IN THE SUPREME COURT OF FLORIDA

Case No. SC08-1920
Lower Tribunal No. 2D07-352

HOWARD CURD, ET AL.,

Petitioners,

v.

MOSAIC FERTILIZER, LLC,

Respondent.

On Discretionary Review from the Second District Court of Appeal

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BRIEF OF *AMICI CURIAE* GENERAL DYNAMICS CORP. AND GENERAL DYNAMICS LAND SYSTEMS, INC. IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST AS AMICI CURIAE

General Dynamics Corp. is a market leader in business aviation; land and expeditionary combat vehicles and systems, armaments, and munitions; shipbuilding and marine systems; and mission-critical information systems and technologies. General Dynamics Land Systems, Inc., a wholly owned subsidiary of General Dynamics Corp., designs and builds armored vehicles and subsystems for the U.S. military and international customers.

In the late 1960s, a former subsidiary of General Dynamics Corp., Stromberg-Carlson, began to operate a manufacturing plant in Lake Mary, Florida. Although they have been unaffiliated with the plant for decades, *Amici* are currently litigating *Culbreath v. Siemens Carrier Networks, LLC*, Case No. 07-CA-3362-11-G (Fla. 18th Cir. Ct.), and related cases concerning alleged pollution at the Lake Mary plant, in which the scope of private-litigant damages under Section 376.313, Florida Statutes (2004), is a critical and contested issue. The resolution of the second question certified to this Court by the Second District Court of Appeal will likely have a significant impact on the Lake Mary cases – in particular, whether the plaintiffs' claims for personal-injury damages state a claim under Florida Statute Section 376.313.

SUMMARY OF ARGUMENT

The lower court has certified two questions to this Court. *Amici* seek to address the second:

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

The answer to that question is: No. Damages under Florida Statute Section 376.313 should be limited to the "destruction to or loss of any real or personal property." §376.031(5), *Fla. Stat.* (2004). Since the fishermen do not own any property damaged by the alleged pollution, they are not entitled to damages under Section 376.313. Likewise, litigants would not be entitled to personal-injury damages under the statute.

Section 376.313 clearly creates a private right of action sounding in strict liability; however, the scope of damages recoverable in such an action is not. No Florida appellate court has directly addressed whether personal-injury damages are available under Section 376.313 and, until this case, the situation as to economic-loss damages was much the same.

Section 376.313 does not define the word "damages," and thus is ambiguous as to whether private litigants can recover for purely economic loss or personal injury. This Court must therefore turn to canons of statutory construction to

discern its meaning. The most applicable canon is the doctrine of *in pari materia*, which counsels that Section 376.313 should be harmonized with Florida Statute Section 376.205, the statute on which it was modeled, which is codified within the same statutory chapter, and which concerns similar subject matter.

In particular, like Section 376.205, Section 376.313 should be understood as limited to "damages" as defined in Florida Statute Section 376.031. That is, recoverable damages under Section 376.313 should be limited to the "destruction to or loss of any real or personal property." §376.031(5), *Fla. Stat.* (2004).

ARGUMENT

Petitioners argue that commercial fishermen can recover damages for their loss of income under Florida Statute Section 376.313; in the *Culbreath* case, plaintiffs claim that personal-injury damages are available under that statute. A proper approach to interpretation of this statutory cause of action leads to the conclusion that neither type of damages is recoverable. Section 376.313 should be interpreted as coextensive with its close cousin, Florida Statute Section 376.205, which imposes express limits on the damages payable to private plaintiffs, excluding both personal injuries and damage inflicted on natural resources. Because there is no reason to believe that the Legislature intended to compensate for a broader category of injuries in Section 376.313, damages under that provision

should be limited to compensating for injuries to real and personal property interests.

I. The Scope of Damages Available Under Florida Statute Section 376.313 is a Question of First Impression for this Court.

In 1970, the Florida Legislature passed the Oil Spill Prevention and Pollution Control Act, codified at Chapter 376 of the Florida Statutes. *See Laws of Fla.* Ch. 70-244, §1, at 741. Now designated the "Pollutant Discharge Prevention and Control Act," it aims to protect Florida's coastal waters and land from pollutant discharges. §§376.021, 376.011, *Fla. Stat.* (2004).

In 1983, the Florida Legislature expanded Chapter 376 when it enacted the Water Quality Assurance Act ("WQAA"). *See Laws of Fla.*Ch. 83-310, §84, at 1878-85. Specifically, "[p]erceiving a need to protect *inland* waters and the groundwater supply from spills and discharges of certain pollutants, the legislature responded by enacting Part II of chapter 376 . . . . These provisions [were] *patterned after* Part I of chapter 376 relating to spills and discharges in *coastal* areas." Wade L. Hopping & William D. Preston, *The Water Quality Assurance Act of 1983 – Florida's "Great Leap Forward" Into Groundwater Protection and Hazardous Waste Management*, 11 Fla. St. U. L. Rev. 599, 610 (1983)(second emphasis added; footnote omitted); *see also Laws of Fla.*Ch. 83-310, preamble, at 1825-26("designating ss. [376.011-376.21], as part I of chapter 376" and "creating part II of chapter 376").

Both the Pollution Discharge Act and WQAA create a private right of action sounding in strict liability – in Sections 376.205 and 376.313, respectively.[1] Section 376.313's new "[i]ndividual cause of action for damages" was clearly "patterned after" Section 376.205's existing "[i]ndividual cause of action for damages." *See Laws of Fla.* Ch. 83-310, §84, at 1885; §376.205, *Fla. Stat.* (1981). The language of the two statutes was virtually identical when Section 376.313 was enacted: Both provided that "[n]otwithstanding any other provision of law, nothing contained [in the relevant sections of Chapter 376] shall prohibit 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 [the relevant sections of Chapter 376]." §376.313, *Fla. Stat.* (1983); §376.205, *Fla. Stat.* (1981).

While this language – central to the question now before the Court – remains almost unchanged at Section 376.313, the Legislature has clarified Section 376.205 over time. In 1996, the Florida Legislature amended Section 376.205, "clarifying individual causes of action," by making the following changes:

> Notwithstanding any other provision of law, ~~nothing contained herein shall prohibit~~ any person *may bring* ~~from bringing~~ a cause of action *against a responsible party* in a court of competent jurisdiction for ~~all~~ damages, *as defined in s. 376.031,* resulting from a discharge or other condition of pollution covered by ss. 376.011-376.21.

[1] The Legislature added Florida Statute Section 376.205 to the Pollution Discharge Act in 1974. *See* Ch. 74-336, § 18, Laws of Fla.

Laws of Fla. Ch. 96-263, §13(deletions struck out; additions in italics). *See also, id.* at preamble.

Section 376.313 provides in relevant part that:

> Except as provided in s. 376.3078(3) and (11), 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.

§376.313(3), *Fla. Stat.* (2004).

While this Court has held in *Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 26 (Fla. 2004) that Section 376.313 creates a strict liability private cause of action, "[t]he question that remains unsettled, both in the statute and the case law, is what type of damages are recoverable under the statute and by whom." *Curd v. Mosaic Fertilizer, LLC,* 993 So. 2d. 1078, 1084 (Fla. 2d DCA), *review granted*, 993 So. 2d 511 (Fla. 2008). "There is no doubt that . . . a neighboring landowner [can] recover damages caused by contamination to his or her land by pollution originating on the adjoining property. The existing case law suggests such damages would include at least the cost of removing the pollutants or other remediation." *Id.* at 1084. Yet there is significant doubt concerning whether private litigants may recover damages for personal injury or purely economic loss caused by damage to natural resources.

With regard to personal injury damages, no Florida appellate court has squarely addressed the question. The court below cites – without explicitly adopting – *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93 (Fla. 1st DCA 1990) as case law supporting the imposition of such damages. *Curd*, 993 So. 2d at 1084. However, that issue was not in fact decided by the *Cunningham* court. The *Cunningham* plaintiffs brought a personal injury claim under Section 376.313. *Cunningham,* 558 So. 2d at 99. The defendants only contended that the statute was inapplicable because the pollutants at issue were gaseous, and because the alleged events had occurred prior to the statute's effective date. *Id.* Thus the court did not address the question whether personal-injury damages are ever recoverable under Section 376.313 — it silently assumed that they were because no party raised the issue.

The situation with regard to economic losses caused by damage to wildlife was much the same until this case arose. As the Second District Court of Appeal correctly noted, there is "no precedent . . . permitting a recovery for damages under the statute when the party seeking the damages does not own or have a possessory interest in the property damaged by the pollution." *Curd*, 993 So. 2d at 1084.

For the reasons set forth below, *Amici* urge the Court to reject such expansive readings of Section 376.313 and limit damages under that provision to those involving injuries to property interests.

II. Florida Statute Section 376.313 Should Be Read *in Pari Materia* with Florida Statute Section 376.205.

While Florida Statute Section 376.313 states that "nothing . . . prohibits any person from bringing a cause of action . . . for all damages resulting from a discharge or other condition of pollution," it neglects to define "damages." *See Kaplan v. Peterson,* 674 So. 2d 201, 206 n.2 (Fla. 5th DCA 1996)(Griffin, J., concurring in part and dissenting in part)(noting "how courts have to keep supplying the missing pieces of this new cause of action [under Section 376.313], such as what are recoverable damages"); *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372, 1376 (Fla. 2d DCA 1993)(Section 376.313 "is less than a model of clarity"). That omission lies in stark contrast with Florida Statute Section 376.205, Section 376.313's analogue in the first portion of Chapter 376. Unlike Section 376.313, Section 376.205 was amended for clarification purposes to include a specific definition of "damages." Given their close relationship, Sections 376.313 and 376.205 should be construed together, and Section 376.313 understood as incorporating the same "damages" definition as its counterpart. *See State v. Fuchs,* 769 So. 2d 1006, 1009 (Fla. 2000)("In the absence of a statutory definition, resort may be had to . . . related statutory provisions which define the term[.]")(internal quotation marks omitted).

It is black-letter law that "[w]here there is uncertainty in the meaning to be given the words employed in a statute, 'the Court must resort to canons of statutory

construction in order to derive the proper meaning.'" *Reform Party v. Black*, 885 So. 2d 303, 312 (Fla. 2004)(quoting *Seagrave v. State*, 802 So. 2d 218, 286 (Fla. 2001)); *see also, e.g.*, *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006)("If the meaning of a statutory provision is deemed ambiguous, it must be subject to judicial construction."). Given the ambiguity of Section 376.313 – in particular, the statute's "missing piece[]" of "recoverable damages," – this Court must engage in such a task. [2] *See Kaplan*, 674 So. 2d at 206 n.2(Griffin, J., concurring in part and dissenting in part).

The most applicable canon of statutory construction is the doctrine of *in pari materia*, which "requires the courts to construe related statutes together so that they illuminate each other and are harmonized." *McGhee v. Volusia County*, 679 So. 2d 729, 730 n.1 (Fla. 1996); *see also, e.g.*, *Grant v. State*, 832 So. 2d 770, 773 (Fla. 5th DCA 2002)("statutes, which relate to the same or closely related subjects or objects, are regarded as *in pari materia*, and must be construed together and compared with each other"). For example, this Court has held that two statutes,

[2] Indeed, even when a statute is unambiguous, "related statutory provisions should be read together to determine legislative intent, so that 'if from a view of the whole law, or from other laws *in pari materia* the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature.'" *Maddox v. State*, 923 So. 2d 442, 445-46 (Fla. 2006)(quoting *Golf Channel v. Jenkens*, 752 So. 2d 561, 564 (Fla. 2000))(internal quotation marks omitted); *see also Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)("[A] literal interpretation of the language of a statute need not be given when to do so would lead to an unreasonable or ridiculous conclusion.").

enacted at different times and codified in different statutory chapters, should be interpreted *in pari materia* because they both relate to "Florida's election process." *Fla. Dep't of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005). Similarly, Sections 376.313 and 376.205 – originally identical and codified in the same statutory chapter – both relate to the protection of Florida waters from the discharge of pollutants. *See Curd*, 993 So. 2d at 1083("Chapter 376 regulates the discharge of pollution."); *see also* Ch. 376, *Fla. Stat.* (2004)(titled "Pollutant Discharge Prevention and Removal").

Although Sections 376.313 and 376.205 no longer employ identical language, Section 376.205's "amended language constitutes a clarification to the previously-employed statutory language; it does not mark a fundamental change to the [Pollutant Discharge Act] and its position on an individual's ability to invoke the statute in a private suit for damages." *Dotsie Dev., Inc. v. Arctic Peace Shipping, Co.*, No. 95-808-CIV-J-MMP, 1996 WL 866119, at *2 n.2 (M.D. Fla. Aug. 14, 1996); *see also Kaplan*, 674 So. 2d at 205("where the statute is being clarified, . . . later amendment may . . . be looked upon as stating what was the original legislative intent"). Similarly, the amended language does not mark a fundamental change in the damages available to private litigants; it merely clarifies how those damages are defined. As it currently stands, Section 376.205 is a *clarification* of its prior "all damages" language – language that remains in Section

376.313. *See Foster v. State*, 861 So. 2d 434, 439 n.4 (Fla. 1st DCA 2002)("That courts may, as a general proposition, consider subsequent clarifying legislation in interpreting statutes is clear.").

Over time, Sections 376.313 and 376.205 have not diverged. Rather, the Legislature's clarification of Section 376.205 clarifies Section 376.313's still-ambiguous "damages" term as well. Under *in pari materia*, the scope of damages available under Section 376.313 should parallel those that are recoverable under Section 376.205. *See* Gary K. Hunter, Jr., *Statutory Strict Liability for Environmental Contamination: A Private Cause of Action to Remedy Pollution or Mere Legislative Jargon?*, 72 Fla. Bar J. 50, 51 (1998)("§376.313 is modeled exclusively after (and in fact mirrors the language of) §376.205 and should be construed similarly.").

To be sure, it could be argued that the subsequent changes to Section 376.205 serve to differentiate that statute from Section 376.313, justifying a different interpretation. But in this instance such an approach makes little sense. The Court should reject the notion that the Legislature decided deliberately to compensate people for injuries caused by inland water pollution while denying them compensation for otherwise identical injuries caused by coastal pollution. Indeed, coastal waters and lands are some of Florida's most cherished resources. *See, e.g.*, §376.021(1)-(2), Fla. Stat. (2008). One would assume that they would

warrant as much protection as other Florida resources, or at the very least that the Legislature would not create such a distinction *sub silentio*.

The more rational conclusion is that the Legislature never intended the two statutory provisions to diverge. It initially employed identical language, and it then saw fit to clarify (but not substantively alter) Section 376.205. Although the Legislature has not taken the trouble to enact a parallel clarification of Section 376.313, the amended language of Section 376.205 constitutes the best indicator of how the Legislature intended both provisions to be read.

Indeed, it simply makes no sense to understand Section 376.313 as permitting recovery of all damages, no matter how indirect. To do so would be to turn a blind eye to the broad and unmanageable consequences of failing to impose a limiting construction. As the lower court recognized:

> [I]f this statute were given the expansive interpretation suggested by the fishermen, it would be very difficult to decide when damages were so remote that they were no longer damages. In this case, for example, a sizable fish kill not only reduces the take for fishermen, but it causes other damage. The fisherman buy fewer supplies. Restaurants and stores pay higher prices for fish, which usually results in decreased sales or decreased profits. If the dead fish end up on beaches, various businesses sustain losses.

Curd, 993 So. 2d at 1084. Section 376.313 requires a limiting principle. Like the lower court, "absen[t] . . . express language stating" an intent to permit such broad recovery, this Court should refuse to assume "that the legislature intends the courts to use such an expansive method to measure recoverable damages under this

statutory action." *Id.* Rather, this Court should harmonize Section 376.313 with Section 376.205, and similarly limit the damages available under both statutes.

III. Damages Available Under Florida Statute Section 376.205, and Therefore also Under Florida Statute Section 376.313, are Limited to the Destruction to or Loss of any Real or Personal Property.

Florida Statute Section 376.205 provides that "[n]otwithstanding any other provision of law, any person may bring a cause of action against a responsible party in a court of competent jurisdiction for damages, as defined in s. 376.031, resulting from a discharge or other condition of pollution covered by ss. 376.011-376.21." §376.205, *Fla. Stat.* (2004). Florida Statute Section 376.031, in turn, defines "[d]amage" as "the documented extent of any destruction to or loss of any real or personal property, or the documented extent, pursuant to s. 376.121, of any destruction of the environment and natural resources, including all living things except human beings, as the direct result of the discharge of a pollutant." *Id.* at §376.031(5).

While the first prong of Section 376.031 is straightforward – the "destruction to or loss of any real or personal property" – its second clause requires additional explanation. *Id.* As is apparent from Florida Statute Section 376.121 and other sections of the Pollutant Discharge Act, only the State – and not private litigants – may recover damages "pursuant to s. 376.121" for "destruction of the

environment and natural resources, including all living things except human beings, as the direct result of the discharge of a pollutant." *Id.*[3]

Section 376.121 lays out detailed procedures for calculating natural resource damages, accounting for factors such as the volume of the discharge, the characteristics of the discharged pollutant, and the type of natural resources affected. *See id.* at §376.121(2). It explicitly provides that "[w]hoever violates, or causes to be violated, s. 376.041 [prohibiting the discharge of pollutants on waters and lands of the state] shall be liable to *the state* for damage to natural resources." *Id.* at §376.121(1)(emphasis added). That compensation is deposited into the Florida Coastal Protection Trust Fund. *Id.*[4] Section 376.121 makes no mention of private-litigant recovery, and that limitation is reinforced elsewhere in the Pollutant Discharge Act. Section 376.12, which, *inter alia*, outlines the liabilities and defenses of responsible parties, states in no uncertain terms that while "[e]ach responsible party is *liable to the fund*, pursuant to s. 376.121, for *all natural resource damages* that result from the discharge," each responsible party is only liable "to any affected *person* for all damages as defined in s. 376.031, *excluding*

[3] Even if private litigants could recover natural resource damages under Section 376.205, it is clear that damages for personal injury are unavailable. *See* §376.031(5), *Fla. Stat.* (2004)(excepting destruction to human beings from its terms).

[4] Similarly, the second portion of Chapter 376 establishes the Water Quality Assurance Trust Fund, *see* §376.307, *Fla. Stat.* (2004), and the Inland Protection Trust Fund, *see id.* §376.3071, into which judgments recovered by the State are deposited. *See id.* at §§376.307(4), 376.3071(3).

natural resource damages, suffered by that person as a result of the discharge." *Id.* at §376.12(4)-(5)(emphasis added).[5] In other words, while private litigants may recover property damages from a responsible party, they cannot recover natural resource damages.

Such a limitation on recovery for natural resource damages is echoed in the federal statutes on which Chapter 376 was modeled. The Federal Water Pollution Control Act, for example, referenced in both the first and second portions of Chapter 376, provides that only governmental entities may recover natural resource damages. 33 U.S.C. §1321(f)(5). *See also*, §376.21, *Fla. Stat.* (2004)("Sections 376.011-376.21 . . . shall be liberally construed to effect the purposes set forth under . . . the Federal Water Pollution Control Act, as amended."); §376.315, *Fla. Stat.* (2004)(similar; applying to Sections 376.30-376.319), Likewise, the federal Oil Pollution Act, on which the 1996 amendments to Chapter 376 were modeled, also explicitly provides that "[d]amages for injury to, destruction of, loss of, or loss of use of, natural resources . . . shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee." 33 U.S.C. §§2702(b)(2)(A), §2706. S*ee also*, Fla. H.R., Tape Recording of Proceedings (Apr. 26, 1996)(tape available from Florida State Archives)(statement of Rep. Lacasa

[5] Section 376.205 cross-references another subsection of Section 376.12, providing that "[t]he only defenses to such cause of action shall be those specified in s. 376.12(7)." §376.205, *Fla. Stat.* (2004).

concerning H.B. 1149)("This bill tracks language of the federal Oil Pollution Act of 1990."); Fla. H.R. Comm. on Natural Res., Final Bill Analysis & Economic Impact Statement, CS/HB 1149 at 3 (1996)(the act "tracks more closely the language of the federal Oil Pollution Act of 1990").[6]

Similarly, the liability provisions of the WQAA "closely mirror[] comparable provisions in . . . CERCLA [(Comprehensive Environmental Response, Compensation, and Liability Act)]." *Fla. Dep't of Envtl. Prot. v. Allied Scrap Processors, Inc.*, 724 So. 2d 151, 152 (Fla. 1st DCA 1998). As such, "the state courts should give the Florida legislation the same construction as the federal courts give the federal legislation." *Id.* Although CERCLA does not contain an exact analogue to Section 376.313, it does provide a private right of action for cost recovery. *See* 42 U.S.C. §9607(a). Neither personal injury nor economic loss damages are recoverable under CERCLA's private cause of action. *See, Artesian Water Co. v. Gov't of New Castle County*, 659 F. Supp. 1269, 1285 (D. Del. 1987)("Congress in enacting CERCLA clearly manifested an intent not to provide compensation for economic losses or for personal injury resulting from the release of hazardous substances."), *aff'd*, 851 F.2d 643 (3d Cir. 1988). *See also Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1537 (10th Cir. 1992); *Polcha v. AT&T Nassau*

[6] The Oil Pollution Act is also referenced throughout Section 376.121.

Metals Corp., 837 F. Supp. 94, 97 (M.D. Penn. 1993). Nor can private parties recover natural resource damages under CERCLA. *See* 42 U.S.C. §9607(f)(1).

Because damages available to private litigants under Section 376.205 are limited to the "destruction to or loss of any real or personal property" – and do not extend to compensation for purely economic loss or personal injury – Section 376.313 should be so understood as well.

CONCLUSION

For the foregoing reasons, the Court should answer the second certified question in the negative and clarify that damages under Florida Statute Section 376.313 are limited to "destruction to or loss of any real or personal property."

Respectfully submitted,

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