

**ORIGINAL**

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SID J. WHITE

**MAY 10 1999**

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IN THE SUPREME COURT OF FLORIDA  
TALLAHASSEE, FLORIDA

SUGAR CANE GROWERS COOPERATIVE  
OF FLORIDA, INC.,

Petitioner,

vs.

CASE NO. 95,045

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**  
**PETITIONER SUGAR CANE GROWERS**  
**COOPERATIVE OF FLORIDA, INC.**

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**CERTIFICATE OF TYPE SIZE AND STYLE**

Respondents hereby certify that the size and style of type used in this brief  
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## **PREFACE**

Petitioner was one of 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 Petitioner for conflict entitling it 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 Petitioner claims 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 PETITIONER CITES FOR CONFLICT

In its jurisdictional brief, Petitioner adopts the arguments made in the jurisdictional brief filed by the Petitioners in Case No. 95,044. Consequently, Respondents hereby adopt all of the arguments made in their jurisdictional brief in Case No. 95,044 as well.

In addition to relying on the arguments for decisional conflict made by its Co-Petitioner, Petitioner Sugar Cane Growers Cooperative of Florida, Inc. attempts to portray the Fourth District's decision as a wholesale onslaught on the Administrative Procedure Act (APA), Chapter 120, Fla. Stat. (1995), and on the entire administrative process. It does so by contending that the cases which it cites for conflict stand for the principle "that primary jurisdiction applies unless it is demonstrated that there is no adequate APA remedy" (Jurisdictional Brief at 6), and that the Fourth District's opinion violates that principle and therefore jurisdictionally conflicts with the cases Petitioner cites for conflict. Not so.

As Respondents have explained in the accompanying jurisdictional brief, the linchpin of the Fourth District's decision is the savings clause in §403.191(1), Fla. Stat. (1995), in the Florida Air and Water Pollution Control Act, Chapter 403, Fla.

Stat. (1995). The instant case involves a nuisance action filed by Respondents, and the applicable savings clause states that nothing contained in the act abridges or alters the rights of action or remedies otherwise available under the common law or statutory law, specifically mentioning “common law or statutory law to suppress nuisances....” The Fourth District explained thoroughly why that language, and the enactment of subsequent statutes, clearly indicated that the legislature did not intend the administrative process to supplant the nuisance remedies in Chapter 823, Fla. Stat. (1995).

Thus, the Fourth District decision does not conflict with any of the additional cases which this Petitioner cites for conflict. DEPARTMENT OF ENVIRONMENTAL PROTECTION v. PZ CONSTRUCTION CO., 633 So.2d 76 (Fla. 3d DCA 1994), involved a lawsuit for temporary and permanent injunction and damages for liable and tortious interference brought against the State of Florida Department of Environmental Protection. The case involved the classic collision of an ordinary lawsuit with the administrative process and the requirement of exhaustion of administrative remedies. Id. at 78. It did not involve a legislatively-created, and legislatively-reiterated, exception in an environmental law of the very statutory cause of action brought by the plaintiff, as does this case.

The same reasoning applies to COMMUNITIES FINANCIAL CORP. v. FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, 416 So.2d 813 (Fla. 1st DCA 1982), and FLORIDA SOCIETY OF NEWSPAPER EDITORS, INC. v. FLORIDA PUBLIC SERVICE COMMISSION, 543 So.2d 1262 (Fla. 1st DCA 1989). The classic exhaustion of administrative remedies principles explained and applied in those cases do not conflict with the Fourth District's decision in this case for the same reason that the Fourth District's decision does not conflict with the PZ CONSTRUCTION case. In FLORIDA SOCIETY OF NEWSPAPER EDITORS, the First District determined that the authorization for injunctive relief in the Government in the Sunshine Law, §286.011(2), Fla. Stat. (1987), did not come within the provision of the Administrative Procedure Act, §120.73, Fla. Stat. (1987), which stated that the Act did not repeal any statutory provision which grants the right to a proceeding in the circuit court in lieu of an administrative hearing. 543 So.2d at 1266. Thus, the case fell within the classic analysis of determining whether an adequate administrative remedy was available, and had been exhausted. On the contrary, the instant case involves a statutory exemption in an administrative act, Chapter 403, authorizing in terms the very cause of action brought by Respondents in lieu of the administrative scheme of Chapter 403. In fact, it probably falls within the exception to the applicability of the APA, §120.73,



discussed in FLORIDA SOCIETY OF NEWSPAPER EDITORS. As the Fourth District held, the legislature's enactment, and reaffirmation, of §403.191(1) could not have been more explicit, and counters any contention of conflict between the Fourth District's decision and the cases cited here for conflict.

### **CONCLUSION**

Respondents respectfully maintain that decisional conflict has not been established by Petitioner, 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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