**ORIGINAL**



IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

FLO-SUN, INCORPORATED,
OKEELANTA CORPORATION,

Petitioners,

vs. CASE NO. 95,044

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

Respondents.
_____/

# JURISDICTIONAL BRIEF OF RESPONDENTS IN RESPONSE TO JURISDICTIONAL BRIEF OF PETITIONERS FLO-SUN AND OKEELANTA

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## CERTIFICATE OF TYPE SIZE AND STYLE

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

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## PREFACE

Petitioners were the Defendants and Appellees, and Respondents were the Plaintiffs and Appellants in the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida and in the Fourth District Court of Appeal, respectively. In this brief, the parties will be referred to as they appear in this Court. The symbol "A" will denote the Appendix to this brief. All emphasis in this brief is supplied by Respondents, unless otherwise indicated.

## STATEMENT OF THE CASE & FACTS

The facts of the case and the legal issues are as they appear in the Opinion by the Fourth District Court of Appeal. KIRK v. UNITED STATES SUGAR CORP., 24 Fla.L.Weekly D342 (Fla. 4th DCA February 3, 1999).

## SUMMARY OF ARGUMENT

The cases cited by Petitioners for conflict entitling them to this Court's discretionary review do not conflict with the decision of the Fourth District Court of Appeal at issue. This case was brought under the nuisance statute, and the very statute which Petitioners claim required the exhaustion of administrative remedies, explicitly exempts statutory or common law actions to suppress nuisances.

## ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THIS CASE DOES NOT CONFLICT WITH THE CASES WHICH PETITIONERS CITE FOR CONFLICT

This Court has discretionary jurisdiction to review a decision of a district court of appeal which expressly and directly conflicts with the decision of another district court of appeal or of this Court on the same point of law. Fla.R.App.P. 9.030(a)(2)(A)(iv). The principal situations establishing jurisdiction by conflict are the announcement of a rule of law which conflicts with a rule previously announced, or the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts. NEILSON v. CITY OF SARASOTA, 117 So.2d 731 (Fla. 1960). See also COMBS v. STATE, 436 So.2d 93 (Fla. 1983). Neither jurisdictional ground has been established here.

Petitioners seek review alleging conflict with three cases, including STATE v. SCM GLIDCO ORGANICS CORP., 592 So.2d 710 (Fla. 1st DCA 1991). First, there can be no direct and express conflict between the Fourth District's opinion in this case and SCM, because the SCM opinion arose out of and applies in the context of criminal law. SCM was an appeal by the State of Florida from orders dismissing two criminal cases. Two corporate defendants had been charged with violations of the nuisance statute, and the First District held that the dismissal of

the charges for violations of §823.01, Fla. Stat. (1987), the criminal nuisance statute, was correct because that section "has been superseded by Chapter 403, Fla. Stat. insofar as any application of that section to air pollution is concerned." Id. at 712. When properly understood, it is apparent that the SCM opinion was an attempt to reconcile a general and a specific criminal statute for purposes of due process notice requirements in the context of criminal law. It has no application to a case such as this, and factually and legally cannot be predicated as the basis of jurisdictional conflict with the decision in this case.

Moreover, even though the Fourth District stated its disagreement with the SCM decision, that disagreement did not create decisional conflict. The linchpin of the Fourth District's decision was the "savings clause" in the Florida Air and Water Pollution Control Act, Chapter 403, Fla. Stat. (1995). That clause appears in §403.191, Fla. Stat. (1995), the pertinent part of which, quoted by the Fourth District in its opinion, 24 Fla.L.Weekly at D343, reads 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.

Critically, the panel majority in SCM did not discuss the savings clause in §403.191(1) at all. 592 So.2d at 710-13. Judge Ervin in dissent did not discuss it either. Id. at 713-717. Apparently, the application of the savings clause was not even considered in the SCM case, and what is dispositive for this proceeding is that the primary legal basis on which the Fourth District disagreed with SCM was neither discussed nor considered in the SCM decision. Therefore, there can be no decisional conflict giving rise to this Court's jurisdiction to review.

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 Respondents brought here. The plain language of §403.191(1) rules out the theory that administrative relief is exclusive, or that it need 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).

Petitioners also cite for conflict STATE EX REL. DEPARTMENT OF GENERAL SERVICES v. WILLIS, 344 So.2d 580 (Fla. 1st DCA 1997), and that case's teachings regarding the doctrine of primary jurisdiction. As the Court in Willis explained, id. at 859, primary jurisdiction is a judicially-created doctrine whereby, in appropriate circumstances, courts which are otherwise fully possessed of jurisdiction in a case will nonetheless postpone judicial consideration of it, and defer to action by an administrative body in order to vindicate the regulatory scheme provided by the legislature. If that is so, then the logic of the doctrine and of the WILLIS opinion absolutely does not apply here, where the legislature could not have been more explicit in creating exceptions to this regulatory scheme. In addition to the savings clause in §403.191, Chapter 376, Fla. Stat. (1995), the Pollution Discharge Prevention and Control Act, also expressly preserves the rights of individuals to bring original actions to seek judicial remedies explicitly in its provisions. See §§376.205, 376.313(1-3), Fla. Stat. (1995) ("the remedies in this action shall be deemed to be cumulative and not exclusive"). Thus, WILLIS

cannot conflict with the Fourth District's decision, which turned on a savings clause. Critically to the jurisdictional issue, WILLIS did not involve the same statutes which are at issue in this case.

Consequently, contrary to Petitioners' argument, the Fourth District's opinion does not undermine the administrative scheme established by the legislature, any more than have the savings clauses authored by the legislature long before the Fourth District authored its opinion. Moreover, because WILLIS involved different statutes, the Fourth District's decision here did not alter the effect of WILLIS' teachings within the statutory context of that case. Because WILLIS did not involve an action for nuisance, it discussed none of the statutory exceptions which were before the Fourth District.

Petitioners' argument that the Fourth District's opinion created a new rule to the effect that the Defendants must disprove the allegations of the complaint through a record evidence in order to establish that the primary jurisdiction doctrine should apply here is not correct. In the section of the opinion at issue, 24 Fla.L.Weekly at D343, the Fourth District properly followed the rule that the allegations of the complaint must be taken as true on a motion to dismiss, and then stated that if those allegations were not proven through record evidence, then primary jurisdiction might serve as a basis for disposing of the case. The use of

the words "[i]f Defendants can later disprove Plaintiffs' allegations through record evidence" simply referenced whether Respondents as Plaintiffs could prevail on their factual allegations. Obviously, that phrase was not intended to effect the kind of sea change in the law which Petitioners contend, since Respondents have never disputed that as Plaintiffs it is their burden to plead and prove their case.

Finally, Petitioners also seek to predicate jurisdiction based on alleged conflict with the Third District's decision in BAL HARBOUR VILLAGE v. CITY OF NORTH MIAMI BEACH, 678 So.2d 356 (Fla. 3d DCA 1996), where the court affirmed the dismissal, on grounds of primary jurisdiction and exhaustion of administrative remedies, of an environmental nuisance claim founded on allegations of water and air pollution. The issues in BAL HARBOUR centered around the Village's lawsuit seeking to prevent the City of North Miami from building an open-air amphitheater near the shores of Biscayne Bay. Id. at 358. North Miami had adopted an ordinance rezoning land to permit the development of the 26,000-seat performing arts facility near the campus of Florida International University. In the section of the opinion dealing with the nuisance claim, id. at 363-5, the Third District held that dismissal under the doctrines of primary jurisdiction and exhaustion of remedies was proper because permits had yet to be obtained from the responsible agencies, including the Florida Department of Environmental Protection.

Because the case involved a new, as-yet unbuilt project, and because the permitting process had not even begun, it was obvious that the permitting process itself might solve the complaints raised by the plaintiff in that case.

As the Third District explained, dismissal was appropriate in BAL HARBOUR also because what the plaintiff sought was akin to an effort to enjoin "a threatened, rather than existing, nuisance." Id. at 364. Thus, the court held that under the rule explained in NATIONAL CONTAINER CORP. v. STATE EX REL. STOCTON, 138 Fla. 32, 189 So. 4, 10 (1939), a nuisance suit cannot be filed simply to enjoin something which may result in a nuisance in the future, but must be directed against something which will necessarily result in the creation of a nuisance. Here, the pivotal facts differs from BAL HARBOUR, because the issue here is not a future nuisance, but a present and persisting one.

Moreover, although the BAL HARBOUR case also involved a nuisance action, as in the SCM case, there was no discussion of the applicability of §403.191(1), and no indication that the argument regarding the savings clause was even made. Furthermore, BAL HARBOUR involved the application of a local ordinance, North Miami City Ordinance 888, which provided: "No development shall occur pursuant to this ordinance prior to approval by the State D.E.R. [formerly the Florida Department of Environmental Regulation, now the Florida

Department of Environmental Protection]...." Id. at 678. Consequently, as the court pointed out, pursuant to the ordinance the environmental permits at issue had to be obtained from the DER as a condition to allowing the project to proceed, a factor involving the doctrines of primary jurisdiction and exhaustion of remedies not present in the instant case. Id. Thus, Respondents maintain that the factual and procedural posture of the nuisance issue in BAL HARBOUR is totally distinguishable from the facts and procedural posture portrayed in the Fourth District's opinion, and cannot serve as the basis for conflict jurisdiction.

## CONCLUSION

Respondents respectfully maintain that decisional conflict has not been established by Petitioners, and that this Court's discretionary review should be denied.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished by mail this 7th day of May, 1999, to: JANE KREUSLER-WALSH, ESQ., 501 S. Flagler Dr., Ste. 503, West Palm Beach, FL 33401; GERRY GIBSON, ESQ., 777 S. Flagler Dr., 1900 Phillips Point W., West Palm Beach, FL 33401; JOSEPH P. KLOCK, JR., ESQ. and EDWARD M. MULLINS, ESQ., 200 S. Biscayne Blvd., 40th Floor, Miami, FL 33131-2398; MARGARET L. COOPER, ESQ., P.O. Box 3475, West Palm Beach, FL 33402-3475; GARY P. SAMS, ESQ., ROBERT P. SMITH, ESQ. and GABRIEL E. NIETO, ESQ., P.O. Box 6526, Tallahassee, FL 32314; THOMAS J. GUILDAY, ESQ., P.O. Box 1794, Tallahassee, FL 32302; and JACK R. AIELLO, ESQ., P. O. Box 4587, West Palm Beach, FL 33402-4587.

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