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 REPLY BRIEF

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

Michael J. Damaso, II
Florida Bar No. 18558
mdamaso@whkpa.com
Jackson W. Adams
Florida Bar No. 47970
jadams@whkpa.com
WOOTEN KIMBROUGH, P.A.
P.O. Box 568188
Orlando, FL 32856-8188
Telephone: (407) 843-7060
Facsimile: (407) 843-5836

Peter D. Webster
Florida Bar No. 185180
pwebster@carltonfields.com
CARLTON FIELDS
215 South Monroe Street, Suite 500
Tallahassee, FL 32301
Telephone: (850) 224-1585
Facsimile: (850) 222-0398

Attorneys for Petitioner

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The question certified asks whether "the private cause of action contained in section 376.313(3), Florida Statutes, permit[s] recovery for personal injury." *Simon's Trucking, Inc. v. Lieupo*, 244 So. 3d 370, 374 (Fla. 1st DCA 2018). To answer the question, this Court must decide whether "all damages" as used in section 376.313(3)[1] means *all* damages, or something less than *all* damages. If the former, then the answer to the certified question is "yes," and the Court's work is done.

If, however, the Court decides that "all damages" means something less than *all* damages, the next question it must answer is "less in what respects?" The pertinent statutes offer no help whatsoever in answering that question. (The section 376.031(5) "Damage" definition can offer no insight because section 376.031 expressly states that its definitions apply only to the 1970 Act.) Accordingly, this Court would essentially be required to craft an answer to that question out of whole cloth, basically drafting a new statute. Of course, the strict separation of powers mandated by article II, section 3, of our constitution prohibits any such arrogation of legislative power by the courts.

Moreover, ascribing a meaning to the language other than that commonly understood given the words used would have an erosive effect on respect for the

[1] Unless otherwise indicated, all references to the Florida Statutes are to the 2011 version.

rule of law because it would suggest that interpretation of statutes is not based on an impartial reading of the text but, instead, is based on the interpreting court's political philosophy. The result would be less predictability in our law.

Here, regardless of whether the 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, the Court should acknowledge that the plain meaning of the words used in that section permits but one conclusion – 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.

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. Statutory Construction Analysis

1. Plain meaning

"When [a] statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005). "Accordingly, where the Court is tasked with construing a statute, '[its] first (and often only) step . . . is to ask what the Legislature actually said in the statute, based upon the common meaning of the words used.'" *Shepard v. State*, 2018 WL 5660550, at *3 (Fla. Nov. 1, 2018) (quoting *Schoeff v. R.J.*

Reynolds Tobacco Co., 232 So. 3d 294, 313 (Fla. 2017) (Lawson, J., concurring in part and dissenting in part)).

"It is well established that 'where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense.'" *Shepard*, 2018 WL 5660550, at *3 (quoting *State v. Brake*, 796 So. 2d 522, 528 (Fla. 2001)). "Moreover, a court may refer to a dictionary to ascertain the plain and ordinary meaning." *L.B. v. State*, 700 So. 2d 370, 372 (Fla. 1997).

To the extent pertinent, section 376.313(3) 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." (Emphasis added). It is difficult to imagine a plainer, less ambiguous term than "all damages." "All" is commonly understood to mean "the whole amount, quantity, or extent of"; "as much as possible"; and "every." Merriam-Webster Online Dictionary, https://www.merrim-webster.com/dictionary/all. "Damages" is commonly understood to mean "compensation in money imposed by law for loss or injury." *Id.* at https://www.merriam-webster.com/dictionary/damages; Black's Law Dictionary 445 (9th ed. 2009) (same)[2]

[2] In fact, just three years after Florida adopted the Water Quality Assurance Act of 1983 (of which section 376.313 is a part), the Supreme Court said that "[d]amages 'have historically been awarded both for injury to property and injury to the person

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 (explaining why section 376.301, the 1983 Act's definitional section, includes no definition of "damages"). This should mark the end of the inquiry.[3]

However, even if this Court were 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 could 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.

– a fact too well-known to have been overlooked by the Congress.'" *United States v. James,* 478 U.S. 597, 605 & n.6 (1986) (quoting *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 450 (1947), and citing to dictionaries).

[3] Instead of explaining why the plain language of the pertinent statutes does not mean precisely what it seems to say, the Florida Justice Reform Institute's Amicus Brief resorts to canons of construction and a lengthy discussion of federal legislative intent under "CERCLA," resulting in a construction of the pertinent statutes that is irreconcilable with their plain language in violation of the cardinal principal that, "[w]hen the language of [a] 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." *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931). *See also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 10 (2012) ("In our adversarial system, one side – the side with a bad argument – has an incentive to urge departure from (or distortion of) text"). The Amicus Brief of the Florida Defense Lawyers Association, which is based on the clearly erroneous premise that Mr. Lieupo is asking the Court to imply a cause of action, is even more puzzling.

1982). *See also Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring in the judgment) (stating that "[t]he language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it").

Because section 376.313(3) is clear and unambiguous, there is no reason to engage in statutory construction. Were one to do that, however, one would find copious support for a reading consistent with that dictated by the words used.

2. Canons of construction

In his Initial Brief, Mr. Lieupo discussed why resort to the canons of construction would support a reading based on the plain meaning of the words used. (I.B. at 19-22). He will not re-plow that ground. He does, however, wish to respond to construction arguments made by Simon's.

Simon's first argues that the 1970 and 1983 Acts are "two closely related statutes regulating environmental discharge and contamination." (A.B. at 15). While it is true that both acts can be found in chapter 376, the recitations of legislative intent in the two acts reflect that they are designed to address very different concerns.

Section 376.021 reflects that the aim of the 1970 Act is to "maintain[] the coastal waters, estuaries, tidal flats, beaches, and public lands adjoining the seacoast in as close to a pristine condition as possible" for "public and private

recreation." § 376.021(1) & (2), Fla. Stat. Hence, the 1970 Act was concerned with preventing "[s]pills, discharges, and escapes of pollutants" that would "pose threats of great danger and damage to the environment of the state, to owners and users of shore front property, to public and private recreation, to citizens of the state and other interests deriving livelihood from marine-related activities, and to the beauty of the Florida coast." § 376.021(3)(b), Fla. Stat. On the other hand, Section 376.30 of the 1983 Act reflects that the aim of that Act is to "preserve[] . . . surface and ground waters . . . , as these waters provide the primary source for potable water in this state." § 376.30(1)(b), Fla. Stat. These very different concerns explain the significant differences in the two acts as to the scope of recoverable damages, including why section 376.313(3) permits recovery of damages attributable to personal injuries and section 376.205 does not.

Next, Simon's maintains that, as originally enacted, what became sections 376.205 and 376.313(3) "were effectively identical." (A.B. at 17 n.11). This is true. *Compare* ch. 74-337, § 18, at 1065, Laws of Fla., *with* ch. 83-310, § 84, at 1885, Laws of Fla. However, when what became section 376.205 was enacted, the 1970 Act did not include a definition of "Damage." The definition of "Damage" that became section 376.031(5) was not added until 1990, when what was then subsection (3) was added. Ch. 90-54, § 10, at 145, Laws of Fla. It did not achieve its current form until 1996. Ch. 96-263, § 1, at 1008, Laws of Fla. Although the

definition of "Damage" was not initially added to section 376.031 until seven years after section 376.313(3) had been adopted as a part of the 1983 Act, no similar definition was added to the definitional section of the 1983 Act (§ 376.301). Similarly telling is the fact that, although section 376.205 was amended in 1996 to change "all damages" to "damages, as defined in s. 376.031" (*see* ch. 96-263, § 13, at 1030, Laws of Fla.), some 13 years *after* what became section 376.313(3) had been adopted, no similar amendment was made to the latter section, notwithstanding that the act making the amendment also amended other sections of the 1983 Act. *See* ch. 96-263, §§15, 16, at 1030-33, Laws of Fla.[4]

Simon's also asserts that Mr. Lieupo's reliance on the fact that section 376.031 states that the definitions in that section – including the definition of "Damage" – apply only to sections 376.011 through 376.21 (i.e., the 1970 Act) is "a red herring" because that "limiting language . . . simply reflects the fact that the [1970 Act] was enacted *before* the [1983 Act]. The Legislature therefore could not possibly have extended the definition of damages to section 376.313(3) at the time it enacted the [1970 Act.]" (A.B. at 33-34 n.15). There are two problems with this

[4] Simon's represents that "Florida courts recognized that the [1996 amendment to section 376.205] merely 'constitute[d] a clarification' and not 'a fundamental change to' the [1970 Act]," citing only a single federal district court case, *Dostie Development, Inc. v. Arctic Peace Shipping Co.*, 1996 WL 866119, at *2 n.2 (M.D. Fla. Aug. 14, 1996). (A.B. at 17, n.11). In fact, the italicization in note 2 of that decision reflects that the court's comment was directed to language providing that "*any person may bring a cause of action against a responsible party*," not to the change of "all damages" to "damages, as defined in s. 376.031." *See id.*

argument. First, prior to 1983, the pertinent language in section 376.031 read "[w]hen used in this chapter." It was changed to "[w]hen used in ss. 376.011-376.21" in 1983 (at the same time the 1983 Act was passed). *Compare* § 376.031, Fla. Stat. (1981), *with* § 376.031, Fla. Stat. (1983). Second, there was, of course, nothing to prevent the legislature from either continuing to use "[w]hen used in this chapter," or changing the language upon passage of the 1983 Act so that it read "[w]hen used in ss. 376.011-376.317," but it did neither.

Finally, Simon's relies on the canon that statutes be construed *in pari materia* – i.e., that "'statutes relating to the same subject or object be construed together to harmonize the statutes.'" *Patrick v. Hess*, 212 So. 3d 1039, 1042 (Fla. 2017) (quoting *Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008)). However, that canon has no role to play here for several reasons. First, it applies only when the statute's language is unclear or ambiguous, *see id.*, and there is nothing unclear or ambiguous about the pertinent language of section 376.313(3). Second, as explained above, the 1970 and 1983 Acts have different purposes and, hence, do not "relat[e] to the same subject." Third, it is apparent from the one very important respect in which sections 376.205 and 376.313(3) differ (the former expressly limiting recovery to "damages, as defined in s. 376.031," while the latter permits the recovery of "all damages"), and from the fact that section 376.031, in plain, unambiguous language states that its definitions – including the definition of

"Damage" – apply *only* to the 1970 Act, that the legislature *did not intend* that sections 376.205 and 376.313(3) be read *in pari materia*. *See Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006) ("'[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended'") (quoting *Dep't of Prof'l Regulation v. Durrani*, 455 So. 2d 515, 518 (Fla. 1st DCA 1984)).

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

Mr. Lieupo explained in his Initial Brief why the Court in *Curd* could not have intended to bar causes of action under section 376.313(3) for personal injuries resulting from a covered discharge or other condition of pollution. (I.B. at 22-28). Suffice it to reiterate here that 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); *Shelfer v. Am. Agric. Chem. Co.*, 113 Fla. 108, 115, 152 So. 613, 615 (1934) (On Petition for Rehearing).

Curd was not a personal injury case and, therefore, whether a plaintiff could recover damages for personal injuries under section 376.313(3) was not an issue. While the Court looked to the "Damage" definition in section 376.031(5) for guidance in determining whether section 376.313(3) contemplated recovery for the

type of consequential damages the fishermen plaintiffs were seeking, it was not asked to decide whether *only* those items of damage listed in section 376.031(5) were recoverable in a section 376.313(3) action, and it was not necessary to do so to resolve the issue before it. "[R]egardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case. . . . All statements that go beyond the facts of the case . . . are dicta." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010).

Despite Simon's protestations to the contrary, Mr. Lieupo believes it is inconceivable that the five-Justice *Curd* majority could have intended to bar recovery of personal injuries in section 376.313(3) actions. (Here, four of those five Justices were on the panel that unanimously voted to accept jurisdiction and answer the certified question.) However, should this Court conclude that was the effect of the majority's opinion, then, as explained in the next part of this brief, the Court should acknowledge its error; recognize that such a holding is palpably irreconcilable with the plain language of section 376.313(3); and recede from *Curd* to that extent.

C. 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

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, then, because such a holding is palpably irreconcilable with the plain language of that statute, the Court should acknowledge its error and recede from *Curd* to that extent.

This Court has often receded from precedent when that precedent's interpretation of a statute is contrary to the statute's plain language. As recently as November 2018, the Court receded from precedent because that precedent had interpreted a statute in a way that was contrary to the statute's plain, unambiguous language, stating that "*stare decisis* does not command blind allegiance to precedent," and that "'[p]erpet[u]ating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the [C]ourt.'" *Shepard*, 2018 WL 5660550, at *4 (quoting *State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995), which had, in turn, quoted *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1096 (Fla. 1987) (Ehrlich, J., concurring in part and dissenting in part)). *Accord Roughton v. State*, 185 So. 3d 1207, 1210-11 (Fla. 2016) (receding from precedent because it was "irreconcilable with the plain language of [the statute]," stating that "[t]he doctrine of stare decisis may bend 'where there has been an error in legal analysis'"); *Brown v. Nagelhout*, 84 So. 3d 304, 309-10 (Fla. 2012) (receding from precedent because it was "based on a serious interpretative error, which resulted in imposing a meaning on the statute that is 'unsound in principle,'" again stating that "'[t]he doctrine of stare decisis bends . . . where there has been an

error in legal analysis'"). *See also McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1096, 1099 (11th Cir. 2017) (en banc) (receding from precedents because they were "not faithful to the text of the statute"; quoting Bryan A. Garner, et al., The Law of Judicial Precedent 388 (2016) for the proposition that precedent may be overruled if it is "'plainly and palpably wrong'" and "overruling the precedent would not 'result in more harm than continuing to follow the erroneous decision'"; and stating that "[w]e have a responsibility to interpret the law correctly").

Indeed, one such decision of this Court is virtually on all fours with this case in its pertinent characteristics. In *State v. Sturdivant*, 94 So. 3d 434, 437, 440 (Fla. 2012), this Court receded from precedent, stating that "[t]o hold otherwise would do violence to legislative intent as evidenced by the plain language of the . . . statute" and that "'[t]he doctrine of stare decisis counsels us to follow our precedents unless there has been "a significant change in circumstances after the adoption of the legal rule, *or . . . an error in legal analysis.*"'" (emphasis added) (quoting *Rotemi Realty, Inc. v. Act Realty Co.*, 911 So. 2d 1181, 1188 (Fla. 2005), which had, in turn, quoted *Dorsey v. State*, 868 So. 2d 1192, 1199 (Fla. 2003)). In *Sturdivant*, as here:

- The First District had held that interpretation of the pertinent statute in this Court's precedent was not dicta, *see Sturdivant v. State*, 84 So. 3d 1044,

1048 (Fla. 1st DCA 2010), concluding that it was, therefore, bound by that precedent, but certifying a question of great public importance, *id.* at 1048-49; and

- In the precedent from which this Court receded, one Justice had concurred in part and dissented in part, arguing in dissent that the majority's analysis was irreconcilable with the "plain language" of the controlling statute. 94 So. 3d at 441.

The age of the precedent being considered is a factor in the analysis of whether that precedent should be receded from. *See Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). However, that factor was accorded no weight in any of the cases cited above, although in *Shepard* the precedent was 23 years old (2018 WL 5660550, at *1), in *Roughton* it was 19 years old (185 So. 3d at 1208), in *Sturdivant*, it was 7 years old (94 So. 3d at 435), and in *Brown* it was 55 years old (84 So. 3d at 306). This Court decided *Curd* in 2010. *See also McCarthan*, 851 F.3d at 1079-80 (receding from precedents that had been in place for 18 years). Likewise, none of the cases accorded any weight to the fact that the legislature had taken no action to amend the statute in question.

"[T]he prospect of 'serious injustice to those who have relied on' a precedent" is also a factor in the analysis of whether that precedent should be receded from. *Brown,* 84 So. 3d at 309-10 (quoting *N. Fla. Women's Health &*

Counseling Servs., Inc. v. State, 866 So. 2d 612, 637 (Fla. 2003)). While Simon's claims that receding from *Curd* "would disrupt settled expectations" (A.B. at 27), it fails to identify what those expectations might be. As in *Brown* (84 So. 3d at 311), so here, "[i]t is not plausible to suggest" that parties will base their decisions as to when and where to pollute on *Curd*. Certainly, there is no reason to be concerned about polluters relying on *Curd* for the proposition that, in the event of an environmental catastrophe like Love Canal, they cannot be held accountable in damages by those who have contracted serious illnesses or died.[5] Surely, that is not the type of expectation respect for precedent seeks to protect.

To the extent 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, the Court should now follow the cases cited above and recede from that

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[5] "In August 1978 [just five years before passage in Florida of the 1983 Act], President Jimmy Carter issued the first of two emergency declarations at Love Canal after learning of reports from the community of strange odors and residues, basements flooded with contaminated groundwater, and health issues, including miscarriages and birth defects. Less than two years later . . . , Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which would become known as the Superfund." "Love Canal Revealed a National Problem; Superfund Provided a Solution," https://www.epa.gov/newsreleases/love-canal-revealed-national-problem-superfund-provided-solution. *See also* "The Love Canal Tragedy," https://archive.epa.gov/epa/aboutepa/love-canal-tragedy.html. Florida has 92 Superfund sites. https://www.epa.gov/superfund/search-superfund-sites-where-you-live.

portion of *Curd* because such a holding is palpably irreconcilable with the plain language of that statute.

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,

Michael J. Damaso, II
Florida Bar No. 18558
mdamaso@whkpa.com
Jackson W. Adams
Florida Bar No. 47970
jadams@whkpa.com
WOOTEN KIMBROUGH, P.A.
P.O. Box 568188
Orlando, FL 32856-8188
Telephone: (407) 843-7060
Facsimile: (407) 843-5836

/s/ Peter D. Webster
Peter D. Webster
Florida Bar No. 185180
pwebster@carltonfields.com
CARLTON FIELDS
215 South Monroe Street, Suite 500
Tallahassee, FL 32301
Telephone: (850)224-1585
Facsimile: (850)222-0398

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 31, 2019, 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:

Jason Gonzalez
JasonGonzalez@shutts.com
Amber Stoner
AmberStoner@shutts.com
Shutts & Bowen LLP
Suite 804
215 South Monroe Street
Tallahassee, FL 32301

/s/ Peter D. Webster
Attorney

CERTIFICATE OF COMPLIANCE

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.

/s/Peter D. Webster
Attorney