicial action. SOUTH LAKE WORTH INLET DISTRICT v. TOWN OF OCEAN RIDGE, 633 So.2d 79 (Fla. 4th DCA 1994). The former doctrine counsels in favor of judicial abstention when claims otherwise cognizable in the courts have been placed within the special competence of an administrative body; the latter when available administrative remedies would serve as well as judicial ones. Id. at 88.

Perhaps the best explanation of the primary jurisdiction doctrine appears in HILL TOP DEVELOPERS v. HOLIDAY PINES SERVICE CORP., 478 So.2d 368, 370 (Fla. 2d DCA 1985), where the Second District quoted from MERCURY MOTOR EXPRESS, INC. v. BRINKE, 475 F.2d 1086, 1091-1092 (5th Cir. 1973), as follows:

> "...primary jurisdiction comes into play when a court and an administrative agency have concurrent jurisdiction over the same matter, and no statutory provision coordinates the work of the court and of the agency. The doctrine operates, when applicable, to postpone judicial consideration of a case to administrative determination of important questions involved by an agency with special competence in the area.

> It does not defeat the court's jurisdiction over the case, but coordinates the work of the court and the agency by permitting the agency to rule first and giving the court the benefit of the agency's views...."

The Second District explained further that primary jurisdiction applies when, although the court has subject matter jurisdiction to pass upon the asserted claim, it "stays its hand and defers to the administrative agency in order to maintain uniformity at that level or to bring specialized expertise to bear upon the disputed issues." 478 So.2d at 370. In the case before it, the court in HILL TOP stated that application of primary jurisdiction "simply would have required the trial court to abate the proceeding until such time as an order was issued by the [Public Service Commission], pursuant to its powers...." Id.

The distinction between primary jurisdiction and exhaustion of administrative remedies was explained by the United States Supreme Court in UNITED STATES v. WESTERN P.R. CO., 352 U.S. 59, 63, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956),[3] as follows:

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory

[3]/As quoted in STATE ex rel. SHEVIN v. TAMPA ELECTRIC CO., 291 So.2d 45, 46 (Fla. 2d DCA 1974).

> duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction" on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. [Citations omitted.]

In this case, the primary jurisdiction doctrine does not apply because Plaintiffs did not claim that any of the injurious conduct by Defendants is in direct violation of any agency regulation, and did not seek particular relief under the provisions of Florida's environmental control legislation. As Plaintiffs argued (R200-202), in the context of air, land and water pollution control, the Florida legislature intended to supplement the avenues of judicial relief already available to harmed individuals. "[A]ggrieved individuals have long been entitled to prosecute private actions to enjoin a nuisance rather than seeking to enjoin violations of particular administrative rules or regulations" (R200). For example, in STATE EX REL. SHEVIN v. TAMPA ELECTRIC CO., 291 So.2d 45 (Fla. 2d DCA 1974), the Florida Attorney General sought an injunction against the Tampa Electric Company (TECO) to enjoin the discharge of sulfur dioxide and sulfur trioxide from TECO's generating plants in Hillsborough County as a judicially abatable nuisance. The case was dismissed on the

basis of the primary jurisdiction doctrine, and the Second District reversed. After a thorough discussion of the doctrine, the court reasoned to its conclusion as follows:

> The determination of a public nuisance as prayed for here, for example, is historically a judicial function, but is not necessarily dependent upon technically established criteria for its resolution. Given existing conditions which are fairly simple to establish, the determination of whether they constitute a judicially abatable nuisance, together with the nature and extent of a full and appropriate remedy if indeed they do, is a matter of law and lies within the special competence of judicial expertise.
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> * * * *
>
> The complained of conditions either exist or they don't; and if they do it is a matter of law whether they constitute a nuisance now which is injurious to the health and well-being of the public generally. How they exist, whether they comply with the agency's regulations or whether present technology allows alleviation thereof when balanced against public necessity or inconvenience, might well be highly technical matters; but they are irrelevant to the ultimate question of whether, assuming their existence (a relatively simple matter to establish in this case we think) they constitute a nuisance as a matter of law. Therefore, the expertise of the agency -- thus the invocation of the primary jurisdiction doctrine -- again is unnecessary.

Id. at 47-48 (emphasis in original).

Thus, with respect to the conduct at issue here, a nuisance proceeding remains available to Plaintiffs despite past and prospective enactment of agency rules, and without first resorting to the administrative process. Courts have so held in reversing

the dismissal of nuisance cases for failure to exhaust administrative remedies. See WETZEL v. A. DUDA & SONS, 306 So.2d 533, 534 (Fla. 4th DCA 1975). See also COWAN v. PEOPLE ex rel. FLORIDA DENTAL ASS'N, INC., 463 So.2d 285, 287 n. 3 (Fla. 4th DCA 1984). Moreover, it has been held that compliance of an activity to administrative regulations does not, as a matter of law, preclude the existence of a nuisance. In TAMPA ELECTRIC, supra, the Second District stated:

> [I]t is clear to us that a given activity can constitute a judicially abatable nuisance notwithstanding full compliance with either legislative mandate or administrative rule. In such cases there is nothing for an agency to decide, and the primary jurisdiction doctrine is inapplicable since the legal effect of the complained of activity, together with an appropriate remedy, is peculiarly a judicial matter.

291 So.2d at 48. See also COWAN, supra at 287 n.3. As Plaintiffs argued (R201), an agency permit is not a bar to judicial action, as shown by regulations promulgated by the South Florida Water Management District ("SFWMD") pursuant to the recently-enacted Everglades Protection Act, §373.4592, Fla. Stat. (1995),[4] which include the following caveat under the category of "Limiting Conditions for Individual Permits:"

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[4]/The Act was enacted in response to the lawsuit brought by the federal government against the SFWMD and Department of Environmental Regulation ("DER") for contamination of the Loxahatchee National Wildlife Refuge and the Everglades National Park. See U.S. v. SOUTH FLORIDA WATER MANAGEMENT DISTRICT, 847 F.Supp. 1567, 1570 (S.D. Fla. 1992), affirmed and reversed in part, 28 F.3d 1563, 1568 (11th Cir. 1994).

> This permit does not relieve the permittee from liability for harm or injury to: human health or welfare; animal, plant or aquatic life; or property.

Fla. Admin. Code R. 40e-63(2)(i).

Plaintiffs also contended below that despite the litany of administrative provisions cited by the Defendants in an effort "to paint a picture of an impressive and exhaustive regulatory framework," the Defendants' businesses are far less rigidly constrained by regulations than they portrayed. The following examples were presented to the trial court:

> By way of illustration, the Department of Environmental Protection ("DEP") has ruled that the atmospheric discharge of "particulate matter" from "emissions units" and "facilities" must comply with specific quantitative flow rates. Fla. Admin. Code R. 62-296.310. These particulate flow rates from emissions units and facilities must also be measured in a described manner, e.g. EPA Method 5. Fla. Admin. Code R. 62-296.310(1)(c). By contrast, the massive agricultural burning engaged in by Defendants does not fall under the ambit of "emissions unit" or "facility" and is not so monitored by the DEP. These burns need instead pass the muster of generic Division of Forestry rules, to be suspended only "whenever atmospheric or meteorological conditions indicate improper dispersion of pollutants creating conditions deleterious to health, safety, or general welfare, or which would obscure the visibility of vehicular or air traffic." Fla. Admin. Code R. 5I-2.006(2). That the Florida agency specifically responsible for pollution control does not directly regulate the significant burning operations by Defendants is a prime illustration of why

> courts have recognized a cause of action in nuisance notwithstanding the issuance of a permit.

(R201-202).

In its order, the trial court relied on the Fourth District's earlier opinion in OCEAN RIDGE, supra, to rule that the primary jurisdiction doctrine barred Plaintiffs' nuisance claim. However, OCEAN RIDGE is distinguishable because in that case the sand transfer plant at issue was operated in the normal, authorized manner, and thus to agree with the nuisance claim would require the court to conclude that it was the "very exercise of agency expertise and discretion that made the nuisance possible," id. at 87, a notion which the Fourth District rejected. As Plaintiffs maintained below, the contention here is precisely the opposite. Plaintiffs' contention here is that appropriate administrative action has not occurred in the past and will not occur in the future (R196), thus permitting the nuisance to continue. In other words, Plaintiffs contended, not that administrative enforcement creates the nuisance, but that the administrative scheme has not been enforced, or simply has not worked. In its opinion, the Fourth District agreed, as follows:

> In the instant case, Plaintiffs are alleging that agency errors have been so egregious or devastating that administrative remedies would be insufficient; that the governmental agencies entrusted with preventing the sort of pollutants and harm allegedly caused by Defendants are not doing their job; and that Defendants are operating in a manner contrary to existing statutes and regulations.

Id. at 825. The Fourth District also took cognizance of the procedural posture of this case. Contrasting it with OCEAN RIDGE, where the case had proceeded past discovery, the Fourth District agreed with Plaintiffs that primary jurisdiction should not have been applied on a motion to dismiss, stating:

> Taking these allegations as true, as a court must do on a motion to dismiss, the trial court erred in determining that the doctrine of primary jurisdiction applies to bar Plaintiffs' public nuisance suit at this juncture. *See Ocean Ridge,* 633 So.2d at 87-88; *see also Londono v. Turkey Creek, Inc.*, 609 So.2d 14 (Fla. 1992). If Defendants can later disprove Plaintiffs' allegations through record evidence, then the doctrine of primary jurisdiction might serve as a basis for disposing of this case. *See Ocean Ridge*, 633 So.2d at 87-88. However, given a court's limited inquiry on a motion to dismiss and given the substance of Plaintiffs' allegations, dismissal on the basis of the primary jurisdiction doctrine was inappropriate.

Id.

In their brief (IB15-20), Defendants cite a number of cases for the proposition that dismissal on the basis of primary jurisdiction is proper because their complaint does not recite that the Administrative Procedure Act does not provide a remedy, or that any agency has ever ignored their grievances or refused to provide them a hearing. However, the cases which Defendants cite do not support that argument in this case. For example, they cite WILLIS and COMMUNITIES FINANCIAL CORP. v. FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, 416 So.2d 813

(Fla. 1st DCA 1982), and recite the exceptions to the primary jurisdiction doctrine listed in both COMMUNITIES FINANCIAL at 816, and WILLIS at 591. However, in those cases, the court acknowledged that a recognized exception to the doctrine "is where agency actions are so egregious or devastating that the promised administrative remedies are too little or too late." 416 So.2d at 816. The Fourth District applied that exception here: "In the instant case, Plaintiffs are alleging that agency errors have been so egregious or devastating that administrative remedies would be insufficient...." 726 So.2d at 825.

Further, all of the cases upon which Defendants rely are distinguishable because in each of them the party which sought relief in the circuit court was involved in some way in the administrative process, and was attempting to bypass that process. For example, COMMUNITIES FINANCIAL involved a dispute with the Department of Environmental Regulation which had filed an administrative complaint against the plaintiff requiring that it submit to the department's permit jurisdiction, and also involved the withholding of approval for the release of certain escrow funds which the plaintiff had posted with the Division of Land Sales and Condominiums, both of which clearly involved "agency action." 416 So.2d at 816. Thus, the plaintiff's resort to the circuit court for injunctive relief was an attempt to bypass the administrative process in which it was involved.

The same is true of the other cases cited by Defendants. See KEY HAVEN ASSOCIATED ENTERPRISES, INC. v. BOARD OF TRUSTEES OF THE INTERNATIONAL IMPROVEMENT TRUST FUND, 427 So.2d 153, 155 (Fla. 1982) (denial of application for dredge-and-fill permit); GULF PINES MEMORIAL PARK, INC. v. OAKLONG MEMORIAL PARK, INC., 361 So.2d 695, 696-7 (Fla. 1978) (denial of license application to operate cemetery facility); BAL HARBOUR VILLAGE v. CITY OF NORTH MIAMI, 678 So.2d 356, 363-4 (Fla. 3d DCA 1996) (ordinance requiring application for environmental permit from Department of Environmental Protection as a condition to allowing construction project to proceed); STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION v. PZ CONSTRUCTION CO., 633 So.2d 76, 77-8 (Fla. 3d DCA 1994) (order by Department to shut down and remove all waste from waste management facility); FLORIDA SOCIETY OF NEWSPAPER EDITORS, INC. v. FLORIDA PUBLIC SERVICE COMMISSION, 543 So.2d 1262, 1263-4 (Fla. 1st DCA 1989) (Public Records Act request for access to documents prepared by public utility in connection with rate proceeding). In each of those cases, the complainants were involved in agency action either by way of an application which it filed or by an enforcement complaint brought against it, and each of them attempted to avoid the administrative process by filing suit in the circuit court.

Moreover, none of those cases involved a cause of action provided by a separate, substantive statute which the Legislature has maintained alongside the body of environmental legislation, unlike here. Rather, most of them involved a request for declaratory or injunctive relief or mandamus. See GULF PINES (mandamus, declaratory judgment); FLORIDA SOCIETY OF NEWSPAPER EDITORS (mandamus); PZ CONSTRUCTION (injunction and declaratory judgment); COMMUNITIES FINANCIAL (injunction). Except for BAL HARBOUR, none of those cases involve the nuisance statute. In BAL HARBOUR, there was an attempt to use a nuisance suit in order to avoid the requirement in the ordinance at issue of obtaining an environmental permit. That context is totally inapposite to this, and therefore none of the cases cited by Defendants offer any guidance on the problem with which the Fourth District was dealing in this case, that is, how to reconcile the nuisance statute with the body of environmental legislation.

That they must be reconciled is apparent from the fact that the Legislature has not conferred exclusive authority in this area upon administrative agencies, as is apparent from the statutory "savings clauses." For example, Chapter 403, Fla. Stat. (1995), the Florida Air and Water Pollution Control Act, includes §403.191, Fla. Stat. (1995), which reads in pertinent part as follows:

403.191 Construction in relation to other law.--

> (1) It is the purpose of this act to provide additional and cumulative remedies to prevent, abate, and control the pollution of the air and waters of the state. Nothing contained herein shall be construed to abridge or alter rights of action or remedies in equity under the common law or statutory law, criminal or civil, nor shall any provisions of this act, or any act done by virtue thereof, be construed as estopping the state or any municipality, or person affected by air or water pollution, in the exercise of their rights in equity or under the common law or statutory law to suppress nuisances or to abate pollution.

The Legislature could not have conveyed with any greater clarity that Chapter 403 is intended to add to the common law and statutory remedies already available to curb polluting activities, such as an action "to suppress nuisances or to abate pollution" as Plaintiffs brought here. The plain language of §403.191(1) rules out the theory that administrative relief is exclusive, or that it must be sought prior to prosecution of a judicial action, and unequivocally so regarding actions to suppress nuisances. Rather than foreclosing remedies and conferring exclusive or primary jurisdiction on particular administrative agencies, the Legislature

> "created a new cause of action, giving the citizens of Florida new substantive rights not previously possessed" and to enable those citizens to institute suit for the protection of their environment without a showing of "special injury" as previously required.

FRIENDS OF THE EVERGLADES, INC. v. BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, 456 So.2d 904, 913 (Fla. 1st DCA 1984) (citation omitted) (re §403.412, Fla. Stat. (1971)).

Similarly, Chapter 376, Fla. Stat. (1995), the Pollutant Discharge Prevention and Control Act, also expressly preserves the rights of individuals to bring original actions to seek judicial remedies in the following provisions:

> **§376.205 Individual cause of action for damages under ss. 376.011-376.21.--** The remedies in this act shall be deemed to be cumulative and not exclusive. Nothing in this act shall require pursuit of any claim against the fund as a condition precedent to any other remedy. Notwithstanding any other provision of law, nothing contained herein shall prohibit any person from bringing a cause of action in a court of competent jurisdiction for all damages resulting from a discharge or other condition of pollution covered by ss. 376-011-376.21.
>
> **§376.313 Nonexclusiveness of remedies and individual cause of action for damages under ss. 376.30-376.319.-**
>
> (1) The remedies in ss. 376.30-376.319 shall be deemed to be cumulative and not exclusive.
>
> (2) Nothing in ss. 376.30-376.319 requires the pursuit of any claim against the Water Quality Assurance Trust Fund or the Inland Protection Trust Fund as a condition precedent to any other remedy.
>
> (3) Notwithstanding any other provision of law, nothing contained in ss. 376.30-376.319 prohibits any person from bringing a cause of action in a court of competent jurisdiction for all damages resulting from a

> discharge or other condition of pollution covered by ss. 376.30-376.319.

As Plaintiffs argued (R199), it cannot be said, without reading these provisions right out of Florida law, that any administrative agency has been charged with the sole responsibility for remedying harm caused by polluting activities, or that agency action is a condition precedent to access to the courts.

Moreover, the trial court cited the same out-of-state decisions (R372)[5] as do Defendants here (IB26-7) in support of its conclusion that a court should decline to apply the primary jurisdiction doctrine "only if the administrative statute under consideration was written expressly to prohibit its application" (R372). However, that line of authority does not govern here in light of the holdings of other Florida cases. For example, in CUNNINGHAM v. ANCHOR HOCKING CORP., 558 So.2d 93, 98-99 (Fla. 1st DCA), rev. denied, 574 So.2d 139 (Fla. 1990), the First District held that §376.313(3) creates an individual cause of action for persons injured by the release of hazardous materials which causes environmental as well as health hazards. More recently, in KAPLAN v. PETERSON, 674 So.2d 201, 204-205 (Fla. 5th DCA 1996),

[5]/TEXAS & PACIFIC RAILWAY CO. v. ABILENE COTTON OIL CO., 204 U.S. 426, 446 (1907); NEW ENGLAND LEGAL FOUNDATION v. COSTLE, 666 F.2d 30, 33 (2d Cir. 1981); FARMERS INS. EXCHANGE v. SUPERIOR COURT, 826 P.2d 730, 735-42 (Cal. 1992).

the Fifth District also held that §376.313(3) demonstrates that Chapter 376 was intended to create "private causes of action for prohibited discharges of pollutants against polluters...." In a prior case, MOSTOUFI v. PRESTO FOOD STORES, INC., 618 So.2d 1372, 1376-1377 (Fla. 2d DCA), rev. denied, 626 So.2d 207 (Fla. 1993), the Second District rejected the argument that §376.313(3) created a new cause of action that did not previously exist. However, MOSTOUFI is significant here for what the Second District stated that the statute did do:

> It seems clear to us that the intent of the statute is to insure that it is not interpreted as preempting any private rights that were already in existence.

Id. at 1377. Cf. EASTERN AIRLINES, INC. v. HILLSBOROUGH COUNTY AVIATION AUTHORITY, 454 So.2d 1076, 1078-1079 (Fla. 2d DCA 1984) (savings clause in §562.46 of the Beverage Law supported conclusion that airport authority need not exhaust administrative remedies before instituting a declaratory judgment action to revoke or suspend airline company's license to sell alcoholic beverages in passenger waiting lounge at airport).

Plaintiffs assert that these cases dealing with the creation of new, private causes of action comport with their argument that the intent of the statutes which they cited to the trial court was, as the court in MOSTOUFI stated, to insure that the environmental

statutory scheme "is not interpreted as preempting any private rights that were already in existence." 618 So.2d at 1377.

The Fourth District agreed with Plaintiffs regarding the savings clauses, 726 So.2d at 825-6, but as further authority for its conclusion, discussed the principle that a statute should not be construed as repealed or superseded by implication unless that is the only reasonable construction, and that a trial court is obliged to adopt an interpretation that harmonizes two related, if apparently conflicting, statutes. Id. at 826, citing PALM HARBOR SPECIAL FIRE CONTROL DIST. v. KELLY, 516 So.2d 249 (Fla. 1987). It reasoned that while a private citizen may seek an injunction under certain provisions of Chapter 403, the public nuisance statute offers broader relief without the prerequisite of first seeking aid from a government agency. It observed that something might be a public nuisance under the statute even though it is in compliance with the laws and regulations arising out of Chapter 403, and concluded that "section 823.05 and chapter 403 are easily harmonized as two different options under which a private citizen might seek relief from air or water pollution, depending upon the particular circumstances of the case." Id. at 826.

The court also reasoned from the principle that the Legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force, PALM HARBOUR, supra. It recounted that after the

enactment of Chapter 403, the Legislature adopted (and later amended three times) the Right to Farm Act, §823.14, Fla. Stat. (1995), as part of Chapter 823, the nuisance statute, which provision provides farming operations with a defense to public nuisance actions as long as unsanitary or hazardous conditions do not exist. The court concluded that enactment of that provision within the chapter pertaining to public nuisances after the Air and Water Pollution Control Act had been adopted indicated that the Legislature assumed that even after the enactment of Chapter 403, farming operations might be subject to public nuisance suits. Id. at 826. Similarly, in STATE v. GENERAL DEVELOPMENT CORP., 448 So.2d 1074, 1080 (Fla. 2d DCA 1984), approved, 469 So.2d 1381 (Fla. 1985), the Second District stated that a public nuisance action "seems to be one of the 'rights of action or remedies in equity under the common law or statutory law,' which was not abridged or altered by Chapter 403 and is cumulative to the remedies provided in that chapter."[6]

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[6]/In a footnote (IB19 n. 7), Defendants cite the First District's opinion in STATE v. SCM GLIDCO ORGANICS CORP., 592 So.2d 710 (Fla. 1st DCA 1992), which the trial court considered to be "controlling precedent" requiring dismissal (R373-4), and which the Fourth District found unpersuasive. Plaintiffs argued from Judge Ervin's dissent that the adoption of Chapter 403 did not implicitly repeal §823.01 because there was neither "a positive repugnancy between the two statutes [nor] clear legislative intent that the later act prescribes the only governing rule." Id. at 715. The First District's opinion did not address and therefore apparently did not consider the effect of the savings clauses. Further, SCM should be limited in its application to the criminal (continued...)

In light of what has been argued thus far, Plaintiffs maintain that Defendants' reference (IB5) to §403.412, Fla. Stat. (1995), and §373.136, Fla. Stat. (1995), as provisions permitting any person to petition an agency to compel enforcement of environmental laws is unavailing because that argument poses the problem of, and not the solution to, the reconciliation of Chapter 823 with Chapter 403. The above discussion has established that §823.05 is still on the books, alongside §403.412 and §373.136. To state that the existence of the latter statutes ipso facto negates the effect of the former simply begs the question. Their existence creates the issue of the effect on Chapter 823, but does not answer it. The answer is in the reasoning presented by the Fourth District.

Defendants argue (IB21-24) that the Fourth District's opinion violates principles of constitutional separation of powers, but that argument is without merit. The Fourth District itself pointed out that its opinion is not to be construed as indicating a departure from the requirement that a party must first exhaust administrative remedies where such remedies exist under a statutory scheme regulated by a particular agency. 726 So.2d at 825 n. 1. The court pointed out that the issue here is not whether administrative

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[6](...continued)
context. When so understood, it is an apparent attempt to reconcile a general and a specific criminal statute for purposes of due process notice requirements in the context of criminal law. It should have no application to a case such as this.

remedies exist because, in this case, it is alleged that the government has illegally failed to enforce the applicable law and regulations. Id. Thus, dismissal at this juncture is inappropriate "given a court's limited inquiry on a motion to dismiss," and the Court stated that primary jurisdiction might still apply if the evidence does not support the substance of Plaintiffs' allegations. Id. at 825.

The Fourth District's resolution of the issue gains further support from this Court's recent holding in COMPTECH INTERNATIONAL, INC. v. MILAM COMMERCE PARK, LTD., 24 Fla.L.Weekly S507 (Fla. October 28, 1999), where the Court held that the economic loss rule does not bar statutory causes of action. Id. at S508. This Court reasoned that the ELR is a judicially-created principle which cannot override a legislative policy pronouncement embodied in a statute. The Court stated:

> It is undisputed that the Legislature has the authority to enact laws creating causes of action. If the courts limit or abrogate such legislative enactments through judicial policies, separation of powers issues are created, and that tension must be resolved in favor of the Legislature's right to act in this area.

Id. at S507. Like the ELR, the doctrine of primary jurisdiction is a judicially-created principle, and Defendants' arguments for its application in this case would essentially abrogate the nuisance statute in the area of environmental law. Defendants' argument

appears to be that citizens may bring their own enforcement actions only pursuant to the provisions of the environmental statutes, through the administrative hearing process and appeal from that process, without access to a nuisance remedy even thereafter (IB19-20). If that is so, then the nuisance statute has been erased by the primary jurisdiction doctrine in this context.[7]

Finally, relying primarily on the WILLIS case, Defendants argue (IB24-26) that the Fourth District relied on outdated case law in citing to STATE EX REL. SHEVIN, supra. However, WILLIS neither discussed, much less rejected, cases such as SHEVIN. In fact, after discussing the history of the development of Florida's administrative procedure statutes, it prefaced its discussion of primary jurisdiction and exhaustion of remedies with the statement that the general power of circuit courts to enjoin administrative action continues "subject to judicial restrictions upon its use which require prior resort to an exhaustion of administrative remedies when they are

[7]/In the Brief of Amicus Curiae Monroe County (Amicus Brief at 8), it is argued that "the suggested application of public nuisance concepts in this case asks the court to create a new judge-made environmental regulatory system for a particular group of defendants, supplanting the Legislative system entirely." That argument ignores that it is the nuisance statute, and not the primary jurisdiction doctrine, that is legislatively-created, and which Defendants seek to supplant. The entire content of the amicus brief fails to meet the central issue in this case, the fact that the Legislature created both the environmental regulatory system and the nuisance statute, which the Fourth District's opinion, unlike the amicus brief, attempts to harmonize. 726 So.2d at 826.

available and adequate." 344 So.2d at 580. If the factual contentions of the complaint in this case had been taken as true, as the standards of review strictly require, the WILLIS case could not have been cited as support for dismissal, because in alleging that the government had failed to enforce existing laws (R15), the complaint demonstrates that administrative remedies are neither available nor adequate. Further, the Second District's statement in GENERAL DEVELOPMENT, supra at 1080, about the continued vitality of the nuisance statute was made ten years after the SHEVIN case, and after the adoption of Chapter 403.

In sum, the allegations of the complaint which remove this case from the ambit of the WILLIS case also should have precluded the application of the primary jurisdiction doctrine. Plaintiffs argued that the complaint included allegations that the Defendants' misconduct has been ignored, condoned and encouraged by the executive and legislative arms of government. Thus, the complaint demonstrated "compelling and unique reasons why administrative remedies are inadequate to provide relief commensurate with Plaintiffs' grievances" and why circuit court action was necessary (R202-203). Therefore, this case falls within the exception to the application of the primary jurisdiction doctrine which applies in cases where a party can demonstrate that no adequate administrative remedy remains available, or that "agency errors" are such that administrative remedies would be "too little, too late." OCEAN RIDGE, supra at

88. The inadequacy of agency action due to agency inaction defeats two of the primary reasons for the application of the primary jurisdiction doctrine, i.e., the uniformity which obtains if initial actions by a specialized agency, and the advantage of the application of expert and specialized knowledge. See UNITED STATES v. WESTERN P.R. CO., supra, 77 S.Ct. at 168.

Moreover, even if the primary jurisdiction doctrine was correctly applied to this case, it should not have resulted in dismissal with prejudice. As has already been established, when primary jurisdiction is invoked, "the judicial process is suspended pending referral of such issues to the administrative body for its views." UNITED STATES v. WESTERN P.R. CO., supra. As the Fifth Circuit stated in MERCURY MOTOR EXPRESS, supra at 1092, the primary jurisdiction doctrine "does not defeat the court's jurisdiction over the case," but instead coordinates the work of the court and the agency "by permitting the agency to rule first and giving the court the benefit of the agency's views...." In HILL TOP DEVELOPERS, supra, the Second District applied the doctrine to abate the proceeding before it, not to dismiss it with prejudice. 478 So.2d at 370. Unquestionably, as this Court made clear in OCEAN RIDGE, the application of the doctrine of primary jurisdiction is an issue of policy, not subject matter jurisdiction. 633 So.2d at 87. Thus, the dismissal should not have been with prejudice, as the Fourth District held in MROTEK v. CITY OF BOYNTON BEACH,

600 So.2d 42, 43 (Fla. 4th DCA 1992), as the Third District held in HILL v. MONROE COUNTY, 581 So.2d 225, 227 (Fla. 3d DCA 1991), and as the First District held in FRIENDS OF EVERGLADES, supra at 915.

Finally, if Defendants' argument is correct, it would establish that the public is forever foreclosed from approaching the courts with a charge that the laws are not being carried out to the extent that they relate to environmental concerns beyond the scope of an individual's private interest. How would anyone then be able to seek redress from the courts if the court refuses at least to hear evidence that the laws are not being carried out. After all, it was precisely that circumstance which led to the filing of the complaint in UNITED STATES v. SOUTH FLORIDA WATER MANAGEMENT DISTRICT, 847 F.Supp. 1567, 1570 (S.D. Fla. 1992), affirmed and reversed in part, 28 F.3d 1563, 1568 (11th Cir. 1994).

CONCLUSION

Based on the foregoing argument, Respondents respectfully request that the Opinion of the Fourth District Court of Appeal be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 28th day of March, 2000, to: JOSEPH P. KLOCK, JR., ESQ. and GABRIEL E. NIETO, ESQ., 200 S. Biscayne Blvd., Suite 4000, Miami, FL 33131-2398; GARY P. SAMS, ESQ., P.O. Box 6526, Tallahassee, FL 32314; THOMAS J. GUILDAY, ESQ., and VIKKI R. SHIRLEY, ESQ., P.O. Box 1794, Tallahassee, FL 32302-1794; and ROBERT T. SCOTT, ESQ., and JACK R. AIELLO, ESQ., P. O. Box 4587, West Palm Beach, FL 33402-4587.

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