IN THE SUPREME COURT OF FLORIDA

Case No. 95,044

(Fourth DCA Case No. 96-04145)
(Fla. 15th Cir. Ct. Case No. CL 95-8733-AF)

FLO-SUN, INCORPORATED;
OKEELANTA CORPORATION; SUGAR CANE GROWERS
COOPERATIVE OF FLORIDA, INC.

Defendants/Petitioners,

v.

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

Plaintiffs/Respondents.

On Notice Invoking Jurisdiction to Review a Decision of the Fourth District Court of Appeal

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Petitioners Flo-Sun and Okeelanta's Brief on Jurisdiction

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CERTIFICATE OF TYPE SIZE AND STYLE

I hereby certify that the typeface used in this brief is 12 point nonproportionately spaced Courier.

Edward M. Mullins

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INTRODUCTION

Petitioners, Flo-Sun, Incorporated and Okeelanta Corporation (collectively "Petitioners"), seek review of a decision of the Fourth District Court of Appeal (copy attached) which overturned a dismissal of a public nuisance claim for failure to utilize available administrative remedies. Under this decision, a plaintiff may bypass extensive administrative regulatory systems by filing a public nuisance claim based on broad allegations of air and water pollution and without invoking administrative remedies if the plaintiff makes conclusory allegations that the government has failed to enforce the applicable law. According to the Fourth District, a plaintiff need not even *plead* invocation of administrative remedies. And, according to the Fourth District, a trial judge can dismiss a claim clearly blocked by primary jurisdiction only after discovery is conducted and adequacy of administrative remedy is proved by the *defendant*.

Conflicts abound. First, this new "non-enforcement" exception to primary jurisdiction in public nuisance cases expressly and directly conflicts with the Third District's application of primary jurisdiction to public nuisance claims in the heavily regulated areas of air and water pollution. Second, by shifting the burden of proof and requiring the defendant to establish that the plaintiff has an adequate administrative remedy, the decision conflicts with the First District -- and numerous other district and Supreme Court decisions following that court -- on the issue of the burden of proof in primary jurisdiction cases.

This case not only raises significant conflict issues, it

seriously destabilizes Florida's administrative scheme and encourages massive judicial intrusion into the power of a co-equal branch of government. Environmental regulation by administrative agencies charged with this responsibility will be supplanted by lawsuits brought by anyone who chooses to ordain judges as the new environmental regulators. This turns primary jurisdiction on its head, effectively giving *circuit courts* primary jurisdiction based upon a bare conclusory allegation of nonenforcement by the administrative agencies. The decision creates a roadmap to circumvent primary jurisdiction and sets back administrative jurisprudence by decades.

The decision directly conflicts with the law of other Districts and of this Court. These conflicts require resolution.

STATEMENT OF THE CASE AND THE FACTS

To protect the environment from air and water pollution, the Florida Legislature has devised an exhaustive regulatory system administered by the Florida Department of Environmental Protection, the South Florida Water Management District ("SFWMD"), and the Division of Forestry. See Ch. 373, 376, and 403, § 509.12, Fla. Stat. (1997). The actions of these agencies are subject to judicial review pursuant to the Administrative Procedures Act ("APA"). Id. Ch. 120.

Any person whose substantial interests are affected by agency action can petition the agency for a formal hearing. Id. § 120.569. Any person can petition a state agency to compel enforcement of the law. Id. § 403.412. And, a detailed plan for

Everglades restoration is found in the Everglades Forever Act, id. § 373.4592, which followed years of federal and state litigation, extensive negotiations between state and federal governments, written agreements between state and federal agencies and private parties, exhaustive hearings, and legislative enactment. It is administered by the SFWMD.

This case was brought by plaintiffs against the Petitioners, other sugar cane growers, and the manufacturer of a byproduct of sugar cane for abatement of a public nuisance pursuant to §§ 60.05 and 823.01, Fla. Stat (1997). They claimed that the defendants' activities had damaged their use and enjoyment of their property and had damaged the general public, (Op. 1-2), caused them "personal discomfort, inconvenience, and annoyance," injured wildlife, and damaged their physical health and being. Id. at 2.

Plaintiffs claimed the government had "aided and abetted" this alleged public nuisance "by failing to enforce existing pollution laws and regulations." Id. at 2. Plaintiffs did not allege that they had brought these alleged failures to the attention of *any* of the agencies charged with regulating air and water pollution; instead, they claimed that the judiciary alone could regulate the alleged pollution at issue. Id. They sought broad injunctive relief "to shut down Defendants' agricultural business." Id.

Defendants moved to dismiss the amended complaint, and the trial court granted the motion based upon, inter alia, the doctrine of primary jurisdiction. Id. The Fourth District reversed in an opinion on March 18, 1998, that was replaced by the February 3,

1999, amended opinion at issue. In the amended opinion, the court sought to distinguish its own decision in South Lake Worth Inlet District v. Town of Ocean Ridge, 633 So. 2d 79, 86-87 (4th DCA), review denied, 645 So. 2d 454 (Fla. 1994), in which the court had held (based on cases upon which Petitioners claim conflict exists herein) that an agency's primary jurisdiction could not be avoided by "artful pleading of public nuisance claims." Id. at 88-89. The District Court held that the trial court in this case had dismissed the action prior to discovery. The District Court held that the bare allegation of a purported failure by the responsible agencies to enforce their own regulations obviated the requirement that plaintiffs invoke administrative remedies before filing a sweeping public nuisance claim. (Op. 2-3 & n.1). In so doing, the court cited a pre-APA decision, State ex rel. Shevin v. Tampa Elec. Co., 291 So. 2d 45 (Fla. 2d DCA 1974), for the proposition that public nuisance "'lies within the special competence of judicial expertise'" no matter the subject matter of the public nuisance or the administrative remedies available to address it. (Op. 2).

The district court also held that *defendants* would be required to disprove Plaintiffs' allegations of agency complicity and enforcement failures "through record evidence" and only "then the doctrine of primary jurisdiction *might* serve as a basis for disposing of this case." Id. at 3 (emphasis added).

SUMMARY OF ARGUMENT

This Court has the opportunity to resolve many conflicts. *First*, the principle that a public nuisance claim based on alleged

environmental damage falls within the "'special competence of judicial expertise,'" rather than the specialized expertise of the numerous administrative agencies delegated to regulate these areas, expressly and directly conflicts with the Third District's decision in Bal Harbour Village v. City of North Miami, 678 So. 2d 356 (Fla. 3d DCA 1996), which holds exactly to the contrary. *Second*, shifting the burden of proof to the defendants to demonstrate the existence of appropriate administrative remedies expressly and directly conflicts with the First District's decision in State ex. rel. Department of General Services v. Willis, 344 So. 2d 580 (Fla. 1st DCA 1977), and the cases following Willis, which hold that a plaintiff, at the outset, must allege in its complaint and prove the inadequacy and inapplicability of administrative remedies.

Willis and Bal Harbour, in enforcing the requirement of prior resort to administrative remedies at the time the complaint is filed, recognized the superior expertise of administrative agencies in matters delegated to them. In contrast, the District Court's decision turns this doctrine on its head, only requiring prior resort to the APA remedies when *defendants* prove adequate enforcement and lack of agency complicity, and thereby rendering primary jurisdiction meaningless. The result conflicts with decisional law and the entire purpose of the administrative framework. This Court not only has jurisdiction here, but strong policy reasons exist for it to accept jurisdiction to avoid a serious disruption of the carefully constructed, modern system of administrative law that has heretofore existed in Florida.

ARGUMENT

Multiple independent bases exist for conflict jurisdiction.

I. The Decision Expressly and Directly Conflicts With the Third District's Bal Harbour Decision

The Fourth District's public nuisance exception to administrative primacy in areas falling within an agency's jurisdiction directly conflicts with Bal Harbour Village v. City of North Miami, 678 So. 2d 356 (Fla. 3d DCA 1996).[1]

In Bal Harbour, the Third District held that the trial court had correctly *dismissed* the plaintiff's nuisance count, which complained that the alleged nuisance "would cause substantial water and air pollution, including leakage of hazardous waste." Id. at 364. The Third District reasoned that "with respect to the pollution claims, dismissal is appropriate under the doctrines of primary jurisdiction and exhaustion of administrative remedies." Id. Noting that the plaintiff there had administrative remedies with various state and federal agencies, the court ruled that nuisance law "is not intended to serve as a substitute for the exhaustion of available administrative remedies." Id. at 364.

In contrast, the decision here effectively creates a "public nuisance" exception to the primary jurisdiction doctrine. It

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[1]Although the Fourth District did not refer to Bal Harbour, "[i]t is not necessary [to do so] in order to create an 'express' conflict under Art. V, 53(b)(3) of the Florida Constitution." Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981); see also The Florida Star v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988) (there must only be some statement or opinion that hypothetically could create a conflict with another opinion reaching a contrary result).

cannot be squared with Bal Harbour.[2] The conflict is exacerbated because the District Court relied upon the Second District's decision in State ex rel. Shevin v. Tampa Electric Co., 291 So. 2d 45 (Fla. 2d DCA 1974), for the proposition that a public nuisance suit is an exception to the primary jurisdiction doctrine. Although the District Court's reliance on Shevin is misplaced,[3] if the Fourth District correctly interpreted Shevin, then the Second and Fourth Districts conflict with the Third District.

II. The Decision Expressly and Directly Conflicts With the First District's *Willis* Decision and Its Progeny

A separate conflict exists with the First District's decision

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[2]Plaintiffs claimed below that Bal Harbour was distinguishable for two reasons, neither of which is valid. First, they argued that the plaintiff there sought to prevent a nuisance which the Bal Harbour court held violated the rule that a nuisance claim can be based only upon an existing nuisance. That was only an alternative holding to the court's holding that a public nuisance suit is not an end-run around the primary jurisdiction. 678 So. 2d at 364. Second, Plaintiffs argued that in Bal Harbour the permitting process would resolve the complaints raised by the plaintiff. The same is true here; adequate remedies are available to Plaintiffs.

Further, Plaintiffs attempted to reconcile the original panel decision with the other decisions that Petitioners claim conflict by arguing that in none of those cases did the plaintiffs sue on the same statutes at issue, which have so-called "savings clauses." E.g., § 403.191, Fla. Stat. (1997). That distinction cannot be made with respect to Bal Harbor which involved the *exact* same type of claims as here -- public nuisance due to alleged water pollution. In any event, separation of powers principles cannot be overcome by such savings clauses. See e.g., Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)(the case giving birth to primary jurisdiction and interpreting clause identical to ones at issue here).

[3]Shevin was decided before the enactment of the modern APA which provides the remedies that were the basis for Willis. The Fourth District's misapplication of Shevin alone is sufficient for this Court to find a conflict between the Second and Fourth Districts. Wale v. Barnes, 278 So. 2d 601, 604 (Fla. 1973).

in State ex rel. Department of General Services v. Willis, 344 So. 2d 580 (Fla. 1st DCA 1977). The Fourth District held that alleged agency inaction is error "so egregious or devastating that administrative remedies would be insufficient," and that *defendants* must disprove through record evidence plaintiffs' allegations of egregious agency error for primary jurisdiction to apply. (Op. 3). In direct contrast, in Willis, the First District held that the burden is on the *plaintiff* and the relevant inquiry is whether "the *complaint* . . . demonstrates some compelling reason why the Administrative Procedure Act does not avail them in their grievance against the Department, and why the circuit court must therefore intervene." Id. at 591. To avoid primary jurisdiction, plaintiffs must plead and prove that the APA provided no remedy for their claims, that the relevant Department refused to hold a hearing, and that "the remedies available under the Act are inadequate." Id.[4]

Plaintiffs' allegations here did not come close to meeting the burden that the Willis court imposed on parties seeking to overcome primary jurisdiction. The notion that a defendant should be required to *disprove* that administrative remedies are inadequate conflicts with Willis and effectively places primary jurisdiction

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[4]See, e.g., Key Haven Assoc. Enters., Inc. v. Board of Trustees, 427 So. 2d 153 (Fla. 1982) (adopting Willis and approving dismissal of inverse condemnation action for failure to exhaust administrative remedies); see also Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695, 698 (Fla. 1978) (adopting Willis); Florida Power Corp. v. State, 605 So. 2d 149 (Fla. 1st DCA 1992) (affirming dismissal of complaint when plaintiff failed to exhaust administrative remedies and failed to establish exception to that doctrine); Metropolitan Dade County v. Department of Commerce, 365 So. 2d 432 (Fla. 3d DCA 1978) (same).

in the judiciary and not the administrative agencies charged with regulating the environment.

The principle that a plaintiff must plead and prove invocation of administrative remedies or a viable exception to that doctrine has been long adhered to by this Court and the First and Third Districts.[5] Here, the District Court reversed a trial court order dismissing a complaint in which Plaintiffs did not plead that they had invoked administrative remedies or any legally viable excuse for failing to do so. The government's alleged nonenforcement of the law does not divest Plaintiffs of the administrative remedies available to compel an agency to comply with the law.

It is not often that a decision from a district court creates so many conflicts with prior precedent. For example, in addition to the conflicts noted above, the decision also conflicts with State v. SCM Glidco Organics Corp., 592 So. 2d 710 (Fla. 1st DCA 1991), which held that "§ 803.01, Fla. Stat. [Florida's Public Nuisance Act], has been superseded by Chapter 403, Fla. Stat. [the Florida Air and Water Pollution Control Act], insofar as any application of that section to air pollution is concerned." Id. at 712. The District Court expressly disagreed with Glidco and expressly approved State v. General Development Corp., 448 So. 2d

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[5]Plaintiffs tried to reconcile Willis with the original decision below by arguing that Willis held that invoking administrative remedies applies only when such remedies are "available and adequate." Assuming the government had not enforced the law as Plaintiffs contend, that does not mean that Plaintiffs have no remedy under the APA, which specifically allows a party to petition an agency to require compliance and also provides for judicial review.

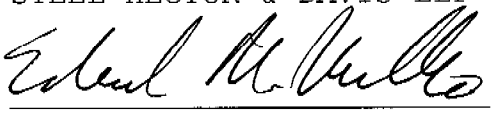
1074, 1080 (Fla. 2d DCA 1984), which held the opposite of Glidco. Thus, the Second and Fourth Districts conflict with the First District on this issue.[6]

And, the Petitioners adopt the jurisdictional brief filed by Petitioner Sugar Cane Growers Cooperative of Florida, Inc., which shows that the decision also conflicts with other decisions not mentioned herein.

CONCLUSION

The decision sets forth rules of law in direct conflict with those of the First and Third Districts and of this Court. It creates a damaging and irreconcilable difference with existing primary jurisdiction law which calls for a crisp and immediate response. Primary jurisdiction is intended to divert administrative matters from the judicial branch -- not to invite time-consuming litigation that will intrude into the administrative jurisdiction of a co-equal branch of government. This Court should accept jurisdiction.

Respectfully submitted,
STEEL HECTOR & DAVIS LLP



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[6]Facing this express conflict, Plaintiffs responded below that Glidco was wrong. Whether Glidco was wrong or not (it was not) does nothing to mitigate the conflict. Plaintiffs also argued that Glidco could be distinguished because it was a criminal case. Nothing in Glidco suggests it applies only in criminal cases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was provided by U.S. mail on March 12, 1999, to:

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