

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC18-657
L.T. Case Nos. 1D17-2065;
2014-CA-000051

CHARLES A. LIEUPO,

Petitioner,

v.

SIMON'S TRUCKING, INC.,

Respondent.

AMICUS BRIEF OF
FLORIDA DEFENSE LAWYERS ASSOCIATION
IN SUPPORT OF RESPONDENT

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PRELIMINARY STATEMENT

This amicus curiae brief is submitted by the Florida Defense Lawyers Association (FDLA) in support of Respondent Simon's Trucking.

STATEMENT OF IDENTITY AND INTEREST

The FDLA is a statewide organization of defense attorneys formed in 1967, and it has approximately 1,000 members. The goal of the FDLA is to “bring industry leaders and defense counsel together and form a strong alliance that promotes fairness and justice in the civil justice system for all parties.” The FDLA maintains an active amicus curiae program in which members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice. The FDLA has actively participated in amicus briefing in numerous appellate cases with statewide impact on tort issues.

This case carries statewide importance as it addresses whether section 376.313, Florida Statutes, permits recovery for personal injuries. The First District Court of Appeal found that the statute did not. A contrary opinion from this Court will impact the defense of civil cases involving this statute.

SUMMARY OF ARGUMENT

As an initial matter, this Court should discharge jurisdiction as

improvidently granted. This case does meet the hallmarks of a case involving a question of great importance. It appears that the issue will only affect the parties as no similar claim has been presented.

If this Court decides to maintain its jurisdiction, the FDLA urges this Court to affirm the First District Court of Appeal's well-reasoned decision. The Legislature did not expressly create a cause of action for personal injuries under the subject statute. It would be improper for this Court to judicially create one.

In addition, this Court should not revisit its precedent, *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010). This case does not meet the criteria articulated by this Court to overturn its precedent.

ARGUMENT

I. THIS COURT SHOULD DISCHARGE JURISDICTION AS IMPROVIDENTLY GRANTED.

This Court initially accepted jurisdiction as a certified question of great importance. While there is no set criteria or specific definition of how that term is defined, this case does not appear to meet any of the hallmarks of cases where jurisdiction is traditionally accepted on these grounds. *Cf.* Raoul Cantero, III, *Certifying Questions to the Florida Supreme Court: What's So Important?*, 76 Fla. Bar J. 40 (May 2002).

Indeed, this question has already been answered conclusively by this Court. In *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010), the Court analyzed

what type of damages are available to a plaintiff under section 376.031(5). The Court concluded that section 376.031(5) excludes injuries to human beings (i.e., personal injuries) from the statutory definition of the term “damages.” *Id.* at 1222. As a result, personal injury claims under section 376.313(3), including the sole claim at issue in this case, are non-cognizable as a matter of law.

Even though a question of great public importance admittedly does not equate to public interest, the question posed still should benefit more persons than the parties. *See Sunshine Meadows Condo. Ass’n, Inc. v. Bank One, Dayton, N.A.*, 599 So. 2d 1004, 1009 n.1 (Fla. 4th DCA 1992) (Farmer, J. dissenting) (arguing that no “great public importance” existed in a case involving a question of the parties’ expectations in investing in an equestrian center); *Sunshine Vistas Homeowner’s Ass’n v. Caruana*, 17 Fla. L. Weekly D 1157, *2 (Fla. 3d DCA 1992) (Schwartz, C.J. dissenting) (“As the question framed by the majority itself clearly demonstrates, the issue involved here--while perhaps interesting and certainly arguable--is of no concern, let alone of great importance, to anyone but the litigants and an abstractor or two.”).

For example, in *Smith v. State*, 497 So. 2d 910 (Fla. 3d DCA 1986), the Third District certified a question of great importance concerning a jury instruction.

The court noted:

[W]e are aware also of the far-reaching possible consequences of a holding contrary to *Snook*, which, if applied retroactively, might

expose to attack under Florida Rule of Criminal Procedure 3.850 every one of the countless previously final convictions in which the standard insanity charge had been granted at trial. In these circumstances, we deem it appropriate that this issue be resolved by the Supreme Court itself.

Id. at 912.

Similarly, in *Beach v. Great Western Bank*, 670 So.2d 986, 994 (Fla. 4th DCA 1996), the Fourth District certified a question of great public importance because the question posed could “[p]otentially affect[] thousands of mortgages in the state.”

In the present matter, the claim made by the Petitioner in the underlying trial may in fact be unique to these litigants. There is no evidence that any other plaintiff has attempted to use the subject statute as a basis for strict liability in a personal injury claim. It is important to remember, that although the *Curd* decision decided whether personal injury damages could be recovered under the subject statute, not even the fisherman affected by the pollution attempted to claim such damages.

Although the Petitioner suggests that this fact somehow strengthens an argument in favor of accepting jurisdiction and deciding in his favor, it only highlights the singularity of the issue raised in this suit. Certainly, in the eight years since this Court decided *Curd*, the issue has not been raised again by lower appellate courts, nor has the Florida Legislature taken any action to amend the

statute in light of this Court's finding that it did not permit a cause of action. The Legislature's inaction following this Court's previous ruling is tantamount to acceptance of the judicial interpretation of the statute. *See Goldenberg v. Sawczak*, 791 So. 2d 1078, 1081 (Fla. 2001) ("Long-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction.").

Conversely, this case is not one that is so aged as to suggest there is a reason to revisit the question decided in *Curd*. Cases that revisit "old precedent" often require significant passages of time. For example, in *Taylor v. State*, 401 So. 2d 812, 816 (Fla. 5th DCA 1981), the Court revisited manslaughter rules because "the question has not been directly addressed by the Supreme Court in almost 50 years."

Often where courts have chosen to revisit precedent on a shorter time frame, there has been a substantial change in technology or circumstance that requires reexamination. For example, in *McMullen v. State*, 660 So. 2d 340, 342 (Fla. 4th DCA 1995), the Fourth District re-examined the issue of expert testimony concerning the reliability of eye-witness testimony after only twelve years. Judge Farmer noted in his special concurrence, "the world of psychology and the subject of eyewitness identifications has turned over several times in that brief span. . . . The state of the art today is considerably different." *Id.*

As a result, this case does not present a question of great public importance, but rather presents a question relevant in what appears to be an isolated claim for damages under a statute, which this Court has previously interpreted as prohibiting such a cause of action just eight years ago. The fact that there have been no other cases addressing this issue, nor any action by the legislature confirms that this Court's discretionary review power should not be used to assert jurisdiction over the question posed by the First District Court of Appeal.

The unique factual presentation of this case and the apparent lack of impact on any significant segment of Florida's citizenship contradict any claim that this is a matter of great public importance. Further, if any citizen is injured as the result of alleged contaminants or pollution, negligence claims exist in order to address those allegations. The Court need not revisit its precedent in an effort to answer the question raised so as to create an avenue for this singular plaintiff to prevail.

II. THIS COURT SHOULD NOT JUDICIALLY CREATE A CAUSE OF ACTION FOR PERSONAL INJURIES WHEN THE LEGISLATURE EXPLICITLY CHOSE NOT TO DO SO.

The seminal case concerning whether a statutory cause of action exists without the statute expressly stating so is *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994). In *Murthy*, this Court stated that it would analyze "legislative intent" in determining whether a cause of action should be judicially implied. *Id.* at 986-87. This Court has since clarified those words to mean "a 'shorthand reference to

the ordinary tools for discerning statutory meaning: text, context, and purpose.”
Horowitz v. Plantation Gen. Hosp. Ltd. P’ship, 959 So. 2d 176, 182 (Fla. 2007)
(quoting *Plantation Gen. Hosp. Ltd. P’ship v. Horowitz*, 895 So. 2d 484, 486 (Fla.
4th DCA 2005)). *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The
Interpretation of Legal Text*, p. 317 (2012) (“So a private right of action cannot be
found to be ‘implied’ unless the implication both is clear and is based on the text of
the statute – not exclusively on its purpose.”)

Indeed, it is not a license for this Court to analyze “committee hearings,
staff commentaries or floor debates for isolated comments favoring an implication
of a right of private parties to sue for damages from violations of regulatory law
when the actual statutory text lacks such authority.” *Plantation Gen. Hosp. Ltd.
P’ship*, 895 So. 2d at 486. *See also* Scalia & Garner, *Reading Law: The
Interpretation of Legal Text*, p. 29 (2012) (“In the interpretation of legislation, we
aspire to be ‘a nation of laws, not of mean.’ This means (1) giving effect to the text
that lawmakers have adopted and that the people are entitled to rely on, and (2)
giving *no* effect to lawmakers’ unenacted desires.”) (emphasis in original).

Notably, the work in discerning the statutory meaning from the “text, context
and purpose” has already been completed by this Court. As noted above, in *Curd*,
this Court interpreted the phrase “all damages” to mean only those damages
defined in Section 376.013(5), which does not include personal injuries. *Curd*, 39

So. 3d at 1129-30. This prior decision is authoritative, and the Petitioner has offered no compelling reason for this Court to reexamine its precedent.

A review of the Court's decision shows that it is well-founded and based on the canons of statutory construction. *Id.* The Court utilized the canon *pari materia* and analyzed the sections within the chapter. *Id.* See also *Fla. Dep't of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) ("The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent."). In any event, this Court should not include personal injuries amongst the type of damages defined by the Legislature in chapter 376, Florida Statutes.

The Respondent's Brief explains in detail the interplay of the closely related statutes that regulate environmental discharge and contamination in our state. See *ch. 376, Fla. Stat.* Adopting this comprehensive explanation leads to the inescapable conclusion that this Court's construction of these statutes, and its decision prohibiting personal injury damages, was well-founded, provides no avenue for alternate ruling, and precludes the Petitioner's argument that an alternative conclusion could be reached.

III. JUDICIALLY CREATING NEW CAUSES OF ACTION WILL NEGATIVELY IMPACT FLORIDA BUSINESSES AND THE INSURANCE INDUSTRY

If courts can create causes of action where the Legislature has chosen not to, the justice system will lack consistency and its very integrity will be challenged. Allowing a trial court to bend to the requests of a plaintiff and infer causes of action subjects potential defendants to completely unexpected causes of action. This increases uncertainty and will increase the potential costs of doing business in our State. This will lead to businesses and corporations leaving the State of Florida. It will likewise lead to insurance companies raising its rates to account for unexpected causes of actions and unaccounted-for risk.

The present case presents a doubly problematic scenario in that not only the cause of action was created by a trial court where one did not exist previously, but the trial court created the cause of action under a strict liability statute. This removed the ability of the defendant to even defend against the claim. This inappropriately shifted the burden of proof and hand-strung the defense. The trial court ignored binding precedent.

The ability to rely on the principles of stare decisis provides predictability that protects Florida's citizens and businesses from inconsistent and unfair applications of the justice system. A court should be very reluctant to recede from one of its own decisions. *See Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (stating

that a court should not depart from precedent in the absence of a “special justification”).

Faithfulness to precedent is favored “because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 829 (1991). Stare decisis is:

[T]he means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986). See also 1 William Blackstone, *Commentaries*, 69. Chief Justice Roberts eloquently wrote: “[i]ts greatest purpose is to serve a constitutional ideal -- the rule of law.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 378 (2010).

Indeed, these principles, which were part of English common law, were codified by Florida in 1829. § 2.01, Fla. Stat. This Court subsequently memorialized the doctrine of stare decisis in 1858. *Tyson v. Mattair*, 8 Fla. 107, 124 (Fla. 1858).

In any event, this case does not fall within the criteria pronounced by this Court to overturn binding precedent. *Strand v. Escambia Cty.*, 992 So. 2d 150, 159 (Fla. 2008); *N. Fla. Women’s Health & Counseling Servs., Inc. v. State*, 866 So. 2d

612, 637 (Fla. 2003). It does not take a particularly active imagination to foresee what chaos might be created if plaintiffs can pursue causes of action previously prohibited by the courts simply because they disagree with established decisions.

The creation of a strict liability theory for personal injuries in the case at bar is unnecessary and would only contribute to the further proliferation of tort and insurance costs in our State. Adequate remedies for personal injuries would exist under basic negligence principles - if Simon's Trucking was found to have owed a duty to the Petitioner, and if they breached that duty, causing him injury. Florida's economy already shows the unfortunate impact of personal injury claims under its current set of laws. Reversing the First District Court of Appeal's well-reasoned decision will only exacerbate that effect.

In September 2018, the Perryman Group, an economic and financial analysis firm, estimated the impact on Florida's economy due to lawsuit abuse to include:

[L]osses of an estimated \$7.6 billion in annual direct costs, as well as \$11.89 billion in output (gross product) each year and about 126,139 jobs when dynamic effects are considered. All major industry groups are negatively affected, with the retail trade, business services, health services, and other services industries experiencing the greatest losses. The yearly fiscal losses (as of 2018) are estimated at \$614.8 million in State revenues and \$516.0 million to local governments. Tort reform can reduce or eliminate these costs. Thus, these results may also be viewed as a measure of the benefits of reasonable reform measures.

Citizens Against Lawsuit Abuse (CALA), *Economic Benefits of Tort Reform*, Sept. 2018, p. 11,

https://d3n8a8pro7vhmx.cloudfront.net/cala/pages/39/attachments/original/1539624576/CALA_FL_Economic_Impact_Report_2018_2.pdf?1539624576 (last visited Jan. 26, 2019). Similarly, a 2017 survey of corporate attorneys found that 85% of respondents indicated that the litigation environment in a state is likely to impact business decisions. U.S. Chamber, Institute for Legal Reform, *2017 Lawsuit Climate Survey - Ranking the States*, Sept. 2017, p. 3, <https://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Executive-Summary-FINAL.pdf> (last visited Jan. 26, 2019).

Accordingly, this Court should not recede from its precedent to judicially create a cause of action. It will wreak havoc on Florida's business and insurance communities.

CONCLUSION

This Court should discharge its jurisdiction in this case as improvidently granted. If it chooses to maintain jurisdiction, the fair application of justice demands that the First District Court of Appeal's question be answered in the affirmative. A cause of action for personal injury damages is not permitted under chapter 376.

WHEREFORE, FLORIDA DEFENSE LAWYERS ASSOCIATION respectfully requests this Court to discharge jurisdiction as improvidently granted. In the alternative, it requests this Court to affirm the First District's opinion.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the e-portal to the following individuals on January 28, 2019:

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CERTIFICATION OF COMPLIANCE

WE HEREBY CERTIFY that this Amicus Brief has been typed using the 14-point Times New Roman font as required by Rule 9.210(a) and 9.210(a)(2), Florida Rules of Appellate Procedure.

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