IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1920
Lower Tribunal No. 2D07-352

---

HOWARD CURD, ET AL.
Petitioners,

vs.

MOSAIC FERTILIZER, LLC

Respondent.

---

On Petition for Certiorari from the Second District Court
of Appeal State of Florida

---

# PETITIONERS' INITIAL BRIEF

---

F. WALLACE POPE, JR.
FBN: 124449
JOHNSON, POPE, BOKOR,
RUPPEL & BURNS, LLP
P.O. Box 1368
Clearwater, FL 33757
(727) 461-1818

ANDRA T. DREYFUS
FBN: 276286
ANDRA TODD DREYFUS, P.A.
1463 Gulf-to-Bay Blvd.
Clearwater, FL 33755
(727) 442-1144

## TABLE OF CONTENTS


I. STATEMENT OF THE CASE AND FACTS ..... 1

A. Introduction ..... 1

B. Overview of Case ..... 1

C. Statement of the Case ..... 1

D. Statement of the Facts ..... 3

II. SUMMARY OF ARGUMENT ..... 6

The Second District Erroneously Held that the Commercial Fishermen Have no Common Law Right to Recover on the Facts Alleged ..... 6

The Second District Erroneously Held that the Commercial Fishermen Have no Claim Under Chapter 376, Florida Statutes, 2004 ..... 7

III. ARGUMENT ..... 7

A. Introduction ..... 7

B. The Standard of Review ..... 8

C. The Second District Erroneously Held that The Commercial Fisherman have no Common Law Right to Recover on the Facts Alleged ..... 9

(1) The Second District's Analysis ..... 9

(2) The Commercial Fishermen Exception to the Economic Loss Rule ..... 15

D. The Second District Erroneously Held that The Commercial Fisherman Have no Recognized Claim Under Chapter 376, Florida Statutes (2004) ..... 23

E. Florida Law Traditionally Protects Persons In the Way They Earn a Living. ..... 27

IV. CONCLUSION ..... 28

CERTIFICATE OF SERVICE ..... 30

CERTIFICATE OF COMPLIANCE ..... 31

## TABLE OF CITATIONS

Florida Cases:

*Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So.2d 20 (Fla. 2005) ..... 26

*Cities Service Co. v. Sate*, 312 So.2d (Fla. 2d 1975)..... 10,13

*Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219 (Fla. 1999)..... 7,23,24,29

*Florida Dept. of Health & Rehabilitative Services v. S.A.P.*, 835 So.2d 1091 (Fla. 2002) ..... 3,8

*Indemnity Insurance Co. v. American Aviation, Inc.*, 891 So.2d. 532 (Fla. 2004).....6-7,9,10,11,12,28

*Knowles v. Beverly Enters.-Fla., Inc.*, 898 So.2d 1 (Fla. 2004)..... 26

*Masonite Corp. v. Steed*, 23 So.2d 756 (Miss. 1945)..... 16

*Monroe v. Sarasota County School Board*, 746 So.2d 530 (Fla. 2d DCA 1999) ..... 10, 15

*Perry v. Cosgrove*, 464 So.2d 664 (Fla. 2d DCA 1985)..... 28

*Register v. Pierce*, 530 So.2d 990 (Fla. 1st DCA) review denied 537 So.2d 569 (Fla. 1988) ..... 15

*Richard v. Gray*, 62 So.2d 597 (Fla. 1953) ..... 28

*Sandarac Ass'n v. W.R. Frizzell Architects, Inc.*, 609 So.2d 1349 (Fla. 2d DCA 1992) .....

*St. Johns River Mgmt. v. Fernberg Geological Services, Inc.*, 784 So.2d 500 (Fla. 5th DCA 2001)..... 15,28

*State v. Webb*, 398 So.2d 820 (Fla. 1981) ..... 26

Federal Cases:

*Asociacion Nacional de Pescadores A Pequena Escala O Artesanales de Colombia v. Dow Quimica de Colomibia, S.A.*, 988 F. 2d 559 (5th Cir. 1993) ..... 17

*Burgess v. M/V Tamano*, 370 F. Supp. 247 (S.D. Me. 1973) *aff'd per curiam* 559 F.2d 1200 (1st Cir. 1977)..... 16,17,18,19,21

*J.H. Miles & Co. v. McLean Contracting Co.*, 180 F.2d 789 (4th Cir. 1950)..... 22

*Blue Gulf Seafood, Inc. v. TransTexas Gas Corporation*, 24 F.Supp. 2d 732 S.D. Tex. 1998), *aff'd* 244 F.3d 135 (5th Cir. 2000)..... 19

*Golnoy Barge Company v. M/T Shinoussa*, 1993 WL 726819 (S.D. Tex. 1993) ..... 20

*In re Complaint of Clearsky*, 1998 WL 42884 (E.D. La. 1998)..... 20

*In re the Exxon Valdez*, 1994 WL 16195323 (D. Alaska 1994)..... 19

*In re the Exxon Valdez*, 1994 WL 182856 (D. Alaska 1994)..... 19

*In re the Exxon Valdez*, 767 F.Supp. 1509 (D. Alaska 1991)..... 19

*Jurisic & Sons, Inc. v. TransTexas Gas Corporation*, 2005 WL 2488433 (S.D. Tex. 2005) ..... 20

*Potomac River Association, Inc. v. Lundberg Maryland Steamship School, Inc.*, 402 F.Supp. 344 (D. Md. 1975) ..... 21

*Pruitt v. Allied Chemical Corporation*, 523 F.Supp. 975 (E.D. Va. 1981)..... 21

*Shaughnessy v. PPG Industries, Inc.*, 795 F.Supp. 193 (W.D. La. 1992) ..... 20

*State of Louisiana v. M/V Testbank*, 524 F. Supp. 1170 (E.D. La. 1981), *aff'd* 728 F.2d 748 (5th Cir. 1984) 752 F.2d 1019 (5th Cir. 1985), *cert. den.* 477 U.S. 903 (1986)..... 15-16,18,19

*The Complaint of Taira Lynn Marine Limited No. 5 L.L.C.*, 349 F.Supp. 2d 1026 (W. D. La. 2004) ..... 20

*Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974)..... 16,17,18,19

Cases from Other States:

*Carson v. Hercules Powder Company*, 402 S.W. 2d 640 Ark. 1966) ..... 22

*Hampton v. North Carolina Pulp Co.*, 27 S.E. 2d 538 (1943) ..... 16,22

*Leo v. General Electric Company*, 145 A.D. 2d 291, 538 N.Y. S. 2d 844 (1989)..... 21

Florida Statutes

Chapter 376, Fla. Stat. (2004)..... 2,7,23

Section 386.313, Fla. Stat. (2004) ..... 8

Sections 376.30 et seq., Fla. Stat. 2004)..... 13

Section 376.30(2)(b) and (d), Fla. Stat. (2004) ..... 13

Section 370.06, Fla. Stat. (2004) ..... 14

Section 370.10(1), Fla. Stat. (2006)..... 14

Section 376.313(3)..... 23

Section 376.30-376.319 ..... 24,26

Section 376.315, Fla. Stat. (2004) ..... 24

Sections 376.30-376.319, Fla. Stat (2008) ..... 25

Section 376.313(3), Fla. Stat. (2004)..... 26

Chapter 772, "Civil Remedies for Criminal Practices" ..... 26

Sections 501.201, et seq., Fla. Stat. (2008) "Deceptive and Unfair Trade Practices"..... 26

Section 376.313(6), Fla. Stat. (2004)..... 27

Section 448.08, Fla. Stat. (2006) ..... 28

Other Authorities

American Heritage Dictionary (3d Ed. 1992) ..... 12

Article I, Section 6, Florida Constitution ..... 28

# I. STATEMENT OF THE CASE AND FACTS

## A. Introduction

We will use the following references:

"Curd" means the named individual plaintiffs/petitioners and all others similarly situated.

"Mosaic" means the defendant/respondent, Mosaic Fertilizer, LLC.

"R" means the record on appeal.

"A" means the appendix to this brief.

## B. Overview of Case

Mosaic owns a phosphogypsum storage area near Archie Creek in Hillsborough County, Florida. In 2004, the storage area was full of pollutants, polluted acid waste water, contaminants and other hazardous substances. Hillsborough County warned Mosaic about the levels of waste water stored in its gypsum storage area, and the State warned Mosaic that a 100 foot section of the pond dike was narrower than permissible. On September 5, 2004, the dike gave way, and the discharge scorched and polluted a large area of Tampa Bay. Mosaic's pollution destroyed Curd's ability to fish and crab in the ruined area of Tampa Bay.

## C. Statement of the Case

On September 23, 2004, approximately 18 days after Mosaic's poisonous bilge flowed into Tampa Bay, Curd filed a class action complaint on behalf of the named plaintiffs and all other similarly situated fishermen. (R-4-15;A-1). Both the original complaint and the amended complaint named Cargill Incorporated, the wrong entity, as a defendant. (R-4-15,19-31;A-1,2). To correct this and other errors, Curd voluntarily filed an amended complaint (R-19-31; A-2), a second amended complaint (R-36-49;A-3) and a third amended complaint. (R-58-74; A-4).

Mosaic filed motions to dismiss, to strike, to sever and for more definite statement, but there were never any hearings in the trial court on any Mosaic motions directed to the original complaint, or the amended or second amended complaint.

On October 11, 2005, the parties argued Mosaic's motions directed to the third amended complaint, and on November 23, 2005, the trial court entered an order dismissing Curd's Chapter 376, Fla. Stat. (2004) claims (Counts I & II), denying the motion to dismiss Curd's common law strict liability and common law negligence counts (Counts III & IV), and denying Mosaic's motions to strike, sever and for more definite statement. (R-153-157; A-5).

On December 15, 2005, Curd filed his fourth amended class action complaint (R-158-174; A-6), and Mosaic moved to dismiss that complaint. (R-175-179). On January 9, 2007, the trial court entered its order dismissing *with prejudice* all three counts of Curd's fourth amended complaint. (R-219-222; A-7).

On January 22, 2007, Curd filed his timely notice of appeal to the Second District Court of Appeal. (R-223-228). On September 17, 2008, the Second District Court of Appeal issued its opinion (A-8) affirming the trial court's dismissal (with one dissent without opinion) and certifying two questions to this Court. On September 30, 2008, petitioners filed their notice to invoke discretionary jurisdiction of this Court, and on October 28, 2008, this Court issued its order accepting jurisdiction of this case.

### D. Statement of the Facts

Because the trial court's order was a dismissal with prejudice based upon the pleadings, the only facts before this Court are those alleged in Curd's fourth amended complaint.[1]

---

[1] This Court has held that when reviewing a dismissal on the pleadings, this Court must take all the factual allegations in Curd's fourth amended complaint as true and construe in Curd's favor all reasonable inferences from those facts. *Florida Dept. of Health & Rehabilitative Services v. S.A.P.*, 835 So.2d 1091, 1094 (Fla. 2002).

Mosaic owns or controls and is the responsible party for a phosphogypsum storage area near Archie Creek in Hillsborough County, Florida. (R-159, ¶3; A-6, ¶3). The storage area is utilized to store hazardous substances, pollutants and contaminants, all of which are substances that are or may be potentially harmful or injurious to human health or welfare, animal or plant life or property or that may unreasonably interfere with the enjoyment of life or property, including outdoor recreation. (R-159-160, ¶3; A-6, ¶3).

In the summer of 2004, the Hillsborough County Environmental Protection Commission (EPC) and the Florida Department of Environmental Protection (DEP) warned Mosaic about the levels of waste water stored in Mosaic's pollution storage area. (R-171,¶42; A-6,¶42). The EPC and DEP warned Mosaic that its 150 acre storage pond was dangerously close to safety limits. (R-171, ¶42; A-6, ¶42). On or about August 10, 2004, the DEP advised Mosaic that a 150 foot section of the pond dike was only 15 feet wide, 3 feet narrower than the required 18 feet of width. (R-171, ¶43; A-6,¶43). The DEP also warned Mosaic that the water in the reservoir was too high and that only an inch or two of rain would raise it to the top of the berm. (R-171, ¶43; A-6,¶43). When the dike ultimately gave way, it occurred in the center southwest section of the dike, the area that the DEP

warned Mosaic was too thin. (R-171-172, ¶43; A-6, ¶43). Mosaic ignored the warnings and its negligence caused a massive pollution of Tampa Bay which proximately damaged Curd. (R-172-173, ¶¶45-48; A-6, ¶¶45-48).

Curd and the other named plaintiffs and the members of the class are members of the fishing industry who depend upon the fishery of the local waters of Tampa Bay for their individual livelihoods. (R-159, ¶2; A-6, ¶2). Curd and the other named plaintiffs represent a proposed class of all fishermen and those persons engaged in the commercial catch and sale of fish, bait and related products in the Tampa Bay area who have lost income and will continue to lose income and continue to suffer damages because of Mosaic's pollution, contamination and discharge of hazardous substances. (R-160, ¶7; A-6, ¶7).

Mosaic is the party responsible for the pollution and is liable to Curd and all members of the class for all damages resulting from the unlawful discharge of pollutants and/or hazardous substances into or upon the surface or ground waters of the State of Florida or upon the lands of the State of Florida, and the unlawful discharge damaged Curd and all others similarly situated. (R-167, ¶28; A-6, ¶28).

The storage and retention of pollutants, contaminants and hazardous substances in a storage facility adjacent to the waters of Tampa Bay, a major

source of public and private business and recreational opportunities for the citizens and workers of the State of Florida, is an abnormally dangerous and/or ultrahazardous activity, rendering Mosaic strictly liable for all damages proximately caused by such activity. Mosaic's unlawful discharge proximately damaged Curd and all others similarly situated. (R-169-171, ¶¶36-38; A-6, ¶¶36-38).

Based upon the foregoing factual allegations, Curd alleged three causes of action:

Count I – statutory strict liability (§§376.30-317.19, Fla. Stat. (2004) (R-164-168, ¶¶16-30; A-6, ¶¶16-30).

Count II – common law strict liability based upon abnormally dangerous and/or ultrahazardous activity (R-168-171, ¶¶31-38; A-6, ¶¶31-38).

Count III – common law negligence (R-171-173, ¶¶39-48; A-6, ¶¶39-48).

## II. SUMMARY OF ARGUMENT

**The Second District Erroneously Held that the Commercial Fishermen Have no Common Law Right to Recover on the Facts Alleged.**

The Second District's opinion improperly distinguishes this Court's holding in *Indemnity Insurance Co. v. American Aviation, Inc.*, 891 So.2d

532 (Fla. 2004) that compensation to a plaintiff is proper even when the defendant's conduct frustrates economic interests unaccompanied by injury to a person or other property. The Second District improperly rejected the well-established rule in numerous jurisdictions that where there has been a tortious invasion of commercial fishing areas by pollutants and contaminants, fishermen who suffer actual economic losses have a cause of action against the polluter.

**The Second District Erroneously Held that the Commercial Fishermen Have no Recognized Claim Under Chapter 376, Florida Statutes (2004).**

Although the Second District expressly recognized in its opinion that statutory causes of action cannot be defeated by application of common law rules such as the economic loss rule, *Comptech Int'l, Inc. v. Milam Commerce Park Ltd.*, 753 So.2d 1219, 1222 (Fla. 1999), the Second District nevertheless applied the economic loss rule *sub silentio*, to defeat the commercial fishermen's statutory claims under Chapter 376. The Second District's ruling is directly contrary to the legislative intent expressed in Chapter 376.

## III. ARGUMENT

### A. Introduction

The Second District certified the following two questions to this Court (A-8 at 2):

> DOES FLORIDA RECOGNIZE A COMMON LAW THEORY UNDER WHICH COMMERCIAL FISHERMEN CAN RECOVER FOR ECONOMIC LOSSES PROXIMATELY CAUSED BY THE NEGLIGENT RELEASE OF POLLUTANTS DESPITE THE FACT THAT THE FISHERMEN DO NOT OWN ANY PROPERTY DAMAGED BY THE POLLUTION?
>
> DOES THE PRIVATE CAUSE OF ACTION RECOGNIZED IN SECTION 376.313, FLORIDA STATUTES (2004), PERMIT COMMERCIAL FISHERMEN TO RECOVER DAMAGES FOR LOSS OF INCOME DESPITE THE FACT THAT THE FISHERMEN DO NOT OWN ANY PROPERTY DAMAGED BY THE POLLUTION?

**B. The Standard of Review.**

In *Florida Dept. of Health & Rehabilitative Services v. S.A.P.*, 835 So.2d 1091, 1094 (Fla. 2002), this Court held that the standard of review from a dismissal on the pleadings is as follows:

> Because this case is before us on the trial court's dismissal of S.A.P.'s second amended complaint, we must take all the factual allegations in her complaint as true and construe all reasonable inferences from those facts in her favor. Our standard of review is de novo. [footnotes omitted].

### C. The Second District Erroneously Held that the Commercial Fishermen have no Common Law Right to Recover on the Facts Alleged.

#### (1) The Second District's Analysis

In *Indemnity Insurance Co. v. American Aviation, Inc.*, 891 So.2d 532 (Fla. 2004), this Court answered the following certified question for the Eleventh Circuit Court of Appeals:

> WHETHER THE ECONOMIC LOSS DOCTRINE BARS A NEGLIGENCE ACTION TO RECOVER PURELY ECONOMIC LOSS IN A CASE WHERE THE DEFENDANT IS NEITHER A MANUFACTURER NOR DISTRIBUTOR OF A PRODUCT AND THERE IS NO PRIVITY OF CONTRACT.

Having so stated the certified question, this Court straightaway held (*Id.* at 534):

> We conclude that the 'economic loss doctrine' or 'economic loss rule' bars a negligence action to recover solely economic damages ***only*** in circumstances ***where the parties are either in contractual privity or the defendant is a manufacturer or distributor of a product, and no established exception to the application of the rule applies.*** [emphasis added]

And lest there be any doubt about this Court's intent, (*Id.* at 543):

> We further conclude that, in general, actionable conduct that frustrates economic interests ***should not go uncompensated solely because the harm is unaccompanied by any injury to a person or other property***. [emphasis added]

Although Curd found the foregoing holdings of this Court to be as clear as spring water, the Second District did not. The Second District began

its analysis of *American Aviation* by stating that "we do not read the opinion as entirely overriding the general principle that recovery in negligence is not usually permitted for purely economic losses unconnected to injury to persons or property." (A-8 at 4). The Second District then noted that "the fishermen reason that they are not in contractual privity with Mosaic and that they are not complaining of losses due to a defective product, ergo, the economic loss rule does not apply to them." (A-8 at 7). The Second District framed the issue in terms of whether this Court in *American Aviation* intended to overrule cases such as *Monroe v. Sarasota County School Board*, 746 So.2d 530, 533 (Fla. 2d DCA 1999) and *Sandarac Ass'n v. W. R. Frizzell Architects, Inc.*, 609 So.2d 1349, 1352 (Fla. 2d DCA 1992).[2]

[2] Neither *Monroe* nor *Sandarac* deals with the duty that Florida law imposes upon a polluter to avoid damaging the citizens of this State and the State's environment. Both *Monroe* and *Sandarac* recognize that the judiciary of Florida has expanded the concept of negligence to protect interests beyond mere damage to property or person. *Sandarac* recognizes that "there is nothing inherently right or wrong with the judicial decision to expand negligence to protect [new interests]." (*Id*. at 1353). *Monroe* recognizes that "under extraordinary circumstances" the common law tort of negligence will be expanded "to protect a plaintiff's economic expectations." (*Id*. at 531). Both *Monroe* and *Sandarac* utilize a "no duty to the plaintiff" analysis to find no cause of action in negligence based upon the economic loss rule. But neither case analyzes the heavy duty that the legislature (Chapter 376, Florida Statutes) has imposed upon polluters or the duty of strict liability that the Second District itself imposed on polluters. *Cities Service Co. v. State*, 312 So.2d 799 (Fla. 2d 1975).

Having thus set the stage, the Second District, utilizing intricate reasoning, avoids this Court's plain holding in *American Aviation* (A-8 at 8-9):

> In American Aviation, Justice Pariente's opinion for the court recognized that its holding, which narrowed the scope of the economic loss rule, was not intended to alter the application of 'traditional negligence principles of duty, breach, and proximate cause' to cases that do not involve either a contractual relationship or defective products. 891 So.2d at 543. In his concurrence, Justice Cantero also emphasized that the narrowing of the scope of the economic loss rule was not intended to diminish the use of 'the duty element' as 'a strong filter . . . virtually as strong as the rule itself' in cases that fell outside the economic loss rule. Id. at 546-47.
>
> Only one sentence in the majority opinion in American Aviation gives us pause. Judge Pariente stated: 'We further conclude that, in general, actionable conduct that frustrates economic interests should not go uncompensated solely because the harm is unaccompanied by any injury to a person or other property.' Id. at 543. Although this statement appears superficially to be broad, we note it is qualified by the term 'actionable conduct.' In general, 'conduct' has not generally been 'actionable' under the common law unless it involved (a) an intentional tort, (b) a claim for professional malpractice, or (c) negligence causing bodily injury or property damage. To this list we may now add (d) the negligent provision of services resulting in foreseeable economic losses by those who might reasonably rely upon the service provided, even though they are not in contractual privity with the service provider.
>
> Taken together, Justice Pariente's assurance that the narrowed scope of the economic loss rule was not intended to disrupt traditional principles of negligence law and Justice Cantero's concurrence regarding the continued import of the duty prong as a 'strong filter' in negligence cases convinces us that the opinion in American Aviation cannot be read as

> broadly as the fishermen suggest. Rather, we conclude that under traditional principles of negligence, whether entitled 'the economic loss rule' or not, the fishermen failed to state a cause of action. [footnotes omitted]

The Second District ignores this Court's holding that compensation is proper even when conduct frustrates economic interests unaccompanied by injury to a person or other property, and focuses upon the term, "actionable," holding that "actionable" means that negligent conduct *must* result in harm to person or property to permit compensation. This is circular reasoning that creates a "CATCH-22" situation.[3]

Having thus distinguished *American Aviation*, the Second District held (A-8 at 10):

> The negligence and strict liability claims seek purely economic damages unrelated to any damage to the property of the fishermen. Simply put, Mosaic did not owe an <u>independent duty of care</u> to protect the fishermen's purely economic interests - - that is, their expectation of profits from fishing for healthy fish. [emphasis added]

Thus, having created an inherent conflict in this Court's holding by ruling that "actionable conduct" automatically requires damage to person or

---

[3] A "Catch-22" is "a situation in which a desired outcome or solution is impossible to attain because of a set of inherently illogical rules or conditions …." American Heritage Dictionary (3d Ed. 1992). The circular reasoning is that the fishermen cannot recover economic damages because this Court used the term, “actionable” which always requires damage to property or person.

property (which, according to this circular logic, would mean that the court could never abolish the requirement of personal or property damage in "actionable conduct"), the Second District then couches its holding in terms of Mosaic's lack of an "independent duty of care" to protect Curd's "purely economic interests." In so holding, the Second District completely ignores the strict statutory duty that requires Mosaic compensate all persons injured by a "discharge or other condition of pollution." Florida Statutes, §§376.30 et seq. (2004).[4] The Second District also ignores the duty created by its own opinion in *Cities Service Co. v. State*, 312 So.2d 799 (Fla. 2d DCA 1975), which makes Mosaic strictly liable for its dangerous and ultrahazardous use of its retention pond. These are ample common law and statutory duties requiring Mosaic to avoid polluting Curd's fishing grounds.

---

[4] In Section 376.30(2)(b) and (d), Fla. Stat. (2004) the Legislature expressly found that pollution that occurs from the storage of dangerous substances poses "threats of great danger and damage to the environment of the State, to citizens of the State, *and to other interests deriving livelihood from the State*; …," and the Legislature also expressly found that the foregoing interests "outweigh any economic burdens imposed by the Legislature upon those engaged in storing" pollutants. This legislatively-imposed duty on the polluter, Mosaic, should carry over into the common law tort of negligence. This is especially so because Mosaic's conduct in ignoring clear warnings from the State about the ability of its slime pond to contain the pollutants was in reckless disregard of the rights the commercial fishermen have to take and sell marine life from the decimated area of Tampa Bay.

Curd, the other named plaintiffs and the fishermen they represent are all involved in commercial fishing for a living. To engage in commercial fishing requires a license from the State of Florida under §370.06, Fla. Stat. (2004). Furthermore, while fish, shellfish, crustacea and the like belong to the State of Florida when in the wild, §370.10(1), Fla. Stat. (2004) gives every citizen of the state the statutory right to take and use such fish, shellfish and crustacea.

For years, Curd and the fishermen who are members of the plaintiff class have been subjecting the fish, crabs and other marine life within the polluted area to their "dominion." These fishermen have a legitimate, protectable economic expectation that they will be able to obtain property in the form of fish, crabs and other marine life from the affected area. Mosaic destroyed their ability to do so.

The Second District concluded that because the fishermen conceded that as private citizens they did not "own" the marine life at the time of its destruction, the fishermen suffered no property damage. (A-8 at 9). But the State of Florida has licensed these fishermen, and created in them an economic expectancy that they will be able to harvest marine life in public waters, become the owners of the marine life and sell it for a profit.

Florida courts have long protected a party's economic expectations. *St. Johns River Mgmt. v. Fernberg Geological Services, Inc.*, 784 So.2d 500, 504 (Fla. 5th DCA 2001) holds that a protected business relationship need not be evidenced by an enforceable agreement, but the relationship "'must afford the plaintiff existing or **prospective** legal or contractual rights.'" [emphasis added] quoting *Register v. Pierce*, 530 So.2d 990, 993 (Fla. 1st DCA) review denied 537 So.2d 569 (Fla. 1988). The damages that Curd and his colleagues have sustained in this matter present one of those instances justifying "judicial interference to protect a plaintiff's economic expectations." *Monroe v. Sarasota County School Board*, 746 So.2d 530, 531 (Fla. 2d DCA 1999). Here, the fishermen have an absolute right to fish for a living in the area of Tampa Bay that defendant laid waste. These fishermen had a clear economic expectancy that, under a liberal interpretation of this part of Chapter 376, qualifies as a "protectable property" right.

**(2) The Commercial Fishermen Exception to the Economic Loss Rule.**

There is a well-established body of law allowing commercial fishermen to recover damages arising from polluted fishing waters. In a case arising in Louisiana, *State of Louisiana v. M/V Testbank*, 524 F.Supp. 1170 (E.D. La. 1981), *aff'd* 728 F.2d 748 (5thCir. 1984) 752 F.2d 1019 (5th

Cir. 1985) (en banc 10-5 decision), *cert. den*. 477 U.S. 903 (1986), the commercial fishermen sued defendants, who had caused a highly toxic chemical to contaminate fishing waters, and alleged damage to their ability to earn a livelihood. They alleged various theories of liability, including private causes of action under the laws of the State of Louisiana, laws of the United States, and federal statutes. Defendants contended that the commercial fishermen could not recover damages for economic loss because plaintiffs had sustained no actual physical damage. The trial court, although recognizing the general rule denying recovery when a claimant lacks a proprietary interest in the property suffering physical damage, applied the long-standing commercial fisherman exception. "[I]n those instances where there has been a tortious invasion of commercial fishing areas by the introduction of pollutants or contaminants, courts have affirmatively protected those fishermen who incurred actual economic losses." (524 F.Supp at 1173) citing *Union Oil Co. v. Oppen,* 501 F.2d 558 (9th Cir.1974); *Burgess v. M/V Tamano,* 370 F.Supp. 247 (S.D.Me.1973), *aff'd per curiam*, 559 F.2d 1200 (1st Cir.1977); *Masonite Corp. v. Steed*, 23 So.2d 756 (Miss.1945); *Hampton v. North Carolina Pulp Co*., 27 S.E.2d 538 (1943). The court specifically noted that under Louisiana law, the fishermen could

claim no proprietary interest in marine life until it is harvested. Nevertheless, following *Oppen* and *Tamano, supra*, the court held that:

> [T]he special interests of commercial fishermen must be protected even in the absence of any proprietary rights over aquatic life. . . .[Fishermen who routinely operated in the area] . . . were exercising their public right to make a commercial use of those waters. . . [T]he discharge of the PCP constituted a tortious invasion that interfered with the special interest of the commercial fishermen, crabbers, shrimpers and oystermen who use those public waters to earn their livelihood and the specific pecuniary losses which can be shown to have been incurred should be recoverable. Id at 1173-74.

In *Asociacion Nacional de Pescadores A Pequena Escala O Artesanales de Colombia v. Dow Quimica de Colombia S.A.*, 988 F.2d 559 (5th Cir. 1993), fishermen sought damages arising from the spill into the bay of pesticide from a Dow storage tank. The spill killed tons of fish that would otherwise have been available for commercial harvest and caused more lasting disruption of the food chain by killing plant and animal life in the bay. The theories of liability included negligence, strict liability, trespass and nuisance. The court upheld the fishermen's right to damages stating:

> Although the right to fish in the Bay of Cartegena may have been shared by the public at large, the theory on which liability has been authorized in cases of this type is that the fishermen had special commercial interests in the water and thus suffered an injury not suffered by the public at large; as a consequence, their 'specific pecuniary losses' could be recovered. Id. at 563.

Similarly, in *Burgess v. M/V Tamano*, 370 F.Supp. 247 (S.D.Me.1973), *aff'd per curiam*, 559 F.2d 1200 (1st Cir. 1977) the court recognized that although fishermen and clammers have no individual property rights with respect to the aquatic life harmed by oil pollution, they could sue for the tortious invasion of a public right, having suffered damages greater than the general public. *Id*. at 250. Thus, when an oil spill prohibited fishermen from plying their trade, the court considered it an interference with the "direct exercise of the public right to fish and dig clams," which was, in fact, a special interest different from that of the general public. In those instances where plaintiff commercial fishermen have established a course of business conduct that makes commercial use of a public right with which the defendant interferes, pecuniary losses are recoverable. *See also Testbank*, *supra*. at 1173.

In *Union Oil Company v. Oppen*, 501 F.2d 558 (9th Cir. 1974), the issue was "whether the defendants (offshore drillers) owed a duty to the plaintiffs, commercial fishermen, to refrain from negligent conduct in their drilling operations, which conduct reasonably and foreseeably could have been anticipated to cause a diminution of the aquatic life in the Santa Barbara Channel area and thus cause injury to plaintiffs' business." *Id*. at 568. The court found that the polluter owed such a duty to the commercial

fishermen stating: "The right of commercial fishermen to recover for injuries to their businesses caused by pollution of public waters has been recognized on numerous occasions." *Id*. at 570.

Cases that follow the *Testbank*, *Oppen*, and *Burgess* cases, *supra*, or that otherwise support the commercial fishermen exception include:

*In re the Exxon Valdez*, 767 F.Supp. 1509 (D. Alaska 1991) – "Those who directly make use of a resource of the area, viz. its fish, in the ordinary course of their business" may recover economic damages in the absence of property damage.

*In re the Exxon Valdez*, 1994 WL 16195323 (D. Alaska 1994) -- Native subsistence harvesters are in same category as commercial fishermen.

*In re the Exxon Valdez*, 1994 WL 182856 (D. Alaska 1994) – "The commercial fishermen's exception includes commercial fishing areas into which pollutants or contaminants were introduced."

*Blue Gulf Seafood, Inc. v. TransTexas Gas Corporation*, 24 F.Supp.2d 732 (S.D.Tex. 1998), *aff'd* 244 F.3d 135 (5th Cir. 2000) -- Commercial fishermen may recover for pure economic harm resulting from negligent acts that affect fishing waters although lacking physical injury to a proprietary interest.

*Golnoy Barge Company v. M/T Shinoussa*, 1993 WL 726819 (S.D.Tex. 1993); -- Recovery for economic loss that is directly related to the activities of commercial fishing, oystering, crabbing is permitted, but economic loss not directly related to those commercial fishing activities is barred.

*In re Complaint of Clearsky*, 1998 WL 42884 (E.D. La. 1998) -- Recognizes the commercial fishermen exception but declines to extend it further to owners of retail shops on pier struck by a runaway ship.

*The Complaint of Taira Lynn Marine Limited No. 5 L.L.C.*, 349 F. Supp. 2d 1026, 1034 (W.D. La. 2004) - - There already exists a commercial fishermen exception to the requirement of physical damage. The exception covers plaintiffs whose economic losses are characterized as of a particular and special nature.

*Shaughnessy v. PPG Industries, Inc.*, 795 F.Supp. 193 (W.D. La. 1992) -- Although "under Louisiana law, fish are resources not personally owned until reduced to possession," commercial fishermen can sue without having sustained physical damage.

*Jurisic & Sons, Inc. v. TransTexas Gas Corporation*, 2005 WL 2488433 (S.D.Tex. 2005) – "Commercial fishermen may recover for pure economic harm resulting from negligent acts that affect the fishing waters."

*Leo v. General Electric Company*, 145 A.D.2d 291, 538 N.Y.S.2d 844 (1989) – "Directly concerning the claims of commercial fishermen, we are in agreement with the reasoning in numerous decisions of our sister states which have addressed the issue and which have found that commercial fishermen do have standing to complain of the pollution of the waters from which they derive their living."

*Potomac River Association, Inc. v. Lundberg Maryland Steamship School, Inc.*, 402 F.Supp. 344, 358 (D. Md. 1975) – "Burgess v. *Tamano*, 370 F.Supp. 247 (D. Me. 1973), considered in detail whether commercial fishers and clammers could maintain an action for tortious invasion of public rights of fishing and navigation. That case held that where the right to fish had in fact been exercised by the plaintiffs, they had vested expectations which had been injured differently from those of the public and which would support a private cause of action. *See* 370 F.Supp. 250 and cases cited therein. This reasoning is persuasive. Therefore insofar as the plaintiffs' claim alleges injury to their rights as commercial fishers, they do have standing to sue for relief."

*Pruitt v. Allied Chemical Corporation*, 523 F.Supp. 975 (E.D. Va. 1981) -- Chemical company which polluted river and bay can be held liable

to commercial fishermen even in absence of direct harm to the fishermens' property.

*J.H. Miles & Co. v. McLean Contracting Co.*, 180 F.2d 789 (4th Cir. 1950) - - Oyster fisherman's rights are injuriously affected in a manner different from the public in general and may maintain a suit for damage resulting from damaged oyster beds.

*Hampton v. North Carolina Pulp Co.*, 27 S.E.2d 538 (N.C. 1943) -- Where defendant polluted waters of navigable stream with toxic chemicals interfering with plaintiff's fishing business, plaintiff could not be denied access to court on theory that he had suffered no special damage.

*Carson v. Hercules Powder Company*, 402 S.W.2d 640 (Ark. 1966) -- Commercial fisherman was entitled to recover damages for loss of profits from fishing during years in which the defendant polluter by discharging industrial waste into the stream destroyed fish and prevented operation of fishing business.

The foregoing cases demonstrate the existence of overwhelming authority for the proposition that commercial fishermen have a right to recover for economic harm that polluters visit upon them. There is no rational reason why the State of Florida should go against this overwhelming weight of authority and deny these fishermen a right to recover because the

fish and crabs were in the wild at the time Mosaic put them to death through its reckless disregard of clear warnings from both the State of Florida and Hillsborough County.

In the face of this overwhelming authority giving commercial fishermen a right to recover against a polluter under the present circumstances, the Second District reasoned (A-8 at 14):

> We do not rule out the possibility that the legislature could give commercial fishermen special rights in this context, but this Court declines to read this intent into Section 376.313(3), or to provide this right as a matter of tort law.

**D. The Second District Erroneously held that the Commercial Fishermen have no Recognized Claim Under Chapter 376, Florida Statutes (2004).**

The Second District begins its analysis of Chapter 376 by recognizing that this Court has "held that statutory causes of action such as this cannot be defeated by application of common law rules such as the economic loss rule." *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219, 1222 (Fla. 1999) ("It is undisputed that the legislature has the authority to enact laws creating causes of action. The courts limit or abrogate such legislative enactments through judicial polices, separation of powers issues are created, and that tension must be resolved in favor of the Legislature's right to act in this area.") The Second District then frames the issue as whether "the Legislature intended in §376.313 (3) to provide fishermen a

cause of action for their economic losses due to pollution." (A-8 at10). The Second District recognized that Chapter 376 provides a private cause of action to injured persons for "all damages" caused by pollution, (A-8 at11) but reasoned that the fishermen gave the statute an "expansive interpretation" (A-8 at 11) and ultimately concluded:

> "There is no precedent, however, permitting a recovery for damages under the statute when the parties seeking the damages does not own or have a possessory interest in the property damaged by the pollution.". (A-8 at 12).

Thus, the Second District began its analysis of Chapter 376 with an acknowledgement that this Court held in *Comptech Int'l, supra*, that statutory causes of action cannot be defeated by application of common law rules such as the economic loss rule and ended the analysis by applying the economic loss rule, *sub silentio*, to defeat the statutory claim.

The Second District completely ignored and failed to mention that the Legislature instructed Florida courts that Part II of Chapter 376 is "necessary for the general welfare and the public health and safety of the State and its inhabitants" and further directed the courts that Part II "shall be liberally construed to effect the purposes set forth under §§376.30 – 376.319 and the Federal Water Pollution Control Act as amended." §376.315. Fla. Stat. (2004).

The Second District also failed to take into consideration the following legislative findings and declarations in Florida Statutes, §§376.30-376.319 (2004):

> **Section 376.30 Legislative intent with respect to pollution of surface and ground waters**. - -
>
> (1) The Legislature finds and declares:
>
> (a) That certain lands and waters of Florida constitute unique and delicately balanced resources and that the protection of these resources is vital to the economy of this state;
>
> (b) That the preservation of surface and ground waters is a matter of the highest urgency and priority, as these waters provide the primary source for potable water in this state; and
>
> (c) That such use can only be served effectively by maintaining the quality of state waters in as close to a pristine condition as possible, taking into account multiple-use accommodations necessary to provide the broadest possible promotion of public and private interests.
>
> (2) The Legislature further finds and declares that:
>
> (a) The storage, transportation, and disposal of pollutants, … and hazardous substances within the jurisdiction of the state and state waters is a hazardous undertaking;
>
> (b) Spills, discharges, and escapes of pollutants, . . . pose threats of great danger and damage to the environment of the state, to citizens of the state and to other interests deriving livelihood from the state;
>
> * * *
>
> (d) Such state interests outweigh any economic burdens imposed by the Legislature upon those engaged in storing,

> transporting, or disposing of pollutants, … and hazardous substances and related activities.
>
> * * *
>
> (4) The Legislature further finds and declares that the preservation of the quality of surface and ground waters is of prime public interest and concern to the state in promoting its general welfare, preventing disease, promoting health, and providing for the public safety and that the interests of the state in such preservation outweighs any burdens of liability imposed by the Legislature upon those persons engaged in storing pollutants and hazardous substances and related activities.[5]

Section 376.313(3), Fla. Stat. (2004) creates a private cause of action for "**all damages** resulting from a discharge or other condition of pollution covered by §§376.30-376.319." [emphasis added] *Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So.2d 20 (Fla. 2005).

The Legislature from time to time creates private causes of action in areas where the state also has enforcing authority, for example, Chapter 772, "Civil Remedies for Criminal Practices," and §§501.201, et seq., Fla. Stat. (2008) "Deceptive and Unfair Trade Practices." These statutes, along with Chapter 376, allow private citizens to seek relief for violation of those statutes. Such citizens become private enforcement agencies of the laws of

---

[5] "'It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided, and *this intent must be given effect even though it may contradict the strict letter of the statute*.' *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So.2d 1, 6 (Fla. 2004) (quoting *State v. Webb*, 398 So.2d 820, 824 (Fla. 1981) (emphasis added)."

the State of Florida and serve as an additional deterrent to potential violators. In Chapter 376, the availability of court awarded attorneys fees provides an additional incentive for private citizens to prosecute wrongdoing under the statutory scheme. *E.g.* §376.313(6), Fla. Stat. (2004).

Commercial fishermen are constantly on the waters of Florida and observe daily the quality and condition of those waters and the wildlife in and around those waters. Commercial fishermen bear a substantial burden when a polluter destroys their ability to take the marine life upon which they depend for a living. A cause of action allowing fishermen to claim damages under Chapter 376 strengthens the purpose of the Act, and will serve as a deterrent to potential polluters.

Given the widespread availability of the "commercial fisherman exception" to the "economic loss rule," and given the Florida Legislature's express findings and declarations regarding the purposes of Chapter 376, it is contrary to the Legislature's intent to deny the commercial fishermen a right to sue a polluter who interferes with the fishermen's licensed right to earn a living from Florida's waters.

**E. Florida Law Traditionally Protects Persons in the Way They Earn a Living.**

We have already noted that Florida has a cause of action for interference with one’s economic expectations, even if an economic

expectation is not based on a formal contract. *St. Johns River Mgmt. v. Fernberg Geological Services, Inc.*, 784 So.2d. 500 (Fla. 5th DCA 2001). In addition, Article I, Section 6 of the Florida Constitution, provides that membership or nonmembership in a labor union cannot be used to deny or abridge one's right to work. In the law of defamation, a false statement that injures one in his or her profession or in his or her ability to earn a living is *per se* defamatory and damages are presumed. *Richard v. Gray,* 62 So.2d 597 (Fla. 1953); *Perry v. Cosgrove,* 464 So.2d 664 (Fla. 2d DCA 1985). And Florida Statutes, §448.08, Fla. Stat. (2008), allows a court to award reasonable attorneys' fees to a person who is required to sue for unpaid wages. So there are many protections in Florida law for the way a person earns a living, and the Second District's opinion in this matter is contrary to this tradition of Florida law.

## IV. CONCLUSION

The Second District has denied the commercial fishermen of Florida a right to recover damages from a polluter who injures them in the way they make a living. The Second District denied the commercial fishermen any common law rights under the doctrines of negligence and strict liability through an overly narrow interpretation of this Court's holding in *Indemnity Insurance Co. v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004).

The Second District denied the commercial fishermen a right to recover under Chapter 376 after first recognizing this Court's holding in *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.,* 753 So. 2d 1219, 1222 (Fla. 1999) that statutory causes of action cannot be defeated by applying common law rules such as the economic loss rule, and then by applying, s*ub silentio,* the economic loss rule to defeat the commercial fishermen's claim, contrary to the expressed intent of the Florida Legislature.

The law of Florida has traditionally provided great protection to a person's way of making a living and the Second District's opinion is contrary to that tradition.

For the reasons set forth above, this Court should answer both certified questions in the affirmative and should reverse and remand.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been served upon David B. Weinstein, Esq., Greenberg Traurig, P.A., Courthouse Plaza, 625 East Twiggs Street, Suite 100, Tampa, FL 33602, by regular U.S. mail, this _____ day of November, 2008.

ANDRA TODD DREYFUS, P.A.
Andra T. Dreyfus, Esq.
FBN: #276286
1463 Gulf-to-Bay Blvd.
Clearwater, FL 33755
727-442-1144; 727-446-4407 fax

and

JOHNSON, POPE, BOKOR,
RUPPEL & BURNS, LLP

BY:_____
F. WALLACE POPE, JR.
FBN: #124449
P.O. Box 1368
Clearwater, FL 33757
727-461-1818; 727-441-8617 - fax
Attorneys for plaintiffs/appellants

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2). This brief is in 14 point, Times New Roman.

_____

F. Wallace Pope, Jr.

461069