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Environmental and Land Use Law

Statutory Strict Liability for Environmental Contamination: A Private Cause of Action to Remedy Pollution or Mere Legislative Jargon?

by Gary K. Hunter, Jr.

From the perspective of a plaintiff and counsel attempting to remedy damages through litigation, it is an enviable posture to pursue such recovery with the aid of a statutory cause of action, particularly one providing for strict liability and affording the otherwise unavailable opportunity to collect costs and attorneys' fees.¹ Litigation to recover damages for pollution or to compel rehabilitation of pollution is no exception to this premise. Although available, traditional tort remedies are not ideal for resolving the complexities associated with the origins and consequences of pollution. Further, they fail to offer the opportunity to recover costs and attorneys' fees which routinely escalate to enormous sums when pursuing damages associated with pollution.

At first glance, F.S. §376.313 appears to resolve favorably this dilemma for Florida environmental practitioners by providing a statutory strict liability cause of action to recover damages associated with a "discharge or other condition of pollution."² After all, this section is entitled "Nonexclusiveness of remedies and individual cause of action for damages under ss. 376.30-376.319."³ Nonetheless, practitioners debate and courts grapple with whether this section provides an individual cause of action for damages attributed to discharges of pollutants or hazardous substances, and, if so, the scope of such an action.⁴

The Florida Supreme Court could have resolved the dispute after granting certiorari to review the Fifth District's opinion in *Kaplan v.*

Courts grapple with whether the law provides an individual cause of action for damages caused by pollution.

Peterson, 674 So. 2d 201 (Fla. 5th DCA 1996), *rev. dismissed*, 687 So. 2d 1305 (Fla. 1997). After completion of the briefing schedule to the Supreme Court, however, the appeal in *Kaplan* was dismissed. This left the matter resolved inconsistently among the district courts of appeal. To borrow from Judge Griffin's dissent in *Kaplan*, this left Florida practitioners "trying to read the tea leaves."⁵

Legislative History

The Florida Legislature enacted F.S. Chapter 376 in various parts, first enacting in 1970 Chapter 70-244, Laws of Florida, currently F.S. §§376.011-376.017 and 376.19-376.21, the Pollutant Discharge Prevention and Control Act,⁶ (referred to herein as Part I). In 1983 the legis-

lature enacted the Water Quality Assurance Act (referred to herein as Part II), Chapter 83-310, Laws of Florida, currently F.S. §§376.30-376.319.

Part I was enacted to protect Florida's coastline from a catastrophic oil spill. The legislature declared, in part, that "the highest and best use of the *seacoast* of the state is as a source of public and private land"⁷ and prohibited: "The discharge of pollutants into or upon any coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast of the state in the manner defined by ss. 376.011-376.021. . . ."⁸

Part II, passed 13 years later, included a broader declaration by the legislature designed to protect not only the seacoast and estuaries, but to protect all of the state's lands and waters from pollution. In Part II, it was declared that

[T]he preservation of surface and groundwater is a matter of the highest urgency and priority, and that such use can only be served effectively by maintaining the quality of inland waters 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.⁹

The scope of Part II was limited to discharges of "pollutants."¹⁰ The act was later amended to prohibit discharges of "hazardous substances" as well.¹¹

For purposes of this article, it is important to note several of the many similarities between these separately enacted and unrelated parts of Chapter 376. Both provide for strict liability to the state for damages incurred as a result of a discharge prohibited by either act.¹²

Each also appears to create an individual cause of action to recover damages associated with violations of the prohibited activities. Section 376.205, within Part I, is entitled "Individual cause of action for damages under ss. 376.011-376.21"; Section 376.313, within Part II, is entitled "Nonexclusiveness of remedies and individual cause of action for damages under ss.376.30-376.319."¹³ This latter similarity is particularly evident when comparing the language of the respective sections. As originally enacted, §376.313 was practically identical to §376.205.¹⁴ If a private cause of action were created in §376.205, then the legislature also intended to provide a similar remedy in §376.313. Courts should harmonize the construction of statutes relating to a common subject or purpose.¹⁵

Fortunately for Floridians and our coastal environment, no reported opinions indicate a necessity, to date, for a private party to pursue an individual cause of action under Part I of Chapter 376 via a §376.205 action for damages.¹⁶ However, in differentiating Part I of Chapter 376 from the federal Water Quality Improvement Act of 1970¹⁷ and concluding that the Florida act was not preempted by the federal law, the U. S. Supreme Court relied partially on the fact that the "Florida Act imposes strict liability for any damage incurred by the State or private persons as a result of an oil spill in the State's territorial waters." *Askew v. American Waterways Operators*, 411 U.S. 325, 327 (1973).

The Supreme Court noted that Congress, in the federal act, "dealt only with cleanup costs," leaving the

states "free to impose liability in damages for losses suffered both by the States and by private interests."¹⁸ Implicitly, the Supreme Court in *Askew* recognized an individual cause of action for damages in Part I of Chapter 376 and specifically the portion of that act which preceded the enactment of §376.205.¹⁹ As noted above, §376.313 is modeled exclusively after (and in fact mirrors the language of) §376.205 and should be construed similarly.

Why Look Beyond the Language of the Statute?

Many would argue that relying exclusively on the language of F.S. §376.313 resolves the debate at issue. It is a basic premise of Florida law that where "the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended."²⁰ Standing alone, the title of the section—"Nonexclusiveness of remedies and individual cause of action for damages under ss. 376.30-376.319"—could provide a sufficient basis to support a private cause of action as consideration must be given to the title of a statute when determining legislative intent.²¹

The language of the statute further supports an intent to create an individual statutory cause of action. The initial version of F.S. §376.313 included the statement that "[n]otwithstanding any other provision of law, nothing contained herein shall prohibit any person from bringing a cause of action in a court of com-

petent jurisdiction for all damages resulting from a discharge or other condition of pollution covered by this part."²²

Coupled with the further direction in the statute that such a suit would not require the plaintiff "to plead or prove negligence in any form or manner";²³ the specification of the limited defenses to such an action;²⁴ and the inclusion of a cost and attorneys' fee award to the injured party,²⁵ it is challenging to perceive any intent other than the creation of a private cause of action for strict liability.

Subsequent amendments to §376.313 only clarify the original expression of intent. The 1984 amendments separated the original language into subsections without revising the terminology.²⁶ The 1986 amendments expressed the absence of a condition precedent in pursuing an action, modified the imposition of liability without fault in limited circumstances, and revised the costs and attorneys' fee award language from mandatory to discretionary as determined by the court.²⁷ The 1992 amendments articulated the right of a liable party to seek contribution from those jointly and severally liable for the prohibited discharge.²⁸ The 1994 and 1995 amendments specified when a drycleaning facility could be subject to an action under this section.²⁹ Courts nonetheless struggle with the issue of whether a private cause of action is created, and if so, the scope of such an action.

What the Courts Are Saying

Alexander Hamilton stated: "Laws are a dead letter without courts to ex-

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pound and define their true meaning and operation.³⁰ Practitioners must then reconcile the various enunciations offered by the judiciary. As for F.S. §376.313 and whether it affords a private cause of action, the recent trend in interpretation permits such an action;³¹ however, the latitude of this affirmation is debatable.

The issue arose first in the context of a personal injury action alleging damages resulting from exposure to toxic pollutants in *Cunningham v. Anchor Hocking*, 558 So. 2d 93 (Fla. 1st DCA 1990), *rev. denied*, 574 So. 2d 139 (Fla. 1990). In this case, the First District Court plainly suggested, in overruling the lower court's dismissal of the plaintiffs' F.S. Chapter 376 claim, that a private cause of action is available through §376.313 for discharges of pollutants.³² As noted, the claimants in *Cunningham* were pursuing personal injury damages and lacked any ownership interest in the property at which the discharges and exposure were alleged to have occurred, allowing one to infer from *Cunningham* the right to pursue, via §376.313, toxic exposure damages unassociated with contamination of land or water. Such a construction seems inconsistent with the express legislative intent of the Water Quality Assurance Act. The act—at a minimum—appears to require some association of the injuries with pollution of land or water.³³ The First District may agree. In *Cunningham*, it specifically referenced the plaintiffs' allegations "that [defendants] violated Chapter 376 by permitting pollutants to discharge upon the land and premises."³⁴

Three years later, the Second District addressed the intent behind §376.313 in *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372 (Fla. 2d DCA), *rev. denied*, 626 So. 2d 1372 (Fla. 1993). In *Mostoufi*, the plaintiff, in a §376.313 action, sought damages from a prior owner of the plaintiff's property for diminution in value allegedly caused by pollution which occurred during the defendant's ownership of the site.³⁵ The defendants asserted successfully in the trial court that §376.313 did not afford a private cause of action

and the doctrine of caveat emptor in commercial real estate transactions precluded plaintiff's claim even if a private cause of action was created in §376.313. The Second District agreed with the lower court in affirming the dismissal of plaintiff's complaint.³⁶

Following an exhaustive comparison of Chapter 376 with the federal Water Pollution Control Act, the court rejected the plaintiff's §376.313 claim—reasoning that "the statute is framed so as not to 'prohibit' bringing a cause, [and] we conclude we should not interpret the statute as 'creating' a new cause of action that did not theretofore exist."³⁷ The Second District further relied upon the doctrine of caveat emptor as an independent basis in rejecting plaintiff's claim under §376.313.³⁸ Although this article does not exhaustively analyze the interplay between §376.313 and the doctrine of caveat emptor, opting to focus exclusively on whether §376.313 even creates a private cause of action, consideration of this relationship should not be omitted when damages are sought from a predecessor in title to the contaminated parcel.³⁹

Mostoufi has been construed to preclude a private cause of action under §376.313.⁴⁰ Read generously, *Mostoufi* construes §376.313 to allow only a cause of action for recovery of damages "connected with the cleanup or removal of the discharge."⁴¹ The latter explication was offered by the U.S. District Court for the Middle District of Florida in *Italiano v. Jones Chemicals, Inc.*, 908 F. Supp. 904 (M.D. Fla. 1995). The *Italiano* court cited *Mostoufi* in granting a motion to dismiss the §376.313 strict liability count due to the claimant's failure to allege a "nexus or connection with the clean up or removal of an alleged discharge."⁴² *Italiano* allows a claimant to reconcile *Mostoufi* and pursue a cause of action for damages under §376.313 where the damages are associated with the cleanup or removal of a prohibited discharge.

Recent opinions analyzing §376.313 support at least a private cause of action for recovery of damages associated with the costs of

remediation. In *Kaplan v. Peterson*, 674 So. 2d 201 (Fla. 5th DCA 1996), *rev. dismissed*, 687 So. 2d 1305 (Fla. 1997), an action in which the plaintiff sought recovery of cleanup costs attributable to petroleum contamination caused by a prior owner of the plaintiff's property, the Fifth District Court of Appeal concluded that §376.313 creates a private cause of action for recovery of such costs and the statute "makes little sense if it does not do so."⁴³ The court in *Kaplan* disagreed with *Mostoufi* as to the application of caveat emptor as a bar to a §376.313 action against a prior owner of commercial property⁴⁴ but also distinguished *Mostoufi* on grounds that the plaintiff in *Kaplan* sought only to recoup cleanup costs as opposed to basing the claim "solely on the reduction in value of the property caused by a discharge," as in *Mostoufi*.⁴⁵ The *Kaplan* majority also relied upon the amendments to §376.313 as clarifying "that private causes of action brought by private parties are contemplated and permitted."⁴⁶ Certiorari was granted in *Kaplan*; however, the appeal was dismissed following submittal of briefs.

In *Volk v. Deguzman*, 4 Fla. L. Weekly Supp. 824 (11th Cir. Appellate Div., July 1997), also an action by a current owner against the seller of the property seeking costs of cleanup associated with pollution, *Kaplan* is authoritatively cited by the Appellate Division of the Dade County Circuit Court in reversing a county court order dismissing the plaintiff's §376.313 claim. Consistent with *Kaplan*, *Volk* holds that the only damages recoverable in such an action are "statutorily allowed costs of pollutant cleanup," and not diminution in the value of the property as attempted in *Mostoufi*.⁴⁷

Conclusion

As observed by Judge Campbell in *Mostoufi* and as with many legislative pronouncements of intent, §376.313 may be "less than a model of clarity."⁴⁸ Nevertheless, an objective review of the statute coupled with its legislative history induces one to reasonably conclude that a private cause of action for strict li-

ability is created. This interpretation is embraced by the clear weight of authority, and even *Mostoufi* is cited as supporting a cause of action for costs associated with remediation of pollution.

Unresolved is whether damages are limited to costs of cleanup in a §376.313 action or whether other injuries such as diminution to value, stigma of the property, or personal injuries are within its purview. *Cunningham* supports an expansive right to damages including personal injuries resulting from exposure to the prohibited pollution, yet all other reported opinions reject this notion. Even if limited to recovery of remediation costs, the *Boardman Petroleum*⁴⁹ holding reminds us of the attractiveness of the statute for recovery of costs and attorneys' fees which are expressly available by statute and otherwise unavailable in a common law action for damages. □

¹ See *Fox v. City of West Palm Beach*, 383 F.2d 189 (5th Cir. 1967).

² FLA. STAT. §376.313(3)(1995).

³ FLA. STAT. §376.313(3)(1995) (emphasis added).

⁴ The reported opinions addressing this issue include: *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93 (Fla. 1st D.C.A. 1990); *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372 (Fla. 2d D.C.A. 1993); *Italiano v. Jones Chemicals, Inc.*, 908 F. Supp. 904 (M.D. Fla. 1995); *Boardman Petroleum, Inc. v. Tropic-Tint*, 668 So. 2d 308 (Fla. 4th D.C.A. 1996); *Kaplan v. Peterson*, 674 So. 2d 201 (Fla. 5th D.C.A. 1996); *rev. dismissed*, 687 So. 2d 1305 (Fla. 1997); *Volk v. Deguzman*, 4 Fla. L. Weekly Supp. 824 (11th Cir., Appellate Div., July 1997).

⁵ *Kaplan*, 674 So. 2d at 206.

⁶ FLA. STAT. §376.011 (1995).

⁷ See 1970 Fla. Laws ch. 244, §2, codified at FLA. STAT. §376.021(1) (emphasis added).

⁸ 1970 Fla. Laws ch. 244, §4, codified at FLA. STAT. §376.041.

⁹ 1983 Fla. Laws ch. 310, §84, codified at FLA. STAT. §376.30(1) (1984 Supp.).

¹⁰ "Pollutants" were defined to include "oil of any kind and in any form, gasoline, pesticides, ammonia, chlorine, and derivatives thereof, excluding liquified petroleum gases." FLA. STAT. §376.301(6) (1984 Supp.).

¹¹ See 1992 Fla. Laws ch. 30, §§2 and 4, codified respectively at FLA. STAT. §§376.30(2) and 376.302(1)(1993), expanding the Water Quality Assurance Act to encompass discharges of hazardous substances in addition to pollutants. "Hazardous substances" are defined in §376.301(14)(1995), as: "those substances

defined as hazardous substances in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No 96-510, 94 Stat. 2767, as amended by the Superfund Amendments and Reauthorization Act of 1986."

¹² See FLA. STAT. §§376.12, 376.121, and 376.308 (1995).

¹³ FLA. STAT. §§376.205 and 376.313 (1995).

¹⁴ Compare FLA. STAT. §376.313 (1984 Supp.) with §376.205.

¹⁵ *Mann v. Goodyear Tire & Rubber Co.*, 300 So. 2d 666 (Fla. 1974).

¹⁶ The court in *Italiano v. Jones*, 908 F. Supp. 904 (M.D. Fla. 1995), refers to §376.205 when citing to *Mostoufi* to conclude that § 376.313 provides a private cause of action. *Italiano* did not encompass coastal pollution (an oil spill). Therefore, §376.205 did not apply.

¹⁷ 84 Stat. 91, 33 U.S.C. §§1161 *et seq.*

¹⁸ *Id.* at 336.

¹⁹ FLA. STAT. §376.205 was established in the 1974 amendments to the Pollutant Discharge Prevention and Control Act, 1974 Fla. Laws ch. 336, §§12, 18, at 1050 and 1065, by reconstructing the language in the original "liabilities" section, which was interpreted in *Askew*, to create a separate section "providing for an individual right of action under this law."

²⁰ *Zuckerman v. Alter*, 615 So. 2d 661, 663 (Fla. 1993).

²¹ *State v. Webb*, 398 So. 2d 820, 825 (Fla. 1981).

²² 1983 Fla. Laws ch. 310, §84, at 3996, codified at FLA. STAT. §376.313 (1984 Supp.).

²³ FLA. STAT. §376.313(3) (1995).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See 1984 Fla. Laws ch. 338, §12, at 356-357, codified at FLA. STAT. §376.313 (1985).

²⁷ See 1986 Fla. Laws ch. 159, §20, at 645-647, codified at FLA. STAT. §376.313 (1987).

²⁸ See 1992 Fla. Laws ch. 30, Laws of Florida, §12, at 207, codified at FLA. STAT. §376.313 (1993).

²⁹ See 1994 Fla. Laws ch. 355, §10, at 1852-53, and 1995 Fla. Laws ch. 239, §6, at 1686, codified at FLA. STAT. §376.313 (1995).

³⁰ ALEXANDER HAMILTON, THE FEDERALIST (1788).

³¹ See *Volk v. Deguzman*, 4 Fla. L. Weekly Supp. 824 (11th Cir., Appellate Div., July 1997); *Boardman Petroleum, Inc. v. Tropic-Tint*, 668 So. 2d 308 (Fla. 4th D.C.A. 1996); *Kaplan v. Peterson*, 674 So. 2d 201 (Fla. 4th D.C.A. 1996); and *Italiano v. Jones Chemicals, Inc.*, 908 F. Supp. 904 (M.D. Fla. 1995).

³² *Cunningham*, 558 So. 2d at 98,99. This holding was limited to "pollutants" since at the time §§376.30-376.319 had not been amended to include "hazardous substances." Nonetheless, the logic of the holding would seem to apply today to a discharge of either hazardous substances or pollutants. It should be noted that *Cunningham* restricts the availability of Ch. 376 remedies to a prospective application only, refusing to permit recovery

for discharges occurring prior to the enactment of §§376.30-376.319.

³³ See FLA. STAT. §§376.30(1), 376.302 and 376.301(7) (1995), all focusing on pollution to lands, surface waters, or groundwaters. *Cf. Perkins, et al. v. Federal Environmental Services, Inc., et al.*, Case No. 96-21-CA (Fla. 3d Cir., Columbia County), in which Judge Bryan entered an order dated January 24, 1997, denying defendants' motions to dismiss plaintiffs' personal injury claims under §376.313, despite plaintiffs' failure to allege a prohibited discharge to land or water.

³⁴ *Cunningham*, 558 So. 2d at 99.

³⁵ *Id.* at 1373.

³⁶ *Id.* at 1377.

³⁷ *Id.* at 1376-77.

³⁸ *Id.* (citing *Haskell Co. V. Lane Co.*, 612 So. 2d 669 (Fla. 1st D.C.A. 1993)).

³⁹ See *Mostoufi*, 618 So. 2d 1372; *Kaplan*, 674 So. 2d 201; and *Volk*, 4 Fla. L. Weekly Supp. 824.

⁴⁰ See *Department of Environmental Protection v. Merola Enterprises, et al.*, Case No. 93-140-CA (Fla. 3d Cir., Order of Aug. 23, 1994) (citing *Mostoufi* as grounds for dismissing crossclaimant's §376.313 cause of action.) *Cf. Perkins v. Federal Environmental Services, Inc., et al.*, Case No. 96-21-CA (Fla. 3d Cir., Order of Jan. 24, 1997) (related action in which the same court permitted personal injury plaintiffs to assert a private cause of action under §376.313.)

⁴¹ *Mostoufi*, 618 So. 2d at 1377.

⁴² *Italiano*, 908 F. Supp. at 906 (emphasis added).

⁴³ *Kaplan*, 674 So. 2d at 203.

⁴⁴ *Id.* at 203 and 205 (certifying this issue to the Florida Supreme Court as one of great public importance.)

⁴⁵ *Id.* at 203.

⁴⁶ *Id.* at 205.

⁴⁷ *Volk*, 4 Fla. L. Weekly Supp. 824. See also *Boardman Petroleum, Inc. v. Tropic-Tint*, 668 So. 2d 308 (Fla. 4th D.C.A. 1996) (affirming the trial court award of costs and reasonable attorneys' fees to the prevailing plaintiff in an action under FLA. STAT. §376.313).

⁴⁸ *Mostoufi*, 618 So. 2d at 1376.

⁴⁹ 668 So. 2d 308 (Fla. 4th D.C.A. 1996).

Gary K. Hunter, Jr., practices with the Tallahassee law firm of Hopping Green Sams & Smith, P.A., where he concentrates on environmental litigation matters as well as legislative representation. He received his J.D., cum laude, in 1992 from the University of Georgia where he also obtained his B.B.A. in 1989. Mr. Hunter also is admitted to practice in Georgia and Colorado.

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