IN THE SUPREME COURT OF FLORIDA

Case No.: SC18-657

L.T. Nos. 1D17-2065, 2014-CA-000051

CHARLES A. LIEUPO,

Petitioner,

v.

SIMON'S TRUCKING, INC.,

Respondent.

BRIEF OF AMICUS CURIAE FLORIDA JUSTICE REFORM INSTITUTE

IN SUPPORT OF RESPONDENT

Frank A. Shepherd
frank.shepherd@grayrobinson.com
Gray Robinson
333 S.E. Second Avenue
Suite 3200
Miami, FL 33131
Telephone: (305) 416-6880

William W. Large
William@fljustice.org
Florida Justice Reform Institute
210 South Monroe Street
Tallahassee, FL 32301-1824
Telephone: (850) 222-0170

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PREFACE vi

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST 1

OVERVIEW AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. PERSONAL INJURY DAMAGES ARE NOT RECOVERABLE IN A STRICT LIABILITY ACTION UNDER THE WQAA 4

II. CONSTRUING THE WQAA TO PERMIT RECOVERY OF PERSONAL INJURY DAMAGES IS INCONSISTENT WITH THE WQAA'S PURPOSE AND WITH CERCLA 9

III. THE JUDICIARY CANNOT ABROGATE TRADITIONAL TORT LIABILITY DEFENSES WITHOUT EXPRESS STATUTORY AUTHORIZATION 13

IV. THE COURT SHOULD DISCHARGE JURISDICTION AS IMPROVIDENTLY GRANTED 16

A. The First District's Decision Does Not Conflict With Any Prior Decision of This Court 17

B. The Certified Question Is Not One of Great Public Importance 19

CONCLUSION 20

CERTIFICATE OF SERVICE 21

CERTIFICATE OF COMPLIANCE 22

TABLE OF AUTHORITIES

Page(s)

Cases

Aguilera v. Inservices, Inc.,
905 So. 2d 84 (Fla. 2005).....18

Ansin v. Thurston,
101 So. 2d 808 (Fla. 1958)..... 4, 16, 17, 18

Artesian Water Co. v. Gov't of New Castle Cnty.,
659 F. Supp. 1269 (D. Del. 1987)..... 10, 12

Bradley v. State,
615 So. 2d 854 (Fla. 1st DCA 1993) 19

Cunningham v. Anchor Hocking Corp.,
558 So. 2d 93 (Fla. 1st DCA 1990) 9

Curd v. Mosaic Fertilizer, LLC,
39 So. 3d 1216 (Fla. 2010)..... *passim*
993 So. 2d 1078 (Fla. 2d DCA 2008).....5

Fla. Star v. B.J.F.,
530 So. 2d 286 (Fla. 1988).....18

Foley v. Weaver Drugs, Inc.,
177 So. 2d 221 (Fla. 1965).....17

Gandy v. State,
846 So. 2d 1141 (Fla. 2003).....16

Gen. Dynamics Corp. v. Brottem,
53 So. 3d 334 (Fla. 5th DCA 2010) ..... *passim*

Goldenberg v. Sawczak,
791 So. 2d 1078 (Fla. 2001).....9

Horowitz v. Plant'n Gen. Hosp. Ltd. P'ship,
959 So. 2d 176 (Fla. 2007).....7, 13

Kaplan v. Peterson,
674 So. 2d 201 (Fla. 5th DCA 1996) 5

Morrison v. Roos,
944 So. 2d 341 (Fla. 2006) 20

N. Mia. Med. Ctr., Ltd. v. Miller,
896 So. 2d 886 (Fla. 3d DCA 2005) 14, 15

New Mexico v. Gen. Elec. Co.,
467 F.3d 1223 (10th Cir. 2006) 11

New York v. Shore Realty Corp.,
759 F.2d 1032 (2d Cir. 1985) 11

Palm Harbor Spec. Fire Control Dist. v. Kelly,
516 So. 2d 249 (Fla. 1987) 7, 8

Palsgraf v. Long Island Railroad Co.,
162 N.E. 99 (N.Y. 1928) 15

Prisco v. State of New York,
902 F.Supp. 400 (S.D.N.Y. 1995) 10, 11, 12

Ruiz v. Tenet Hialeah Healthsystem, Inc.,
43 Fla. L. Weekly S655a, 2018 WL 6696028 (Fla. Dec. 20, 2018) 19

Simon's Trucking, Inc. v. Lieupo,
244 So. 3d 370 (Fla. 1st DCA 2018) 2

Star Cas. v. U.S.A. Diagnostics, Inc.,
855 So. 2d 251 (Fla. 4th DCA 2003) 19

State, Dep't of Envt'l Prot. v. Allied Scrap Processors, Inc.,
724 So. 2d 151 (Fla. 1st DCA 1998) 10, 12

State v. Fuchs,
769 So. 2d 1006 (Fla. 2000) 8

United States v. Miami Drum Servs., Inc.,
No. 85-0038-Civ-Aronovitz, 1986 WL 15327 (S.D. Fla. Dec. 12, 1986) 10

West v. Caterpillar Tractor Co.,
336 So. 2d 80 (Fla. 1976).....14

Constitution

Art. V, § 3(b)(3), Fla. Const..... 1, 3, 16, 18

Statutes

Chapter 376, Fla. Stat. 3, 4, 5, 7

§§ 376.011-376.21, Fla. Stat. (2011) (Pollutant Discharge Prevention and Control Act).....4

§ 376.021(1), Fla. Stat. (2011).....4

§ 376.021(3), Fla. Stat.(2011).....4

§ 376.031(5), Fla. Stat. (2011)..... *passim*

§ 376.205, Fla. Stat. (2011).....5

Laws of Fla., Ch. 83-310.....4

§§ 376.30-317, Fla. Stat. (2011) (Water Quality Assurance Act of 1983). 4

§ 376.30(1), Fla. Stat. (2011).....2

§ 376.30(1)(b), Fla. Stat. (2011) 5

§ 376.30(1)(c), Fla. Stat. (2011) 5

§ 376.30(2)(b), Fla. Stat. (2011) 5

§ 376.30(2)(c), Fla. Stat. (2011) 5

§ 376.30(3), Fla. Stat. (2011).....5

§ 376.30(4), Fla. Stat. (2011).....5

§ 376.30(5), Fla. Stat. (2011).....10

§ 376.307, Fla. Stat. (2011).....11

§ 376.3071, Fla. Stat. (2011) 11

§ 376.308, Fla. Stat. (2011) 14

§ 376.308(2), Fla. Stat. (2011) 14

§ 376.313, Fla. Stat. (2011) 5, 11

§ 376.313(3), Fla. Stat. (2011) ..... *passim*

§ 376.315, Fla. Stat. (2011) 11

42 U.S.C. § 9601 *et. seq.* (Comprehensive Environmental Response, Compensation and Liability Act) ..... *passim*

42 U.S.C. § 9607(a) 11

42 U.S.C. § 9607(b) 11

42 U.S.C. § 9607(a)(4) 11

42 U.S.C. § 9607(a)(4)(A) 11

42 U.S.C. § 9607(a)(4)(B) 11

42 U.S.C. § 9607(a)(4)(C) 12

Other Authorities

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, § 32 (2012 ed.) 9

Harry Lee Anstead, et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 483 (2005) 4

Sidney F. Ansbacher, Robert D. Fingar, & Adam G. Schwartz, *Strictly Speaking, Does F.S. § 376.313(3) Create Duty to Everybody, Everywhere?* (Parts I & II), Fla. Bar. J. Vol. 84, Nos. 8, 9 (Sept./Oct. 2010 & Nov. 2010) 11

Thomas C. Marks, Jr., *Jurisdiction Creep and the Florida Supreme Court*, 69 Alb. L. Rev. 543, 543 (2006) 16

PREFACE

Amicus Curiae The Florida Justice Reform Institute is referred to as "the Institute." Petitioner/Plaintiff Charles A. Lieupo is referred to as "Plaintiff." Respondent/Defendant Simon's Trucking, Inc., is referred to as "Defendant." Citations to the Record on Appeal, which includes the trial transcript in a single PDF file, appear as R.__ (PDF page number). With respect to quoted material, unless otherwise indicated, emphasis is supplied and citations and internal quotations are omitted.

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The Institute is Florida's leading organization of concerned citizens, business owners, business leaders, and lawyers, who share the common goal of promoting predictability in Florida's civil justice system by eliminating wasteful civil litigation and promoting fair and equitable legal practices. The Institute's members have a strong interest in appropriate interpretation of statutes imposing strict liability, and in ensuring the uniform application of this Court's precedent to such interpretations.

The Institute and its members also have a substantial interest in ensuring the Court exercises its limited discretionary jurisdiction in compliance with the Florida Constitution. Florida's voters amended article V, section 3(b)(3) of the Florida Constitution in 1980 to return finality to the decisions of Florida's district courts of appeal. This Court's exercise of its discretionary jurisdiction would contravene the will of the people expressed in that amendment and deprive the Institute's members and all other litigants of the finality and certainty that district court decisions generally represent.

OVERVIEW AND SUMMARY OF THE ARGUMENT

Defendant owned a tractor-trailer that crashed on Interstate 75 when the driver suffered a fatal heart attack. The cargo was automobile batteries, many of which were ejected from the trailer on impact and broke, releasing battery acid

around the accident site. Plaintiff—a tow truck driver employed by the towing company that removed the disabled tractor-trailer—sued Defendant, alleging personal injury resulting from contact with battery acid. Plaintiff asserted but later abandoned a negligence claim, choosing to proceed solely on a strict liability claim under the Water Quality Assurance Act of 1983 (the "WQAA")—the stated intent of which is to protect and preserve Florida's surface and ground waters. *See* § 376.30(1), Fla. Stat. (2011). Judgment was entered for Plaintiff on a jury verdict of over $5.2 million, including $4 million for past and future pain and suffering.

The First District Court of Appeal reversed, holding that section 376.313(3), Florida Statutes, does not authorize a strict liability cause of action for personal injury damages. *Simon's Trucking, Inc. v. Lieupo*, 244 So. 3d 370 (Fla. 1st DCA 2018), However, the court certified the following question as one of great public importance: "Does the private cause of action contained in section 376.313(3), Florida Statutes, permit recovery for personal injury?" *Id.* at 374. This Court accepted jurisdiction.

The Institute respectfully submits that the answer to the certified question should be 'no', as the First District correctly held. In *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010), this Court held that the types of damages recoverable in an action under section 376.313(3) are those specified in section 376.031(5). That section provides **only** for recovery of damages for loss of

property or destruction of the environment and natural resources. Construing section 376.313(3) to allow recovery of personal injury damages would create a conflict within Chapter 376 and violate well-established principles of statutory construction. And such a construction would contravene the directive that the WQAA ordinarily should be construed consistent with the federal legislation upon which it is modeled, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA—which provides private strict liability causes of action similar to those in the WQAA—is uniformly interpreted to exclude personal injury damages.

Even more, construing section 376.313(3) to allow recovery of personal injury damages in a tort setting such as this would create a strict liability cause of action with no defenses. Absent express statutory authority—which is lacking here—the judiciary may not eliminate traditional common law defenses to garden-variety tort claims. In short, Plaintiff asks this Court to create a form of 'super-strict' liability that is unsupported by the statutory text, is inconsistent with the stated purpose of the WQAA, and contradicts this Court's precedent.

Lastly, the Institute respectfully submits that it would be improvident for this Court to exercise jurisdiction in this case. Article V, section 3(b) of the Florida Constitution enumerates the narrow classes of cases over which this Court may exercise discretionary review. "[U]nder the constitutional plan the powers of this

Court to review decisions of district courts of appeal are limited and strictly prescribed." *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958). Consequently, district court of appeal decisions should be "final and absolute" in most instances, *id.*, and petitioners invoking this Court's discretionary jurisdiction should be "fighting against a presumption that the Court cannot hear the case." Harry Lee Anstead, et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 483 (2005). The exercise of jurisdiction over this case is improvident because the decision does not expressly and directly conflict with *Curd*, nor does it present a question of great public importance.

ARGUMENT

I. PERSONAL INJURY DAMAGES ARE NOT RECOVERABLE IN A STRICT LIABILITY ACTION UNDER THE WQAA.

Chapter 376, Florida Statutes, regulates pollution in Florida. In 1970, the Legislature enacted what is now called the Pollutant Discharge Prevention and Control Act, codified in sections 376.011-376.21, Florida Statutes (the "1970 Act"). The 1970 Act aims to protect coastal waters and adjoining lands from dangers occasioned by transfers of pollutants among marine vessels and offshore/onshore facilities. *See* § 376.021(1)-(3), Fla. Stat.

In 1983, the Legislature enacted the WQAA, codified in sections 376.30-317, Florida Statutes, as Part II of Chapter 376. Laws of Fla., Ch. 83-310, preamble, at 1825-26 ("designating [the 1970 Act] as part I of chapter 376" and

"creating part II of chapter 376"). The WQAA aims to maintain the quality of Florida's surface and ground waters, which "provide the primary source for potable water in this state." *See* §§ 376.30(1)(b)-(c) & (4), Fla. Stat. More specifically, the WQAA's purpose is to protect Florida's environment and citizens from—and remedy harm resulting from—discharges of "pollutants, drycleaning solvents, and hazardous substances that occur" in connection with "the storage, transportation and disposal of such products." §§ 376.30(2)(b)-(c), (3), Fla. Stat.

The 1970 Act and the WQAA each provide a private strict liability cause of action for damages resulting from a discharge of pollutants. The operative language of the relevant provisions is virtually identical. *Cf.* §§ 376.205, 376.313, Fla. Stat. In construing these statutes, Florida courts have been required to grapple with the question of what types of damages are recoverable and by whom. *Curd v. Mosaic Fertilizer, LLC*, 993 So. 2d 1078, 1084 (Fla. 2d DCA 2008), *quashed*, 39 So. 3d 1216 (Fla. 2010); *see also Kaplan v. Peterson*, 674 So. 2d 201, 206 (Fla. 5th DCA 1996) (referring to a "can of worms in terms of who can sue . . . and for what") (Griffin, J., concurring in part and dissenting in part).

This case features the question of whether personal injury damages are recoverable on a strict liability claim under section 376.313(3)—a question that this Court answered conclusively in *Curd*, by holding that damages recoverable in

such an action are those defined in section 376.031(5), Florida Statutes. *See Curd*, 39 So. 3d at 1221-22. Section 376.031(5) defines "damage" as:

> the documented extent of any destruction to or **loss of any real or personal property, or** the documented extent, pursuant to s. 376.121, of any **destruction of the environment and natural resources, including all living things except human beings**, as the direct result of the discharge of a pollutant.

Id.[1] The foregoing statutory text is disjunctive and makes plain that recoverable damages are limited to those resulting from property loss **or** destruction of natural resources, including "all living things **except human beings**." So there is no room for debate as to personal injury damages—they are not in either category under **any** principle of statutory construction.

Plaintiff may rely on Justice Polston's concurring opinion in *Curd* to argue the phrase "all damages" in section 376.313(3) includes personal injury damages.[2]

---

[1] *Curd* held that commercial fishermen could state a strict liability cause of action under section 376.313(3) for economic losses resulting from destruction of marine and plant life when wastewater was discharged from a phosphate plant, even though the fishermen owned no property damaged by the discharge. 39 So. 3d at 1218, 1221-22. The *Curd* majority reasoned that section 376.031(5) provides for recovery of "damages to 'natural resources, including all living things'" and that section 376.313(3) does not "specifically list the lack of property ownership as a defense." *Id.* at 1222 (quoting § 376.031(5), Fla. Stat.).

[2] Justice Polston agreed that the commercial fishermen could state a strict liability cause of action for economic damages under section 376.313(3), but disagreed with the majority's approach to construing the statute. Justice Polston argued that because the WQAA lacks a damages definition, the Court should not look to the damage definition in the 1970 Act. 39 So. 3d at 1229-30 (Polston, J., concurring in part, dissenting in part). Justice Polston opined that the "plain meaning" of "all damages" applies in cases involving claims under section 376.313(3). *Id.* at 1230.

Nothing in Justice Polston's concurrence suggests that section 376.313(3) includes personal injury damages; indeed, he noted the fishermen "suffered no personal injury." 39 So. 3d at 1232. Importantly, his conclusion that section 376.313(3) should be read to include the fishermen's economic losses did **not** create a conflict within Chapter 376 because the fishermen sought damages resulting from destruction of marine life, a matter expressly specified in section 376.031(5).

Interpreting section 376.313(3) to include personal injury damages when section 376.031(5) excludes personal injury damages **would create a conflict within Chapter 376**. "Courts faced with conflicting statutes must attempt to adopt an interpretation that harmonizes the related statutes while giving effect to each." *Gen. Dynamics Corp. v. Brottem*, 53 So. 3d 334, 337 (Fla. 5th DCA 2010) (resolving "apparent conflict" between worker's compensation immunity and section 376.313(3)'s limitations on defenses; holding that immunity defense barred plaintiffs' WQAA claims for personal injury damages) (Lawson, J.).

The *Curd* majority properly read the related provisions of Chapter 376 together and harmonized section 376.031(5) with section 376.313(3). *See, e.g.*, *Horowitz v. Plant'n Gen. Hosp. Ltd. P'ship*, 959 So. 2d 176, 182 (Fla. 2007) ("[I]t is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole.") (italics in original); *Palm Harbor Spec. Fire Control Dist. v. Kelly*, 516 So. 2d 249, 249 (Fla. 1987) (courts should "adopt an interpretation that

harmonizes two related, if conflicting, statutes while giving effect to both"); *see also State v. Fuchs*, 769 So. 2d 1006, 1009 (Fla. 2000) (absent "a statutory definition, resort may be had to case law or related statutory provisions which define the term").

Section 376.031(5) lists specific damages recoverable in a strict liability action for the discharge of pollutants to coastal waters and lands; it is followed by the later-enacted and general phrase "all damages" in section 376.313(3), which authorizes a strict liability action for the discharge of pollutants to inland waters and lands. Of course, the Legislature was aware of the damages definition in section 376.031(5) when it enacted section 376.313(3). *See Kelly*, 516 So. 2d at 249. Nothing suggests that—after narrowly limiting the types of damages recoverable for pollution to coastal waters—the Legislature intended to impose **no** limitations on the types of damages recoverable for pollution to inland waters.

The *Curd* majority's interpretation is consistent with "the canon of statutory construction *ejusdem generis*, which states that when a general phrase follows a list of specifics, the general phrase will be interpreted to include only items of the same type as those listed." *Brottem*, 53 So. 3d at 337, n.3. This canon applies to avoid contradictions within legal text "by giving the enumeration the effect of limiting the general phrase (while still not giving the general phrase a meaning it

will not bear)." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, § 32 at 200 (2012 ed.).

Moreover, in the eight years since the *Curd* and *Brottem*[3] decisions issued, the Legislature has not amended section 376.313(3), thereby confirming its approval of those decisions' construction of section 376.313(3). *See Goldenberg v. Sawczak*, 791 So. 2d 1078, 1081 (Fla. 2001) ("Long-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that judicial construction."). In sum, neither the statutory text nor this Court's precedent construing it authorizes recovery of personal injury damages in a strict liability action under the WQAA.

II. CONSTRUING THE WQAA TO PERMIT RECOVERY OF PERSONAL INJURY DAMAGES IS INCONSISTENT WITH THE WQAA'S PURPOSE AND WITH CERCLA.

Sections 376.313(3), 376.205, and 376.031(5) are codified in the same statutory chapter and were enacted as part of the same "far-reaching statutory scheme aimed at remedying, preventing, and removing the discharge of pollutants

---

[3] *Brottem* certified conflict with *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 97, 98 n.2 (Fla. 1st DCA 1990) (holding that workers' compensation immunity did not bar plaintiffs' claims for intentional torts "outside the scope of worker's compensation"; noting that worker's compensation immunity would not be a defense to a WQAA claim). General Dynamics sought review in this Court, but the petition was dismissed before a merits decision issued. 75 So. 3d 1243 (Fla. 2011). *Cunningham* does not control this case because it did not expressly decide the issue of whether personal injury damages are recoverable under section 376.313(3); to the extent *Cunningham* could be read to support an argument that they are, it was abrogated by this Court's later decision in *Curd*.

from Florida's waters and lands." *Curd*, 39 So. 3d at 1222. Because the WQAA is modeled on CERCLA, the WQAA "should be interpreted in the same manner as CERCLA." *State, Dep't of Envt'l Prot. v. Allied Scrap Processors, Inc.*, 724 So. 2d 151, 153 (Fla. 1st DCA 1998); *accord Brottem*, 53 So. 3d at 337, n.4; *see also* § 376.30(5), Fla. Stat. (the WQAA is intended "to support and complement applicable provisions of the Federal Water Pollution Control Act").[4]

CERCLA was enacted in 1980

> as a legislative response to the growing problem of toxic wastes, many of which were disposed of before their dangers were widely known and had contaminated precious land and water resources. The statute attempts to create a coherent answer to two related problems: the emergency abatement of releases of hazardous substances into the environment and the response, both short- and long-term, to the presence of hazardous wastes in existing disposal sites.

Artesian Water Co. v. Gov't of New Castle Cnty., 659 F. Supp. 1269, 1276 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988); *see also Prisco v. State of New York*, 902 F.Supp. 400, 405 (S.D.N.Y. 1995) (CERCLA was designed "to ensure that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up").

To that end—and like the WQAA—CERCLA authorizes private parties and the government to sue for damages resulting from a hazardous substance

---

[4] CERCLA's liability standard is based on the Federal Water Pollution Control Act. *See United States v. Miami Drum Servs., Inc.*, No. 85-0038-Civ-Aronovitz, 1986 WL 15327, at *3 (S.D. Fla. Dec. 12, 1986).

discharge; like the WQAA, CERCLA imposes strict liability and limits defenses to acts of God, third parties, and war. 42 U.S.C. § 9607(a), (b); *see also New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (discussing legislative history relative to strict liability under CERCLA). Like the WQAA, CERCLA is "construed broadly in order to accomplish Congressional intent." *Prisco*, 902 F. Supp. at 405; *accord Curd*, 39 So. 3d at 1221 (the WQAA "shall be liberally construed to effect the purposes set forth [therein] and the Federal Water Pollution Control Act") (quoting § 376.315, Fla. Stat.)).[5]

Also like the WQAA, CERCLA specifies that recoverable damages include removal and response costs incurred by the government and private parties. *See* 42 U.S.C. § 9607(a)(4)(A), (B); §§ 376.307, 376.3071, Fla. Stat. As does the WQAA, CERCLA authorizes recovery of damages for "injury to, destruction of, or loss of natural resources." 42 U.S.C. § 9607(a)(4); *cf.* § 376.031(5), Fla. Stat. Most relevant to the instant analysis, **CERCLA does not authorize a private party to recover personal injury damages**. *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1246 n.34 (10th Cir. 2006) ("Although some unsuccessful bills proposed to do so, CERCLA as enacted provides no private right of action for personal or economic

[5] For a comprehensive discussion of section 376.313(3) and its interplay with CERCLA, *see* Sidney F. Ansbacher, Robert D. Fingar, & Adam G. Schwartz, *Strictly Speaking, Does F.S. § 376.313(3) Create Duty to Everybody, Everywhere?* (Parts I & II), Fla. Bar. J. Vol. 84, Nos. 8, 9 (Sept./Oct. 2010 & Nov. 2010).

injury caused by the release of hazardous substances."); *see also Prisco*, 902 F. Supp. at 411 (same); *Artesian Water Co.*, 659 F. Supp. at 1285 (same).

Since the WQAA is modeled on CERCLA, this Court should give the WQAA the "same construction" as federal courts have given CERCLA. *Allied Scrap*, 724 So. 2d at 152; *accord Brottem*, 53 So. 3d at 337, n.4. Meaning that, damages recoverable under section 376.313(3) do not include personal injury damages and are limited to those specified in section 376.031(5)—damages resulting from property loss or destruction of the environment. Section 376.031(5) is even clearer than CERCLA in this regard. Both statutes authorize recovery of damages resulting from destruction of natural resources, but section 376.031(5) is even more limited—it authorizes recovery of damages for destruction of "natural resources, including all living things **except human beings**." *Id.*; *cf.* 42 U.S.C. § 9607(a)(4)(C) (authorizing recovery of "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury").

CERCLA and the WQAA were enacted in response to environmental threats caused by discharge of hazardous substances and are principally designed to establish remediation procedures and allocation of liability among property owners and users. CERCLA is silent regarding personal injury damages and federal courts uniformly interpret CERCLA to exclude them. The statutory chapter containing the WQAA specifically defines damages to exclude personal injury damages, and

this Court has held that definition applicable to strict liability causes of action under the WQAA.

Given the text and stated purpose of the WQAA—and that the Legislature in the 1970 Act expressly precluded personal injury damages resulting from a pollutant discharge on coastal waters or adjoining lands—the only rational interpretation of the WQAA is that the Legislature did not authorize strict liability for personal injury damages resulting from a pollutant discharge on inland waters or adjoining lands. *See, e.g.*, *Horowitz*, 959 So. 2d at 182 (relying on "text, context and purpose" of physician financial responsibility statute to hold that it does not create a cause of action against hospital for failure to ensure compliance therewith by its physician staff members).

III. THE JUDICIARY CANNOT ABROGATE TRADITIONAL TORT LIABILITY DEFENSES WITHOUT EXPRESS STATUTORY AUTHORIZATION.

Reversal of the First District's decision will effectively eliminate traditional tort liability defenses in **any** setting where a pollutant was discharged, regardless of causation or the degree of attenuation between the pollutant discharge and the claimant's injuries. Consider the hypothetical 'next case': a manicurist driving away from a beauty supply store collides with another car, as a result of which her passenger—who is holding a bottle of nail polish remover (acetone)—is ejected from the car; the bottle breaks open on impact and acetone splashes into the

passenger's eyes (and onto the ground), blinding the passenger. Are the manicurist and/or the other motorist strictly liable for the passenger's blindness because it was a consequence of the discharge of a pollutant? The answer under Plaintiff's construct is 'yes.'

The reversal by this Court of the First District's decision will enable **strict liability with no defenses**[6] for all garden-variety negligence claims that happen to cross paths with a pollutant. Such a decision also would be inconsistent with this Court's holding over forty years ago that "the ordinary rules of causation and the defenses applicable to negligence are available" in strict liability cases. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 86, 90 (Fla. 1976) (adopting strict liability for manufacturers of defective products); *see also N. Mia. Med. Ctr., Ltd. v. Miller*, 896 So. 2d 886, 890 & n.5 (Fla. 3d DCA 2005) (declining to interpret physician financial responsibility statute as "a strict liability statute *to which there is no defense*"; noting that "[i]n any other legal realm, defenses are available to strict liability causes of action at common law") (italics in original) (citing authorities including *West*).

In short, absent clear statutory text authorizing such a departure from

---

[6] Section 376.313(3) states that "the only defenses" are those specified in section 376.308. Section 376.308(2) requires a defendant to prove that the "occurrence was solely the result of" an act of God, the sovereign, war, or third parties unrelated to the defendant. *Id.*

common law, courts are "not free to ascribe such a presumptuous legislative intent." *Miller*, 896 So. 2d at 890. This is particularly true where, as here, neither the text, purpose, nor context of the legislation support such an outcome. *Id.* (refusing to "judicially engraft" rule of "super-strict" liability onto physician financial responsibility statute where "chief purpose" of legislation was to increase availability of healthcare providers).

Finally, it is telling that Plaintiff abandoned his negligence claim against Defendant after it became apparent that the claim was a non-starter as a matter of law because the "pollutant discharge" was caused by the driver's fatal heart attack, not by Defendant's negligence. *See* R. 1678-84, 1929. Put simply, the trial court disregarded this Court's holding in *Curd* and permitted Plaintiff to hijack a limited strict liability provision in an environmental clean-up statute to achieve a multi-million dollar verdict on a legally insufficient negligence claim.[7]

Such an unprecedented expansion of traditional concepts of tort liability contravenes applicable precedent of this Court and is inconsistent with the text and purpose of the statutory framework that Plaintiff successfully exploited in the trial

[7] The error in the trial court's decision in this case parallels that of the trial court in the legendary case *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928) (reversing judgment on negligence claim where injury to plaintiff was unforeseeable). The cause of the release of battery acid in this case had about the same relevance to Plaintiff's injuries as did the conductors' assistance to the passenger that dropped the package containing fireworks in *Palsgraf*.

court. The First District's decision should be affirmed, and this Court should confirm—consistent with the holding of *Curd*—that damages recoverable in a strict liability action under section 376.313(3) are limited to those defined in section 376.031(5) and do not include personal injury damages.

IV. THE COURT SHOULD DISCHARGE JURISDICTION AS IMPROVIDENTLY GRANTED.

"The jurisdiction of this Court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution." *Gandy v. State*, 846 So. 2d 1141, 1143 (Fla. 2003). Absent an express basis for jurisdiction in article V, section 3(b), this Court lacks power to review a case. The Florida Constitution vests plenary appellate jurisdiction in Florida's district courts of appeal, and in most instances, the district court's decisions should be "final and absolute." *Ansin*, 101 So. 2d at 810.

Notwithstanding the constitutional limitations on its discretionary jurisdiction, this Court has in the past exercised jurisdiction over cases that do not fall within the express parameters of article V, section 3(b), resulting in "jurisdiction creep."[8] This expansion of discretionary review concerns the Institute

[8] *See* Thomas C. Marks, Jr., *Jurisdiction Creep and the Florida Supreme Court*, 69 Alb. L. Rev. 543, 543 (2006) (explaining that the phrase "jurisdiction creep" "was taken from the similar 'mission creep,' a military term," and that "jurisdiction creep" parallels a military situation where "a unit attempts to do more than is allowed in the current mandate and mission").

because, by deciding such cases, this Court undermines the finality that district court decisions are meant to represent. *See Ansin*, 101 So. 2d at 810.

This is a garden-variety tort case in which the First District correctly applied this Court's precedent to conclude that personal injury damages are not available under section 376.313(3), Florida Statutes. This case does not conflict with a prior decision of this Court, nor does it present a question of great public importance. The Institute respectfully submits that the Court should discharge jurisdiction.

A. The First District's Decision Does Not Conflict With Any Prior Decision of This Court.

The question of law presented to the First District was an issue of statutory interpretation: whether personal injury damages are available under section 376.313(3), Florida Statutes. The court's conclusion that such damages are **not** available under the statute does not directly or expressly conflict with this Court's decision in *Curd*. The *Curd* majority held that such damages are limited to those defined in section 376.031(5), which excludes injury to "human beings." 39 So. 3d at 1221; § 376.031(5), Fla. Stat.

The exercise of jurisdiction to review the instant decision would invite every party that loses at a district court of appeal on an issue of statutory interpretation to ask this Court for a second review in the hopes of achieving a different result. That is not—and should not be—the purpose of conflict review. *See Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221, 234 (Fla. 1965) (Thornal, J., dissenting) (expressing

concern that exercising jurisdiction in that case would be an "open invitation to every litigant who loses in the District Court, to come on up to the Supreme Court and be granted a second appeal"). Florida voters have narrowly limited this Court's discretionary conflict jurisdiction to district court of appeal decisions "that ***expressly and directly*** conflict[] with a decision of another district court of appeal or of the supreme court on the same question of law." *Fla. Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988) (emphasis added) (quoting art. V, § 3(b)(3), Fla. Const.). This constitutional provision was amended in 1980 to ensure that this Court review only those decisions that create true direct and express conflicts on the same question of law.

Even if this Court in the first instance might have reached a different conclusion than the First District, "[s]uch a difference of view . . . is not the measure of [this Court's] appellate jurisdiction to review decisions of Courts of Appeals because of alleged conflicts with prior decisions of this Court on the same point of law." *Aguilera v. Inservices, Inc.*, 905 So. 2d 84, 99 (Fla. 2005) (Wells, J., dissenting). "It was never intended that the district courts of appeal should be intermediate courts." *Ansin*, 101 So. 2d at 810. Florida's business litigants therefore rightly expect that, in most cases, district court decisions will be the end of litigation.

The Institute respectfully submits that, in line with the constitutional command of the people of Florida, this Court should—in this case and all others—limit the exercise of its discretionary conflict jurisdiction to only those cases that present direct and express conflicts. In this instance, jurisdiction should be discharged as improvidently granted. *Cf. Ruiz v. Tenet Hialeah Healthsystem, Inc.*, 43 Fla. L. Weekly S655a, 2018 WL 6696028, at *4 (Fla. Dec. 20, 2018) (Polston, J., dissenting) ("Because the Third District's decision [on review] does not expressly and directly conflict with the decisions alleged by the Petitioner during jurisdictional briefing, this Court does not have constitutional authority to review this case.").

B. The Certified Question Is Not One of Great Public Importance.

The question the First District certified does not present a question of great public importance either. Questions of great public importance are those "where [the Court's] decision will affect a large segment of the public and the extant decisional law may not coalesce around a single answer to the question posed," *Star Cas. v. U.S.A. Diagnostics, Inc.*, 855 So. 2d 251, 252 (Fla. 4th DCA 2003), and those "of constitutional magnitude . . . [or those] which [are] frequently raised but with inconsistent results in the lower tribunals." *Bradley v. State*, 615 So. 2d 854, 855 (Fla. 1st DCA 1993).

This case meets none of these criteria. The First District's decision merely addressed an issue of statutory interpretation—that is, whether the phrase "all damages" as used in section 376.313(3) includes damages for personal injuries. The issue is not one of constitutional magnitude. Nor has it frequently been raised in the lower courts. Indeed, the instant case is the first time this issue has been raised in a Florida appellate court in the eight-and-a-half years since *Curd* was decided. The isolated question raised in this case will not affect a large segment of the public. Accordingly, the Court should exercise its discretion to discharge jurisdiction as improvidently granted. *Cf. Morrison v. Roos*, 944 So. 2d 341 (Fla. 2006) (discharging jurisdiction where it had initially been granted to review question of great public importance).

CONCLUSION

For these reasons, the Institute respectfully submits that this Court should either discharge jurisdiction as improvidently granted or affirm the First District's decision.

Respectfully submitted,

Frank A. Shepherd
Florida Bar No. 152620
frank.shepherd@gray-robinson.com
GRAY ROBINSON
333 S.E. Second Avenue, Suite 3200
Miami, FL 33131
Telephone: (305) 416-6880

-and-

William W. Large
Florida Bar No. 0981273
william@fljustice.org
Florida Justice Reform Institute
210 South Monroe Street
Tallahassee, FL 32301-1824
Telephone: (850) 222-0170

Attorneys for Amicus Curiae Florida Justice Reform Institute

/s/ Frank A. Shepherd
Frank A. Shepherd

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2019 a true and correct copy of the foregoing was furnished by E-mail to all counsel listed below.

Jackson W. Adams, Esquire
Wooten Kimbrough, P.A.
P.O. Box 568188
Orlando, FL 32856-8188

Peter D. Webster, Esquire
Carlton Fields
215 S. Monroe St., Ste. 500
Tallahassee, FL 32301

E-mail: jadams@whkpa.com,
msaad@whkpa.com

James M. Janousek, II, Esquire
109 Court Street
Live Oak, FL 32064
E-mail: janousek@janouseklaw.com

Jason Gonzalez
Amber Stoner
Shutts & Bowen
215 S. Monroe Street, Ste. 804
Tallahassee, Florida 32301
E-mail: jasongonzalez@shutts.com
amberstoner@shutts.com

E-mail: pwebster@carltonfields.com,
scartwright@carltonfields.com

Kansas R. Gooden, Esquire
Boyd & Jenerette, P.A.
201 North Hogan Street, Suite 400
Jacksonville, FL 32202
E-mail: kgooden@boydjen.com

/s/ Frank A. Shepherd
Frank A. Shepherd

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 because it was prepared using Times New Roman 14-point font.

/s/ Frank A. Shepherd
Frank A. Shepherd