

	IN THE SUPREME COURT OF FLORIDA
ARAMARK UNIFORM AND CAREER APPAREL, INC., et al., <p style="text-align: center;">Petitioners,</p> vs. SAMUEL M. EASTON, JR., <p style="text-align: center;">Respondent.</p> <hr/> _/_	Case No. SC02-2190 On Appeal from the District Court of Appeal for the First District of Florida, Case No. 1D01-2952

PETITIONERS' INITIAL BRIEF AND APPENDIX

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TABLE OF CONTENTS

<u>Description</u>	<u>Page No.</u>
TABLE OF CITATIONS	iv
STATEMENT OF THE CASE AND OF THE FACTS	1
A. Nature of the Case	1
B. Course of the Proceedings	1
C. Disposition in the Lower Tribunal	1
D. Facts of the Case	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
POINT ONE	3
A. The Statute	4
B. The District Court's Opinion.	4
C. The District Court's Opinion is in conflict with the	5
D. The District Court's Opinion conflicts with the	6
E. The District Court's Opinion also violates the	9
POINT TWO	11
POINT THREE	14
CONCLUSION	15
CERTIFICATE OF SERVICE	15
CERTIFICATION OF COMPLIANCE	16
APPENDIX	17

TABLE OF CITATIONS

Cases:

<u>Name</u>	Page No.
Ady v. American Honda Finance Corporation, 675	6
Alameda v. Newman, 2002 WL 248330 (E.D. Pa. 2002)	9
Ellman v. Woo, 1991 WL 274838 (E.D. Pa. 1991)	7
Florida Convalescent Centers v. Somberg, 840 So.2d	5
Futura Realty v. Lone Star Building Centers, Inc., 578	12
General Electric Corp. v. General Electric Corp., 159	13
General Electric Corp. v. General Electric Corp., 159	13
McCain v. Florida Power Corporation, 593 So.2d 500,	3
Mostoufi v. Presto Food Stores, Inc., 618 So. 2d 1372	10
O’Neal v. Department of the Army, 852 F. Supp. 327,	7
Shearn v. Orlando Funeral Home, Inc., 88 So.2d 591,	5
State v. Fitch, 76 Misc.2d 1006, 1009 (Fla. 2000)	8
State v. Liberty Mutual Insurance Co., 21 So.2d 695	8
Trianon Park Condominium Association, Inc. v. City of	12
Westland Skating Center, Inc. v. Gus Machado Buick,	13

Statutes:

<u>Name</u>	Page No.
Section 376.308, Florida Statutes	9
Section 376.313, Florida Statutes	4; passim

Treatises:

<u>Name</u>	Page No.
55 Fla. Jur. 2 nd , Trespass, Section 1	12
Restatement (Second) of Torts, Section 166	12

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case. In this action, Respondent sued the Petitioners for damages and injunctive relief on the basis of environmental contamination on Petitioner’s property. Respondent alleged various common law and statutory causes of action, including a count under Section 376.313(3), Florida Statutes.

B. Course of the Proceedings. After a bench trial the trial court entered

judgment in favor of Petitioners. Respondent appealed to the District Court of Appeal for the First District of Florida (“the District Court”).

C. Disposition in the Lower Tribunal. The District Court, in an opinion entered on August 6, 2002 (“the Opinion”), reversed the trial court’s judgment. Petitioners timely moved for certification. The motion for certification was denied on September 13, 2002. The District Court issued its Mandate on October 1, 2002. This appeal followed.

D. Facts of the Case. In its Opinion, the District Court noted the trial court’s finding that there was no evidence that Petitioners had caused the contamination that had migrated to Respondent’s property. The District Court did not disturb this holding. Appendix, p. 2. Nevertheless, the District Court held that this lack of evidence did not bar Respondent’s action under Section 376.313(3), Florida Statutes. In particular, the District Court expressly held that Section 376.313(3), Florida Statutes *creates* a statutory cause of action for these circumstances, without regard to whether the Petitioners caused the contamination, and that the only defenses to such liability are the defenses cited in Section 376.308, Florida Statutes. Appendix, p. 5. Implicitly holding that Respondent had proved a prima facie case of liability under the statute, the District Court remanded to the trial court with instructions to determine whether the statutory defenses were applicable. Id.

1

¹ Although the burden is on a defendant to prove its affirmative defenses, Hough v. Menses, 95 So.2d 410, 412 (Fla. 1957), the defendant has no duty to go forward with

SUMMARY OF ARGUMENT

The District Court held that Section 376.313(3), Florida Statutes created a new cause of action under which Petitioners were prima facie liable, and that the trial court erred by rendering judgment in Petitioners' favor without considering the exclusive defenses to liability enumerated by the statute. The District Court's conclusion is erroneous because it is contradicted by the clear language of the statute. Furthermore, to interpret the statute as creating a new cause of action would violate the tenet that statutes in derogation of the common law are to be strictly construed, and that the court will presume that such a statute was not intended to alter common law other than by what was clearly and plainly specified in the statute. Such an interpretation also violates the doctrine that that statutes that relate to the same or closely related subject matter should be read *in pari materia*, and that statutes are to be construed to avoid absurd results.

The statute simply modifies existing causes of action by eliminating the need to prove a standard of care and by providing for limited defenses. Accordingly, Respondent was required to prove a prima facie case under an existing common law cause of action, except for an appropriate standard of care. There is no common law cause of action under which Petitioners, who did not cause the contamination, could be held liable to Respondent, regardless of any applicable standard of care. As

any evidence until plaintiff establishes a prima facie case, Greenfield Real Estate Investment Corp. v. Merritt, 348 So.2d 1199, 1201 (Fla. 3rd DCA 1977).

Respondent failed to prove a prima facie case under the statute, it was not necessary for the trial court to consider the enumerated defenses to liability under the statute, and the trial court's judgment was correct.

Finally, to interpret the statute as creating a new cause of action would lead to inequitable and illogical results.

ARGUMENT

POINT ONE

SECTION 376.313(3), FLORIDA STATUTES, DOES NOT CREATE A NEW CAUSE OF ACTION.

As the District Court's ruling was based on its interpretation of a statute, its decision was purely one of law and therefore the standard of review is plenary.

See, e.g. McCain v. Florida Power Corporation, 593 So.2d 500, 502 (Fla. 1992).

A. The Statute

Section 376.313(3), the statute at issue in this case, provides in relevant part as follows:

Notwithstanding any other provision of law, nothing contained in ss. 376.30-376.319 prohibits any person from bringing a cause of action in a court of competent jurisdiction for all damages resulting from a discharge or other condition of pollution covered by ss. 376.30-376.319.... Except as otherwise provided in subsection (4) or subsection (5), in any such suit, it is not necessary for such person to plead or prove negligence in any form or manner. Such person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred. The only defenses to such cause of action shall be those specified s. 376.308.

B. The District Court's Opinion.

As noted above, the District Court expressly held that Section 376.313(3), Florida Statutes *creates* a new cause of action for strict liability:

A plain reading of section 376.313 indicates that a cause of action for strict liability was created. Subsection (3) provides that it is not necessary to plead or prove negligence.² This discussion of requisite proof indicates that a separate cause of action is being created by the statute. Moreover, subsection (3) also states that the “only defenses to such cause of action shall be those specified in section 376.308.” This reference to the “only defenses to such cause of action” indicates that a cause of action was created by the statute. We do not read section 376.313(3) to require Appellant to prove that Appellees caused the contamination on their own property.

²The exceptions referenced for subsection (4) and (5) provide circumstances when a person bringing an action must prove negligence.

Appendix, pp. 4-5.

C. The District Court’s Opinion is in conflict with the plain language of the statute.

The District Court’s conclusion does not bear scrutiny for several reasons. First, the plain language of the statute commands a contrary result. Section 376.313(3) states that “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...”(emphasis added). “Cause of action” has been defined as “the right which a party *has* to institute a judicial proceeding.” Bacardi v. Lindzon, 2002 WL 185910 (Fla. 2002), citing Shearn v. Orlando Funeral Home, Inc., 88 So.2d 591, 593(Fla. 1956). The legislature’s use of the term “cause of action” must therefore refer to an existing

cause of action, one that a party already *has*. The use of the term “prohibits” clearly indicates that that the state legislature simply intended that nothing in Sections 376.30-376.319 would prevent a party from asserting existing causes of action. If the legislature had intended to create a new cause of action, it would not have used language of this nature. It would simply have stated, for example, that a responsible party “shall be liable to” an injured party for damages. Thus, because the statute is unambiguous, no further construction is necessary. Florida Convalescent Centers v. Somberg, 840 So.2d 998, 1000 (Fla. 2003).

D. The District Court's Opinion conflicts with the doctrine that statutes in derogation of the common law are to be strictly construed.

If any further construction of the statute is undertaken, it is clear that the District Court's decision violates the doctrine that statutes in derogation of the common law are to be strictly construed, and that the court must presume that such a statute was not intended to alter common law other than by what was clearly and plainly specified in the statute. Ady v. American Honda Finance Corporation, 675 So.2d 577, 581 (Fla. 1996).

² In support of its holding that the statute creates a new cause of action, the District Court stated that “[s]ubsection (3) provides that it is not necessary to plead or prove negligence. This discussion of requisite proof indicates that a separate cause of action is being created by the statute.” Appendix, pp. 4-5 [footnote omitted]. This conclusion does not logically follow, as the referred-to language in the statute can just as easily be interpreted as a desire by the legislature to simply dispense with a negligence standard of care in any existing causes of action. It is

² To the extent that Section 376.313(3) may be considered a “remedial” statute, Petitioners are aware that this Court has held that even remedial statutes in derogation of common law must be liberally construed “to ensure access to the remedy provided by the Legislature.” Irven v. Department of Health and Rehabilitative Services, 790 So.2d 403, 406 (Fla. 2001). However, Irven also instructs that such a statute “should not be extended to create rights of action not within the intent of the lawmakers as reflected by the language employed when aided, if necessary, by any applicable rules of statutory construction.” Id. at 406, citing Stokes v. Liberty Mutual Insurance Co., 213 So.2d 695 (Fla. 1968). This requirement can be met only if the statute is expansively read *within the limitation* that it simply modifies existing causes of action.

not difficult to imagine situations in which a defendant would be liable under common law for a discharge of pollutants but for the lack of proof of negligence, for example where a plaintiff proved that a defendant caused the contamination but there was no proof of an appropriate standard of care.³ In such cases the statute would impose liability on the defendant under existing common law doctrines, without unnecessarily creating an entirely new cause of action that would dispense with other elements of proof such as causation. The statute must be interpreted in this manner so as not to further alter the common law.⁴

The District Court also cited in support of its holding the language in the statute providing that “[t]he only defenses to such cause of action shall be those specified in section 376.308.” The District Court concluded that “[t]his reference

³ For example, in the case of Ellman v. Woo, 1991 WL 274838 (E.D. Pa. 1991), although the defendant had caused contamination by discharging dry-cleaning solvents into the soil and groundwater, the court held that not only had the plaintiffs failed to prove liability for nuisance or common law strict liability, they had also failed to prove a negligence cause of action because the plaintiff had presented no evidence at trial regarding the appropriate standard of care to be used by a dry-cleaner in the handling of the contaminant. Presumably, had they proven such a standard of care and a violation of that duty they would have prevailed. Similarly, in O’Neal v. Department of the Army, 852 F. Supp. 327, 337 (M.D. Pa. 1994), the defendant was held not liable for contamination caused by its operations because the plaintiffs presented no evidence of the appropriate standard of care.

⁴ Nor does the next sentence in the statute—“Such person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred.”—imply the creation of a new cause of action. As there are obviously many other elements that would have to be proved in any action, such as damages and the identity of the proper parties, this sentence must be construed as limited to modifying the preceding sentence regarding the standard of care.

to the ‘only defenses to such cause of action’ indicates that a cause of action was created by the statute.” Appendix, p. 5. Again, such a conclusion does not logically follow, as there is no reason that the legislature could not have intended to limit the defenses available in existing common law causes of action. For example, in a common law cause of action a defendant might raise the “avoidable consequences” defense, a defense that still exists notwithstanding the comparative fault doctrine. See, e.g. Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984). Section 376.313(3) would appear to have the effect of eliminating such a defense, without the need to create an entirely new cause of action.⁵

E. The District Court’s Opinion also violates the doctrines that statutes that relate to the same or closely related subject matter should be read *in pari material*, and that statutes are to be construed to avoid absurd results.

The District Court’s decision also violates the doctrines that statutes that relate

⁵ Although not mentioned by the District Court, one can imagine an additional argument that by permitting a defendant to prove as a defense “that the occurrence was solely the result of... [a]n act or omission of a third party, other than an employee or agent of the defendant or other than one whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the defendant...”, as provided by Section 376.308(2)(d), Florida Statutes (emphasis added), the legislature, by thus including complete lack of causation by a defendant only as a conditional affirmative defense, intended that no such causation is required to make a prima facie case for liability, and that therefore a cause of action unknown at common law was created. This argument too would be unavailing, as there are indeed common law causes of action that would hold a defendant liable even if he or she did not cause the injury, such as where the defendant is liable as a general partner to the tortfeasor, or liable for the acts of an employee under the doctrine of respondeat superior.

to the same or closely related subject matter should be read *in pari material*, and that statutes are to be construed to avoid absurd results. State v. Fuchs, 769 So.2d 1006, 1009 (Fla. 2000); Amente v. Newman, 653 So.2d 1030, 1032 (Fla. 1995). Section 376.308(1), Florida Statutes, referenced in Section 376.313(3), sets forth the circumstances in which the Florida Department of Environmental Protection (“FDEP”) may institute an action against a party for groundwater contamination. It is very similar in language to Section 376.313(3), stating in relevant part:

(1) In any suit instituted by the department under ss. 376.30-376.319, it is not necessary to plead or prove negligence in any form or manner. The department need only plead and prove that the prohibited discharge or other polluting condition has occurred. The following persons shall be liable to the department for any discharges or polluting condition:

(a) Any person who caused a discharge or other polluting condition or who owned or operated the facility, or the stationary tanks or the nonresidential location which constituted the facility, at the time the discharge occurred... [emphasis added]

Thus, the FDEP could enforce the statute against Petitioners only if they either caused the discharge, or owned or operated the facility at the time the discharge occurred, facts not present in this case. Accordingly, Petitioners could not *prima facie* held be liable to the FDEP, and therefore would not need to prove any defenses. It would make no sense to allow Respondent to prove a *prima facie* case under the same facts, and thereby give Respondent greater rights than the FDEP, as the decision of the District Court will do if left undisturbed.

Moreover, to construe Section 376.313(3) as creating an entirely new cause of action would render the statute ambiguous and leave courts with no guidance as to the

class of defendants that might be held liable. The statute simply states that a plaintiff “need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred”, without providing any guidance as to who can be sued. Can a property owner who did not cause the contamination be held liable? Can a lessor be held liable for the acts of its tenant? Can a tenant be held liable for the acts of its landlord? Can a remote predecessor in title be held liable? Can a mortgagee be held liable, on the theory that it owns an interest in the contaminated property? Only by construing the statute as modifying existing causes of action might such questions be answered.

Finally, by distinguishing the Second District’s decision in Mostoufi v. Presto Food Stores, Inc., 618 So. 2d 1372 (Fla. 2d DCA 1993) -- which allowed the defense of caveat emptor to be used a defense to an action under the statute -- on the grounds that that decision involved a predecessor in title and not an adjacent property owner, the Opinion implicitly sanctions a defense that is not provided for in the statute, leading to further confusion.

POINT TWO

BECAUSE SECTION 376.31, FLORIDA STATUTES, DOES NOT CREATE A NEW CAUSE OF ACTION, AND THERE IS NO COMMON LAW DOCTRINE UNDER WHICH THE PETITIONERS COULD BE HELD LIABLE UNDER THE FACTS OF THIS CASE, THE TRIAL COURT’S DECISION WAS CORRECT.

The trial court held that there was no evidence that Petitioners had caused the

contamination that had migrated to Respondent's property. The District Court did not disturb this holding. Appendix, p. 2. Accordingly, the standard of review of the District Court's ruling is plenary.

Because Section 376.313(3), Florida Statutes, does not create a new cause of action, the Respondent was first required to prove a prima facie case of Petitioners' liability under a common law cause of action, excepting only the need to prove a standard of care should the cause of action normally so require. Only if such proof was made would Petitioners then be required to prove one of the enumerated defenses.

There is no common law cause of action that would impose liability on a landowner for pollution to an adjoining landowner's property that it did not somehow cause, regardless of the applicable standard of care, nor has the Respondent pointed to any such authorities. For example, in order to establish an actionable trespass, the plaintiff must prove that the trespass resulted from the defendant's intentional or negligent *act*. 55 Fla. Jur. 2nd, Trespass, Section 1; 75 Am. Jur. 2nd, Trespass, Section 9; Restatement (Second) of Torts, Section 166; Hudson v. Peavey Oil Company, 566 P.2d 175 (Or. 1977). Similarly, a common law strict liability cause of action for an abnormally dangerous or ultrahazardous activity must be based upon some *activity* by the defendant. See, e.g. Great Lakes Dredging v. Sea Gull Operating Corp., 460 So.2d 510, 512 (Fla. 3d DCA 1984). With regard to negligence actions, there is no common law duty to prevent the

misconduct of third persons, Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912, 918 (Fla. 1985), nor is there a duty to warn of conditions caused by others. Cf. Futura Realty v. Lone Star Building Centers, Inc., 578 So. 2d 363 (Fla. 3d DCA 1991).^{6,7}

Petitioners are unable to locate any court decisions in which a plaintiff sued a defendant for contamination that the defendant did not in any way cause. However, although this case involves the flow of groundwater, the facts are analogous to situations in which a landowner sues an adjacent landowner for damages resulting from the natural flow of surface waters from the adjacent landowner's land. In such cases, liability is denied, under the theory that the "upper" landowner has a servitude on the land of the "lower" landowner. It is only where the upper landowner actively and unreasonably changes that natural flow that liability can be established. See, e.g. Westland Skating Center, Inc. v. Gus Machado Buick, 542 So.2d 959 (Fla. 1989).

⁶ In Futura the court held that a seller of property had no duty to warn a purchaser of pollution on the property. Although Petitioner had been unable to locate any decisions involving adjacent landowners, if the law recognizes no such duty between a buyer and seller it is doubtful that the law would recognize such a cause of action between parties not in privity.

⁷ As for the only other possible common law cause of action, nuisance, the trial court determined that the Respondent had not proved the elements of nuisance, specifically holding that "the intrusion of the contaminated groundwater onto the Plaintiffs' property does not unreasonably interfere with, disturb, or annoy the Plaintiff in the free use and possession of his property." Appendix, pp. 7-8. The District Court did not disturb this holding.

Here, Petitioners are no different from the innocent “upper” landowner who, through no fault of his own, and through no modification of the flow, allows surface water to flow onto the lands of an adjoining landowner. Petitioners had no obligation to control the flow of contaminated groundwater that they did not cause.⁸ Had Respondent proved that Petitioners somehow through their actions had caused the contamination to increase, Respondent might have a cause of action, but that is not the case here.

As Respondent has failed to prove a prima facie case of liability on the part of Petitioners under the common law, there was no need for the trial court to consider the exclusive defenses enumerated by the statute. Accordingly, the trial court’s judgment was correct.

POINT THREE

INEQUITABLE AND ILLOGICAL RESULTS WILL FOLLOW IF THE DISTRICT COURT’S MANDATE IS NOT REVERSED.

Left undisturbed, the District Court’s Opinion will expose an entirely innocent party to potential liability. The limited defenses set forth in Section 376.308, Florida Statutes, place the burden on the innocent property owner to prove that the contamination was caused by a third party, and that the innocent

⁸ Nevertheless, the trial record amply shows that upon discovery of the contamination Petitioners immediately advised the FDEP, commenced assessment to determine whether and to what extent the property was contaminated, and commenced remedial action, always in full compliance with state regulations, under the oversight and with the approval of the FDEP.

property owner exercised due care and took appropriate precautions against any foreseeable acts of such third party, burdens that a completely innocent party may not be able to carry. The District Court's Opinion is a novel and dangerous expansion of the jurisprudence of this state in that it imposes liability on a property owner for damage to an adjoining property that it did not cause in any way. As a result, it will unfairly penalize innocent owners of contaminated property. More broadly, such an interpretation leaves unresolved the class of defendants that can be held liable, and therefore will cause great uncertainty in real estate transactions throughout the state. It is not difficult to imagine the restraints on the free transfer of property, not to mention the increased transaction and insurance costs, that must ultimately result from the decision. Innocent owners of contaminated property wishing to avoid its effect may be induced to sell their property to unsuspecting purchasers in order to avail themselves of the protections of the doctrine of *caveat emptor*, a result implicitly sanctioned by the District Court's Opinion. Innocent parties like Petitioners will be dissuaded from purchasing and cleaning up contaminated property for fear of liability.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court reverse the Mandate of the First District Court of Appeal dated October 1, 2002, and reinstate the judgment of the trial court.

CERTIFICATE OF SERVICE

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

CERTIFICATION OF COMPLIANCE

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

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INDEX TO APPENDIX

PAGE

Opinion dated August 6, 2002 1
Final Judgment for the Defendants..... 6