IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC02-2190

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ARAMARK UNIFORM AND CAREER APPAREL, INC., et al.,

Petitioner,

vs.

SAMUEL M. EASTON, JR.,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Discretionary Review from the
First District Court of Appeal
Case No. 1D01-2952

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References to the Index of the Supreme Court Record are designated as S.C.R., together with the appropriate page number. Petitioner's Initial Brief is designated as P.I.B., together with the appropriate page number. References to Petitioner's Appendix are noted as P.App., together with the appropriate page number, whereas references to Respondent's Appendix are noted as R.App., together with the appropriate page number.

To distinguish references to the briefs relied upon during the appeal before the First District from those used in the instant appeal, the Answer Brief filed by Petitioner as the Appellee is referred to as "A.A.B.", and the Initial Brief and Reply Brief filed by Respondent as the Appellant are designated as "A.I.B." and "A.R.B.", respectively. Appellee's Appendix is designated simply as "App.", and Appellant's Appendix as "A.App."

References to the record at the trial level are designated herein as "R." Additionally, references to the excerpts of the trial transcripts are designated by "T" with a notation as to the date of the trial proceedings, the name of the witness and the page of the transcript referenced. Plaintiff's trial exhibits are referenced as "P-___" and Defendant's trial exhibits are referenced as "D-___".

IV. SUMMARY OF ARGUMENT

The writ of certiorari issued by the Court must be quashed because the decision of the First District in *Easton* does not create decisional conflict, express, direct, or otherwise on the same question of law. Petitioner failed to include any analysis of the conflict issue in Petitioner's Initial Brief, including any analysis of how *Mostoufi* would apply to the *Easton* decision and/or why the decision would have been different if this Court were to approve *Mostoufi* and apply the question of law as decided in *Mostoufi* instead of *Easton*.

Regardless, no conflict between these decisions exists. The First District held that §376.313, Fla. Stat. (2000) creates a cause of action in suits between adjoining landowners. Although the First District made no attempt to extend the holding in *Easton* to suits between successive owners, Petitioner nonetheless rests its case for discretionary review on the erroneous premise that no valid basis exists to distinguish the *Easton* decision with the decision of the Second District in *Mostoufi*.

This premise is simply wrong. The Second District held in *Mostoufi* that §376.313(3), Fla. Stat. (2000) does not abrogate the common law and thereby create a cause of action between successive landowners whose diminution claims are otherwise barred by the doctrine of *caveat emptor*. Since *caveat emptor* does not bar suits between adjoining property owners, the First

District's decision in *Easton* that such claims come within the purview of the statute does not create any direct and express conflict with *Mostoufi* on the same question of law.

Petitioner asks this Court to find not only that §376.313(3) fails to create a private cause of action, but also that no common law claims are available to adjoining landowners against the current owner of the source property unless that owner caused the initial discharge of the pollution migrating onto the adjoining property. If followed, Petitioner's position would render superfluous the entire statutory scheme embodied in Chapter 376, Fla. Stat. (2000) and unfairly burden truly innocent landowners to the benefit of owners who are in a better position to protect themselves against strict liability through due diligence, price negotiation, environmental insurance and the like. The legislature has balanced these competing interests by both imposing strict liability upon the current owner, and creating defenses, exceptions, immunities and protections where appropriate. [1]

The creation of a private cause of action under §376.313(3) is demonstrated by the plain language of the statute, especially when read *in pari materia* with the related provisions in Chapter 376, by the weight of authority decided post-

[1] On remand, the First District has instructed the trial court to determine whether Petitioner can avail itself of one of these defenses to strict liability under §376.313(3). (P.App., p. 5; S.C.R. 5)

Mostoufi, by legal commentary on this question of law, by legislative amendments to §376.313(3), including a bill passed in the 2003 Regular Session, and by public policy concerns.

To find a purpose to §376.313(3) if the statute were interpreted to not create a private cause of action, Petitioner argues that the statute imposes a new standard of care into existing causes of action. Relying upon the incorrect premise that no common law causes of action are available to Respondent, Petitioner asserts that: (a) §367.313(3) would therefore be unavailing to Respondent; and (b) the First District's finding that the statute creates a statutory cause of action is in derogation of the common law.

Petitioner itself asserts that no case has yet squarely decided the issue of whether an adjoining property owner can maintain a common law cause of action for pollution damages against a current owner that did not cause the pollution. Unlike *Mostoufi*, which involved a long standing common law bar to the plaintiff's claim, the absence of a case "on all fours" does not mean that a cause of action for Respondent's claim would be barred under the common law, and there is nothing in established precedent to suggest otherwise. To the contrary, recent case law confirms that common law claims are readily available for adjoining landowners to recover diminution damages from a current owner, regardless of fault. Accordingly, the First District's finding that §376.313(3) creates a private cause of action is not in derogation of the common law.

This Court should therefore quash the writ because there is no express and direct conflict. Alternatively, Respondent requests this Court to approve the decision in *Easton* and harmonize *Mostoufi* by limiting the holding to a finding that the doctrine of *caveat emptor* bars a private claim under §376.313 by a current owner against a prior owner to recover diminution damages caused by pollution.

V. SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The legal issue for resolution on appeal requires few facts to distinguish the cases alleged to be in conflict, and they are contained within the First District's opinion. The following supplemental statement of the case and facts supports Respondent's rebuttal of Petitioner's remaining arguments.

Respondent sued Petitioners, Aramark and DELSAC VIII, Inc. ("DELSAC VIII"), for damages to commercial property (the "Easton Property") located adjacent to commercial property owned by Aramark Uniform and Career Apparel, Inc. ("Aramark") in Jacksonville, Florida (the "Source Property"). Aramark's uniform service business includes both sales and the rental of uniforms it owns and launders. (T. Krejci, 5/10/00, Transcript Vol. 2, p. 71)(App. 47) As of the time of trial, Aramark employed approximately 14,000 employees and generated annual sales of approximately $1.5 billion. (T. Krejci, 5/10/00, Transcript Vol. 2, p. 72)(App.48)

In 1986, Aramark acquired a company known as Servisco.[2] The transaction included the acquisition of some twenty (20) sites, of which twelve to fourteen (12-14) were later determined to be contaminated. (T. Krejci,

[2]For the sake of simplicity, the parties, the Trial Court and the First District have generally referenced "Aramark's" acquisition of "Servisco". Aramark was formerly known as "Aratex". Aratex merged in 1988 with DELSAC I, who was a successor to SAC of Delaware, who was a successor to Servisco. It was DELSAC I who acquired Servisco in December, 1986.

5/10/00, Transcript Vol. 2, pp. 75, 200)(App. 51, 54-57) The Source Property was one of the 12-14 contaminated sites Aramark acquired from Servisco. As part of the transaction, Aramark expressly assumed Servisco's liabilities and thereafter commenced assessment and remediation of the various contaminated sites it acquired from Servisco. (P-28; P-32; T. Krejci, 5/10/00, Transcript Vol. 2, p. 75, 88-91)(App. 10, 7-9, 30-32)

The groundwater migrating onto the Easton Property from the Source Property is contaminated with perchloroethlyene (PCE) and various related constituents such as trichloroethene (TCE), vinyl chloride (VC) and total 1,2-dichloroethylene (DCE). (D-8, D-12, D-17-19) Although PCE is often referred to as a "drycleaning solvent," the PCE at issue should not be confused with the legal definition of "drycleaning solvent" used in the "Drycleaning Solvent Cleanup Program" ("DSCP"). §§376.3078-376.319, Fla. Stat. (2000)

Created in 1994, the DSCP *inter alia* creates a source of funding to cleanup sites contaminated with drycleaning solvents originating from a "dry cleaning facility." The PCE contamination migrating from the Source Property onto the Easton Property falls within the exclusion for solvents originating from uniform rental and linen supply companies and is therefore not covered by the

DSCP[3]. §376.301(13), Fla.Stat. (2000); §376.301(14), Fla.Stat. (2000).

Defendants' experts agreed that an above-ground PCE tank located on the Source Property was the likely source of the PCE contamination, which contamination has caused groundwater concentrations of PCE, TCE, DCE and VC on both the Source Property and the Easton Property to exceed levels authorized by Florida law. The contamination is extensive and exists in the shallow, intermediate and deep zones of the groundwater aquifer on both properties. (R. Vol. 1, 1-4)(D-8, D-12, D 17-19)

Regarding remediation, the Trial Court found that "Plaintiff's property was damaged solely by chemical solvents that were allowed to seep into the groundwater on the Defendant's property (source property) and then migrate onto Plaintiff's property. It is also undisputed that the chemical solvents are continuing to contaminate the Plaintiff's soil and groundwater and will continue to do so for the next several years." (P.App. p. 6) The First District's opinion recites these same findings. (P.App. p. 2; S.C.R. 2)

The Trial Court also found that "[t]he evidence established that after extensive delays and long periods of inaction, remediation efforts have begun. These efforts will continue for several years, most likely more than thirty (30)

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[3] A detailed discussion of this issue, which was conceded by Petitioner, is contained in Appellant's Initial Brief, pp. 7-8, 30-32. (R.App. 66-67, 72-74)

years." (P.App., p. 7) Although Aramark learned of the migration of the contaminated groundwater onto the Easton Property in 1988 or 1989, the Trial Court further found that Aramark "failed to disclose this fact to the Plaintiff". (P.App., p. 7)

Aramark plans to remediate the groundwater to risk based standards appropriate to commercial properties which means that certain residual contamination may remain in the groundwater even after remediation is complete. (D-19, D-30) After considering expert testimony regarding the inhalation risk posed by the PCE contamination in the groundwater on the Easton Property, the Final Judgment recites that "[b]ased upon that testimony [of the experts], the Trial Court finds that there are no ***significant*** health risks to humans. However, both experts agreed that vapors from the contaminated groundwater, in some amount, would be inhaled by occupants of buildings on Plaintiff's property. Also, contact with the groundwater and consumption of the groundwater must be avoided." (emphasis added)(R. Vol. 5, p. 805; P.App. 8)

Regarding Plaintiff's damages, the Trial Court found that "[t]he contamination to the Plaintiff's property has resulted in the diminution in value to the Plaintiff's property in the amount of $153,000.00. This diminution in value results from the reduced demand for the Plaintiff's property due to its extensive contamination, and is based upon the fact that Aramark is obligated to remediate or cleanup the contamination at its expense." (R. Vol. 5, p. 805;

P.App. 8) (P.App.2; S.C.R. 2)

Although finding that Aramark is obligated to remediate the contamination, the Trial Court further found that Defendants are not liable to Plaintiff for the $153,000 in damages which were otherwise recoverable against the persons actually causing the contamination. The Trial Court based this decision on its finding that "[t]here is no evidence that Aramark caused the contamination. Aramark assumed the liabilities of Servisco when it purchased Servisco and became owner of the source property, but there is no evidence that Servisco caused the contamination. There is no evidence that Servisco used the type of chemicals that contaminated the groundwater in its business operations. There is no evidence that any of the other named Defendants caused the contamination." (R. Vol. 5, p. 804; P.App. 9) (P.App. 2; S.C.R. 2)

While Respondent contends that it was not required to prove that Servisco caused the contamination, it appealed the finding of "no evidence" on the basis that the Trial Court overlooked substantial evidence of Servisco's storage and/or use of the chemicals now contaminating the groundwater. Notwithstanding **unrebutted** factual recitations presented to the First District which demonstrated that Servisco caused the contamination, the court declined to reverse on this issue without comment. (A.I.B. pp. 6-9, 32-39; A.A.B., pp. 9, 30; A.R.B. p. 3; P.App. 2; S.C.R. 2) (R.App. 65-67, 74-81; 83)

VI. ARGUMENT

A. THE WRIT OF CERTIORARI MUST BE QUASHED FOR LACK OF JURISDICTION

1. THE DECISION OF THE FIRST DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE SECOND DISTRICT IN EITHER MOSTOUFI *OR* MORGAN

Petitioner seeks to invoke this Court's discretionary jurisdiction to review by certiorari the instant decision of the First District which Petitioner alleges is in direct and express conflict with the Second District's decision in *Mostoufi v. Presto Food Stores*, Inc., 618 So.2d 1372 (Fla.2d DCA 1993) on the same point of law. Petitioner further alleges conflict with the decision of the Second District in the case of *Morgan v. W.R. Grace & Co.*, 779 So.2d 503 (Fla. 2d DCA 2000), to the extent it can be interpreted to uphold *Mostoufi*.

As such, this appeal is constitutionally limited to the issue of whether the alleged conflict actually exists and, if it does, whether the appropriate remedy is for this Court to either (a) approve one of the decisions and disapprove the other as to the conflicting question of law; or (b) harmonize any such conflict. Within this narrow context, and not for the broader purpose of providing a successive appeal on the individual merits of the *Easton* case, this Court may review the correctness of the First District decision in *Easton*.

Alternatively, if this Court does not find the conflict initially alleged by Petitioner, the appropriate remedy is for the Court to quash the writ. For example, in the case of *Fla. Power & Light Co. v. Bell*, 113 So.2d 697 (Fla. 1959), the Court quashed the writ after noting that:

> The constitutional objectives can be achieved and the creation of the

> district courts justified only if we recognize that the primary function of this Court, particularly in the area of "conflicts" here involved, is to stabilize the law by a review of decisions which form patently irreconcilable precedents. The petitioners have not, for the reasons above set forth, shown that the decision in this case has that effect.

Id. at 699. The Court similarly quashed a writ of certiorari in *Seaboard Air Line Railroad Co. v. Branham*, 104 So.2d 356 (Fla. 1958) after determining that:

> …an actual examination of the decision of the District Court of Appeal to which the petition for certiorari is addressed and the earlier decision of this Court with which it is supposed to be in direct conflict fails to disclose the direct conflict suggested by the petitioners. To grant a review of the decision of the District Court of Appeal under these circumstances would amount, in effect, to allowing the petitioners two separate successive appeals at two separate and distinct appellate levels; and this the constitution does not authorize.

Id. at 358.

Application of these guiding principles to the instant appeal compels the discharge of the writ. Petitioner's Initial Brief fails to include ***any*** discussion of the alleged conflict between *Easton* and *Mostoufi*, including any analysis of how *Mostoufi* applies to the *Easton* case and/or why the decision would have been different if this Court were to apply the question of law as decided in *Mostoufi* instead of *Easton*. In fact, Petitioner's Initial Brief mentions *Mostoufi* just once, and then only briefly in the context of a one sentence argument that is irrelevant to the issue of whether the two decisions are in conflict. (P.I.B., p. 11.)

Petitioner failed to offer this analysis because a review of the case law and relevant legislative history would conclusively show that the cases are readily

distinguished and/or harmonized on the question of law allegedly in conflict so that the writ must be quashed or, alternatively, the decision of the First District approved. Although Petitioner did not present a conflict argument for Respondent to "answer" in this brief, Respondent nevertheless presents herein an analysis of the conflict issue to demonstrate why the writ must be quashed and/or the decision of the First District approved.

2. PUBLIC POLICY COMPELS APPROVAL OF THE EASTON DECISION

Petitioner asks this Court to find not only that §376.313(3) fails to create a private cause of action, but also that no common law claims are available to adjoining property owners against the current owner of the source property unless that owner caused the initial discharge of the pollution continuing to migrate onto and pollute the adjoining property. Such a result may leave the adjoining property owner without a remedy for the property damage resulting from the pollution and shifts the burden of the loss from the owner of the source property to the truly innocent adjoining property owner. In this regard, the current owner of the source property is in a better position to protect itself from the consequences of strict liability through pre-acquisition due diligence, purchase of environmental insurance to cover third party claims, and negotiation of indemnities with the seller of the property. Indeed, as discussed in Section B *infra*, the entire legislative scheme embodied in Chapter 376 contemplates this allocation of risk among these parties.

While Petitioner complains of unfairness because it did not cause the contamination, the facts reveal that Petitioner acquired the real property as part of an

overall acquisition of Servisco, the prior owner of the Source Property, and became Servisco's legal successor. Even though the First District declined to disturb the Trial Court's finding that there was "no evidence" to establish whether Servisco caused the contamination, this does not translate into Petitioner being "innocent" or make its liability unfair. Petitioner is a sophisticated purchaser with $1.5 billion in annual revenues who, prior to the acquisition of some twenty sites from Servisco (of which twelve to fourteen were contaminated), was admittedly well versed in environmental assessment, remediation and liability matters. (R.App. 64-90)

Because of the well established strict liability imposed on purchasers of contaminated sites, an entire industry providing pre-acquisition environmental audits and environmental insurance products to protect against third party damage claims has developed. To further encourage the marketability, cleanup and productive reuse of sites where the threat of actual or perceived contamination complicates sale or redevelopment, especially for the purchaser who will become liable for the contamination, the Legislature enacted the Brownfields Redevelopment Act, §376.77-376.85, Fla. Stat. (1997) For a general discussion of these issues, see Joseph D. Richards; *Environmental Considerations for Corporate Real Estate Transactions,* Florida Environmental and Land Use Law, Chapter 22, §1, pp.22.1-1-22 (Feb. 2001) (R. App. 42)

The *Easton* decision does not therefore represent any expansion of jurisprudence, dangerous or otherwise, that will unfairly surprise or prejudice owners of commercial property as suggested by Petitioner. To the contrary, to follow

Petitioner's argument would emasculate the entire statutory scheme embodied in Chapter 376 and render wholly superfluous not only the Brownfields Redevelopment Act, but also the defenses and immunities protecting certain qualifying owners from strict liability, such as the "innocent purchaser defense," the "third party defense" and the immunities from suit created in the DSCP. *See* discussion in Section B *infra*.

Unhappy with these Legislative requirements, Petitioner asks this Court to effect a wholesale change in the law to allow current owners to escape third party liability completely, as long as they did not actually contaminate the source property and even if they purchased the property with knowledge of the contamination, negotiated resulting price concessions, and then generate significant profit from the operation of the property without, for example, "exercising due care with respect to the pollutants" as required by the third party defense set forth in §376.308(2)(d), Fla. Stat. (2000). Indeed, Petitioner argues that such owners are not liable to the state or to third parties, exonerating them completely without regard to whether they can meet the elements of the statutory defenses. *See* discussion *infra* Section B(5).

It is therefore Petitioner's position, and not Respondent's, that constitutes the dangerous and novel expansion of jurisprudence. If accepted, this will allow purchasers to knowingly acquire contaminated property and, in clear contravention of Chapter 376, to take no action to prevent the continued migration of the pollution onto adjoining properties, cleanup the pollution creating damage to the third party, or be responsible for third party damages. This circumstance would be ripe for abuse and would thwart the public policy of encouraging prompt voluntary cleanups of

contaminated sites.

Proper consideration of the public policy considerations must also include a discussion of the true damages potentially imposed on adjoining landowners from migrating pollution. For example, the contamination at issue in *Easton* is expected to continue to migrate onto the Easton Property for the next few years, to take as many as thirty years to remediate, and to then leave residual contamination in place. During this lengthy cleanup process, Respondent is unable to use the groundwater on its property and, though the Trial Court found that the health risks to the occupants of the buildings were not significant, it also found that the occupants of the buildings on the property would inhale the vapors from the PCE. This differs significantly from situations where contamination is contained on the Source Property or where the pollution can or will be cleaned up in a relatively short period of time without subjecting the adjoining property to land use restrictions, inability to use the groundwater resources, stigma, and/or other economic loss from reduced demand for the property during the cleanup process, from land use restrictions to address residual contamination left in place, or concern over the continued financial resources of the responsible party to fund a lengthy and expensive cleanup.

As discussed in Section B (6) *infra*, a bill amending the DSCP passed during the 2003 Regular Session which grants immunity to sites covered by the DSCP against all third party causes of action for property damages, including common law claims. Passed in response to *Courtney v. Publix Super Markets, Inc.*, 788 So.2d 1045 (Fla. 2d DCA 2001), a case which is discussed extensively in Section B *infra*, the bill

justifies the abrogation of rights in order "to prevent judicial interpretations allowing windfall awards that thwart the public interest provisions of this section." *See infra* Section 2, p.3 (R.App.26); *see also* discussion *infra* at Section B(6) Key to this issue, however, is that the amendment offers what could be construed as a "reasonable alternative" to the damage claims by offering to adjoining landowners inclusion in the DSCP and its "offsetting" remedies of protecting the adjoining landowner from any cleanup liability or liability from third party suits and providing assurance to the adjoining landowner that the property will be cleaned up at no cost to that owner.

It remains to be seen whether this amendment to the DSCP will survive judicial scrutiny given the damage issues discussed above.

[4] While adjoining property owners will themselves be immune from suit, this does not address the interim damages that many of these owners may suffer for loss of use, stigma, reduced market demand, and restrictions on land use, consumption or use of groundwater, etc. For adjoining landowners suffering such economic damages, it is questionable whether they would obtain the "windfall" raised in *Courtney* of having the ability to recover these economic damages even though the property will be remediated under the DSCP. As discussed above, this overlooks the "damage gap" created when the cleanup will be lengthy and/or will not restore the property to its pre-contamination condition and require land use controls, restrictions on use of groundwater, and other

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[4] Even the April 2, 2003 Staff Analysis discussed in Section B(6) *supra* indicates that it is unclear whether the abrogation of all damage claims and the retroactive effect of the statute will survive scrutiny. April 2, 2003 Staff Analysis, pp.7-8 (R.App. 17-18)

limitations on the use of the adjoining property. From a public policy perspective, the April 2, 2003 Staff Analysis also notes the negative impact on encouraging voluntary cleanups:

The bills' changes to third party liability immunity could have an indirect environmental and fiscal impact by reducing the incentive to conduct a voluntary cleanup in order to avoid potential third-party liability. Under current law, the real property owner of a site contaminated with drycleaning solvents, whether eligible for the DSCP or not, is vulnerable to third party damage claims. Consequently, some owners proceed with timely, voluntary cleanup at their expense. For DSCP-eligible sites, this saves state funds since the owner pays for the cleanup rather than waiting for the DSCP to do so. For non-DSCP-eligible sites, this saves state staff resources since the DEP is then working cooperatively with a motivated party rather than working to persuade or coerce an unmotivated party to act. In either eligibility context, the voluntary cleanup results in a cleanup sooner rather than later.

April 2, 2003 Staff Analysis, *infra* at p. 9 (R. App. 19)

The bill also does not address the rights of the aggrieved adjoining landowner if the state funding of the remediation for that site does not occur, or if the party conducting the voluntary remediation under the DSCP fails to complete the remediation. The language in the bill directed to this latter point creates many issues because the immunity is triggered when the voluntary remediation is "initiated" and does not appear to include any rights for the adjoining property owner to participate in the development or approval of the nature, scope , extent or timing of the cleanup

process. [5]

Regardless, none of the case law to date has squarely addressed the issue of how to properly measure damages when the remediation efforts will take many years and leave residual contamination in place that will restrict the land use and the availability of groundwater resources not only during the interim, but perhaps after remediation is deemed complete from a regulatory standpoint. While resolution of these issues are outside the scope of this appeal, Respondent raises them to (a) provide context to the discussion presented herein regarding *Courtney* and the amendment of the DSCP; (b) suggest that this will likely be an evolving area of law triggered by changing approaches to environmental cleanup that no longer requires remediation to "pre-contamination;" conditions and instead contemplates managing the risk of contamination left in place through the use of land use restrictions and other institutional and engineering controls. and (c) encourage consideration of the overall current context of environmental remediation when interpreting or relying upon older case law where such factors were not within the contemplation of the courts.

B. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN EASTON CORRECTLY DETERMINES THAT CHAPTER 376.313, FLORIDA

[5]This is relevant because the assessment and remedial plan development process can take many years before actual cleanup commences. Petitioner asserts that it has acted diligently in complying with the 1989 Consent Order under which the Trial Court found Petitioner is bound, yet plans were not submitted to the state for approval to implement remedial actions to stop or reduce the continued migration of the contaminated groundwater onto the Easton Property until nearly eleven years later (D-8, D-17)

STATUTES CREATES AN INDIVIDUAL CAUSE OF ACTION FOR DAMAGES

1. THE STATUTE AND THE QUESTION OF LAW AT ISSUE

The question of law allegedly in conflict between *Easton* and *Mostoufi* is whether §376.313(3), Fla. Stat. (2000)[6] creates a private cause of action for damages resulting from a discharge or other condition of pollution covered by Part II of Chapter 376, Florida Statutes, which is known as the Water Quality Assurance Act (hereinafter the "WQAA"). Chapter 83-810, Laws of Florida (codified at §§376.30-376.319, Fla. Stat.).

A review of §376.313(3) in its entirety reveals a comprehensive statute that (a) plainly evidences in the title both an intent to make the remedies in the WQAA cumulative and nonexclusive, see §376.313(1), and the intent to create an individual cause of action; (b) creates an attorney's fee provision for actions commenced under this section; (c) provides special standards of proof for certain actions arising from petroleum storage system discharges and discharges of drycleaning solvents from drycleaning and/or wholesale supply facilities; and (d) creates a right of contribution among parties who are jointly and severally liable as follows:

> **376.313 Nonexclusiveness of remedies and individual cause of action for damages under ss. 376.30-376.319.--**
>
> (1) The remedies in ss. 376.30-376.319 shall be deemed to be cumulative and not exclusive.
>
> (2) Nothing in ss. 376.30-376.319 requires the pursuit of any claim against the Water Quality Assurance Trust Fund or the Inland Protection Trust

[6] This was the law in effect at the time the trial court rendered the Final Judgment.

Fund as a condition precedent to any other remedy.

(3) Notwithstanding any other provision of law, nothing contained in ss. 376.30-376.319 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. 376.30-376.319. Nothing in this chapter shall prohibit or diminish a party's right to contribution from other parties jointly or severally liable for a prohibited discharge of pollutants or hazardous substances or other pollution conditions. Except as otherwise provided in subsection (4) or subsection (5), in any such suit, it is not necessary for such person to plead or prove negligence in any form or manner. Such person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred. The only defenses to such cause of action shall be those specified in s.376.308.

(4) In any civil action brought after July 1, 1986, against the owner or operator of a petroleum storage system for damages arising from a petroleum storage system discharge, the provisions of subsection (3) shall not apply if it can be proven that, at the time of the discharge:

[(a)-(c) which set forth performance standards, etc. for petroleum storage systems are omitted]

Any person bringing such an action must prove negligence to recover damages under this subsection. For the purposes of this subsection, noncompliance with this act, or any of the rules promulgated pursuant hereto, as the same may hereafter be amended, shall be prima facie evidence of negligence.

(5)(a) In any civil action against the owner or operator of a drycleaning facility or a wholesale supply facility, or the owner of the real property on which such facility is located, if such facility is not eligible under s. 376.3078(3), for damages arising from the discharge of drycleaning solvents from a drycleaning facility or wholesale supply facility, the provisions of subsection (3) shall not apply if it can be proven that, at the time of the discharge the alleged damages resulted solely from a discharge from a drycleaning facility or wholesale supply facility that was in compliance with department rules regulating drycleaning facilities or wholesale supply facilities.

(b) Any person bringing such an action must prove negligence in order to recover damages under this subsection. For the purposes of this subsection, noncompliance with s. 376.303 or s.376.3078, or any of the rules promulgated pursuant thereto, or any applicable state or federal law or regulation, as the same may hereafter be amended, shall be prima facie

evidence of negligence.

(6) The court, in issuing any final judgment in any 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.

§376.313, Fla. Stat.(2000)

Petitioner argues that this subsection does not create a private cause of action ***period***, not just in the context of a damage claim by an adjoining property owner against a current owner who did not cause the contamination. In contrast, Respondent asserts that this section not only creates a cause of action, but specifically creates a cause of action for Respondent's claim as found by the First District in *Easton*. The creation of the individual cause of action in §376.313(3) is demonstrated by (a) the clear language of the statute and its title, especially when viewed in the context of the entire statutory scheme embodied in the WQAA, including the related defenses and immunities and the various legislative amendments; (b) the post-*Mostoufi* decisions decided by the district appellate courts, including the Second District; and (c) the body of legal commentary on this question of law. Moreover, the precedential value of *Mostoufi* must be determined in light of the later decisions and related legislative amendments, an analysis Petitioner failed to offer in either Petitioner's Brief on Jurisdiction or in Petitioner's Initial Brief.

2. THE WEIGHT OF AUTHORITY NOT ONLY SUPPORTS THE EASTON DECISION, BUT LIMITS THE HOLDING IN MOSTOUFI TO CLAIMS BARRED BY CAVEAT EMPTOR

Read conservatively, the *Mostoufi* decision holds that claims between the current owner and the prior owner do not come within the purview of the statute

because these claims are barred by *caveat emptor* and the statute does not reflect sufficient intent to abrogate this well established common law doctrine. Faced with a current owner suing a prior owner for diminution damages barred by *caveat emptor*, the Second District in *Mostoufi* expressly limited the context in which the decision arose:

> Absent such a statutory provision for damages from a newly created cause of action, appellant cannot recover for any damages to the property that occurred before he purchased the property. The doctrine of *caveat emptor* protects a seller of commercial real property from any liability to the purchaser of that property for any condition of that property that preexists the sale.

Id. at 1377. Finding a lack of legislative intent to abrogate the common law doctrine of *caveat emptor*, the Second District accordingly concluded that §376.313(3) did not create a cause of action for the current owner to recover diminution damages from the prior owner.

The subsequent case law among the district courts of appeal interpreting *Mostoufi* focuses on whether a cause of action ***not barred by caveat emptor*** is created by §376.313(3), an issue not relevant in the *Easton* decision. *See, Courtney v. Publix Super Markets, Inc.*, 788 So.2d 1045 (Fla. 2d DCA 2001)[Court rejected current landowner's expansive interpretation of *Mostoufi*, noting that the plaintiff in *Mostoufi* "was a successor landowner suing his predecessor in title under section 376.313(3) for strict liability for damages resulting from petroleum contamination of

the plaintiff's real property," *Id*. at 1050.]; *Kaplan v. Peterson*, 674 So.2d 201 (Fla. 5th DCA 1996)[Court stated "[i]n *Mostoufi*, as in this case, the plaintiff essentially argued section 376.313 (1989) created a cause of action which is not barred by *caveat emptor*…It [the Second District] also said that chapter does not create a new cause of action for polluters of land and ground water, ***if the party so damaged is a current land owner and the polluter was a prior owner."*** (emphasis added) *Id.* at 203.]

[7]

Also indicative of *Mostoufi*'s limited holding is the fact that the Second District did not certify a conflict with the First District's prior decision in *Cunningham v. Anchor Hocking Corporation,* 558 So. 2d 93 (Fla. 1st DCA 1990) where the court confirmed the creation of a private cause of action under §376.313(3) in the context of personal injury damages allegedly related to a discharge of pollutants. Similar to the *Easton* decision, the question of whether the claim was barred by the doctrine of *caveat emptor* was not at issue. The *Mostoufi* court does not even cite to *Cunningham*, further indicating the Second District's narrow focus on the *caveat*

[7] While not a Florida district court decision, the court in *Italiano v. Jones Chemicals, Inc.*, 908 F. Supp. (M.D. Fla. 1995), found that a cause of action was created by both §376.205, Fla. Stat. (2000) and §376.313, Fla. Stat. (2000), and interpreted *Mostoufi* as preventing a claim under the statute for diminution damages only. *Id.* at 906. When applied to suits between a current owner and a prior owner, this holding would honor the bar created by *caveat emptor*, but avoid the result of leaving the current owner strictly liable and without a remedy against the polluter. It is unclear from the opinion whether *Italiano* involved a case between successive or adjoining landowners, but the opinion contains no analysis of the *caveat emptor* issue. The opinion further cites only to §376.205, not §376.313, for the conclusion that the damages must be connected with the cleanup in order to recover under "Chapter 376". *Id.* at 906.

emptor bar.

Accordingly, the First District correctly distinguished *Mostoufi* from *Easton* upon this same basis:

> "*Mostoufi* is not applicable because Appellant is an adjoining landowner rather than a successor in interest. To the extent that *Mostoufi* may be read to hold that section 376.313 does not create a statutory cause of action for these circumstances, we decline to follow it."

P.App., pp. 3-4; S.C.R., pp. 3-4.

Finally, although not referenced in Petitioner's Initial Brief, Petitioner's Jurisdictional Brief cites to *Morgan* as a conflicting decision. A review of this decision shows that it fails to provide a basis for conflict jurisdiction. *Morgan* involved the dismissal with prejudice of a complaint involving numerous sparsely plead and poorly articulated claims against what appears to be a predecessor in title. While the court cited the holding in *Mostoufi* and noted the conflicting decision in *Kaplan*, the court found that, even if a statutory cause of action existed, the pleadings were so sparse that they could not state a claim. The Second District therefore reversed the dismissal to allow the plaintiff another opportunity to plead the statutory claim with more specificity. *Morgan*, 779 So.2d at 507.

Other courts have implicitly acknowledged the private cause of action created by §376.313(3) or have granted relief pursuant to its terms. In *Boardman Petroleum, Inc. v. Tropic Tint of Jupiter, Inc.*, 668 So.2d 308 (4th DCA 1996) an adjoining landowner successfully sued a gasoline station for contamination due to leaking underground petroleum storage tanks and prevailed at trial on both a statutory claim under Section 376.313(3) and

a theory of common law negligence. Finding that the lawsuit expedited the cleanup of the contamination and may have prevented the further spread of the pollution, the Fourth District sustained the trial court's award of attorney's fees under Section 376.313(5), (Florida Stat. 1993). *Boardman Petroleum at 309-310.* While not directly called upon to interpret or apply Section 376.313(3), the Third District in *Jones v. Sun Bank/Miami, N.A.*, 609 So.2d 98 (3rd DCA 1992) implicitly acknowledged the private cause of action when it referred to the statute as creating "a private right of action for environmental contamination and a strict liability standard of proof for a Plaintiff bringing suit thereunder…" and referred to "…the civil remedy created under Ch. 376…" *Id. at 101*

Also noteworthy is the Second District's reference in *Courtney* to two Florida Bar Journal articles as providing "a general overview on the WQAA and causes of action available to adjoining landowners for dry-cleaning contamination" *Courtney*, 788 So.2d. at 1046, n.1. The first article presents an analysis of the very question as to whether §376.313 creates a private of cause action and concludes that "…an objective review of the statute coupled with its legislative history induces one to reasonably conclude that a private cause of action for strict liability is created." Gary K. Hunter, Jr., *Statutory Strict Liability for Environmental Contamination: A Private Cause of Action to Remedy Pollution or Mere Legislative Jargon?*, 72 Fla. B.J. 50, 52-53 (Jan. 1998) (R.App.1-4) While not directly discussing the scope and extent of §376.313(3), the author of the second article cited assumes the creation of a private cause of action and discusses, in the context of the DSCP, the implication of the Legislature's decision to provide immunity from suits to compel cleanup or recover costs and to amend §376.313(5) to reduce the operator's standard of care

from strict liability to negligence. Michael R. Goldstein, *Environmental and Land Use Law: Riding the Solvents Sea of Dry Cleaners: How the Environment, the Economy and the Citizens of Florida Have Been Disserved by House Bill 2817*, 69 Fla.B.J. 50, 56 (May, 1995)(R.App. 5,7) *See, also,* Joseph D. Richards; *Environmental Considerations for Corporate Real Estate Transactions,* Florida Environmental and Land Use Law, Chapter 22, §1, pp.22.1-1-22 (Feb. 2001) (R. App. 42)

3. THE WQAA CREATES OTHERWISE SUPERFLUOUS IMMUNITIES AND DEFENSES FOR ELIGIBLE CURRENT OWNERS IF SUCH OWNERS ARE NOT LIABLE UNDER §376.313(3), REGARDLESS OF FAULT

Petitioner correctly asserts the doctrine that related statutes should be read *in pari materia* and construed to avoid absurd results. (P.I.D., p. 9) Application of this doctrine to the instant appeal, however, conclusively demonstrates the correctness of the First District's decision in *Easton.* In fact, a reading of the same two statutes relied upon by Petitioner to show that the *Easton* decision violates this doctrine actually shows that the decision supports it.

Specifically, Petitioner argues that §376.313(3), must be read *in pari materia* with §376.308(1). On this point, Respondent agrees. For all discharges and polluting conditions covered by the WQAA, §376.308 makes the parties identified in §376.308(1) liable to the Department of Environmental Protection[8], and establishes certain defenses to such liability.

[8] (1) In any suit instituted by the department under ss. 376.30-376.319, it is not necessary to plead or prove negligence in any form or matter. The department need only plead and prove that the prohibited discharge or other polluting condition has occurred. The following persons shall be liable to the department for any discharges or polluting condition: (a) Any person who caused a discharge or other polluting condition or who owned or operated the facility, or the stationary tanks or the nonresidential location which constituted the facility, at the time the discharge

§376.308, Fla. Stat. (2000). Section 376.313(3) adopts by reference the defenses found in §376.308, and by implication identifies the universe of parties potentially liable under the individual cause of action created by §376.313(3). *See*, §376.308(2), Fla. Stat. (2000)(Subsection (2) reads, in pertinent part, "[i]n addition to the defense described in paragraph (1)(c), **the only other defenses of *a person specified in subsection (1) are***….")(emphasis added).

In a grossly misleading manner, Petitioner selectively excerpts only §376.308(1)(a), ignoring completely §376.308(1)(b) and §376.308(1)(c), and then relies upon this one subsection to wrongly claim that "the FDEP could enforce the statute against petitioners only if they either caused the discharge, or owned or operated the facility at the time the discharge occurred, facts not present in this case…It would make no sense to allow Respondent to prove a prima facie case under the same facts, and thereby give Respondent greater rights than the FDEP[9], as the decision of the First District Court will do if left undisturbed." (P.I.B., p. 10)

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occurred. (b) In the case of a discharge of hazardous substances, all persons specified in s. 403.727(4). (c) In the case of a discharge of petroleum, petroleum products, or drycleaning solvents, the owner of the facility, the drycleaning facility, or the wholesale supply facility, unless the owner can establish that he or she acquired title to property contaminated by the activities of a previous owner or operator or other third party, that he or she did not cause or contribute to the discharge, and that he or she did not know of the polluting condition at the time the owner acquired title…[remainder of "innocent purchaser defense" omitted.]

[9] Petitioner's argument also assumes that the listed parties are only liable to the Department, notwithstanding the incorporation of this section into §376.313(3). Regardless, Petitioner's point, which is wrong, is that it would be unfair to impose civil liability on third parties that §376.308 does not make liable to the Department. Had Petitioner simply read the next two subsections, it would have confirmed that both subsections impose liability on the current owner.

True, §376.308(1)(a), Fla. Stat. (2000) imposes liability on the owner or operator of a facility at the time of the prohibited discharge as well as the person causing the prohibited discharge or polluting condition, unless they can establish one of the defenses set forth in §376.308(2). Contrary to Petitioner's argument, however, this is not the exclusive list of liable parties. The next two subsections impose strict liability on the current owner for a discharge of hazardous substances[10], *see* §376.308(1)(b), Fla. Stat. (2000), and for petroleum storage system and/or drycleaning solvent discharges, unless the owner can establish the elements of what is commonly known as the innocent purchaser defense, *see* §376.308(1)(c), Fla. Stat. (2000).[11] If Petitioner is correct that the law does not otherwise impose strict liability in the first instance on the current owner, the innocent purchaser defense is totally superfluous. Moreover, given that the defense is only applicable to petroleum and drycleaning solvent discharges, the enactment of the defense by implication confirms the strict liability of the successive property owner for other discharges, such as the discharge at issue in *Easton.*

Once a prima facie case is established under one or more of these subsections, the burden then shifts to the defendant to establish the existence of the enumerated defenses. *See*,

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[10] PCE is a hazardous substance. §376.301(20), Fla. Stat. (2000) and §403.703(29), Fla. Stat. (2000)("hazardous substances" are defined to mean … "those substances defined as hazardous substances in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, as amended by the Superfund Amendments and Reauthorization Act of 1986." ("CERCLA") CERCLA defines PCE as a hazardous substance. 40 *CFR* §302.4

[11] *See, also, James J. Wooten vs. Florida DEP*; Case No. 97-0662; Final Order 11/05/97 (strict liability of owner of property); *Orchard View Development Ltd. vs. DEP*; Case No.97-5894; Final Order entered 9/08/1988) (strict liability of property owner where owner failed to satisfy element of third party defense to take precautions against the foreseeable acts of third parties).

e.g., §376.308(2), Fla. Stat. (2000). In this regard, the distinction between the "innocent purchaser defense" and the "third party defense" is instructive. The innocent purchaser defense protects the purchasers of previously contaminated petroleum and drycleaning sites from strict liability if the purchaser can meet the elements of the defense. §376.308(1)(c), Fla. Stat. (2000). Since the innocent purchaser defense is limited to petroleum and drycleaning sites, purchasers of other previously contaminated sites are liable under the WQAA unless they can establish one of the other defenses referenced in §376.313 and §376.308, of which the "third party defense" is the most common defense asserted. §376.308(2)(d), Fla.Stat. (2000)

In contrast, the third party defense is available to all liable parties and requires the owner to show that the contamination is solely the result of the actions of an unrelated third party and that the defendant (a) exercised due care with respect to the contamination; and (b) took reasonable precautions against both the foreseeable acts of the third party and the foreseeable consequences of the act or omissions of the third party. §376.308(2)(d), Fla. Stat. (2000). In the absence of strict liability imposed upon the owner of contaminated property, this defense would be unnecessary.

Creation of the defense further evidences the legal duty imposed on a current owner to take at least some action to keep the contamination from creating personal injury or property damage to third parties. Additionally, by allowing lack of causation only as a conditional defense, the cause of action created in §376.313(3) does not require causation as an element of a prima facie case.

With respect to this latter point, Petitioner's argument is strained to the breaking point

when Petitioner suggests that the third party defense is not intended to apply to claims against purchasers of contaminated properties, against whom Petitioner argues no common law claim exists. Instead, Petitioner argues that the defense applies to common law claims against a narrow group of defendants such as general partners of polluters and persons liable for the acts of polluting employees under the doctrine of respondeat superior. (P.I.B., p. 8) This interpretation not only ignores the entire statutory scheme upon which this defense is based, but it also ignores the language of the defense itself which applies only where the discharge was caused solely by a third party "other than an employee or agent of the defendant or other than one whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the defendant." §376.308(2)(d), Fla.Stat. (2000).

Within the context of a statutory scheme imposing strict liability on current owners, the Legislature not only created the innocent purchaser and third party defenses discussed above, but also created limited immunities for petroleum and drycleaning sites included in the state funded cleanup programs, and special defenses for sites included in the Brownfields program. *See, e.g.*, §376.3078(3), Fla. Stat. (2000), §376.3078(11), Fla. Stat. (2000), §376.308 (1) (c), Fla. Stat. (2000), §376.308(5), Fla. Stat. (2000), §376.313 (5), Fla. Stat. (2000), §376.313(6), Fla. Stat. (2000) and §376.7082, Fla. Stat. (2000) In each instance, the immunity is expressly limited to actions initiated by FDEP *or to actions initiated by third parties seeking to either compel cleanup or recover response costs*[12]. The immunities in

[12] *For example, §376.308(5) provides, in relevant part, that "…[i]n accordance with the eligibility provisions of this section, no real property owner or no person who owns or operates, or who otherwise could be liable as a result of the operation of, a drycleaning facility or a wholesale supply facility shall be subject to administrative or judicial action brought by or on behalf of any state or local government or agency thereof or by or on behalf of any person* ***to compel rehabilitation or pay for the costs of***

§376.308(5) expressly exempt from their protection third party actions for all other damages.[13] Because the current owner would otherwise be strictly liable, this subsection also lists the current owner as one of the parties protected by the immunity from suit to recover cleanup costs, which by implication preserves not only the cause of action in §376.313(3) to sue the current owner for diminution damages, but also any common law claims.

A reading of §376.205, Fla. Stat. (2000) *in pari materia* with §376.313(3) also demonstrates the correctness of the First District's decision in *Easton.* To hold that §376.313(3) fails to create an individual cause of action would require the Court to find that §376.205, Fla. Stat. (2000) does not create a private claim. §376.205 is included in Part I of Chapter 376, commonly known as the Pollutant Discharge Prevention and Control Act, Chapter 70-244, Laws of Florida, which was primarily enacted to address coastline oil spills. §§376.011-376.017 and §§376.19-21, Fla. Stat. (2000). §376.205 was established in 1974 to provide "for an individual right of action under this law." 1974 Fla. Laws ch.336 §§12, 18 at 1050, 1065.

The analysis of this issue was well summarized in the 1998 Florida Bar Journal article cited by the Second District in the *Courtney* case. Noting both the U.S. Supreme Court's implicit recognition of the individual cause of action under §376.205 in the case of *Askew v.*

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rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents. §376.308(5), Fla. Stat. (2000) (emphasis added)

[13] §376.3078(5) provides, in relevant part "**Nothing herein shall preclude any person from bringing civil action for damages or personal injury, not to include the cost of restoration or the compelling of restoration in advance of the state's commitment of restoration funding in accordance with a site's priority ranking pursuant to s. 376.3071(5)(a).**"§376.3078(5), Fla. Stat. (2000)**(**emphasis added**)**

American Waterways Operators, 411 U.S. 325, 327 (1973), and the legislative history showing that this section was intended to create a private cause of action, the author explains:

> "For purposes of this article, it is important to note several of the many similarities between the separately enacted and unrelated parts of Chapter 376. Both provide for strict liability to the state for damages incurred as a result of a discharge prohibited by either act. Each also appears to create an individual cause of action to recover damages associated with violations of the prohibited activities. Section 376.205, within Part I, is entitled "Individual Causes of action for Damages Under ss. 376.011-376.21"; Section 376.313, within Part II, is entitled "Nonexclusiveness of remedies and individual cause of action for damages under ss. 376.30-376.319." This latter similarity is particularly evident when comparing the language of the respective sections. As originally enacted, §376.313 was practically identical to §376.205. If a private cause of action were created in §376.205, then the legislature also intended to provide a similar remedy in §376.313. Courts should harmonize the construction of statutes relating to a common subject or purpose."

Gary K. Hunter, Jr., Statutory Strict Liability for Environmental Contamination: A Private Cause of Action to Remedy Pollution or Mere Legislative Jargon?, 72 Fla. B.J. 50-51 (Jan. 1998)(R.App.1-2)

4. SUBSEQUENT AMENDMENTS TO THE WQAA CONFIRM THE CREATION OF AN INDIVIDUAL CAUSE OF ACTION UNDER §376.313(3)

While the various amendments to the WQAA over the years support the conclusion that a private cause of action is created by §376.313(3),

[14]the 2003 amendments to the DSCP recently passed by the Legislature, which includes a related amendment to §376.313(3), constitutes perhaps the most compelling confirmation of this issue. The bill was introduced in response to the Second District's decision in *Courtney*. Specifically, *Courtney* held that the immunity from suit to compel cleanup or recover cleanup costs provided by the DSCP did not affect the ability of an adjoining landowner to assert common law claims for diminution. Because the plaintiff did not bring an action under §376.313, the court was not called upon to consider how the immunity would affect an action brought under that statute. The court did, however, express concern that the preservation of the diminution claim in the face of the immunity against claims to compel cleanup and/or recover cleanup costs could potentially create a windfall for some plaintiffs.

While it is doubtful such a windfall could occur under the facts of *Courtney*[15], the Legislature recently amended the DSCP to expand the immunity to all damage claims. In so doing, the legislative history reflects that the amendment was created in direct response to the *Courtney* decision. *See* Florida House of Representatives Staff Analysis, HB 741, Liability Under the Drycleaning Solvent Cleanup Program, (April 2, 2003) p. 4 (R.App. 14)(hereinafter "April 2, 2003 Staff Analysis"); *see also* Florida House of Representatives Staff Analysis, HB 741, Liability Under the Drycleaning Solvent Cleanup Program, p. 2 (March 20, 2003)(R.App. 12)(hereinafter "March 20, 2003 Staff Analysis").

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[14] *See, e.g., Statutory Strict Liability for Environmental Contamination: A Private Cause of Action to Remedy Pollution or Mere Legislative Jargon?*, 72 Fla. B.J. at 51 (R.App. 2)

[15] See discussion in Section A(2) *supra*

Easton was decided August 6, 2002, well before the 2003 Regular Session, yet the Legislature took no action to amend §376.313 to either eliminate the individual cause of action the First District held to have been created under that same statute, or to narrow the scope of the statute to preclude suits for diminution and other damages unrelated to the cost of cleanup.

The April 2, 2003 Staff Analysis for HB 741 confirms the individual cause of action created by §376.313(3) in several respects. First, the analysis states that the bill would expand the existing immunity under the DSCP with "the effect of eliminating all causes of actions for property damage, including common law causes of action." April 2, 2003 Staff Analysis at 1 (R.App. 11) The Section Directory in both the April 2, 2003 Staff Analysis and the March 20, 2003 Staff Analysis states that Section 6 of HB 741 "[a]mends subsection 376.313, F.S., to eliminate individual cause of action for property damages resulting from drycleaning solvent contamination from drycleaning facilities or wholesale supply facilities." April 2, 2003 Staff Analysis at 6; March 20, 2003 Staff Analysis at 3 (R.App. 13, 16) Additionally, the March 20, 2003 Staff Analysis of HB 741 states:

"In light of the existing statutory provision creating an individual cause of action for damages caused by drycleaning solvent contamination (see. §376.313, F.S.), the effect of the proposed legislation is a significant change to Florida's current environmental laws." March 20, 2003 Staff Analysis at 3. (R. App. 13)

As passed, the amendment to the DSCP amends §376.313(3) to remove the introductory clause "[n]otwithstanding any other provision of law" and replace it with the language "[e]xcept as provided in s. 376.3078(3) and (11)" to reflect the expanded immunity

provisions under the DSCP. Committee Substitute for Senate Bill 956, First Engrossed, Section 5, p. 16-17 (Fla. 2003 Regular Session) (R.App. 39-40) These expanded immunity provisions specifically create immunity for "…claims of any person, for property damages of any and kind, including, but not limited to, diminished value of real property or improvements, lost or delayed rent, sale or use of real property or improvements, or stigma to real property or improvements caused by drycleaning-solvent contamination…" *Id.* at Section 2, pp. 13-14. (R.App. 36-37)

By addressing the *Courtney* decision, but not the *Easton* decision, and by amending §376.313(3) to eliminate the individual cause of action for drycleaning sites only, the Legislature implicitly, if not expressly, confirmed the creation, and preservation, of an individual cause of action for the precise property damages it excluded under the DSCP.

5. SECTION 376.313(3) IS NOT IN DEROGATION OF THE COMMON LAW

To support the argument that no individual cause of action is created by §376.313(3), Petitioner argues that the statute is in derogation of the common law and further attempts to explain the statute's purpose by arguing that §376.313 is intended to impose a strict liability standard into existing common law causes of action, which, according to Petitioner, do not exist for Respondent's claim.

The concept that §376.313(3) is intended to impose a strict liability standard into existing causes of action arose in *Mostoufi* where the Second District stated, in clear dicta, that "[w]hile we are not required by this appeal to reach the issue, there is some indication of an intent by the legislature, in enunciating standards of proof in section 376.313(3) and (4), to impose in some existing causes of action a new standard of care of strict liability for

pollution damages that are found to have occurred." *Mostoufi*, 618 So.2d at 1377. No analysis was offered by the court to explain the basis for this statement, which was indirectly used to support the court's conclusion that the plaintiff had no remedy, even under an alternative interpretation of §376.313, because the doctrine of *caveat emptor* precluded any common law damage claim by a purchaser against the prior owner. Subsequent to *Mostoufi*, no court has yet to interpret §376.313 in this manner.

Assuming Petitioner were correct on this issue, Petitioner claims that no such common law claims exist for Respondent to apply the new standard care, thereby asking this Court to find that all similarly situated plaintiffs are without a remedy against such current owners. In this regard, Petitioner states that it has not been able to locate any court decisions where plaintiff sued a defendant for contamination not caused by the defendant. P.I.B., p.13. Stated differently, no court has determined that adjoining landowners do not have common law claims against the current owner of property where contaminated groundwater is continuing to migrate and pollute the plaintiff's land, regardless of whether the current owner caused the initial contamination to occur. This stands in stark contrast to *Mostoufi*, which involved a long standing common law **bar** against common law claims for damages. No such bar exists in the instant case, so that no finding of an intention by the Legislature to abrogate such a bar is required in order to find that §376.313(3) creates a private cause of action for Respondent's claim.

Moreover, the *Courtney* case acknowledges the availability of the traditional common law claims in an action by an adjoining landowner to recover diminution damages against what appears to be a defendant that did not cause the contamination. Specifically, Publix, the

defendant, was in possession of the source property by virtue of a ninety-nine year lease. A tenant on the property was alleged to have caused the contamination. Similar to the facts in *Easton*, Publix failed to notify the adjoining property owner when it learned of the contamination. Because the property was accepted into the DSCP and would be cleaned up under the program with state funds, Publix was not required to take any voluntary action to remediate the contamination and was immune from suit by adjoining property owners to compel cleanup or recover cleanup costs.

Notwithstanding the immunity provided by §376.3078(3), Fla. Stat. (2000), the Second District noted that:

"…this state recognized common law causes of action for a landowner whose land was damaged by pollution from an adjoining landowner. [citations omitted] The plain language of the statutes simply does not justify the emasculation of common law causes of action against adjoining landowners for diminution in property value."

Id. at 1048.

In referencing the existing common law claims available to adjoining landowners, the Second District made no distinction between suits against the active polluter and, as was present in the *Courtney* case, suits against the party in control of the site while contaminated groundwater is continuing to migrate and pollute the adjoining property.

Petitioner's argument that the common law claims require some "act" by the defendant overlooks the "failure to act" as sufficient to establish this element. In the case of migrating contamination, and as discussed throughout this brief, the WQAA imposes a duty on the current landowner to abate the pollution. The third party defense in §376.308(2), Fla. Stat.

(2000), confirms this duty by making the defense available only if that owner has exercised "due care" with respect to the pollution.

[16] In fact, the Consent Order obligating Petitioner to remediate the contamination at issue alleges violations of various statutes, including *inter alia* §403.087, Fla. Stat. (making it a violation to maintain a stationary installation that constitutes a source of pollution), §403.161(1)(a), Fla. Stat. (prohibiting pollution that is harmful to human, animal, aquatic, or plant life, or property); and §403.161(1)(b), Fla. Stat. (making it unlawful to violate any rule or regulation of the FDEP). (App. 69-73; P-29-33) In this context, it is the failure to abate what is arguably a continuing "discharge" that constitutes the requisite "act" under a trespass theory.[17] Similarly, in a negligence claim, this duty alone would be sufficient to state a claim. Petitioner did not discuss this duty, instead arguing that there is no common law action arising from a duty to prevent the misconduct of others or the duty to warn of conditions caused by others. (P.I.B., p.12) With respect to the duty to warn, which remains a relevant common law claim given the trial court's finding that Petitioner failed to disclose the contamination, Petitioner cites to *Futura Realty v. Lone Star Building Centers, Inc.*, 578

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[16] Even under Petitioner's interpretation of §376.313, this defense would be applicable to Respondent's common law claims. In *Easton*, the First District has remanded the case to the trial court to determine whether this defense is available to Petitioner, which will necessarily involve a determination as to whether the ten year gap between execution of the consent order and Petitioner's submittal of a plan to the Florida Department of Environmental Protection to stop the continued migration of the plume constitutes "due care" under the circumstances.

[17] If Petitioner is correct that §376.313(3) is intended in suits to recover pollution damages to impose a new strict liability standard of care into the common law trespass claim, it would seem that this element of the claim has been replaced by the elements of proof set forth in the statute which clearly dispense with proof of "causation."

So.2d 363 (Fla. 3d DCA 1991) and concludes "…if the law recognizes no such duty between a buyer and seller it is doubtful that the law would recognize such a cause of action between parties not in privity." (P.I.B., p.12, n.6)

This is a blatant misreading of *Futura*, which involved the role of *caveat emptor* in a case brought by the purchaser of contaminated property against the prior owner for failure to disclose the contamination. Exactly opposite of Petitioner's reading, the court rejected the argument that there was no distinction between the rights of a successor in title and the rights of an adjoining property owner and found:

> In the case at hand, Futura was simply not bringing a claim as an injured adjoining landowner. The commercial property vendor owes no duty for damage to the land to its vendee because the vendee can protect itself in a number of ways, including careful inspection and price negotiation. This is the vital and practical distinction between the duty owed a neighbor and the duty owned a successor in title which *T&E Industries* failed to identify.

Id. at 365.

Finally, Petitioner's reliance on the theory that an upper landowner has a servitude on a lower landowner is misplaced. Respondent can find, and Petitioner has not cited to any case law to suggest that this theory contemplates the polluting of the waters by the upper land when they come in contact with a source of pollution located on that property. Indeed, this result would violate the WQAA.

VII. CONCLUSION

For the reasons demonstrated herein, the decisions of *Easton* and *Mostoufi* are not in express and direct conflict so that this Court lacks jurisdiction to consider this appeal on the merits. Respondent accordingly requests this Court to quash the writ. Alternatively, Respondent asks this Court to approve the decision of *Easton*, and harmonize *Mostoufi* by limiting it to suits for diminution damages between successive owners that are barred by *caveat emptor*.

Respectfully Submitted,

By:_____

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VIII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Hand Delivery to Vincent J. Profaci, P.A., 932 Centre Circle, Suite 1000, Alamonte Springs, Florida 32714, this 20th day of June, 2003.

_____
Attorney

IX. CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY compliance with the font requirements of Rule 9.210(a), as amended effective January 1, 2001. Appellant's Reply Brief has been computer generated using Times New Roman 14-point font.

_____
Attorney