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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Cases:

Federal Cases:

Florida Statutes:

ARGUMENT

I. INTRODUCTION

Mosaic loads its answer brief with apocalyptic language forecasting the demise of the common law tort system in Florida if commercial fishermen are allowed to recover for their lost economic expectations. ["drastically depart" (p.1); "judicial fiat" (p.2); "drastic change" (p.3); "limitless common law liability" (p.3); "unprecedented request" (p.4); "extraordinary nature of their requested relief" (p.5); "common law Pandora's Box" (p.6); "drastically depart" (p.8); "such a dramatic change" (p.11); "unprecedented relief" (p.22 n.10); "virtually limitless liability" (p.23); "limitless scope of statutory strict liability" (p.23)]

But as we outlined in our initial brief and again argue below, allowing commercial fishermen to recover for damage to their economic expectations is entirely consistent both with Florida common law and the statutory command of Sec. 376.30, et seq. The fishermen merely ask the Court to hold explicitly what is already strongly implied in Florida law.

II. MOSAIC'S JURISDICTIONAL ARGUMENT

In its answer brief (pp. 4-7) Mosaic argues that the Court should decline to exercise its review jurisdiction in this matter. On October 28, 2008, this Court issued its order stating: "The Court accepts jurisdiction of

this case." The Second District considered the issues of this case to be of sufficient import to certify two questions to this Court as issues of great public importance.[1]

Mosaic cites *Star Casualty v. U.S.A. Diagnostic, Inc.*, 855 So. 2d 251, 252 (Fla. 4th DCA 2003) for the proposition that a question should be certified where it will affect a large segment of the public. The fishermen have filed a request that this Court take judicial notice of data from the Florida Fish and Wildlife Conservation Commission. Those figures establish that each year since 2004, Florida has issued between 10,875 and 12,501 commercial fishing licenses, and that the value of the salt water products that licensed fishermen have taken from Florida's waters annually has ranged between $165 million and $185 million. This Court should reject Mosaic's attempt to paint the interests of Florida's commercial fishermen as trivial and not sufficiently important for this Court to consider.

Mosaic's jurisdictional argument is an improper and untimely motion for rehearing on the jurisdictional point that this Court decided three months ago. This Court should reject Mosaic's effort to have the Court divest itself of jurisdiction of this proceeding.

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[1] Mosaic characterizes the Second District's certification as a "kindly gesture" toward the fishermen implying that the certification was a sop to the otherwise inconsequential fishermen. (Br. at 6).

III. MOSAIC'S COMMON LAW ARGUMENT

Mosaic's answer brief makes it appear as if the question of ownership of the fish and wildlife in Florida is a bright-line rule. Mosaic cites several cases to support its contention that ownership of all saltwater fish is vested in the State. But the cited cases paint a more complex picture. All of the cases that Mosaic cites to support its contention of state ownership deal with the State's power to regulate Florida wildlife and, in particular, fish and sea creatures. The cases arise out of Florida's enactment of regulations and ordinances to protect and conserve Florida wildlife for the benefit of all citizens.

In *State ex rel. Gray v. Stoutamire*, 179 So. 730 (Fla. 1938), this Court noted the distinction between the property rights held by the state in its buildings, lands and personal property, and the state's rights in fish in the public waterways. While the state has absolute proprietary ownership of its buildings, lands and personalty, when it comes to the fish, this Court held:

> In fish in the public waters the State has a sovereign right primarily and essentially of preservation, conservation, and regulation for the people of the State, whose right is to take fish from the public waters subject to the regulations imposed by the State for the benefit of the people of the State. People of the State may take fish from the public waters unless forbidden by law. They may not legally take proprietary property of the State unless authorized to do so by due course of law. *Id*. at 733.

The state is custodian of the fish for the benefit of people like licensed commercial fishermen, who are entitled to help themselves to the fish as regulated by law. But the fishermen may not help themselves to the state's vehicles and other personalty on pain of criminal charges. There is a difference between the state's and the people's interest in sea life and their interest in other forms of state property formally titled in the state.

In *State v. Perkins*, 436 So.2d 150 (Fla. 2nd DCA 1983), the court held that salt water fish belong to all the people of Florida, and while they cannot be claimed by one individual, it is clearly established that "[t]he people have a right to take fish from the salt waters subject to regulations imposed by the state for the benefit of the people of the state." *Id*. at 152.

Mosaic also cites *Lane v. Chiles*, 698 So.2d 260 (Fla. 1997), but the issue in *Lane* was not whether commercial fishermen have any property interest in salt water fish, but whether the state's regulation of nets constituted a deprivation of the commercial fishermen's property right to own and use fishing nets as private property.

These cases establish the state's duty, as the custodian for all the people of the state, to preserve, protect and promote the well being of the fish. When a commercial fisherman complies with the fishing regulations and laws of the state, that fisherman has a right to and an interest in the

catch. Ironically, Mosaic attempts to use these cases that clearly establish rights of commercial fishermen in Florida sea life to argue against the fishermen having any right to redress for damage to their interest in Florida's sea life.

Mosaic cites *Monroe v. Sarasota County School Bd.*, 746 So.2d 530 (Fla. 2nd DCA 1999) to support its argument that one can only recover for negligence for damages suffered to persons or property. Mosaic failed to point out that the court in *Monroe* cited this Court's holding in *Moransais v. Heathman,* 744 So.2d 973 (Fla. 1999), decided only a few month before *Monroe,* that under certain circumstances, recovery will be allowed for purely economic losses, even without a showing of damage to property or persons. In *Moransais* this Court made an exception to the economic loss rule in professional service contracts. "[W]e hold that the economic loss rule does not bar a cause of action against a professional for his or her negligence even though the damages are purely economic in nature and the aggrieved party has entered into a contract with the professional's employer." *Moransais* at 983.

As this Court noted in *Moransais,* "[t]he essence of the early holdings discussing the [economic loss] rule is to prohibit a party from suing in tort for purely economic losses to a product or object provided to another for

consideration, the rationale being that in those cases 'contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage.'" *Id*. at 980. With this in mind, the Second District in *Monroe* signaled that "[w]e will expand the common law tort of negligence, waiving that essential element only under extraordinary circumstances which clearly justify judicial interference to protect a plaintiff's economic expectations." *Monroe v. Sarasota County School Bd*., 746 So.2d 530, 531 (Fla. 2nd DCA 1999).

The fishermen ask this Court to recognize that pollution of water that leads to the destruction of the fish of this state constitutes the kind of circumstance justifying protection of the significant economic expectations of Florida's commercial fishermen.[2]

Mosaic's basic argument is that at the time Mosaic slaughtered the fish, the fishermen had absolutely no interest whatsoever in those fish and, therefore, under "traditional tort principles" they have no cause of action for damages against Mosaic. That is a pinched view of Florida tort law. The

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[2] The fishermen have filed a request that this Court take judicial notice of data from the Florida Fish and Wildlife Conservation Commission. Those figures establish that each year since 2004, Florida has issued between 10,875 and 12,501 commercial fishing licenses, and that the value of the saltwater products that licensed fishermen have taken from Florida's waters annually has ranged between $165 million and $185 million.

fishermen have shown that they have a protectable interest in those fish.

This Court's holding in *Indemnity Insurance Co. v. American Aviation, Inc.*, 891 So.2d 532 (Fla. 2004) certainly gave the fishermen cause to believe that their economic expectations are protected:

> "We conclude that 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**.** (*Id.* at 534) [emphasis added].
>
> ***
>
> 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) [emphasis added].

The fishermen clearly have an "economic interest" in the fish. They have an economic expectation that is a protectable interest and therefore a form of "property." The "spin" that Mosaic places on *American Aviation* (Ans. Br. at 10-12) is completely contrary to this Court's straightforward language and holding.

Instead of coming to grips with the plain holding of *American Aviation*, Mosaic argues that it had no "duty" to the fishermen. Normally, the law imposes upon persons a duty to conduct oneself in a way that avoids foreseeable harm to others.

In *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992), this Court held that: [f]orseeability clearly is crucial in defining the scope of the general duty placed on every person to avoid negligent acts and omissions. (*Id*. at 503); "[A] legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others." (*Id*. at 503); "Where a defendant's conduct creates a *foreseeable zone of risk*, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." (*Id*. at 503). "[E]ach defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result." (*Id*. at 503). In *Clay Electric Co., Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla. 2003), this Court held:

> The principle of 'duty' is linked to the concept of foreseeability and may arise from four general sources:
>
> > (1) Legislative enactments or administration [sic] regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedents; and (4) a duty arising from the general facts of the case.

Given the foregoing concept of legal "duty" in Florida, this question arises: is it reasonably foreseeable that commercial fisherman would suffer from Mosaic's negligent release of its poisonous bilge into Tampa Bay where numerous fishermen earn a living catching fish? This question

answers itself. In the language of *Clay Electric, supra*, Mosaic owed the commercial fishermen a duty arising not only from the "general facts of this matter," but also from judicial precedent (*American Aviation, supra*) and the legislative enactment of Chapter 376.30 *et. seq*., which imposes ***strict liability*** on polluters and specifically states that one of the purposes of the law is to protect those "deriving livelihood from the state." *Fla. Stat.* §376.30(2). (*See* our argument at pp. 10-11, *infra*).

Mosaic's common law argument boils down to this: (1) The fishermen did not "own" the fish when it killed them, so the fishermen have no right to recover from Mosaic; and (2) Mosaic owed no duty to the fishermen to avoid polluting their fishing grounds. Both of these arguments fail because they are contrary to the existing law of Florida.

IV. MOSAIC'S STATUTORY LIABILITY ARGUMENT UNDER §§376.30, ET SEQ.

Mosaic's answer brief completely fails to address the inherent contradiction in the Second District's ruling. The Second District began its analysis of Chapter 376 by acknowledging this Court's decision in *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So.2d 1219, 1222 (Fla. 1999), holding that statutory causes of action cannot be defeated by application of common law rules such as the economic loss rule, but the

Second District did just that by applying the economic loss rule, *sub silentio*, to defeat the fishermen's statutory claim.

Instead of dealing with the fishermen's argument, Mosaic cites *Carlile v. Game and Fresh Water Fish Commission* 354 So.2d 362, 364 (Fla. 1977), for the proposition that courts cannot interpret statutes to alter common law unless the statutory language is clear in its intent to do so. Mosaic argues on page 21 of its answer brief that "there is *no* language in the statute that even remotely suggests that the Legislature intended to permit plaintiffs to recover for solely economic losses." [emphasis in Mosaic's brief].

Actually, §§ 376.30, et seq. are replete with language that the Legislature intended to permit the fishermen to recover for the loss of their economic expectancies.

To begin, § 376.315 makes it clear that the law is necessary for the "general welfare" and the "public health and safety" of both the state and its inhabitants and that the law "*shall be liberally construed* to effect the purposes set forth under §§ 376.30-376.317 …." [emphasis added]

Furthermore, in §376.30, the law contains an express statement of legislative purpose. In subsection (1)(c), the Legislature "finds and declares that:"

- It is the intent of the Legislature that the state's waters be held in "as close to a pristine condition as possible," for the broadest possible protection of both public and "private interests." Protection of the "private interests" of the commercial fishermen's ability to earn a living from the "pristine" waters of Florida, constitutes one of the clear aims of this law.

In subsection (2) the Legislature "finds and declares that:"

- Escapes of pollutants "pose threats of great danger and damage … to citizens of the state, and to ***other interests deriving livelihood from the state***; …" [emphasis added]. Commercial fishermen are clearly "deriving livelihood from the state …," and pollutants pose "threats of great danger and damage" to the way fishermen derive their livelihood in Florida.
- Escaped pollutants are, according to the Legislature, "inimical to the paramount interests of the state as set forth in this section; …" Thus, protecting those "deriving livelihood from the state" is declared to be of "paramount interest" to Florida.
- These "interests outweigh any economic burdens imposed upon those engaged in storing, transporting, or disposing of pollutants …" Thus,

polluters have a strong duty to commercial fishermen, notwithstanding the economic burden.

The foregoing is a powerful legislative statement of intent that commercial fishermen be protected from the ravages of polluters. When this legislative intent is combined with the traditional protection that Florida law affords persons in the way they earn a living (petitioner's initial brief, pp. 27-28), the inescapable conclusion is that §§ 376.30, et seq. bestow upon the commercial fishermen a right to recover damages when a polluter destroys their economic expectations.

Mosaic cites two cases (Ans. Br. p. 21-22) for the proposition that "recoverable damages under the statute should be restricted to those connected to the cost of cleanup and removal of prohibited discharge …." *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372 (Fla. 2d DCA 1993) and *Italiano v. Jones Chemicals, Inc.*, 908 F.Supp. 904 (M.D. Fla. 1995). That is surprising because this Court overruled *Mostoufi* in *Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So.2d 20 (Fla. 2005), and the U.S. District Court for the Middle District of Florida backed off of its limited damages holding in the first *Italiano* case in its second *Italiano* decision, *Italiano v. Jones Chemicals, Inc.*, 1997 WL118426, *2 (M.D. Fla. Feb. 21, 1997).

In *Aramark*, this Court placed no such limitation on the "damages" that may be recovered under §§ 376.30 *et seq*. In fact, the claim in *Aramark* was for $153,000 in diminished property value, so this Court has already held that damages under the 1983 statute are not limited to "the costs of cleanup and removal."

On May 24, 2006, the United States District Court, Middle District of Florida, Orlando Division, decided *Brottem v. Crescent Resources, LLC*, 2006 WL 1529327 (M.D. Fla. 2006). *Brottem* first recognizes that this Court's opinion in *Aramark, supra*, disapproves of the Second District's opinion in *Mostoufi, supra*, and that "the line of Florida cases finding that § 376.313 does not create a right of action is based on reasoning rejected by the Florida Supreme Court." (*Brottem* at 3). Second, *Brottem* noted that the first *Italiano* decision was later repudiated in a second *Italiano* opinion by the same federal court that wrote the first *Italiano* opinion. (*Brottem* at 3):

> At least one federal court has determined that although Chapter 376 does create an individual cause of action for damages, those 'damages must be connected with the clean up or removal of the prohibited discharge.' *Italiano v. Jones Chemicals, Inc.*, 908 F.Supp. 904, 906 (M.D. Fla. 1995). [footnote omitted]. However, that court subsequently revisited the issue in a case in which the plaintiff sought damages for contamination that reduced the value of the plaintiff's property and rendered it non-saleable, and the defendant argued that the plaintiff failed to state a cause of action under Chapter 376. *Italiano v. Jones Chemicals, Inc.*, 1997 WL 118426, * 2 (M.D. Fla. Feb. 21 1997). The court determined that its prior interpretation of

> Section 376.313 'may [have been] too restrictive,' and resolved its doubts in favor of the plaintiff, denying the defendant's motion to dismiss. *Id.*

Aramark squarely holds that a plaintiff asserting a private cause of action under §§ 376.30, *et seq.* may make a claim for property damage. The question before this Court is whether the fishermen's economic expectancy is the sort of property for which they may recover under the statute. Mosaic advances no rational reason why Florida law should allow a plaintiff to recover in tort for interference with economic expectations even without a formal contract, *St. Johns River Mgmt. v. Fernberg Geological Services, Inc.*, 784 So.2d 500 (Fla. 5th DCA 2001), yet deny a plaintiff the right to recover damaged economic expectations from a polluter.

Mosaic ends its answer brief (p.23) with a purported "public policy" argument that it formulates as this bugaboo:

> Neither Mosaic nor anyone else should be deemed responsible for the purported losses of every person who can conjure up some purported economic impact from an *environmental release*. [emphasis added]

The fishermen believe that "poisonous bilge" is a more apt description than Mosaic's sugar-coated "environmental release." And the fishermen's losses are not "purported." Their fishery was wiped out. They depend upon the fishery to make a living. They will have to prove their losses pursuant to the rules of evidence. The members of the class consist solely of people

who go out onto the water, harvest sea life from the water and sell it. This is not the untamed liability picture that Mosaic attempts to paint.

Mosaic argues that "there is no precedent for such a rule of law," (Ans. Br. at 23) but completely ignores the extensive body of maritime law that allows recovery under these exact circumstances. (Our initial brief, pp. 15-22).

The fishermen do not ask for "a virtually limitless scope of statutory strict liability," as Mosaic exaggerates. The fishermen merely argue that they should be allowed to recover damages to their economic expectations when a polluter destroys their fishery.

V. CONCLUSION

For the reasons set forth in the fishermen's initial brief and this reply brief, the fishermen respectfully request that the Court answer the certified questions in the affirmative, reverse the Second District Court of Appeal and remand the case for further proceedings.

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 February, 2009.

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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.

_____

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