

	IN THE SUPREME COURT OF FLORIDA
ARAMARK UNIFORM AND CAREER APPAREL, INC., et al., Petitioners, vs. SAMUEL M. EASTON, JR., Respondent. _____ /	Case No. SC02-2190 On Appeal from the District Court of Appeal for the First District of Florida, Case No. 1D01-2952

PETITIONERS' REPLY BRIEF AND APPENDIX

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COUNTER-STATEMENT OF THE CASE AND OF THE FACTS

In his Answer Brief, Respondent has submitted a “Supplemental Statement of the Case and Facts” setting forth Respondent’s version of the evidence at trial. Respondent’s Answer Brief (hereinafter abbreviated as “RAB”) at 5. Although the alleged facts as presented do not appear to be relevant to the issues on this appeal, in order to present this court with a complete understanding of the trial proceedings should this Court consider them relevant, Petitioners have attached as Appendix pp. 1 through 14 of this Reply Brief their statement of facts set forth in their Answer Brief before the District Court in this action.

ARGUMENT

POINT ONE

RESPONDENT HAS PROVIDED NO GROUNDS TO QUASH THE WRIT OF CERTIORARI

Respondent first appears to argue that because Petitioner did not reargue in its Initial Brief the basis of this Court’s jurisdiction over this appeal, the writ of certiorari must be quashed. RAB 12. The basis of this Court’s jurisdiction was extensively argued in Petitioner’s Brief on Jurisdiction and in Respondent’s Brief on Jurisdiction, and the Court after reviewing those submissions exercised jurisdiction. Petitioner is unaware of any requirement that the basis of jurisdiction be reargued in its Initial Brief. Perhaps Respondent is utilizing this argument in order to present cases it did not present in its jurisdiction brief. Nevertheless, the new authorities cited by Respondent do nothing to call into question the jurisdiction of this Court.

Respondent first cites Florida Power & Light Co. v. Bell, 113 So. 2d 697 (Fla. 1959). In that case the petitioner sought review of the district court's holding that the evidence presented at trial was sufficient to submit the case to the jury. Id. at 697. This Court dismissed the appeal, applying the rule that where the asserted conflict depends directly on the quantum and character of proof, a jurisdictional conflict will arise only if the case at bar is "on all fours" factually with the allegedly conflicting case. Id. at 698-699. In this appeal, Petitioners do not argue that the trial court's findings of fact were incorrect. This appeal concerns the legal conclusion of the District Court that Respondents proved a prima facie cause of action pursuant to Section 376.313(3), Florida Statutes, under the facts as determined by the trial court. Accordingly, the doctrine stated in Bell is simply inapplicable.

Respondent also cites Seaboard Air Line Railroad Company v. Branham, 104 So. 2d 356 (Fla. 1958), in support of its request that the Court dismiss its writ. In Branham, the Court discharged the writ of certiorari on the grounds that the petitioner had failed to allege or show an actual conflict with a proper decision of the Court. The decision did not discuss the manner in which the case allegedly conflicted with the prior precedent, so is of no assistance to Respondent's argument here. Nevertheless, in the instant case Petitioners have both alleged and shown a conflict.

As noted in Petitioners' Brief on Jurisdiction, the conflict between the District Court's decision in this case and the decision in Mostoufi v. Presto Food

Stores, Inc., 618 So. 2d 1372 (Fla. 2d DCA 1993), is clear. Petitioners will not repeat here the arguments made in that brief but, concisely stated, if Mostoufi is correct that Section 376.313(3) does not create a new cause of action but at most modifies existing causes of action by creating a new standard of care, then under the facts of this case the District Court should have affirmed the trial court's decision. Because it did not, and based its reversal on the conclusion that a new cause of action was created, the cases are in clear conflict.

POINT TWO

PUBLIC POLICY COMPELS THE REVERSAL OF THE DISTRICT COURT'S DECISION.

Respondent next asserts various grounds in support of its argument that public policy compels approval of the District Court's decision. None of these arguments bear scrutiny; to the contrary, public policy clearly compels reversal of that decision.

First, Respondent claims that a reversal of the decision "shifts the burden of the loss from the owner of the source property to the truly innocent adjoining landowner." RAB 13. That argument is without basis, as there is no common law burden to begin with on an innocent owner of source property, as discussed at length in Petitioners' Initial Brief (hereinafter abbreviated as "PIB") at pp. 11-14.

Respondent next argues that Petitioners are somehow liable as the successors in title to Servisco, the party that allegedly caused the contamination. RAB 14. The District Court affirmed the trial court's holding to the contrary, and Respondent has not appealed that ruling.

Respondent argues that Petitioners' argument would "emasculate the entire statutory scheme embodied in Chapter 376..." RAB 15. On the contrary, Petitioners argument would leave all provisions of Chapter 376 completely intact, including the expanded rights under existing common law doctrines that Section 376.313(3) provides by modifying the standard of care and limiting the defenses available to those actions.

Respondent next argues that Petitioners' argument would "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 price concessions, and then generate significant profit from the operation of the property without, for example, 'exercising due care with respect to the pollutants...'" RAB 15. Respondent appears to be implying that such are the facts of this case. Respondent is well aware, however, that the undisputed testimony at trial showed that Petitioners were unaware of the contamination when they purchased the property, and that the trial record is devoid of any evidence that Petitioners negotiated any price concessions or generated significant profits from the operation of the property.

Nevertheless, Petitioners are unaware of any common law doctrine that would impose liability on such a hypothetical purchaser, regardless of standard of care. It is for the Legislature to establish such liability, and it has not done so.

Respondent asserts that the contamination will take years to clean up, that

Respondent is unable to use the groundwater on its property, and that occupants will inhale PCE vapors. RAB 16. Respondent fails to note that remediation has been delayed by his own intransigent refusal to provide site access to enable Petitioners to clean up his property, that Respondent had no reason or occasion to use the groundwater on his property, and that the District Court did not disturb the trial court's findings that Respondent had suffered no interference with his use and enjoyment of the property and that there were no health risks associated with the contamination. Appendix, pp. 1-14; Appendix to Appellant's Initial Brief, pp. 6-10.

Respondent next argues that the recent amendments to Chapter 376 support its position. As Respondent repeats those arguments in greater detail later in its brief, Petitioners will address those arguments below.

POINT THREE

MOSTOUFI IS NOT LIMITED TO CLAIMS BARRED BY THE DOCTRINE OF CAVEAT EMPTOR

Respondent once again appears to be arguing that the District Court's decision does not conflict with Mostoufi. RAB 24. In support of that argument, Respondent discusses several lower court or federal district court decisions that, Respondent asserts, limit Mostoufi to cases involving successive landowners and the doctrine of *caveat emptor*.

As noted above, the conflict with Mostoufi is clear. Moreover, as none of the cases cited by Respondent are decisions of this Court, they are of no

precedential value to the issues presented on this appeal. Nevertheless, the cited cases either do not support Respondent's position or affirmatively support Petitioners' position.

Respondent first asserts that Courtney Enterprises, Inc. v. Publix Super Markets, Inc., 788 So. 2d 1045 (Fla. 2d DCA 2001), interpreted Mostoufi to apply only to cases involving successive landowners and the doctrine of *caveat emptor*. Respondent fails to comprehend the holding of Courtney. In Courtney, the plaintiff sued the defendant under common law causes of action. The trial court granted summary judgment for the defendant, holding that if a party such as the defendant meets the requirements of Section 376.3078, then such a party should be immune from all suits, including common law causes of action, for to hold otherwise would render the DSCP "toothless." Id. at 1048. The district court reversed, holding simply that the Legislature did not intend to eliminate all common law causes of action.

In asserting that Courtney "rejected the 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 on the plaintiff's real property,'" Respondent implies that the "interpretation" sought by the defendant was that Section 376.313(3) did not create a new cause of action. RAB 25. To the contrary, the district court quoted with approval the language in Mostoufi that held that no new cause of action was created. Id. at 1050. Thus, Courtney in dictum

fully supports Petitioners' position here. Moreover, Courtney's actual holding, that Section 376.313(3) does not bar common law causes of action, has no relevance to the issues presented here, as Petitioners have never alleged that Chapter 376 bars common law actions.

Respondent also cites Kaplan v. Peterson, 674 So. 2d 201 (Fla. 5th DCA 1996), as further support for his argument that Mostoufi is limited to cases involving successive landowners and the doctrine of *caveat emptor*. RAB 25. Kaplan, like Mostoufi, involved a suit under Section 376.313(3) by a current owner against its predecessor in title. As in Mostoufi, the issue on appeal was whether the suit was barred by the doctrine of *caveat emptor*. Id. at 202.

In quoting from the opinion in Kaplan, Respondent omits the two sentences that appear right in the middle of Respondent's quoted language. The full quote is as follows:

In 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. However, in that case, the claim for damages was based solely on the reduction in value of the property caused by a discharge of petroleum products from an underground storage tank. The court said loss of market value of real estate was not encompassed in section 376. It 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.

Id. at 203 (underlined emphasis added). The court did not disapprove Mostoufi, but went on to hold that the statute created a new cause of action *for the recovery of response costs only*, and that the defense of *caveat emptor* was not available in such an action. Id. at 205. Thus, the court did not, as asserted by Respondent,

limit Mostoufi's holding to cases involving the doctrine of *caveat emptor*; to the contrary, it expressly disavowed such a result, and implicitly harmonized Mostoufi as barring only cases seeking damages unrelated to cleaning up the pollution, even in suits that would otherwise have been governed by the doctrine of *caveat emptor* under common law.¹

Another decision cited by Respondent, Cunningham v. Anchor Hocking Corp., 558 So. 2d 93 (Fla. 1st DCA 1990), permitted a suit under Chapter 376.313 for personal injury. RAB 26. Cunningham, decided before Mostoufi, obviously can offer no support to Respondent's efforts to limit Mostoufi's holding for conflict purposes. Moreover, as the suit was against the party that caused the pollution, a suit that would be permitted under common law, the holding of the case would remain valid even if this Court interprets the statute in the manner asserted by Petitioners.

In laboriously trying to interpret Morgan v. W.R. Grace & Co., 779 So. 2d 503 (Fla. 2d DCA 2000), in his favor, RAB 26-27, Respondent fails to note the

¹ Even if Kaplan's interpretation of Mostoufi is correct, Mostoufi is still in conflict with the District Court's decision in this case. Although Petitioners argued at trial and before the District Court that Respondent's action was barred on the alternative ground that his only damages alleged were for diminution in value, the District Court nevertheless held that Respondent had established a prima facie case of liability under Section 376.313(3), a ruling that is contrary to Kaplan's interpretation of Mostoufi as simply barring actions for diminution in value unconnected with cleanup costs.

The District Court's decision therefore is also in conflict with Kaplan, because Respondent's only alleged damages were for diminution of property value. Italiano v. Jones Chemicals, Inc., 908 F. Supp. 904 (M.D. Fla. 1995), also cited by Respondent, reached the same conclusion.

express language in the decision expressly affirming the relevant holding in

Mostoufi:

This court has previously held that section 376.313(3), Florida Statutes (1991) does not create a private cause of action. *See Mostoufi v. Presto Food Stores, Inc.*, 618 So.2d 1372 (Fla. 2d DCA 1993). The trial court followed *Mostoufi* and properly dismissed the count alleging violations of statutory rights.

Id. at 507.

Respondent next presents Boardman Petroleum, Inc. v. Tropic Tint of Jupiter, Inc., 668 So. 2d 308 (Fla. 4th DCA 1996), for the proposition that Section 376.313(3) creates a private cause of action. RAB 27. That case does not discuss Mostoufi and therefore is not relevant for the purposes submitted by Respondent. Moreover, the holding in that case would not be disturbed by Petitioner's argument here, because in that suit the plaintiff sued an adjoining landowner who actually caused the contamination.

Finally, Respondent claims that Jones v. Sun Bank/Miami, N.A., 609 So. 2d 98 (Fla. 3rd DCA 1992), a probate case, holds that Section 376.313 creates a private cause of action. RAB 27-28. The language quoted by Respondent is a quote from the trial court's opinion, which was not expressly adopted by the district court. Moreover, such a holding was clearly dictum, as the district simply affirmed the trial court's ruling that the plaintiff's statement of claim would be stricken as untimely under the probate code. Id. at 103.

POINT FOUR

**THE WQAA DOES NOT CREATE SUPERFLUOUS
IMMUNITIES AND DEFENSES IF SECTION**

**376.313 IS INTERPRETED IN THE MANNER
ASSERTED BY PETITIONERS.**

Respondent asserts that Petitioners, “in a grossly misleading manner,”² selectively excerpted only portions of Section 376.308(1), completely ignoring other parts that the Respondent apparently feels to be of extreme importance. RAB 30. Respondent obviously fails to comprehend the meaning of the term “in relevant part,” with which Petitioners in their Initial Brief prefaced the quoted portions of the statute. Respondent asserts that Petitioners should have included Sections 376.308(1)(b) and (c) in the quote. Those sections are simply not relevant.

Section 376.308(1)(b) limits its application solely to “persons specified in s. 403.727(4).” Section 403.727(4) refers to the following “persons”:

- (a) “The owner and operator of a facility.” The term “facility,” standing alone, is not specifically defined in the statute. However, there is a definition for “hazardous waste facility,” to which the statute must be referring if it is to make any sense. Section 403.703(22) defines “hazardous waste facility” as “any building, site, structure, or equipment at or by which *hazardous waste* is disposed of, stored, or treated.” (Emphasis added). Section 403.703(21) defines “hazardous waste” as limited to “solid waste” or a “combination of solid wastes.”

² It is not undersigned counsel’s practice to engage in such accusatory innuendos; however, as is evident from Petitioners rebuttals in this reply brief, this is surely a case of the teapot calling the kettle black.

No solid wastes are implicated under the facts of this case. Therefore, this subsection is inapplicable.

- (b) “Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substance was disposed of.” Although the incorporation of the term “hazardous substance” in this subsection makes it broad enough to include the type of contaminants implicated in this case, the trial court, by expressly finding that the contamination occurred before Petitioners acquired title to the property, implicitly found that they did not “dispose of” the waste as that term is defined. Section 403.703(19) defines “disposal” as the “discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or *hazardous waste* into or upon any land or water...” (Emphasis added). Ignoring the fact that the statute is poorly drafted and internally inconsistent in that it prohibits the “disposal” of “hazardous substances” but limits the definition of “disposal” to include only hazardous “wastes,” and assuming that the Legislature intended to define disposal of “hazardous substances” as the “discharge, deposit, injection, dumping, spilling, leaking, or placing of any [hazardous substances] into or upon any land or water...”, Petitioners still not “dispose of” any hazardous substances.
- (c) “Any person who ... arranged for disposal or treatment...of

hazardous substances...” Although Petitioners, upon purchase of their property, removed chemicals that had been stored there, no evidence was presented that such removal caused Respondent’s alleged damages.

- (d) “Any person who accepts or has accepted any hazardous substances for transport to disposal or treatment facilities...” This section clearly applies to transporters of hazardous waste, and Petitioners never accepted any hazardous substances for transport.

Thus, the “missing” Section 378.308(1)(b) is simply not applicable.

The other “missing” section, 376.308(1)(c), applies only to discharges of “drycleaning solvents.” Under the narrow definition of that term as set forth in the statute, the substances at issue here are not “drycleaning solvents.”³ Respondent’s assertion of the relevance of the latter section is especially troubling since Respondent himself previously argued that that section was not applicable to Petitioners. Appendix, p. 15 (page missing from the excerpted portions of Respondent’s District Court brief attached as pages 64 through 81 of Respondent’s Appendix).

³ Section 376.301(14) states that the term “drycleaning solvents” only includes those drycleaning solvents originating from use at a drycleaning facility or by a wholesale supply facility. Subsection (13) of the same section states that the term “drycleaning facility” does not include a facility that operates or has at some time in the past operated as a uniform rental company. As the property was operated by Petitioner Aramark as a uniform rental facility, it is not a “drycleaning facility” as so defined. A “wholesale supply facility”, as defined in subsection (17), means a commercial establishment that supplies drycleaning solvents to drycleaning facilities, an activity that Petitioners never engaged in.

In a footnote, Respondent briefly mentions two administrative decisions of the FDEP, which in actuality strongly support Petitioners' arguments. RB 32. In James J. Wooten v. DEP, Case No. 97-0662 (1997 WL 799107), the petitioner was held not liable for the cost to remove a 55 gallon drum containing gasoline and water from his property. The drum was placed on his property by unknown persons at a time when petitioner owned the property. The FDEP held that the Department had met its initial burden of proving that the petitioner was the owner of the property on which the drum was located, but that the petitioner had proved a defense under Section 376.308(2). Id., Paras. 35-40.

In holding that it had proved a prima facie case of liability, the FDEP specifically cited to Sections 376.308(1) and 403.727(4), Florida Statutes. The FDEP noted that that former section imposes liability on “[a]ny person who caused a discharge or other polluting condition or who owned or operated the facility ...at the time the discharge occurred,” and that the latter section imposes liability on “[a]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substance was disposed of.” Id., Paras. 28 and 31. Clearly the petitioner in Wooten met those definitions because the “disposal,” i.e. the placing of the drum, occurred when he owned the property, even though he was not at fault. In the instant case, the disposal occurred before Petitioner Aramark purchased its property, and therefore Petitioners could not be held liable under the standard enunciated by the FDEP.

The other FDEP decision cited by Respondent, Orchard View Development,

Limited v. DEP, Case No. 97-5894 (1998 WL 741657), similarly supports Petitioners. As in Wooten, the FDEP sued petitioner to recover the cost of removing drums containing pollutants from petitioner's property. The drums apparently were dumped on the petitioner's property after he had acquired ownership of the property. The FDEP held petitioner liable, as in Wooten specifically grounding its holding on Section 403.727(4)(b). Id., FN3.

Next, in language taken almost verbatim from Petitioners' Initial Brief (p.8 n.5), Respondent argues that the defenses set forth in Section 376.308(2)(d), by allowing lack of causation only as a conditional defense, indicate that Section 376.313(3) does not require causation as an element of a prima facie case. RAB 33. Respondent dismisses Petitioners' argument that there are some common law causes of action that do not require causation, such as actions against a general partner or employee of the tortfeasor. Respondent asserts that the defense, by defining third persons whose acts a defendant will be held liable for as including "an employee or agent of the defendant" or "one whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the defendant," already anticipates the hypothetical third persons mentioned by Petitioners. Id. at 34. Stated another way, Respondent's argument appears to be that the defense would be superfluous if some causation is required for a prima facie case, since the only possible causes of action not requiring causation are against those persons expressly barred from using the defense. However, in the case of partnership liability, a partner is not the direct "agent" of each other partner,

but of the partnership. See, e.g. Section 620.8301, Florida Statutes (“Each partner is the agent of the partnership for the purpose of its business...”). Moreover, the term “in connection with” would appear to be more appropriately applicable to contractual relationships relating to the pollutants, such as contaminant transport or remediation contracts. In any case, there are other causes of action that do not require causation by the defendant that clearly would not be excluded by the defense. For example, an action based on a contractual assumption of liability or statutory merger would not be excluded by the defense because the third party would not be an “agent” of defendant, and the act or omission of the third party that resulted in the pollution cannot reasonably be said to have occurred “in connection with” the contractual relationship.⁴

Respondent next appears to argue that the immunities created in Chapter 376.308(5), being limited to actions to compel cleanup or recover response costs, and specifically immunizing the ‘real property owner’, indicate that the statute creates a new cause of action not requiring any causation by the property owner for

⁴ This difficulty in determining the statutory intent as to whom may be held liable under Section 376.313(3) calls to mind Judge Griffin’s separate opinion in Kaplan, in which he stated that “[t]he statute is so badly drafted that if it does intend to create a cause of action, it opens up a real can of worms in terms of who can sue, where, and for what. At most, the statute is a *failed attempt* to create a private cause of action.” Kaplan, 674 So. 2d at 206 (footnote omitted; emphasis in the original).

Moreover, assuming for the sake of argument that the statute can be interpreted to create an entirely new private cause of action, the only way to identify potentially liable parties would be to limit the class of Petitioners to those described in Section 376.308(1), none of which, as discussed above and in Petitioners’ Initial Brief, include Petitioners.

recovery of damages for diminution in value. RAB 34-35. Nothing in that statute or in Chapter 376 even remotely suggests that such vague language dispenses with any causation requirement.

Respondent argues that because the Legislature, in enacting Section 376.205, Florida Statutes (a similarly worded statute not applicable here), expressly provided for an individual right of action, Section 376.313(3) must also have been so intended. RAB 35. Respondent neglects to note key differences in the wording of the two statutes. Section 376.205 states, *inter alia*, that “any person *may bring* a cause of action against a *responsible party*...” (emphasis added). “Responsible party” is very specifically defined in Section 376.031(20). In contrast, Section 376.313(3) states, *inter alia*, that “nothing contained in ss. 376.30-376.319 *prohibits* any person from bringing a cause of action...”, and not only fails to reference any “responsible party,” but provides no guidance whatsoever as to whom may be sued. Far from supporting Respondent’s position, the contrast between these two statutes demonstrates that the Legislature knew exactly how to provide for an entirely new private cause of action, but clearly intended not to do so in Section 376.313(3)

POINT FIVE

SUBSEQUENT AMENDMENTS TO THE WQAA SUPPORT PETITIONERS’ POSITION THAT SECTION 376.313(3) DOES NOT CREATE AN ENTIRELY NEW CAUSE OF ACTION

Respondent argues that the recent amendments to Chapter 376 “constitutes perhaps the most compelling confirmation” that a private cause of action is created by

Section 376.313(3). RAB 37. A closer review of those amendments demonstrates that they actually support Petitioners' position, not Respondent's.

Respondent correctly notes that the amendments were enacted in response to the Second District's Courtney decision. Respondent argues that, by addressing Courtney but not the District Court's decision in this case (referred to by Respondent as the "Easton" decision), the Legislature intended for the Easton decision to correctly reflect the law. Such an argument is tenuous at best, as it took the Legislature some two years to respond to the Courtney decision, and there is no reason to expect the Legislature to have responded any more quickly to the Easton decision, which was decided in late 2002. Moreover, the bill was not presented to the Governor until June 30, 2003. Appendix, p. 16. At that time the Easton decision was on appeal and this Court had accepted jurisdiction. It seems logical to conclude that if the Legislature was aware of the Easton decision, it was also aware that it was on appeal and that review by this Court might eliminate the need to further amend the statute.

In passing the bill, the Legislature noted that "[s]trong public interests are served by subsections (3) and (11)." RA 26. Once the amendments are signed by the Governor, those subsections will enable owners of non-source properties, such as Respondent, to be eligible for the state-funded clean up program, and will bar all actions against property owners such as Petitioners who are performing a voluntary cleanup. Those public interests include "improving the marketability and use of, and the ability to borrow funds as to, property contaminated by drycleaning solvents and encouraging the voluntary remediation of contaminated sites." Id. at 26.

Those very same strong public interests, as noted in Petitioners' Initial Brief at p.14, would be furthered by interpreting Section 376.313(3) in the manner asserted by Petitioners. Innocent parties such as Petitioners would be extremely hesitant to voluntarily assess and spend the enormous funds required to remediate their property if the information gained from such assessment could be used as the basis for a private action for damages.

The Legislature further noted that the amendments were "intended to prevent judicial interpretations allowing windfall awards that thwart the public-interest provisions of this section," a clear reference to the Courtney decision. RA 26. Although the Legislature ignores the fact that Courtney was a result of the Legislature's own poor drafting, the Legislature's intent to bar all actions for damages of any nature against a party undertaking a voluntary cleanup is clear. To interpret Section 376.313(3) with this policy in mind compels the conclusion that the Legislature did not intend to create a new cause of action against an innocent property owner.

POINT SIX

TO INTERPRET SECTION 376.313(3) AS IMPOSING LIABILITY ON PETITIONERS IS IN DEROGATION OF THE COMMON LAW.

Respondent next argues that the Courtney decision contradicts Petitioners' assertion that there are no common law causes of action available against Petitioners. RAB 42. According to Respondent, the district court in Courtney imposed just such liability.

The facts of Courtney stand in stark contrast to the facts of this case. In

Courtney, the plaintiff alleged various common law causes of action against defendant Publix, on the grounds that Publix was the lessor of the property and had subleased a portion of the property for use as a drycleaning establishment; that contamination occurred on the ground outside of the drycleaning establishment; and that Publix was aware of the contamination caused by the drycleaning operations, yet failed to warn the plaintiff, an adjoining property owner, resulting in damage to the plaintiff's property. Although the court did not discuss in any detail the common law bases of the action, in reversing summary judgment for the defendant the district court could very well have been applying the well-settled rule that a landlord (or presumably a sublessor) is liable for injuries resulting from conditions existing on property that is under the control of the landlord. See, e.g. Simms v. Kennedy, 74 Fla. 411, 415-6; 76 So. 739, 740 (Fla. 1917)(in suit for injuries caused by awning falling on person walking on sidewalk, lessor may be liable if premises are under its partial or total control). Respondent is still unable to point to any legal authorities that would impose common law liability on Petitioners under the fact of this case.

Finally, Respondent asserts that Petitioners' citation of Futura Realty v. Lone Star Building Centers (Eastern), Inc., 578 So. 2d 363 (Fla. 3d DCA 1991), is a "blatant misreading" of that case, asserting that Futura expressly approved of actions against an adjoining property owner. RAB 44-45. Although Respondent recognizes that Petitioners cited Futura for the proposition that Petitioners had no duty to warn, the portion of the Futura opinion that Respondent quotes has nothing to do with an alleged duty to warn, but relates solely to the plaintiff's claim for strict liability under

the ultrahazardous activity doctrine. Futura, 578 So. 2d at 365. Petitioners have never alleged that Respondent was barred from bringing an action based on the ultrahazardous activity doctrine. In fact, Respondent originally asserted that doctrine as one of the counts of its complaint, but later amended that count to assert the cause of action under Section 376.313(3) that is at issue here.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in their Initial Brief, Petitioners respectfully request that the Supreme Court reverse the Mandate of the First District Court of Appeal dated October 1, 2002, and reinstate the judgment of the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to: Steven E. Brust, Esq., Smith, Gambrell & Russell, LLP, Attorneys at Law, Suite 2200, Bank of America Tower, 50 North Laura Street, Jacksonville, Florida 32202, and Deborah D. Walters, Esq., The Walters Law Firm, One Independent Drive, Suite 3201, Jacksonville, FL 32202, on the ____ day of July, 2003.

CERTIFICATION OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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