IN THE SUPREME COURT OF FLORIDA

FLO-SUN, INCORPORATED, OKEELANTA CORPORATION, and SUGAR CANE GROWERS COOPERATIVE OF FLORIDA, INC., et al.,	)	
Defendants/Petitioners,	)	Case No. 95,044
vs.	)	
FORMER GOVERNOR CLAUDE R. KIRK, individually and in the name of the State of Florida, et al.,	)	
Plaintiffs/Respondents.	)	

On Petition to Review a Decision of
The District Court of Appeal, Fourth District

JURISDICTIONAL BRIEF OF PETITIONER SUGAR CANE GROWERS COOPERATIVE OF FLORIDA, INC. INCLUDING APPENDIX

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TABLE OF AUTHORITIES

Judicial Decisions

Florida Statutes

LIST OF ABBREVIATIONS USED IN THIS BRIEF

A-__	The Appendix to this Brief
APA	The Administrative Procedure Act, Chapter 120, Florida Statutes
DCA	District Court of Appeal
Defendants	Defendant/Petitioner, Sugar Cane Growers Cooperative of Florida, Inc. and its co-defendants below, United States Sugar Corporation, et. al.
Flo-Sun Brief	The Brief on Jurisdiction of Flo-Sun, Incorporated and Okeelanta Corporation.
Plaintiffs	Plaintiffs/Respondents, Former Governor Claude R. Kirk, et al.

STATEMENT OF THE CASE

In the decision below, the Fourth DCA articulated and enforced a notice pleading standard to test the sufficiency of a complaint which seeks to divert large-scale environmental controversies from the primary jurisdiction of executive agencies to public nuisance adjudication in the circuit courts. Emphasizing the posture of the case on a motion to dismiss, the court found a general allegation that agencies have not been enforcing the law sufficient, without more, to supplant the requirements of primary jurisdiction:

> 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. 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.
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> * * *
>
> 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. [A-1, p.2-3.]

The Fourth DCA was, in its view, forced to so hold by the nature of the complaint, which alleged that statutes and rules administered by executive agencies regulate the complained-of activities and that the agencies have failed to enforce these laws. [Id.] However, the court pointed to no allegation that: (1) Plaintiffs have ever raised the alleged violations with any regulatory agency; (2) available administrative remedies are legally inadequate to remedy such violations; or (3) any agency has

ever failed to provide access to administrative remedies.[1] [A-1, p. 2.]

The rationale stated in the complaint for not seeking available administrative remedies was that "the government 'aided and abetted' in the nuisance by failing to enforce existing laws and regulations and by providing direct and indirect economic subsidies to the defendants" and "the judicial branch alone has the will, the authority, the power and the independence to abate this ongoing nuisance." [A-1, p. 2.]

Applying a notice pleading standard to these general allegations, the Fourth DCA reversed the Circuit Court's dismissal[2], and held that:

- General allegations of governmental complicity and failure to enforce the law are sufficient to preclude application of primary jurisdiction; [A-1, p.2.]
- These allegations shift the burden to the Defendants to prove that the agencies have been adequately performing their duties. Absent that showing, there is no requirement of prior resort to administrative remedies. [Id.]

In contrast the First and Third DCAs have held:

- Circuit court jurisdiction is limited by "judicial

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[1] Damages alleged in the complaint include pollution of public lands and injury to wildlife [A-1, p.2.] The relief sought by Plaintiffs is "to shut down Defendants' agricultural business." [Id.]

[2] The Circuit Court's dismissal did not "preclude Plaintiffs from bringing any individual, private right of action they may have for personal injury or property damage allegedly resulting from the activities of the Defendants." [A-2, p. 2.]

restrictions . . . which require prior resort to and exhaustion of administrative remedies when they are available and adequate." State ex. rel. Department of Gen. Services v. Willis, 344 So.2d 580, 589 (Fla. 1st DCA 1977); accord, Bal Harbour Village v. City of Miami, 678 So.2d 356, 364 (Fla. 3d DCA 1996). Trial court intervention into areas of executive authority is justified by improper agency conduct only if the complaint demonstrates that the APA cannot provide a remedy. Willis, 344 So.2d at 590-91.

- Allegations regarding the timeliness, efficacy and propriety of agency action are, without more, insufficient to justify trial court intervention into matters regulated by agencies. Communities Financial Corp. v. Department of Envtl. Reg., 416 So.2d 813, 816-17 (Fla. 1st DCA 1982). Where administrative remedies have not been pursued, it cannot be concluded that those remedies are inadequate. Id.; Florida Soc. of Newspaper Editors v. Florida Pub. Serv. Comm'n, 543 So.2d 1262, 1266 (Fla. 1st DCA 1989), rev. denied, 551 So.2d 461 (Fla. 1989); Department of Envtl. Prot. v. PZ Constr., 633 So.2d 76, 78-79 (Fla. 3d DCA 1994).

Based on conflict with these decisions, and the decisions of this Court which have expressly adopted Willis--Key Haven Assoc. Enter. v. Trustees of the Internal Improvement Trust Fund, 427 So.2d 153, 156-57 (Fla. 1982) and Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So.2d 695, 698-99 (Fla. 1978)--the Petitioner seeks review in this Court.

SUMMARY OF THE ARGUMENT

The Fourth DCA held that general allegations of agency

complicity and failure to enforce the law are sufficient, without more, to supplant primary jurisdiction requirements, unless and until a defendant disproves those allegations through record evidence. This holding conflicts with Supreme Court and First and Third DCA decisions which require prior resort to available APA remedies.[3] To bypass the agencies, those decisions require that the complaint allege an attempt to invoke APA remedies and demonstrate that APA remedies are unavailable or inadequate. The allegations the Fourth DCA relied upon fall far short of this standard and its decision conflicts with these precedents.

The Fourth DCA decision requires trial courts, based on broad but general allegations of agency complicity and inaction, to adjudicate the efficacy and propriety of agency behavior before requiring parties to use to APA remedies. Because of the far-reaching implications to the judicial and executive branches, this Court should exercise its jurisdiction and review this case on the merits.

ARGUMENT

I. THE DECISION OF THE FOURTH DCA EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THE FIRST AND THIRD DCAs REQUIRING PRIOR RESORT TO ADMINISTRATIVE REMEDIES.

The fundamental question in this appeal is whether a general allegation that executive agencies have not been enforcing the law due to complicity with regulated parties is sufficient, without

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[3] The Fourth DCA decision also conflicts with State v. SCM Glidco Organics Corp., 592 So.2d 710 (Fla. 1st DCA 1991). Petitioner adopts the arguments in the Flo-Sun Brief on this point.

more, to preclude application of primary jurisdiction. The Fourth DCA answered this question in the affirmative, creating conflict with two decades of established judicial policy--based on constitutional separation of powers principles--of not prematurely interfering with executive decisionmaking. This policy is embodied in the doctrines of primary jurisdiction and exhaustion, which, as articulated by this Court and the First and Third DCAs, require parties to utilize available administrative remedies before seeking relief in the courts.[4] As emphasized in Willis, this policy of judicial restraint recognizes the ample protections afforded by the APA, which include independent administrative law judges and judicial review in the district courts. Willis, 344 So.2d at 590.

As this Court has noted, "if administrative agencies are to function and endure as viable institutions, courts must refrain from promiscuous intervention in agency affairs except for the most urgent reasons." Gulf Pines, 361 So.2d at 698; see also, Key Haven, 427 So.2d at 157. Accordingly, courts recognize exceptions to primary jurisdiction only where "agency errors may be so egregious or devastating that the promised administrative remedy is too little or too late." Willis, 344 So.2d at 590. The Fourth DCA, using language from Willis, held that the Plaintiffs had alleged

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[4] Willis, 344 So.2d at 590. The doctrines of primary jurisdiction and exhaustion, as articulated in Willis, were adopted by this Court in Key Haven, 427 So.2d 157-58 and Gulf Pines, 361 So.2d at 698-99, and by the Third DCA in Bal Harbour, 678 So.2d at 364. The Bal Harbour court further held, contrary to the decision below, that public nuisance law does not abrogate the requirement of prior resort to APA remedies. Id. Petitioner adopts the arguments in the Flo-Sun Brief regarding conflict with Bal Harbour.

"egregious and devastating" agency errors. [A-1, p. 2-3, n. 1.] However, the Fourth DCA misapplied Willis by not also requiring the complaint to demonstrate that there is no adequate APA remedy.[5]

Under First and Third DCA precedents, a complaint that seeks to bypass primary jurisdiction must demonstrate either that the agency cannot or will not consider the complainants' claims or that the agency has acted improperly and the APA has no adequate remedy. Willis, 344 So.2d at 591; Communities Financial, 416 So.2d at 816-17; PZ Constr., 633 So.2d at 78-79. The key to these holdings is that primary jurisdiction applies unless it is demonstrated that there is no adequate APA remedy. For example, in Communities Financial, 416 So.2d at 816-17, the First DCA held that allegations of agency errors and improper agency conduct are insufficient to bypass primary jurisdiction because such allegations do not demonstrate that APA remedies are inadequate. The First DCA expressly rejected the argument that defects in "the timeliness and efficacy of agency action and the propriety of [the agency] applying certain statutory and regulatory standards" necessitated trial court intervention into areas of environmental agency jurisdiction. Id. It further held that "such an allegation, without more, undermines the very purposes of the APA, for it presupposes that a circuit court is a more appropriate forum for resolution of disputes which are particularly within the administrative agency's expertise." Id.

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[5] Willis, 344 So.2d at 590. The Fourth DCA's misapplication of Willis is sufficient to confer jurisdiction in this Court. See, Wale v. Barnes, 278 So.2d 601, 604 (Fla. 1973).

First and Third DCA precedents also require an actual attempt to invoke administrative remedies:

> [T]he absence of any claim that [the agency] refused to afford [the plaintiffs] an administrative hearing or otherwise refused to recognize that their grievances were administratively cognizable undermines the very assertion that the APA has no adequate remedy. . . . Since [administrative] avenues of relief were not pursued we cannot conclude that the remedies of the administrative process are inadequate.

Communities Financial, 416 So.2d at 816. This fundamental principle --that to bypass agency jurisdiction a complaint must, at a minimum, allege an attempt to invoke APA remedies--was reiterated by the First DCA in Florida Soc. Of Newspaper Editors, 543 So.2d at 1266 n. 10, and by the Third DCA in PZ Constr., 633 So.2d at 78-79.

The decision below acknowledges agency jurisdiction and creates an exception to primary jurisdiction based on allegations of agency complicity and inaction. [A-1, p. 2-3.] However, the court did not require the Plaintiffs to allege that they ever petitioned any agency to pursue enforcement action or otherwise remedy its alleged failures. [Id.] Nor did the court require the complaint to demonstrate that the APA cannot provide adequate relief. [Id.] At most, the allegations relied upon by the Fourth DCA demonstrate that the agencies have not been as active as Plaintiffs would have wished. Such allegations, without more, are insufficient under First and Third DCA precedents. See, Communities Financial, 416 So.2d at 816-17; PZ Constr., 633 So.2d at 79; Willis, 344 So.2d at 590-91. The Fourth DCA decision further conflicts with these precedents by shifting the burden to the Defendants to "disprove Plaintiffs' allegations through record

evidence." [A-1, p. 3.] This transforms into an affirmative defense what was in Willis a condition precedent to bringing suit.[6]

Moreover, the Willis court held that a court's decision whether to intervene in areas of executive authority should take into account the "extent of injury from pursuit of administrative remedies, the degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question." Willis, 344 So.2d at 590 n.10. Even a cursory examination of these factors shows a conflict with Willis. The decision below acknowledges agency jurisdiction, but there is no allegation that any unique injury would result from APA remedies. And, resolution of the broad environmental issues implicated in this case requires application of the specialized knowledge of regulatory agencies. See, Bal Harbour, 678 So.2d at 364.

II. THIS COURT SHOULD EXERCISE ITS JURISDICTION TO PRESERVE LONG-STANDING JUDICIAL POLICIES BASED ON THE CONSTITUTIONAL SEPARATION OF POWERS.

By overturning the trial court's dismissal, the Fourth DCA required that court to engage in exactly the sort of "promiscuous intervention" that this Court warned of in Gulf Pines. Trial courts of the Fourth District will now be forced by very general allegations to adjudicate the adequacy and propriety of executive

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[6] Petitioner adopts the arguments of the Flo-Sun Brief on this point. This holding also conflicts with Hillsborough County Aviation Auth. v. Taller & Cooper, 245 So.2d 100, 102 (Fla. 2d DCA 1971), which articulates a presumption that public officials properly perform their duties in accordance with the law which must be overcome by those challenging such performance.

agency action before deciding whether parties must use APA remedies. The courts will effectively be forced to conduct trials of the executive branch of government in absentia. This will entail calling current and former agency personnel and elected officials before the court to assess the adequacy of and motivations for their actions. In the meantime the alleged "public nuisances" that might have been addressed expeditiously under the APA will go unattended. Ultimately, regardless of final outcome, each case will require the trial court to audit and superintend for months and perhaps years the realm of environmental regulation for entire industries over large geographic areas.

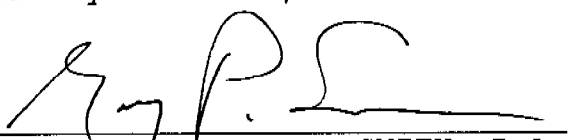
This result conflicts with decisions that respect constitutionally based principles of judicial restraint and recognize the "impressive arsenal of varied and abundant remedies" afforded by the APA. Willis, 344 So.2d at 590-91. The Fourth DCA decision presumes the APA protections, which include independent fact-finders and judicial review in the district courts, id., inadequate to remedy alleged failures by agencies to "[do] their job." [A-1, p. 2.] If the APA is to be held so inadequate and long-standing policies of judicial restraint therefore abandoned, the decision should be based on this Court's analysis of the constitutional separation of powers, judicial policy considerations and the protections of the APA, not on the Fourth DCA's mechanical application of notice pleading requirements.

CONCLUSION

The Fourth DCA decision expressly and directly conflicts with

Communities Financial and PZ Constr. which require a claim of inadequate administrative remedies to be supported by a good faith attempt to use those remedies. Communities Financial, 416 So.2d at 816; PZ Constr., 633 So.2d at 78-79. It further conflicts with Willis, Key Haven and Gulf Pines, which require the complaint to demonstrate that APA remedies (including judicial review in the district courts) cannot provide adequate relief. Willis, 344 So.2d at 590-91. Additionally, the Fourth DCA created an "agency impropriety and inaction" exception to primary jurisdiction that was expressly rejected in Communities Financial, 416 So.2d at 816-17. Because of the importance of the constitutional separation of powers and administrative law principles implicated here, this Court should exercise its jurisdiction to consider the merits of Petitioner's arguments that the dismissal of the public nuisance complaint was proper and indeed required.

Respectfully submitted this 15th day of March, 1999.



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I HEREBY CERTIFY that on this 15th day of March, 1999, the original and five (5) copies of Petitioner's Jurisdictional Brief, with Appendix, were filed with the Clerk of the Supreme Court of Florida, and that a true and correct copy of the same was furnished by U. S. Mail, postage prepaid, to:

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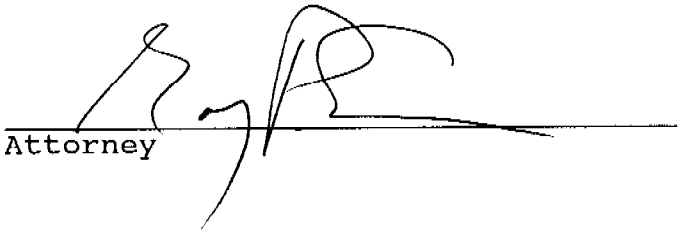

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