IN THE SUPREME COURT OF FLORIDA

FLO-SUN, INCORPORATED, OKEELANTA CORPORATION, and SUGAR CANE GROWERS COOPERATIVE OF FLORIDA,	)	
Petitioners,	)	Case Nos. 95,044
vs.	)	95,045
FORMER GOVERNOR CLAUDE R. KIRK, individually and in the name of the State of Florida, et al.,	)	
Respondents.	)	

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

REPLY BRIEF OF PETITIONERS FLO-SUN INCORPORATED, OKEELANTA CORPORATION AND SUGAR CANE GROWERS COOPERATIVE OF FLORIDA

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

CASES

FLORIDA STATUTES AND CONSTITUTIONAL PROVISIONS

FLORIDA RULES OF CIVIL PROCEDURE

FLORIDA ADMINISTRATIVE RULES

LIST OF ABBREVIATIONS USED IN THIS BRIEF

AB	Plaintiffs' Answer Brief
APA	The Administrative Procedure Act, Chapter 120, Florida Statutes (1999).
Defendants	Defendants/Petitioners, Flo-Sun, Inc., Okeelanta Corporation and Sugar Cane Growers Cooperative of Florida and their co-defendants below, United States Sugar Corporation, et. al.
IB	Petitioners' Initial Brief
IB, A-___	The Appendix to Petitioners' Initial Brief.
Petitioners	Petitioners Flo-Sun, Inc., Okeelanta Corporation and Sugar Cane Growers Cooperative of Florida.
Plaintiffs	Plaintiffs/Respondents, Former Governor Claude R. Kirk, et al.

ARGUMENT

I. THE EXCEPTION TO PRIMARY JURISDICTION DOES NOT APPLY; ADMINISTRATIVE REMEDIES ARE AVAILABLE AND ADEQUATE.

Plaintiffs attempt to invoke the exception to primary jurisdiction -- no adequate administrative remedy -- by alleging that the environmental statutes which "prohibit and regulate" the Defendants' activities "have not been enforced" by executive agencies. (AB, p. 9) Without further elaboration, Plaintiffs argue that their allegation of agency non-enforcement demonstrates "compelling and unique reasons why administrative remedies are inadequate. . . ." (AB, p. 31) Plaintiffs' argument fails for two reasons: First, the Complaint fails to set forth any "ultimate facts" demonstrating the inadequacy of administrative remedies. Second, even if taken as true, Plaintiffs' conclusory allegation of past agency enforcement errors fails, as a matter of law, to establish that administrative remedies are inadequate.

A. Plaintiffs have not pled "ultimate facts" demonstrating the inadequacy of administrative remedies.

Florida Rule of Civil Procedure 1.110(b)(2) requires a complaint to set forth "ultimate facts showing that the pleader is entitled to relief." Thus, "a pleading is deemed insufficient if it contains mere statements of opinion or conclusions unsupported by specific, ultimate facts." Rishel v. Eastern Airlines, 466 So. 2d 1136 (Fla. 3d DCA 1985); see also, Ginsberg v. Lennar Florida Holdings, Inc., 645 So. 2d 490 (Fla. 3d DCA 1994); Beckler v. Hoffman, 550 So. 2d 68 (Fla. 5th DCA 1989). It is also well

established that a complainant seeking to bypass primary jurisdiction must demonstrate that administrative remedies are inadequate. St. Joe Paper Co. v. Florida Dept. of Natural Resources, 536 So. 2d 1119, 1125 (Fla. 1st DCA 1988); State ex rel. Department of General Services v. Willis, 344 So. 2d 580, 591 (Fla. 1st DCA 1977).

Plaintiffs' Complaint falls far short of these requirements. Their entire case on bypassing primary jurisdiction is based on the following allegation:

> Government from the local municipal level to the Federal level has 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....

(R 15-16, IB, A-3, p. 5-6) Importantly, there is no allegation that Plaintiffs have ever approached any agency with their concerns, much less that any agency has ignored their claims. See Communities Financial Corp. v. Department of Envtl. Reg., 416 So. 2d 813, 816 (Fla. 1st DCA 1982). (This is not an oversight; Plaintiffs cannot make this crucial allegation.) Moreover, Plaintiffs' claim that government has "aided and abetted" the nuisance and failed to enforce the law is pure conclusion and nothing more. Plaintiffs do not allege one specific instance where government has failed to enforce the laws. Indeed, Plaintiffs do not even allege which of the "complex panoply" of environmental laws "intended to deal with pollution of the Everglades" (AB, p. 9-10) has not been enforced. And, Plaintiffs

offer no factual allegation to support their conclusion that government has "aided and abetted" the alleged nuisance.

Florida law does not permit a litigant to bypass administrative remedies through the expedient of a conclusory statement that all government is compromised and therefore "the judicial branch alone" is a worthy forum. (R 16, IB, A-3, p. 6) To the contrary, Plaintiffs must state ultimate facts demonstrating that there is no adequate remedy. Bare conclusions or opinions on the timeliness and efficacy of regulatory action or the propriety of past agency decisions are, without more, insufficient to satisfy this requirement. See Communities Financial, 416 So. 2d at 816.

B. Even if taken as true, Plaintiffs' allegations do not establish that administrative remedies are inadequate as a matter of law.

Contrary to Plaintiffs' rhetoric, the administrative remedies are designed to protect against and correct improper agency action. As extensively discussed in the Initial Brief (at p. 4-5, 16-21), Plaintiffs are protected against the very government complicity they fear by safeguards that include:

- Independent administrative law judges and deference to their factual findings (§ 120.57(1), Fla. Stat.);
- Trial-type hearings with formal evidentiary procedures (Id.; Fla. Admin. Code R. 28-106.201-.217.);
- Judicial review of agency orders in the district courts (§ 120.68, Fla. Stat.); and
- The right to bring direct citizen enforcement action if an agency refuses to act (§§ 373.136 and 403.412, Fla. Stat.).

Thus, if an agency was to refuse to enforce the laws allegedly "prohibiting and regulating" the Defendants' conduct, Plaintiffs could either appeal to a district court or file a citizen enforcement action. §§ 120.68, 373.136 and 403.412, Fla. Stat. In either case, however, the claim must first be presented to the agency, which Plaintiffs have stubbornly refused to do. See Communities Financial, 416 So.2d at 816.

In light of the protections afforded by the APA and environmental statutes, there is no justification for Plaintiffs' attempt to bypass the administrative system. Indeed, Plaintiffs' Answer Brief does not even attempt to explain why these protections are inadequate. The unavoidable fact is that Plaintiffs have simply chosen not to utilize the administrative remedies available to them.

II. PLAINTIFFS MAY NOT BYPASS AGENCY PRIMARY JURISDICTION BY CLAIMING THAT THEY ARE NOT SEEKING PARTICULAR RELIEF UNDER THE ENVIRONMENTAL LAWS.

A. The activities complained-of are within the jurisdiction of executive agencies.

While simultaneously claiming that the complained-of activities are prohibited and regulated by existing environmental laws, Plaintiffs also state that primary jurisdiction does not apply because they are "not seek[ing] particular relief under" those laws and not alleging "direct violation of any agency regulation." (AB, p. 12) Plaintiffs cannot have it both ways, arguing, on the one hand, that primary jurisdiction does not apply because they have alleged lax enforcement of the laws and,

on the other, because they are not seeking "particular relief" under those very laws.

Plaintiffs' attempt to sidestep agency jurisdiction is without merit. The Fourth District below recognized that the primary jurisdiction doctrine was triggered by the Plaintiffs' complaint; its decision was based not on a determination that primary jurisdiction does not apply, but on the mistaken view that a conclusory allegation that government has failed to enforce the law, without more, is sufficient to bypass agency primary jurisdiction:

> [T]his 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, absent extraordinary circumstances. See Ocean Ridge, 633 So. 2d at 86-88. Here, however, it is alleged that the government has illegally failed to enforce the applicable law and regulations and that agency errors have been egregious and devastating.

Kirk v. United States Sugar Corp, 726 So. 2d 822, 825, n. 1 (Fla. 4th DCA 1999). If primary jurisdiction is defeated whenever someone simply states that he does not "seek particular relief under" the administrative statutes, there would have been no need for the Fourth District to invoke the exception. The Fourth District correctly recognized that the determining factor is whether the matters at issue are within the regulatory authority of the executive branch, not how Plaintiffs have chosen to structure their legal theories.

The jurisdiction of the executive agencies over the matters complained of is clear, and Plaintiffs apparently do not contend

otherwise. Primary jurisdiction therefore applies regardless of the legal theory under which Plaintiffs seek relief. In this respect, Bal Harbour Village v. City of North Miami,[1] 678 So. 2d 356 (Fla. 3d DCA 1996), is nearly identical to the instant case. Bal Harbour sued North Miami claiming that a proposed amphitheater would "cause substantial water and air pollution, including leakage of hazardous waste." Id. at 364. Like the Plaintiffs here, Bal Harbour did not seek particular relief under the environmental statutes or allege a violation of any specific agency regulation. Instead, it asked the court to enjoin the construction of the amphitheater under general public nuisance law. The Third District refused, holding as follows:

> First, with respect to the pollution claims, dismissal is appropriate under the doctrines of primary jurisdiction and exhaustion of administrative remedies. . . . Where, as here, environmental permits must be obtained from the Department of Environmental Protection as a condition to allowing the project to proceed, it is appropriate to defer to the Department on matters which are within the agency's expertise. . . . The law of nuisance is not intended to serve as a substitute for exhaustion of available administrative remedies.

Id. at 364 (emphasis added).

Similarly, in South Lake Worth Inlet Dist. v. Town of Ocean Ridge, 633 So. 2d 79 (Fla. 4th DCA 1994), the Fourth District

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[1] Plaintiffs attempt to distinguish Bal Harbour by claiming it "was an attempt to use a nuisance suit in order to avoid the requirement in the ordinance at issue of obtaining an environmental permit." (AB, p. 21) To the contrary, Bal Harbour, like this case, involved a suit to enjoin a regulated activity as a public nuisance. There, as here, the plaintiff sought to avoid the requirement of pursuing administrative remedies by pleading in nuisance.

found that dismissal was required of a complaint that sought to enjoin as a public nuisance the construction of a sand transfer facility regulated by a state agency and governed by the statutes within the agency's jurisdiction. Because administrative remedies were available, the court found there was "no serious contention. . . that the APA does not appertain". Id. at 88. Dismissal under primary jurisdiction was therefore required notwithstanding the plaintiffs' attempt to "[dress] up [their] agency enforcement claims as common law or equity actions seeking relief from public nuisance." Id. at 86. As the Fourth District noted, "an agency's primary jurisdiction cannot be transferred, in effect, to the judicial forum as an action for declaratory or equitable relief simply by artful pleading of public nuisance claims." Id. at 88-89.

B. The outdated case law cited by Plaintiffs is inapposite.

To support their argument that public nuisance actions may be pursued without regard to primary jurisdiction, Plaintiffs cite a number of outdated cases whose holdings have not stood the test of time. The foundation for Plaintiffs' argument, State ex rel. Shevin v. Tampa Elec. Co., 281 So. 2d 45 (Fla. 2d DCA 1974) and Wetzel v. A Duda & Sons, 306 So. 2d 533 (Fla. 4th DCA 1975), has been eroded by later precedent. The simple fact is: to the extent these cases suggest that primary jurisdiction does not apply to environmental public nuisance claims, they are no longer good law.

Shevin is extensively discussed in Petitioners' Initial Brief at pages 24-26.[2] Like Shevin, Wetzel v. A Duda & Sons, 306 So. 2d 533 (Fla. 4th DCA 1975), is not indicative of modern primary jurisdiction law and is superceded by later decisions. See Ocean Ridge, 633 So. 2d at 88-89. Moreover, Wetzel involved a private nuisance and "continuing trespass" of the plaintiffs' riparian property rights, neither of which is at issue here. 306 So. 2d at 534. In that context, the Wetzel court held that persons may sue to abate a "nuisance directly affecting them." Id. If Plaintiffs in the instant case believe they have similar claims, they may bring them, as the trial court's order of dismissal preserved their right to pursue individual, private claims.[3] (R 375, IB, A-2, p. 12)

Only the Second District (Shevin) has not rejected the notion that public nuisance law may be used to freely bypass environmental agency primary jurisdiction. Compare, State v. SCM

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[2] Shevin was based on a determination that the matters at issue were "fairly simple" and "not dependent on technically established criteria", and therefore did not require the application of agency expertise. Shevin, 291 So.2d at 47. Nothing could be farther from the truth in the instant case, as noted in the trial court's order of dismissal. (IB, A-2, p. 8) The complexity of the issues involved is self evident from the detailed factual findings and remedial plan of the Everglades Forever Act. §§ 373.4592(1)(d)-(h) and 373.4592(4), Fla. Stat. Indeed, the issues surrounding Everglades protection and related agricultural impacts are so complex that the Legislature has committed to a massive study of the problem to develop workable scientific solutions. See § 373.4592(4)(d), Fla. Stat.

[3] Of course, the ultimate facts setting forth such claims must demonstrate that they are indeed private, and not just an artful attempt to re-clothe a public nuisance claim as a private cause of action.

Glidco Organics Corp., 592 So. 2d 710 (Fla. 1st DCA 1992); Bal Harbour, 678 So. 2d at 363-64 (3d DCA); Ocean Ridge, 633 So. 2d at 88-89 (4th DCA). And even that anomaly is more likely the result of the court not having been presented with an opportunity to depart from Shevin during the last 25 years, rather than its desire to preserve outdated and discarded precedent.[4]

Plaintiffs' reliance on Cowan v. People ex rel. Florida Dental Association, 463 So. 2d 285 (Fla. 4th DCA 1984), is also misplaced. Cowan affirmed the dismissal of a public nuisance complaint, holding that the matter "should be resolved by efficient administrative proceedings." Id. at 288. To the extent that dictum in Cowan suggests that primary jurisdiction does not apply to certain nuisance actions,[5] it has been superceded by Ocean Ridge, (633 So. 2d at 688-89) and even by the decision below (726 So. 2d at 825, n. 1).

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[4] Plaintiffs cite State v. General Development Corp., 448 So. 2d 1074 (Fla. 2d DCA 1984), which involved neither public nuisance law nor primary jurisdiction, as evidencing the continuing value of Shevin. (AB, p. 27) In that case the Second District stated in dictum that "public nuisance. . .seems to be one of the rights of action. . .which is not abridged or altered by Chapter 403," citing Shevin. Id. at 1080 (emphasis added). However, the court was merely repeating what Shevin held, not passing on its continuing viability.

[5] Plaintiffs refer to dictum in Cowan stating that a violation of state law is not a prerequisite to a nuisance suit. (AB, p. 14, 15). However, that statement was merely a repetition of the holdings of two early Third District cases, Town of Surfside v. County Line Land Co., 340 So. 2d 1287 (Fla. 3d DCA 1977) and State ex rel. Gardner v. Sailboat Key, Inc., 295 So. 2d 658 (Fla. 3d DCA 1974), both of which were based on the outdated Shevin holding. To the extent those cases can be read to allow a public nuisance complainant to bypass primary jurisdiction, they are superceded by Bal Harbour, 678 So. 2d at 363-64.

III. THE CUMULATIVE REMEDIES PROVISIONS CITED BY PLAINTIFF ALSO DO NOT DEFEAT PRIMARY JURISDICTION IN THIS CASE.

Plaintiffs' public nuisance claims fall into two categories (1) a suit by former governor Kirk "in the name of the state" and (2) a suit by the other plaintiffs "in their individual capacities." (AB, p. 6) Dismissal of both sets of claims with prejudice was appropriate, notwithstanding the cumulative remedies provisions invoked by Plaintiffs (AB, p. 21-23).

First, there was no prejudice to those suing "in their individual capacities" to the extent they wish to bring claims for personal injuries or property damage -- claims which were not pleaded below. The trial court's order of dismissal expressly "does 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." (R 375, IB, A-2, p. 12) Therefore, Plaintiffs are free to pursue any such individual claims they may have through an appropriate action in circuit court.[6] It is only to the extent that Plaintiffs seek to sue beyond their individual interests that the dismissal limits them. Recognizing this, Plaintiffs' expressed concern about dismissal with prejudice is that:

[6] Because these rights were preserved, the cases and statutes cited by Plaintiffs (AB, p. 24-25) for the proposition that certain environmental statutes create or preserve causes of action for damages are simply irrelevant. See Cunningham v. Anchor Hocking Corp., 558 So. 2d 93 (Fla. 1st DCA 1990); Kaplan v. Peterson, 674 So. 2d 201 (Fla. 5th DCA 1996); Mostoufi v. Presto Food Stores, 618 So. 2d 1372 (Fla. 2d DCA 1993); § 373.13, Fla. Stat.

> 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.

(AB, p. 33, emphasis added). Thus, Plaintiffs appear to recognize that their individual rights were preserved and that the true issue in this case is whether they may sue in nuisance beyond their individual interests.

However, the cumulative remedies "savings clause" provisions invoked by Plaintiffs do not preserve rights "beyond the scope of an individual's private interests." In 1967, the Florida Legislature enacted the Air and Water Pollution Control Act, finding that:

> [t]he pollution of the air and waters of this state constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and other aquatic life, and impairs domestic, agricultural, industrial, recreational, and other beneficial uses of air and water . . . ,

§ 403.021(1), Fla. Stat. (1967) (emphasis added). In that legislation, Florida for the first time adopted a comprehensive system of environmental regulation, so as to address public nuisances. The broad purposes of the legislation were to:

- "conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies, for the propogation of wildlife, fish and other aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses . . ."; and
- "achieve and maintain such levels of air quality as will protect human health and safety, and to the greatest degree practicable, prevent injury to plaint and animal life and property, further the comforts and convenience of the people, promote the economic and social development of this state . . . ."

§ 403.021(2) and (3), Fla. Stat. (1967).

In the 1967 Act, the Legislature included the savings clause Plaintiffs invoke, section 403.191, Florida Statutes. However, that provision addresses private rights of action and is not intended to allow public nuisance claims to avoid primary jurisdiction. The critical difference between the 1967 savings clause and the 1917 public nuisance law Plaintiffs rely upon is that, while the 1917 statute authorized broad public nuisance actions by persons acting "in the name of the state", the 1967 savings clause[7] was far more limited:

> 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 or statutory law to suppress nuisances or to abate pollution.

§ 403.191(1), Fla. Stat. (1967) (emphasis added). The 1967 Act thus preserved the rights of private citizens to sue to abate environmental nuisances only to the extent they are "affected" by pollution. Therefore, there is no right for Plaintiffs to sidestep the administrative system through a public nuisance suit that goes "beyond the scope of an individual's private interest." (AB, p. 33)

By preserving all "private right[s] of action. . .for personal injury or property damage," the trial court carefully

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[7] The other savings clauses cited by Plaintiffs, sections 376.205 and 376.313, Florida Statutes, apply only to claims for "damages," and are irrelevant because the trial court preserved Plaintiffs' rights to bring such claims.

protected all rights of action Plaintiffs may have as "affected persons" and secured for them all rights available under section 403.191.[8] The question thus becomes what rights, if any, they have beyond the scope of their individual interest. The answer is found in section 403.412, which allows enforcement of the environmental laws by all persons, affected or otherwise, but applies only to the extent of a claimed violation of environmental "laws, rules, or regulations." Importantly, section 403.412(2)(c) expressly recognizes agency primary jurisdiction by requiring a complainant, before pursuing judicial remedies, to file a verified complaint with the appropriate agency and allow it 30 days to take action. Thus, section 403.412 reinforces the principles of primary jurisdiction, allowing court action only if the issue of noncompliance is first presented to the appropriate agency and, in the face of that filing, the agency refuses to act.

Section 403.412 must be read in pari materia with section 403.191 and other environmental statutory savings clauses. Golf Channel v. Jenkins, 2000 Westlaw 31834 (Fla. 2000); Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452 (Fla. 1992). In doing so, it becomes nonsensical to assume that

[8] For this reason Plaintiffs' argument that dismissal should have been without prejudice is incorrect. Plaintiffs' right to sue for matters within their individual private interests was unaffected by the dismissal. To the extent Plaintiffs wish to sue beyond their personal interests, they must do so through the citizen enforcement mechanisms and administrative remedies described herein.

persons suing beyond the scope of their interests as affected persons may circumvent section 403.412 and the requirement of presentment to the agency simply by pleading a public nuisance.

Moreover, even assuming for the sake of argument that the savings clauses did apply, such provisions do not defeat primary jurisdiction requirements. As discussed in the Initial Brief (at 26-28), while statutory savings clauses may authorize judicial action, they do not mandate circuit court intervention into matters of agency jurisdiction. The exercise of that authority is restrained by "judicial restrictions upon its use which require prior resort to and exhaustion of administrative remedies when they are available and adequate." Willis, 344 So. 2d at 589; accord, Key Haven Enterprises v. Board of Trustees of the Internal Improvement Trust Fund, 427 So. 2d at 153, 157 (Fla. 1982). Thus, "even though the legislative power may not presume to characterize an adequate administrative remedy as exclusive, the courts will so regard it," out of deference to the executive branch. Willis, 344 So. 2d at 589.

Indeed, this is what distinguishes primary jurisdiction from the related doctrine of exhaustion. Exhaustion applies where the administrative jurisdiction is exclusive. Primary jurisdiction applies where the executive and judicial branches have concurrent jurisdiction over an activity, and requires persons to pursue administrative remedies before seeking relief in the courts. Willis, 344 So. 2d at 589. This doctrine reflects a judicial

policy of self-limitation founded on the constitutional separation of powers (Key Haven 427 So. 2d at 157; Ocean Ridge, 633 So. 2d at 87-88); it is not defeated by provisions that merely preserve the authority of a court to act under the common law. See New England Legal Found. v. Costle, 666 F.2d 30 (2d Cir. 1981).

CONCLUSION

Plaintiffs have administrative remedies available to them. Nothing in their complaint justifies bypassing those remedies, and none of their allegations demonstrate that the available remedies are inadequate. This case is not about the adequacy of remedies; it is about forum shopping. What Plaintiffs really ask is that the courts subsume the role of executive agencies and supplant the existing regulatory system in favor of circuit court public nuisance adjudication. A circuit court should not be allowed, much less required, to take such action merely because a group of Plaintiffs who have refused to even attempt participation in the regulatory system express unsubstantiated, albeit highly indignant, distrust of it. "The law of nuisance is not intended to serve as a substitute for exhaustion of available administrative remedies." Bal Harbour, 678 So. 2d at 364. Nor should a court be required, upon the barest statement of a plaintiff's dissatisfaction with past agency action, to conduct a mini-trial of government to determine whether it should have taken jurisdiction in the first place.

Respectfully submitted this 24th day of April 2000.

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