IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-657
L.T. CASE NOS. 1D17-2065, 242014CA000051CAAXMX

CHARLES A. LIEUPO,

Petitioner,

v.

SIMON'S TRUCKING, INC.,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

On Discretionary Review From A Decision
Of The First District Court Of Appeal

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STATEMENT OF THE CASE AND FACTS

The sole issue presented to, and decided by, the First District Court of Appeal below was one of law – whether, in the words of the pertinent statute, section 376.313(3), Florida Statutes (2011), permits one to recover "all damages resulting from a [covered] discharge or other condition of pollution"; or, notwithstanding the statute's plain language, one may recover only *some* damages, excluding those attributable to personal injuries. *Simon's Trucking, Inc. v. Lieupo*, 244 So. 3d 370, 371 (Fla. 1st DCA 2018).

Agreeing with the sole argument of Simon's – that, in *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010), this Court held that the definition of "Damage" in section 376.031(5) applies to all claims brought under section 376.313(3) – the First District concluded that *Curd* "precludes personal injury claims from being brought under section 376.313(3)" (*Simon's Trucking*, 244 So. 3d at 371) and, accordingly, reversed the judgment in favor of Mr. Lieupo. However, candidly acknowledging that it found *Curd* confusing, the First District certified the following question of great public importance, asking this Court for clarification: "Does the private cause of action contained in section 376.313(3), Florida Statutes, permit recovery for personal injury?" *Id.* at 374.

As we will explain below, this Court could not possibly have intended such a result in *Curd*; however, to the extent *Curd* has caused confusion as to its

intended scope, the Court should now resolve that confusion by a clear statement that section 376.313(3) means precisely what its plain language says – that those harmed by a violation of the statute, and especially those who suffer serious personal injuries, are entitled to maintain an action for "all damages" resulting from that violation.

Although the sole issue presented for this Court's review is one of law, we believe that a short recitation of the procedural history and facts will help to provide context. The facts are presented in a light most favorable to the conclusions of the finder of fact. *See, e.g., Hall v. Hall*, 190 So. 3d 683, 684 (Fla. 3d DCA 2016).

A. The Cause of Action Tried

Mr. Lieupo proceeded to trial against Simon's solely on Count III of his Second Amended Complaint, which alleged a cause of action in strict liability pursuant to section 376.313(3), Florida Statutes (2011). (R. 311-12). That Count alleged that, on August 1, 2011, a tractor trailer of Simon's was "transporting a cargo containing hazardous substances" as contemplated by chapter 376; that, as a result of the crash of the tractor trailer, "[t]he hazardous substances were unlawfully discharged or otherwise created a pollutive condition in violation of Fla. Stat. §§ 376.302 and 403.161(1)(a)"; that, "[a]s a result of th[e] unlawful discharge or pollutive condition," Mr. Lieupo suffered personal injuries; and that,

pursuant to section 376.313(3), Simon's was "strictly liable for all damages resulting from the discharge or condition of pollution, regardless of causation." (R. 311-12).

B. The Crash

The tractor trailer was carrying more than 800 automotive batteries when it crashed. (R. 9174). Those batteries were ejected from the trailer in all directions. (R. 9134, 9814). The batteries were in "[p]retty bad condition. Most of them had been cracked, leaking, not many that were without leaking – had not been leaking." (R. 9163). "[T]here was battery acid . . . everywhere throughout the property." (R. 9146). "[T]here was a significant release of battery acid." (R. 9208).

Before anything else could be done, the Fire Department had to put out the fire. To do that, it pumped nearly 3,000 gallons of water onto the property. (R. 9811). As a result, the property was "[s]oaking wet," with areas of standing water. (R. 9125, 9134, 9310, 9312-13).

"Battery acid is highly corrosive. When it's released, it makes the list of hazardous waste." (R. 9172). In fact, Simon's stipulated that the cargo of the tractor trailer consisted of "lead acid automobile batteries," and that this was "hazardous material." (R. 9078).

An "environmental specialist" who "clean[s] up spills" (R. 9107) testified that the company for which he worked was retained by an agent working for

Simon's to clean up the batteries. (R. 9140-41). When he arrived at the crash site to supervise the cleanup, there was no wrecker there, and the tractor trailer had been removed. All that remained were the batteries. (R. 9114-15, 9124).

The environmental specialist testified that:

> [W]e knew we were going to be dealing with sulfuric acid. There was a requirement for boots, a splash protection for the face, and . . . tuck-in suits to cover the guys' bodies that were going to be involved with handling the batteries. So we had from gloves to splash protection – gloves, suits, and boots was the requirement.

(R. 9121-22). His employer believed that "battery acid posed a danger to health and human safety at th[e] site" and, so, he would not have allowed any of his employees into the area without the required protective gear. (R. 9128-29). He said, "we were not allowing our guys to go in without the proper [protective gear], without protecting them, knowing that there's that much acid there." (R. 9130). When asked whether he would consider the groundwater on the property unsafe for people, he responded, "[u]nsafe for animals, unsafe for life." (R. 9140). He testified that the contamination was such that his company removed nearly 30 tons of soil from the property, transporting it to a "fully licensed EPA-approved waste disposal facility." (R. 9137).

It took Mr. Lieupo and his fellow towing company employees 14 to 16 hours to remove the wreckage, including the time they spent waiting on-site. (R. 9315). During that time, Mr. Lieupo worked all around the wreckage (R. 9308-10, 9312-

14) wearing "[k]haki breeches" and "[w]ork boots." (R. 9398). While he was at the crash site, nobody told him that it "was an active hazmat scene," or that he needed to wear any kind of "safety equipment." (R. 9378). The following day, his pants were "just like crumbling apart," and his boots were "separating and falling apart." (R. 9284, 9320).

C. Mr. Lieupo's Injuries

Mr. Lieupo experienced a stinging sensation in his legs while he was still at the crash site. (R. 9314). He had never experienced any sort of chemical burn, so he thought he might have been stung by fire ants. (R. 9314). The next day, his feet and ankles had blisters from "an eraser size up to probably a quarter size." (R. 9319, 9236). According to one of his friends, "[t]hey didn't look like ant bites." (R. 9238). The injuries "progressively got worse." (R. 9238). Even after he began seeking treatment, he was not really sure what the cause was. (R. 9437).

Mr. Lieupo underwent six years of treatments during which he had 37 visits to burn centers, visits to 15 different hospitals and 150 doctor visits. (R. 10000-01). He had 37 skin grafts (R. 10000-01), including grafts using his own skin (R. 9246, 9336), cadaver skin (R. 9341, 9636), baby foreskin (R. 9636-37), and cow skin. (R. 9637). "[O]n a couple of different occasions, the doctors told [Mr. Lieupo] they may have to take his feet off." (R. 9247, 9343). At one point, Mr. Lieupo became so depressed that he considered suicide. (R. 9344).

D. Causation

Mr. Lieupo's expert medical witness on causation was Dr. Walter Conlan, a board certified wound care specialist (R. 9582), and medical director of Osceola Regional Medical Center in Kissimmee and Orlando Health in Orlando, both of which are "wound care centers." (R. 9584). He testified that, in his opinion, Mr. Lieupo's injuries were caused by direct exposure to sulfuric acid contained in the battery acid spilled at the crash site, resulting in first-, second- and third-degree burns on his feet and ankles (R. 9596, 9633), explaining at length the bases for his conclusion. He said that, while it would make sense for Mr. Lieupo initially to think that the wounds were caused by fire ants "without really having a knowledge of what he was exposed to at the scene" (R. 9622), it was "very, very unlikely" that one would have wounds the size of Mr. Lieupo's, "with the amount of necrosis that Mr. Lieupo had," from ant bites. (R. 9712). He then explained why he ruled out fire-ant bites as the cause of the wounds. (R. 9619-23). He similarly ruled out venous insufficiency because Mr. Lieupo had had a venous reflux study performed at Shands on August 14, 2013, which was negative for venous insufficiency. (R. 9607, 9670).

Dr. Alejandro Soler, a board-certified general surgeon (R. 9447) with "extensive experience in vascular surgery and managing wounds" (R. 9445) who was called in to consult at Lake City Medical Center regarding Mr. Lieupo's leg

wounds, testified as a treating physician. (R. 9448-49). He, too, believed that Mr. Lieupo's wounds were caused primarily by a "chemical burn," rather than ant-bite infection (R. 3788, 9453, 9463), and that they were definitely not caused by venous insufficiency. (R. 9463-65). His "final opinion" as to the cause of Mr. Lieupo's wounds was that Mr. Lieupo

> had prolonged contact with a caustic agent, in this case battery acid. . . . [I]t got into his work boots in a wet environment and probably soaked into his socks.
>
> He continued working with this wet – probably a low percentage of actual acid in contact with his skin. So he then developed a severe painful blistering wound. This was a slow continuous exposure under pressure, and . . . he had deep penetration into his skin, and it initiated his wounds.

(R. 9467). Like Dr. Conlan, he testified that Mr. Lieupo may have believed he had been bitten by fire ants "because he didn't know how to explain what happened to him." (R. 9485).

E. Damages

1. Past medical expenses

The following stipulation was read to the jury at the beginning of the trial:

> [T]he parties agree that the Plaintiff may offer into evidence the reduced medical expense amounts including payments by worker's compensation insurance, patient payments, payments from other collateral sources, if any, and outstanding balances. Plaintiff may also tell the jury the worker's compensation insurer has a legal right of reimbursement from any recovery for payments made.

(R. 9078-79). Thus, in closing argument, Mr. Lieupo's lawyer told the jury:

> We have the bills – the medical bills he's incurred as a result of this, and they're here as Plaintiff's Exhibit 2. . . . The total medical expenses are like $1.5 million, but we're not asking for that. There's a worker's compensation itemization of payments, and that's like $730,000. That is what we're asking for. . . . We're asking for the medical expenses that worker's comp paid, which you know they have a right to get back.

(R. 10002). Accordingly, the jury awarded $730,000 for past medical expenses. (R. 8229).[1]

2. Other economic damages

Regarding lost earnings from the date of the accident to the date of trial, Mr. Lieupo's lawyer told the jury:

> For lost earnings in the past, for the amount of time that [Mr. Lieupo] could not work, . . . you have his tax records . . . . [T]hat shows that he made anywhere from . . . $38,000 to $42,000, so we said the average of $40,000, over five years, which is $200,000.

(R. 10028-29). That is precisely the amount the jury awarded. (R. 8229).

Regarding future lost earning capacity, Mr. Lieupo's expert vocational evaluator testified that he was employed part-time by a friend, in what was essentially sheltered employment, and that he would likely never be able to work more than part-time, in sedentary jobs. (R. 9525-26, 9522, 9529-30). This expert testified that Mr. Lieupo's future loss of earning capacity was between $23,366 and $27,621 per year. (R. 9530). Mr. Lieupo, who was 60 at the time of trial (R.

[1]In fact, post-trial, the workers' compensation insurer filed an Amended Notice of Lien, in which it asserts entitlement to $733,949.61 for medical benefits paid. (R. 8713).

9517), testified that, before his injuries, he had no plans to retire, and intended to work as long as he was able. (R. 9369). The jury awarded $280,000 for future loss of earning capacity (R. 8229), which is roughly equal to an award until age 70.

3. Non-economic damages

Regarding past non-economic damages, the evidence established that Mr. Lieupo had undergone six years of treatments during which he had 37 visits to burn centers, visits to 15 different hospitals and 150 doctor visits. (R. 10000-01). He had 37 skin grafts (R. 10000-01), including grafts using his own skin (R. 9246, 9336), cadaver skin (R. 9341, 9636), baby foreskin (R. 9636-37), and cow skin. (R. 9637). The pain associated with the debridements that preceded the skin grafts, and the grafts themselves, was intense. (R. 9242, 9246, 9336, 9341). For years, Mr. Lieupo was in nearly constant pain. (R. 9239, 9242, 9244, 9246, 9249, 9250, 9252, 9336, 9352). He was also unable to drive. (R. 9251). "[O]n a couple of different occasions, the doctors told [Mr. Lieupo] they may have to take his feet off." (R. 9247, 9343). At one point, Mr. Lieupo became so depressed that he considered suicide. (R. 9344).

Mr. Lieupo continues to have aching, shooting pain in his lower extremities. (R. 9517). Some days the pain level is a 10 on a scale of 1 to 10. (R. 9365). "Late in the evening his pain level gets up to 8 or 9 . . . . The pain increases during the day." (R. 9517). He regularly suffers from leg spasms at night. (R. 9366-67).

"His balance is really poor" and "[h]e tends to stumble." (R. 9518). He also drags his right leg (R. 9521), has "an unsteady gait pattern" (R. 9527), "shuffles" (R. 9234, 9253-54), has "numbness and tingling in his lower extremities" (R. 9528), "stumble[s] a lot" (R. 9528), and is "unstable walking on level and uneven surfaces." (R. 9528). He has significant permanent scarring and disfigurement of his lower extremities. (R. 9254, 9376-78). He is also no longer able to pursue his favorite pastimes, including hunting and fishing. (R. 9232-34, 9367-75).

The jury awarded $3 million for past non-economic damages, and $1 million for future non-economic damages. (R. 8229).

F. The First District's Decision

The sole issue presented to, and decided by, the First District was "whether section 376.313(3) permits recovery for personal injury." *Simon's Trucking*, 244 So. 3d at 371. That court concluded that it was required by this Court's *Curd* decision to hold that section 376.313(3) did not permit recovery for damages attributable to personal injuries.

Curd involved "'whether the private cause of action recognized in section 376.313(3), Florida Statutes (2004), allows commercial fishermen to recover damages for their loss of income despite the fact that the fishermen do not own any property damaged by the pollution.'" *Id.* at 372 (quoting from 39 So. 3d at 1220). It did not involve any claim for damages resulting from personal injuries. *Id.*

According to the First District, to arrive at an affirmative answer to that question, this Court looked to the definition of "Damage" found in section 376.031(5), notwithstanding that section expressly states that it applies *only* to sections 376.011 to 376.21 – i.e., the Oil Spill Prevention and Pollution Control Act of 1970. *Id.* at 373. That definition excepts injuries to "human beings." *Id.*

Because of this, the First District concluded that this Court's reliance on the section 376.031(5) definition of "Damage" was "part of the . . . holding and not dicta." *Id.* at 372. However, the court said that the question was a close one "because the [*Curd*] opinion alternatingly states that the court relied solely on the plain language of section 376.313(3) to reach its decision and that the court relied on an *in pari materia* reading of the definition of 'damages' from the 1970 act." *Id.* Moreover, it is clear from the following paragraph, which summarizes Mr. Lieupo's position, that, although the First District felt itself bound by *Curd's* reliance on the section 376.031(5) definition of "Damage," it believed that, in this case, such reliance would produce a result at odds with the plain meaning of the pertinent statutes:

> Lieupo argues that *Curd* was not a personal injury case, and the court could not have intended to hold that this more restrictive definition of damages should be applied to prohibit all personal injury claims from being brought under the 1983 act. Such a holding would contradict the plain language of section 376.031, which states the "damages" definition only applies to the 1970 act. It would also contradict the court's statement that it reached its decision based "solely" on the "plain language" of sections 376.313(3) and 376.30,

> and the court's finding that the 1983 act should be liberally construed. Instead, Lieupo suggests the supreme court merely looked to the 1970 act's definition for "guidance" and did not reach the question of whether *only* those damages available under the 1970 act could be sought under the 1983 act.

Id. at 373-74 (footnote omitted).

However, the First District found it "difficult to discern" whether this Court in *Curd* "actually intended for th[e] definition of damages from the 1970 act to be applied to all causes of action brought under the 1983 act" and, accordingly, certified as a question of great public importance whether "the private cause of action contained in section 376.313(3), Florida Statutes, permit[s] recovery for personal injury." *Id.* at 374.

In its order dated November 6, 2018, this Court accepted jurisdiction based on that certified question.

SUMMARY OF THE ARGUMENT

In plain language that could not be more clear, section 376.313(3), Florida Statutes, creates a private, strict-liability, cause of action "for *all damages* resulting from a discharge or other condition of pollution covered by ss. 376.30-376.317." (Emphasis added). Simon's has not challenged the sufficiency of the evidence to establish either "a discharge or other condition of pollution covered by ss. 376.30-376.317" or that Mr. Lieupo's injuries "result[ed] from [that] discharge or other condition of pollution." In the First District, its sole argument was that this Court

held in *Curd v. Mosaic Fertilizer* that the definition of "Damage" in section 376.031(5) applies to all claims brought under section 376.313(3) and, because section 376.031(5) expressly excludes "destruction" to "human beings," one may not recover damages attributable to personal injuries under section 376.313(3), notwithstanding that section's plain language and equally plain language in section 376.031 stating it does *not* apply to section 376.313. The First District agreed, and reversed the judgment for Mr. Lieupo. Respectfully, both Simon's and the First District are mistaken.

Curd was not a personal injury case – whether a plaintiff can recover for personal injuries under section 376.313(3) was, therefore, not an issue. While this Court looked to the "Damage" definition in section 376.031(5) for guidance, it was not asked to decide whether *only* those items listed in that section are recoverable in an action under section 376.313(3) notwithstanding use of the term "all damages" in the latter section; and it was not necessary to do so to resolve the issue before it. Accordingly, any suggestion in *Curd* that the section 376.031(5) definition of "Damage" would apply, and preclude an action for personal injury damages under section 376.313(3), is dicta which must be disregarded in favor of the clear and unambiguous statutory language.

Common sense also requires the conclusion that this Court did not intend in *Curd* to bar a cause of action under section 376.313(3) for personal injuries

resulting from a covered act of pollution. To conclude that the Court did intend to bar such an action, one would first have to conclude that the Court intended to decide an issue that was not raised and that, in doing so, it either overlooked or ignored numerous rules of statutory construction, including what it has consistently called the first rule – when the language of the statute is clear and unambiguous, there is no reason to resort to rules of statutory construction; the statute must be given effect according to its plain meaning. It would also produce a truly absurd result – that, while the legislature meant to permit the recovery of damages by commercial fishermen for loss of income even though they did not own the property damaged by pollution, it did not mean to permit the recovery of damages for serious, life-altering, injuries caused by a covered act of pollution.

However, if the Court did intend such a result in *Curd*, that result would be irreconcilable with numerous rules of statutory construction, including what this Court has consistently called the first rule. Therefore, the Court should acknowledge its error and recede from *Curd* to that extent.

The trial court correctly held that Mr. Lieupo's action is permitted by section 376.313(3). Accordingly, this Court should answer the certified question in the affirmative; quash the First District's decision; and remand with instructions to reinstate the judgment for Mr. Lieupo.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 376.313(3) PERMITS RECOVERY OF "ALL DAMAGES" CAUSED BY A COVERED ACT OF POLLUTION, INCLUDING THOSE ATTRIBUTABLE TO PERSONAL INJURIES

A. Standard of Review

Although the First District did not perform a statutory construction analysis because it concluded it was bound by this Court's *Curd* decision to hold that damages attributable to personal injuries cannot be recovered under section 376.313(3), it correctly recognized that the sole question presented was a pure question of law, reviewable de novo. *Simon's Trucking*, 244 So. 3d at 371. This Court has consistently acknowledged that construction of statutes presents a pure question of law, reviewable de novo. *E.g.*, *Shepard v. State*, 2018 WL 5660550, at *2 (Fla. Nov. 1, 2018); *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 301 (Fla. 2017); *Kumar v. Patel*, 227 So. 3d 557, 558 (Fla. 2017).

B. Statutory Construction Analysis

The sole argument of Simon's in the First District was that this Court's decision in *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010), precludes the recovery of damages pursuant to section 376.313(3), Florida Statutes (2011), for personal injuries resulting from a discharge or other condition of pollution covered by the Water Quality Assurance Act of 1983 (codified as sections 376.30-376.317, Florida Statutes). Although Simon's studiously avoided any analysis of

the pertinent statutes in the First District, such an analysis is a necessary prelude to a discussion of why this Court could not possibly have intended in *Curd* to preclude the recovery of damages for personal injuries resulting from a covered discharge or other condition of pollution.

1. Plain meaning

"The first rule of statutory interpretation is that '[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'" *Streeter v. Sullivan*, 509 So. 2d 268, 271 (Fla. 1987) (quoting *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931)); *accord Shepard*, 2018 WL 5660550 at *2, 3; *Schoeff*, 232 So. 3d at 301; *Kumar*, 227 So. 3d at 559; *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984).

So, in construing a statute, a court must always begin with the language. If the words used are clear and unambiguous, a court should end there as well. *See, e.g., Schoeff*, 232 So. 3d at 313 (Lawson, J., concurring in part and dissenting in part) (stating that "our first (and often only) step in statutory construction is to ask what the Legislature actually said in the statute, . . . based upon the common meaning of the words used"); *Whynes v. Am. Sec. Ins. Co.*, 240 So. 3d 867, 870 (Fla. 4th DCA 2018) (Levine, J., concurring specially) (stating that "[o]ur

consideration of a statute should always start—and if possible, end—with the text. Only after reviewing the text should we look, if needed, to 'legislative intent'"). In doing this, words must generally be given their plain, common, ordinary meanings, and "a court may refer to a dictionary to ascertain the plain and ordinary meaning" of words used. *L.B. v. State*, 700 So. 2d 370, 372 (Fla. 1997).

Even if a court is convinced the legislature actually meant something other than the meaning conveyed by the words used, in the absence of any ambiguity in the language itself, the court may not disregard the plain meaning of the words used – if the legislature intended something else, it made the mistake, and it should fix it. *E.g.*, *Overstreet v. State*, 629 So. 2d 125, 126 (Fla. 1993); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982); *Whitney Bank v. Grant*, 223 So. 3d 476, 479 (Fla. 1st DCA 2017).

What is now section 376.313 was originally enacted as a part of the Water Quality Assurance Act of 1983. *See* ch. 83-310, §§ 1, 84, at 1826, 1878, 1885 Laws of Fla. In *Aramark Uniform and Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 21 (Fla. 2004), this Court held that section 376.313(3) "create[s] a strict liability cause of action for damages." To the extent pertinent to this action, that section reads that "nothing contained in ss. 376.30-376.317 prohibits any person from bringing a cause of action in a court of competent jurisdiction for all damages resulting from a discharge or other condition of pollution covered by ss. 376.30-

376.317." In the First District, Simon's did not challenge the sufficiency of the evidence to establish either "a discharge or other condition of pollution covered by ss. 376.30-376.317," or that Mr. Lieupo's personal injuries "result[ed] from [that] discharge or other condition of pollution." Accordingly, the only pertinent question is whether the term "all damages" includes those resulting from personal injuries.

Simon's argued in the First District that the term "damages" is not defined in section 376.313(3). However, this ignores the modifying adjective "all," which is commonly understood to mean "the whole amount, quantity, or extent of"; "as much as possible"; and "every." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/all. By its plain language, the section permits a private cause of action for "all" damages caused by a covered discharge or other condition of pollution. No further definition is needed. This should mark the end of the inquiry.

In addition, however, it is equally clear that the definition of "Damage" in section 376.031(5)[2] does not apply to section 376.313(3). Section 376.031 clearly

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[2]Section 376.031 was originally enacted in 1970, as a part of the Oil Spill Prevention and Pollution Control Act. Ch. 70-244, § 3, at 742-44, Laws of Fla. However, there was no definition of "Damage" until 1990, when what was then subsection (3) was added. Ch. 90-54, § 10, at 145, Laws of Fla. (The subsection did not achieve its current form until 1996. Ch. 96-263, § 1, at 1008, Laws of Fla.) Even though the definition was not added until seven years *after* section 376.313(3) had been adopted as a part of the Water Quality Assurance Act of

and unambiguously states that the definitions in that section (including the definition of "Damage") apply *only* to sections 376.011 to 376.21 (i.e., what had been originally adopted in 1970 as the Oil Spill Prevention and Pollution Control Act). Moreover, since its enactment, the Water Quality Assurance Act of 1983 (codified as sections 376.30 to 376.317) has always included its own set of definitions. Ch. 83-310, § 84, at 1879-80, Laws of Fla. *See* § 376.301, Fla. Stat. (2011).

Because sections 376.313(3) and 376.031(5) are both clear and unambiguous, there is no reason to engage in statutory construction. Were one to do that, however, one would find additional support for the proposition that Mr. Lieupo's action is permissible.

2. Canons of construction

The Oil Spill Prevention and Pollution Control Act and the Water Quality Assurance Act both include a separate statute relating to an "individual cause of action for damages." §§ 376.205 & 376.313, Fla. Stat. (2011). They are in many ways very similar. Both provide that the Acts' remedies are to be "deemed to be cumulative and not exclusive." Both authorize a private cause of action. Both expressly state that any such cause of action need not "plead or prove negligence in any form or manner"; one "need only plead and prove the fact of the prohibited

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1983, the definition was expressly limited to the Oil Spill Prevention and Pollution Control Act, codified as sections 376.011 to 376.21. *Id.*

discharge or other pollutive condition and that it has occurred." Both permit only specified, limited, defenses. And both provide that "[t]he court, in issuing any final judgment in such action, may award costs of litigation, including reasonable attorney's and expert witness fees, to any party, whenever the court determines such an award is in the public interest."

Sections 376.205 and 376.313 differ, however, in one very important respect – section 376.313(3) permits recovery of "*all* damages resulting from a discharge or other condition of pollution covered by ss. 376.30-376.317," whereas section 376.205 permits recovery only of "damages, *as defined in s. 376.031*, resulting from a discharge or other condition of pollution covered by ss. 376.011-376.21." (Emphases added). In light of the many striking similarities in the two statutes, it is inconceivable that this significant dissimilarity could have been merely the result of legislative inadvertence. On the contrary, "[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." *Dep't of Prof'l Regulation v. Durrani*, 455 So. 2d 515, 518 (Fla. 1st DCA 1984); *accord Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006). One would expect that, had the legislature intended to preclude recovery of personal injury damages in section 376.313(3), instead of using the term "all damages" it would have said "damages, as defined in s. 376.031," as it did in section 376.205.

In addition, in construing a statute, "[n]o part of [the] statute, not even a single word, should be ignored, read out of the text, or rendered meaningless." *Scherer v. Volusia Cty. Dep't of Corrs.*, 171 So. 3d 135, 139 (Fla. 1st DCA 2015). "It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003). To construe section 376.313(3) in the way advocated by Simon's would effectively read the adjective "all" out of the statute.

Moreover, the 1983 Act includes two statutes that authorize the Department of Environmental Protection to assist in making third-party liability insurance available to cover violations of the Act – one for owners and operators of "petroleum storage systems" (§ 376.3072), and the other for owners and operators of "drycleaning facilities and wholesale supply facilities" (§ 376.3079). The two statutes provide for coverage of "incidents," in substantively identical language, defined as including "any sudden or gradual discharge . . . that results in a need for ["restoration"] ["site rehabilitation"] or results in *bodily injury* or property damage neither expected nor intended by the . . . owner or operator." §§ 376.3072(4)(c), 376.3079(3)(b), Fla. Stat. (2011) (emphasis added). It seems unlikely that the legislature would have provided for coverage of "incidents" resulting in "bodily

injury" if it had intended that damages attributable to personal injuries could not be recovered under section 376.313(3).

Last, but by no means least, the legislature has expressly mandated that section 376.313(3) (along with the rest of the Water Quality Assurance Act of 1983) be "liberally construed." § 376.315, Fla. Stat. (2011).

C. *Curd* Does Not Bar Recovery of Damages Attributable to Personal Injuries under Section 376.313(3)

Simon's sole argument below was that this Court's *Curd* decision bars a cause of action pursuant to section 376.313(3) for personal injuries resulting from a covered discharge or other condition of pollution because *Curd* holds that damages recoverable under section 376.313(3) include only those within the definition of "Damage" found in section 376.031(5). A review of the *Curd* decision refutes this argument.

1. Parsing *Curd*

The sole issue decided by *Curd* that is pertinent to this appeal was the second question certified by the Second District:

> DOES THE PRIVATE CAUSE OF ACTION RECOGNIZED IN SECTION 376.313, FLORIDA STATUTES (2004), PERMIT COMMERCIAL FISHERMEN TO RECOVER DAMAGES FOR THEIR LOSS OF INCOME DESPITE THE FACT THAT THE FISHERMEN DO NOT OWN ANY PROPERTY DAMAGED BY THE POLLUTION?

Curd, 39 So. 3d at 1218. By unanimously answering that question in the affirmative, this Court substantially broadened the scope of a cause of action under section 376.313(3) by extending the right to damages to plaintiffs only indirectly affected by a covered act of pollution.

Curd was not a personal injury case. Accordingly, whether a plaintiff could recover damages for personal injuries under section 376.313(3) was not an issue. Instead, this Court was asked to decide whether the fishermen could recover "'lost income or profits'" allegedly caused by "'a loss of underwater plant life, fish, bait fish, crabs, and other marine life'" that resulted from the defendant's release of pollutants. *Id.* at 1218-19 (quoting the Second District's opinion).

To determine whether section 376.313(3) contemplated recovery of such damages even though the fishermen did not own the marine life, this Court looked for guidance to the definition of "Damage" in section 376.031(5). It concluded that subsection permitted recovery not only "for damages to real or personal property but . . . for damages to 'natural resources, including all living things,'" as well. *Id.* at 1222. Accordingly, it further concluded that the fishermen's complaint should not have been dismissed for failure to state a cause of action. *Id.* at 1218.

This Court *was not asked* to decide whether *only* those items of damages listed in section 376.031(5) were recoverable in an action under section 376.313(3), and it was not necessary to do so to resolve the issue before it.

Accordingly, any suggestion in the opinion that the section 376.031(5) definition of "Damage" would apply to preclude an action seeking personal injury damages under section 376.313(3) is dicta.

In addition, this Court has repeatedly said that its opinions "must be construed in the light of the facts and circumstances of the case which was then before [it] for decision." *Dade Cty. v. Brigham*, 47 So. 2d 602, 603 (Fla. 1950); *accord Pearson v. Taylor*, 32 So. 2d 826, 827 (Fla. 1947) ("all enunciations of law[] must be considered in the light of the factual case before us"); *Shelfer v. Am. Agric. Chem. Co.*, 113 Fla. 108, 115, 152 So. 613, 615 (1933) (On Petition for Rehearing) ("It is familiar law that the language of an opinion must be considered with reference to the facts in the case which is being considered and the issues presented"); *see also Ex parte Amos*, 93 Fla. 5, 21, 112 So. 289, 295 (1927) (Whitfield, J., concurring) ("in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different").

Moreover, in its decision in *Curd*, the Second District noted that, in *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93 (Fla. 1st DCA), *review denied*, 574 So. 2d 139 (Fla. 1990), the First District had interpreted section 376.313(3) as "permitting recovery for personal injury caused by contamination."

Curd v. Mosaic Fertilizer, LLC, 993 So. 2d 1078, 1084 (Fla. 2d DCA 2008); *accord Easton v. Aramark Uniform & Career Apparel, Inc.*, 825 So. 2d 996, 998 (Fla. 1st DCA 2002) (stating that, "[i]n *Cunningham v. Anchor Hocking Corporation*, . . . the court held that the plaintiffs, seeking damages from their employer resulting from exposure to toxic substances resulting in respiratory problems, liver damage, brain tumors, pulmonary disease, cancer, and other disorders, stated a cause of action pursuant to section 376.313"), *approved*, 894 So. 2d 20 (Fla. 2004). While acknowledging in its motion for judgment notwithstanding the verdict filed in the trial court that *Cunningham* held that section 376.313(3) permitted a cause of action for personal injury damages, Simon's argued there that this Court's *Curd* decision had overruled *Cunningham*. (R. 8349-50). However, *Curd* does not even mention *Cunningham*. The reason why is obvious – this Court was not concerned with whether section 376.313(3) permits a cause of action for personal injuries resulting from a covered act of pollution because the issue was not before it.

2. Employing common sense

Common sense also requires the conclusion that this Court did not intend in *Curd* to bar a cause of action under section 376.313(3) for personal injuries resulting from a covered act of pollution. To conclude that the Court *did* intend to bar such an action, one would first have to conclude that the Court:

- was deciding an issue not presented by the facts of the case (which did not involve any claim for personal injury damages);
- overlooked or ignored the plain, unambiguous, language of section 376.313(3) permitting a cause of action for "all damages" resulting from a covered act of pollution, in violation of what it has consistently called the first rule of statutory interpretation;
- overlooked or ignored the plain, unambiguous, language of section 376.315, in which the legislature mandated that the 1983 Act, including section 376.313(3), is to be "liberally construed," again in violation of the first rule of statutory interpretation;
- overlooked or ignored the plain, unambiguous, language of section 376.031 stating that the definitions contained in that section – including the definition of "Damage" – apply *only* to the 1970 Act, yet again in violation of the first rule of statutory interpretation;
- overlooked or ignored the fact that, although section 376.205 (which authorizes a private cause of action for violations of the 1970 Act) and section 376.313(3) (which authorizes a private cause of action for violations of the 1983 Act) are in many ways similar, they differ in one very significant respect – the former expressly limits recovery to

"damages, as defined in s. 376.031"; while the latter permits the recovery of "all damages";

- intended to read the adjective "all" out of section 376.313(3), notwithstanding the principle of statutory construction that significance and effect must be given to every word if possible and that no words should be construed as mere surplusage; and
- overlooked or ignored the fact that the 1983 Act includes two statutes that contemplate third-party liability insurance coverage of "incidents," defined as including "any sudden or gradual discharge . . . that . . . results in bodily injury or property damage neither expected nor intended . . .".

To reach such conclusions regarding this Court's intent in *Curd* would lead to a truly absurd result – that, while the legislature meant to permit the recovery of damages by commercial fishermen for loss of income even though they did not own the property damaged by pollution, it did not mean to permit the recovery of damages for serious, life-altering, injuries caused by a covered act of pollution. It would also raise a serious separation of powers issue given the clear and unambiguous language used by the legislature in the pertinent statutes. It is inconceivable that this Court could have intended such a result.

Yet, the First District necessarily *did* reach such conclusions; otherwise, it would not have reversed the judgment in Mr. Lieupo's favor. Accordingly, there is a need for this Court to resolve the confusion the First District acknowledged regarding *Curd* by issuing a clear statement that section 376.313(3) means precisely what its plain language says – that those harmed by a violation of the statute, and especially those who suffer serious personal injuries, are entitled to maintain an action for "all damages" resulting from the violation.

D. If *Curd* Does Bar Recovery of Damages Attributable to Personal Injuries under Section 376.313(3), The Court Should Recede from That Portion of the Decision

As explained in the preceding section, Mr. Lieupo does not believe this Court intended in *Curd* to bar recovery under section 376.313(3) of damages attributable to personal injuries caused by a covered act of pollution. However, if that *was* the Court's intent, Mr. Lieupo submits that, for all of the reasons discussed in this brief, the Court should acknowledge its error and recede from *Curd* to that extent.

While stare decisis is an important concept, it "does not command blind allegiance to precedent." *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995). "Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the Court." *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1096 (Fla. 1987) (Ehrlich, J., concurring in part and

dissenting in part) (quoted in *Gray*). As the United States Supreme Court has said, "a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405 (1970).

CONCLUSION

This Court should hold that section 376.313(3) means precisely what its plain language says – that those harmed by a violation of the statute, and especially those who suffer serious personal injuries, are entitled to maintain an action for "all damages" resulting from that violation. It should answer the certified question in the affirmative; quash the First District's decision below; and remand with instructions to reinstate the judgment for Mr. Lieupo.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 21, 2018, I electronically filed the foregoing using the Florida E-Portal. I also certify that the foregoing is being served this day on all parties identified below via transmission of Notice of Electronic Filing generated by the Florida E-Portal:

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The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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