IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SIMON'S TRUCKING, INC.,
an Iowa corporation,

Appellant,

v.

CASE NO. 1D17-2065
L.T. CASE NO. 2014-CA-000051

CHARLES A. LIEUPO,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

On Appeal From A Final Judgment Of The Third Judicial Circuit
Court In And For Hamilton County, Florida

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STATEMENT OF THE CASE AND FACTS

Appellant's sole issue on appeal is one of law – whether section 376.313(3), Florida Statutes (2011), permits a plaintiff to recover damages for personal injuries "resulting from a discharge or other condition of pollution covered by [sections] 376.30-376.317." Appellant does not challenge the sufficiency of the evidence presented at trial to support the jury's verdict. Nevertheless, it includes a recitation of what it claims the evidence was at trial in its "Statement of the Facts and of the Case." In doing so, it has selectively chosen from the evidence presented small excerpts intended to reflect its position in a favorable light, disregarding its obligation "to provide a statement of facts and to interpret the evidence in the light most favorable to sustaining the conclusions of the finder of fact." *Hall v. Hall*, 190 So. 3d 683, 684 (Fla. 3d DCA 2016). Mr. Lieupo can only conclude that the intent behind this selective recitation of the evidence is to lead this Court to believe that his case was a weak one, and that the result must have been based on improper considerations by the jury. Accordingly, he feels constrained to present the following recitation of evidence.

A. The Cause of Action Tried

Mr. Lieupo proceeded to trial against Appellant solely on Count III of his Second Amended Complaint, which alleged a cause of action in strict liability pursuant to section 376.313(3), Florida Statutes (2011). (R. 311-12). That Count

alleged that Appellant's tractor trailer was "transporting a cargo containing hazardous substances" as contemplated by chapter 376; that, as a result of the crash of the tractor trailer, "[t]he hazardous substances were unlawfully discharged or otherwise created a pollutive condition in violation of Fla. Stat. §§ 376.302 and 403.161(1)(a)"; that, "[a]s a result of the unlawful discharge or pollutive condition," Mr. Lieupo suffered personal injuries; and that, pursuant to section 376.313(3), Appellant was "strictly liable for all damages resulting from the discharge or condition of pollution, regardless of causation." (R. 311-12).

B. The Crash

The tractor trailer was carrying more than 800 automotive batteries when it crashed. (R. 9174). Those batteries were ejected from the trailer in all directions. (R. 9134, 9814). The batteries were in "[p]retty bad condition. Most of them had been cracked, leaking, not many that were without leaking – had not been leaking." (R. 9163). "There was battery acid . . . everywhere throughout the property." (R. 9146). "[T]here was a significant release of battery acid." (R. 9208).

Before anything else could be done, the Fire Department had to put out the fire. To do that, it pumped nearly 3,000 gallons of water onto the property. (R. 9811). As a result, the property was "[s]oaking wet," with areas of standing water. (R. 9125, 9134, 9310, 9312-13).

"Battery acid is highly corrosive. When it's released, it makes the list of hazardous waste." (R. 9172). In fact, Appellant stipulated that the cargo of the tractor trailer consisted of "lead acid automobile batteries," and that this was "hazardous material." (R. 9078).

An "environmental specialist" who "clean[s] up spills" (R. 9107) testified that the company for which he worked was retained by an agent working for Appellant to clean up the batteries. (R. 9140-41). When he arrived at the crash site to supervise the cleanup, there was no wrecker there, and the tractor trailer had been removed. All that remained were the batteries. (R. 9114-15, 9124).

The environmental specialist testified that:

> [W]e knew we were going to be dealing with sulfuric acid. There was a requirement for boots, a splash protection for the face, and . . . tuck-in suits to cover the guys' bodies that were going to be involved with handling the batteries. So we had from gloves to splash protection – gloves, suits, and boots was the requirement.

(R. 9121-22). His employer believed that "battery acid posed a danger to health and human safety at th[e] site" and, so, he would not have allowed any of his employees into the area without the required protective gear. (R. 9128-29). He said, "we were not allowing our guys to go in without the proper [protective gear], without protecting them, knowing that there's that much acid there." (R. 9130). When asked whether he would consider the groundwater on the property unsafe for people, he responded, "[u]nsafe for animals, unsafe for life." (R. 9140). He

testified that the contamination was such that his company removed nearly 30 tons of soil from the property, transporting it to a "fully licensed EPA-approved waste disposal facility." (R. 9137).

It took Mr. Lieupo and his fellow towing company employees 14 to 16 hours to remove the wreckage, including the time they spent waiting on-site. (R. 9315). During that time, Mr. Lieupo worked all around the wreckage (R. 9308-10, 9312-14) wearing "[k]haki breeches" and "work boots." (R. 9398). While he was at the crash site, nobody told him that it "was an active hazmat scene," or that he needed to wear any kind of "safety equipment." (R. 9378). The following day, his pants were "just like crumbling apart," and his boots were "separating and falling apart." (R. 9284, 9320).

C. Mr. Lieupo's Injuries

Mr. Lieupo experienced a stinging sensation in his legs while he was still at the crash site. (R. 9314). He had never experienced any sort of chemical burn, so he thought he might have been stung by fire ants. (R. 9314). The next day, his feet and ankles had blisters from "an eraser size up to probably a quarter size." (R. 9319, 9236). According to one of his friends, "[t]hey didn't look like ant bites." (R. 9238). The injuries "progressively got worse." (R. 9238). Even after he began seeking treatment, he was not really sure what the cause was. (R. 9437).

Mr. Lieupo underwent six years of treatments during which he had 37 visits to burn centers, 15 visits to hospitals and 150 doctor visits. (R. 10000-01). He had 37 skin grafts (R. 10000-01), including grafts using his own skin (R. 9246, 9336), cadaver skin (R. 9341, 9636), baby foreskin (R. 9636-37), and cow skin. (R. 9637). "[O]n a couple of different occasions, the doctors told [Mr. Lieupo] they may have to take his feet off." (R. 9247, 9343). At one point, Mr. Lieupo became so depressed that he considered suicide. (R. 9344).

D. Causation

Mr. Lieupo's expert medical witness on causation was Dr. Walter Conlan, a board certified wound care specialist (R. 9582), and medical director of Osceola Regional Medical Center in Kissimmee and Orlando Health in Orlando, both of which are "wound care centers." (R. 9584). He testified that, in his opinion, Mr. Lieupo's injuries were caused by direct exposure to sulfuric acid contained in the battery acid spilled at the crash site, resulting in first-, second- and third-degree burns on his feet and ankles (R. 9596, 9633), explaining at length the bases for his conclusion. He said that, while it would make sense for Mr. Lieupo initially to think that the wounds were caused by fire ants "without really having a knowledge of what he was exposed to at the scene" (R. 9622), it was "very, very unlikely" that one would have wounds the size of Mr. Lieupo's, "with the amount of necrosis that Mr. Lieupo had," from ant bites. (R. 9712). He then explained why he ruled out

fire-ant bites as the cause of the wounds. (R. 9619-23). He similarly ruled out venous insufficiency because Mr. Lieupo had had a venous reflux study performed at Shands on August 14, 2013, which was negative for venous insufficiency. (R. 9607, 9670).

Dr. Alejandro Soler, a board-certified general surgeon (R. 9447) with "extensive experience in vascular surgery and managing wounds" (R. 9445) who was called in to consult at Lake City Medical Center regarding Mr. Lieupo's leg wounds, testified as a treating physician. (R. 9448-49). He, too, believed that Mr. Lieupo's wounds were caused primarily by a "chemical burn," rather than ant-bite infection (R. 3788, 9453, 9463), and that they were definitely not caused by venous insufficiency. (R. 9463-65). His "final opinion" as to the cause of Mr. Lieupo's wounds was that Mr. Lieupo

> had prolonged contact with a caustic agent, in this case battery acid. . . . [I]t got into his work boots in a wet environment and probably soaked into his socks.
>
> He continued working with this wet – probably a low percentage of actual acid in contact with his skin. So he then developed a severe painful blistering wound. This was a slow continuous exposure under pressure, and . . . he had deep penetration into his skin, and it initiated his wounds.

(R. 9467). Like Dr. Conlan, he testified that Mr. Lieupo may have believed he had been bitten by fire ants "because he didn't know how to explain what happened to him." (R. 9485).

E. Damages

1. Past medical expenses

Appellant implies that Mr. Lieupo received an award for past medical expenses to which he was not entitled because "[a]ll of [his] medical expenses have been covered by Worker's Compensation." (IB at 7 n.7). The record actually reflects that the following stipulation was read to the jury at the beginning of the trial:

> [T]he parties agree that the Plaintiff may offer into evidence the reduced medical expense amounts including payments by worker's compensation insurance, patient payments, payments from other collateral sources, if any, and outstanding balances. Plaintiff may also tell the jury the worker's compensation insurer has a legal right of reimbursement from any recovery for payments made.

(R. 9078-79). Thus, in closing argument, Mr. Lieupo's lawyer told the jury:

> We have the bills – the medical bills he's incurred as a result of this, and they're here as Plaintiff's Exhibit 2. . . . The total medical expenses are like $1.5 million, but we're not asking for that. There's a worker's compensation itemization of payments, and that's like $730,000. That is what we're asking for. . . . We're asking for the medical expenses that worker's comp paid, which you know they have a right to get back.

(R. 10002). Accordingly, the jury awarded $730,000 for past medical expenses. (R. 8229).[1]

[1]In fact, post-trial, the workers' compensation insurer filed an Amended Notice of Lien, in which it asserts entitlement to $733,949.61 for medical benefits paid. (R. 8713).

2. Other economic damages

Regarding lost earnings from the date of the accident to the date of trial, Mr. Lieupo's lawyer told the jury:

> For lost earnings in the past, for the amount of time that [Mr. Lieupo] could not work, . . . you have his tax records . . . . [T]hat shows that he made anywhere from . . . $38,000 to $42,000, so we said the average of $40,000, over five years, which is $200,000.

(R. 10028-29). That is precisely the amount the jury awarded. (R. 8229).

Regarding future lost earning capacity, Mr. Lieupo's expert vocational evaluator testified that he was employed part-time by a friend, in what was essentially sheltered employment, and that he would likely never be able to work more than part-time, in sedentary jobs. (R. 9525-26, 9522, 9529-30). This expert testified that Mr. Lieupo's future loss of earning capacity was between $23,366 and $27,621 per year. (R. 9530). Mr. Lieupo, who was 60 at the time of trial (R. 9517), testified that, before his injuries, he had no plans to retire, and intended to work as long as he was able. (R. 9369). The jury awarded $280,000 for future loss of earning capacity (R. 8229), which is roughly equal to an award until age 70.

3. Non-economic damages

Regarding past non-economic damages, the evidence established that Mr. Lieupo had undergone six years of treatments during which he had 37 visits to burn centers, 15 visits to hospitals and 150 doctor visits. (R. 10000-01). He had 37 skin grafts (R. 10000-01), including grafts using his own skin (R. 9246, 9336),

cadaver skin (R. 9341, 9636), baby foreskin (R. 9636-37), and cow skin. (R. 9637). The pain associated with the debridements that preceded the skin grafts, and the grafts themselves, was intense. (R. 9242, 9246, 9336, 9341). For years, Mr. Lieupo was in nearly constant pain. (R. 9239, 9242, 9244, 9246, 9249, 9250, 9252, 9336, 9352). He was also unable to drive. (R. 9251). "[O]n a couple of different occasions, the doctors told [Mr. Lieupo] they may have to take his feet off." (R. 9247, 9343). At one point, Mr. Lieupo became so depressed that he considered suicide. (R. 9344).

Mr. Lieupo continues to have aching, shooting pain in his lower extremities. (R. 9517). Some days the pain level is a 10 on a scale of 1 to 10. (R. 9365). "Late in the evening his pain level gets up to 8 or 9 . . . . The pain increases during the day." (R. 9517). He regularly suffers from leg spasms at night. (R. 9366-67). "His balance is really poor" and "[h]e tends to stumble." (R. 9518). He also drags his right leg (R. 9521), has "an unsteady gait pattern" (R. 9527), "shuffles" (R. 9234, 9253-54), has "numbness and tingling in his lower extremities" (R. 9528), "stumble[s] a lot" (R. 9528), and is "unstable walking on level and uneven surfaces." (R. 9528). He has significant permanent scarring and disfigurement of his lower extremities. (R. 9254, 9376-78). He is also no longer able to pursue his favorite pastimes, including hunting and fishing. (R. 9232-34, 9367-75).

The jury awarded $3 million for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a physical disease or defect, permanent significant scarring and loss of capacity for the enjoyment of life in the past, and $1 million for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a physical disease or defect, permanent significant scarring and loss of capacity for the enjoyment of life in the future. (R. 8229).

SUMMARY OF THE ARGUMENT

In plain language that could not be clearer, section 376.313(3), Florida Statutes (2011), creates a private strict-liability cause of action "for *all damages* resulting from a discharge or other condition of pollution covered by ss. 376.30-376.317." (Emphasis added). Appellant does not challenge the sufficiency of the evidence to establish either "a discharge or other condition of pollution covered by ss. 376.30-376.317," or that Mr. Lieupo's personal injuries "result[ed] from [that] discharge or other condition of pollution." Appellant's sole argument is that, because of the supreme court's decision in *Curd v. Mosaic Fertilizer*, this Court must ignore the plain language of section 376.313(3) and reverse the trial court's denial of Appellant's motion for judgment notwithstanding the verdict. Appellant is mistaken.

Curd was not a personal injury case – whether a plaintiff could recover damages for personal injuries under section 376.313(3) was, therefore, not an issue. While the court looked to the "Damage" definition in section 376.031 for guidance, it was not asked to decide whether *only* those items of damages listed in section 376.031(5) were recoverable in an action under section 376.313(3) notwithstanding use of the term "all damages" in the latter section; and it was not necessary for it to do so to resolve the issue before it. Accordingly, any suggestion in *Curd* that the section 376.031(5) definition of "Damage" would apply, and

preclude an action for personal injury damages under section 376.313(3) is dicta, and must be disregarded in favor of the clear and unambiguous statutory language.

Common sense also requires the conclusion that the court did not intend to bar a cause of action under section 376.313(3) for personal injuries resulting from a covered act of pollution. To conclude that the court intended to bar such a cause of action, one would first have to conclude that:

- the court ignored the plain language of not only section 376.313(3), but also of section 376.315 (which mandates that section 376.313 be "liberally construed") and section 376.031 (which states that the section's definitions apply *only* to sections 376.011 through 376.21);
- the court overlooked the significant difference between section 376.205 (which authorizes a private cause of action for violations of sections 376.011 through 376.21) and section 376.313 (which authorizes a private cause of action for violations of sections 376.30 through 376.317) – the limitation in the former to recovery only of "damages, as defined in s. 376.031," while the latter permits the recovery of "all damages"; and
- the court intended to read the adjective "all" out of section 376.311(3).

Attributing all of this to the court would produce a truly absurd result – while section 376.313(3) permits the recovery of consequential damages resulting from damage to property not even owned by the plaintiff, it precludes the recovery of damages for serious personal injuries caused by a covered act of pollution.

The trial court correctly held that Mr. Lieupo's action is permitted by the plain language of section 376.313(3) and nothing in *Curd* requires a different result. This Court should affirm.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE PLAIN LANGUAGE OF SECTION 376.313(3) PERMITS ONE TO RECOVER FOR *"ALL DAMAGES"* RESULTING FROM A COVERED DISCHARGE OR OTHER CONDITION OF POLLUTION

A. Standard of Review

Whether the trial court correctly denied Appellant's motion for judgment notwithstanding the verdict turns on the meaning of section 376.313(3), Florida Statutes (2011). This presents a pure question of law, reviewable de novo. *E.g.*, *Kumar v. Patel*, 2017 WL 4296212, at *1 (Fla. Sept. 28, 2017) ("Questions of statutory interpretation are reviewed de novo."); *Whitney Bank v. Grant*, 223 So. 3d 476, 479 (Fla. 1st DCA 2017) (same).

B. Statutory Construction Analysis

Appellant's sole argument for reversal is that the Florida Supreme Court's decision in *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216 (Fla. 2010), precludes the recovery of damages pursuant to section 376.313(3), Florida Statutes (2011), for personal injuries resulting from a discharge or other condition of pollution covered by the Water Quality Assurance Act of 1983 (codified as sections 376.30-376.317, Florida Statutes). Although Appellant studiously avoids any analysis of the pertinent statutes, such an analysis is a necessary prelude to a discussion of why the supreme court could not possibly have intended in *Curd* to preclude the

recovery of damages for personal injuries resulting from a covered discharge or other condition of pollution.[2]

1. Plain meaning

"The first rule of statutory interpretation is that '[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'" *Streeter v. Sullivan*, 509 So. 2d 268, 271 (Fla. 1987) (quoting *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931)); *accord Kumar*, 2017 WL 4296212, at *1; *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984); *Whitney Bank*, 223 So. 3d at 479.

So, in construing a statute, a court must always begin with the language. If the words used are clear and unambiguous, a court should end there, as well. In doing this, words must generally be given their plain, common, ordinary meanings, and "a court may refer to a dictionary to ascertain the plain and ordinary meaning" of words used. *L.B. v. State*, 700 So. 2d 370, 372 (Fla. 1997).

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[2]The statutory construction analysis is also intended as a response to the analysis in the Florida Justice Reform Institute's Amicus Brief which, instead of explaining why the plain language of the pertinent statutes does not mean precisely what it seems to say, resorts to canons of construction and a lengthy discussion of federal legislative intent under "CERCLA," resulting in a construction of the pertinent statutes that is irreconcilable with their plain language in violation of the cardinal principle that, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction." *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931).

Even if a court is convinced the legislature actually meant something other than the meaning conveyed by the words used, in the absence of any ambiguity in the language itself, the court may not disregard the plain meaning of the words used – if the legislature intended something else, it made the mistake, and it should fix it. *E.g.*, *Overstreet v. State*, 629 So. 2d 125, 126 (Fla. 1993); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982); *Whitney Bank*, 223 So. 3d at 479.

What is now section 376.313 was originally enacted as a part of the Water Quality Assurance Act of 1983. *See* ch. 83-310, §§ 1, 84, at 1826, 1878, Laws of Fla. In *Aramark Uniform and Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 21 (Fla. 2004), the court held that section 376.313(3) "create[s] a strict liability cause of action for damages." To the extent pertinent to this action, that section reads that "nothing contained in ss. 376.30-376.317 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. 376.30-376.317." Appellant does not challenge the sufficiency of the evidence to establish either "a discharge or other condition of pollution covered by ss. 376.30-376.317," or that Mr. Lieupo's personal injuries "result[ed] from [that] discharge or other condition of pollution." Accordingly, for purposes of this appeal, the only pertinent question is whether the term "all damages" includes those resulting from personal injuries.

Appellant maintains that the term "damages" is not defined in section 376.313(3) and that, therefore, one should look to the definition of "Damage" found in section 376.031(5). (IB at 13). However, this ignores the modifying adjective "all," which is commonly understood to mean "the whole amount, quantity, or extent of"; "as much as possible"; and "every." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/all. By its plain language, the section permits a private cause of action for "all" damages caused by a covered discharge or other condition of pollution. This should mark the end of the inquiry, as the clear language of the statute demonstrates that the trial court correctly denied Appellant's motion for judgment notwithstanding the verdict.

In addition, however, it is equally clear that the definition of "Damage" in section 376.031(5)[3] does not apply to section 376.313(3). Section 376.031 clearly and unambiguously states that the definitions in that section (including the definition of "Damage") apply *only* to sections 376.011 to 376.21 (i.e., what had been originally adopted in 1970 as the Oil Spill Prevention and Pollution Control

[3]Section 376.031 was originally enacted in 1970, as a part of the Oil Spill Prevention and Pollution Control Act. Ch. 70-244, § 3, at 742-44, Laws of Fla. However, there was no definition of "Damage" until 1990, when what was then subsection (3) was added. Ch. 90-54, § 10, at 145, Laws of Fla. (The subsection did not achieve its current form until 1996. Ch. 96-263, § 1, at 1008, Laws of Fla.) Even though the definition was not added until seven years *after* section 376.313(3) had been adopted as a part of the Water Quality Assurance Act of 1983, the definition was expressly limited to the Oil Spill Prevention and Pollution Control Act, codified as sections 376.011 to 376.21. *Id.*

Act). Moreover, since its enactment, the Water Quality Assurance Act of 1983 (codified as sections 376.30 to 376.317) has always included its own set of definitions. Ch. 83-310, § 84, at 1879-80, Laws of Fla. *See* § 376.301, Fla. Stat. (2011).

Because sections 376.313(3) and 376.031(5) are both clear and unambiguous, there is no reason to engage in statutory construction. Were one to do that, however, one would find additional support for the proposition that Mr. Lieupo's action is permissible.

2. Canons of construction

The Oil Spill Prevention and Pollution Control Act and the Water Quality Assurance Act of 1983 both include a separate statute relating to an "individual cause of action for damages." §§ 376.205 & 376.313, Fla. Stat. (2011). They are in many ways very similar. Both provide that the Acts' remedies are to be "deemed to be cumulative and not exclusive." Both authorize a private cause of action. Both expressly state that any such cause of action need not "plead or prove negligence in any form or manner"; one "need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred." Both permit only specified, limited, defenses. And both provide that "[t]he court, in issuing any final judgment in such action, may award costs of litigation, including

reasonable attorney's and expert witness fees, to any party, whenever the court determines such an award is in the public interest."

Sections 376.205 and 376.313 differ, however, in one very important respect – section 376.313(3) permits recovery of "*all* damages resulting from a discharge or other condition of pollution covered by ss. 376.30-376.317," whereas section 376.205 permits recovery only of "damages, *as defined in s. 376.031*, resulting from a discharge or other condition of pollution covered by ss. 376.011-376.21." (Emphases added). In light of the many striking similarities in the two statutes, it is inconceivable that this significant dissimilarity could have been merely the result of legislative inadvertence. On the contrary, "[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." *Dep't of Prof'l Regulation v. Durrani*, 455 So. 2d 515, 518 (Fla. 1984); *accord Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006); *Beshore v. Dep't of Fin. Servs.*, 928 So. 2d 411, 413 (Fla. 1st DCA 2006). One would expect that, had the legislature intended to preclude recovery of personal injury damages in section 376.313(3), instead of using the term "all damages" it would have said "damages, as defined in s. 376.031," as it had done in section 376.205.

In addition, in construing a statute, "[n]o part of [the] statute, not even a single word, should be ignored, read out of the text, or rendered meaningless." *Scherer v. Volusia Cty. Dep't of Corrs.*, 171 So. 3d 135, 139 (Fla. 1st DCA 2015).

"It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003). To construe section 376.313(3) in the way advocated by Appellant would effectively read the adjective "all" out of the statute.

Last, but by no means least, the legislature has expressly mandated that section 376.313(3) (along with the rest of the Water Quality Assurance Act of 1983) be "liberally construed." § 376.315, Fla. Stat. (2011).

C. *Curd* Does Not Bar Recovery of Damages Attributable to Personal Injuries under Section 376.313(3)

Appellant's sole argument on appeal is that the supreme court's decision in *Curd* bars a cause of action pursuant to section 376.313(3) for personal injuries resulting from a covered discharge or other condition of pollution because *Curd* holds that damages recoverable under section 376.313(3) include only those within the definition of "Damage" found in section 376.031(5). (IB at 1, 13, 14, 16-17). A review of the *Curd* decision refutes this argument.

The sole issue decided by *Curd* that is pertinent to this appeal was the second question certified by the Second District:

> DOES THE PRIVATE CAUSE OF ACTION RECOGNIZED IN SECTION 376.313, FLORIDA STATUTES (2004), PERMIT COMMERCIAL FISHERMEN TO RECOVER DAMAGES FOR

THEIR LOSS OF INCOME DESPITE THE FACT THAT THE FISHERMEN DO NOT OWN ANY PROPERTY DAMAGED BY THE POLLUTION?

Curd, 39 So. 3d at 1218. By answering that question in the affirmative, a unanimous supreme court dramatically broadened the scope of a cause of action under section 376.313(3) by extending the right to damages to plaintiffs only indirectly affected by a covered act of pollution.

Curd was not a personal injury case. Accordingly, whether a plaintiff could recover damages for personal injuries under section 376.313(3) was not an issue. Instead, the court was asked to decide whether the fishermen could recover "'lost income or profits'" allegedly caused by "'a loss of underwater plant life, fish, bait fish, crabs, and other marine life'" that resulted from the defendant's release of pollutants. *Id.* at 1218-19 (quoting the Second District's opinion).[4]

To determine whether section 376.313(3) contemplated recovery of such damages even though the fishermen did not own the marine life, the court looked for guidance to the definition of "Damage" in section 376.031(5). It concluded that subsection permitted recovery not only "for damages to real or personal property but . . . for damages to 'natural resources, including all living things,'" as

[4]Such damages are considered "consequential." *See Nyquist v. Randall*, 819 F.2d 1014, 1017 (11th Cir. 1987) ("lost profits may indeed be the quintessential example of 'consequential damages'") (applying Florida law); *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35, 40 (Fla. 1st DCA 1998) (quoting *Nyquist*).

well. *Id.* at 1222. Accordingly, it further concluded that the fishermen's complaint should not have been dismissed for failure to state a cause of action. *Id.* at 1219.

The court *was not asked* to decide whether *only* those items of damages listed in section 376.031(5) were recoverable in an action under section 376.313(3), and it was not necessary for it to do so to resolve the issue before it. Accordingly, any suggestion in the opinion that the section 376.031(5) definition of "Damage" would apply to preclude an action seeking personal injury damages under section 376.313(3) is dicta.[5] "When the clear and unambiguous language of a statute commands one result . . . , while *dicta* from case decisions might suggest a different result, [courts] must apply the statute so as to give effect to legislative intent." *Garcia v. Dyck-O'Neal, Inc.*, 178 So. 3d 433, 436 (Fla. 3d DCA 2015) (following clear and unambiguous statutory language notwithstanding dicta in prior decisions of the supreme court and this Court suggesting a different result).

In addition, our supreme court has repeatedly said that its opinions "must be construed in the light of the facts and circumstances of the case which was then before [it] for decision." *Dade Cty. v. Brigham*, 47 So. 2d 602, 603 (Fla. 1950);

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[5]"[D]icta is defined as those portions of an opinion that are 'not necessary to deciding the case then before [the court].'" *United States v. Kaley*, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009). "[D]icta is not binding on anyone for any purpose." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010); *see also Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So. 2d 339, 344 (Fla. 1986) (concluding that language in a prior opinion was dicta because not necessary to resolution of the issue presented in that case).

accord Pearson v. Taylor, 32 So. 2d 826, 827 (Fla. 1947) ("all enunciations of law[] must be considered in the light of the factual case before us"); *Shelfer v. Am. Agric. Chem. Co.*, 113 Fla. 108, 115, 152 So. 613, 615 (1933) (On Petition for Rehearing) ("It is familiar law that the language of an opinion must be considered with reference to the facts in the case which is being considered and the issues presented"); *see also Ex parte Amos*, 93 Fla. 5, 21, 112 So. 289, 295 (1927) (Whitfield, J., concurring) ("in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied on were made, and should not be extended to cases where the facts are essentially different").

Moreover, in its decision in *Curd*, the Second District noted that, in *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93 (Fla. 1st DCA), *review denied*, 574 So. 2d 139 (Fla. 1990), this Court had interpreted section 376.313(3) as "permitting recovery for personal injury caused by contamination." *Curd v. Mosaic Fertilizer, LLC*, 993 So. 2d 1078, 1084 (Fla. 2d DCA 2008); *accord Easton v. Aramark Uniform & Career Apparel, Inc.*, 825 So. 2d 996, 998 (Fla. 1st DCA 2002) (stating that, "[i]n *Cunningham v. Anchor Hocking Corporation*, . . . the court held that the plaintiffs, seeking damages from their employer resulting from exposure to toxic substances resulting in respiratory problems, liver damage, brain tumors, pulmonary disease, cancer, and other disorders, stated a cause of

action pursuant to section 376.313"), *approved*, 894 So. 2d 20 (Fla. 2004). While acknowledging in its motion for judgment notwithstanding the verdict filed in the trial court that *Cunningham* held that section 376.313(3) permitted a cause of action for personal injury damages, Appellant argued there that the supreme court's *Curd* decision had overruled *Cunningham*. (R. 8349-50). However, the *Curd* opinion does not even mention *Cunningham*. The reason why is obvious – the court was not concerned with whether section 376.313(3) permits a cause of action for personal injuries resulting from a covered act of pollution because the issue was not before it.

Common sense also requires the conclusion that *Curd* does not bar a cause of action under section 376.313(3) for personal injuries resulting from a covered act of pollution.

Before one could conclude that the supreme court intended to bar damages for personal injuries one would first have to conclude that, in violation of what it has repeatedly called the "first rule of statutory interpretation," the court ignored the plain, unambiguous, language of section 376.313(3) that permits a cause of action for "all damages" resulting from a covered act of pollution; section 376.315, in which the legislature mandated that the Water Quality Assurance Act of 1983, including section 376.313(3), is to be "liberally construed"; and section 376.031, which in equally plain and unambiguous terms states that the definitions contained

in that section – including the definition of "Damage" – apply only to the provisions of the Oil Spill Prevention and Pollution Control Act (codified as sections 376.011 to 376.21). One would also have to conclude that the court overlooked the significant difference between section 376.205 (which authorizes a private cause of action for violations of the Oil Spill Prevention and Pollution Control Act) and section 376.313 (which authorizes a private cause of action for violations of the Water Quality Assurance Act of 1983) – i.e., the limitation in the former to recovery only of "damages, as defined in s. 376.031," while the latter permits the recovery of "all damages"; and that the court intended to read the adjective "all" out of section 376.313(3). Such disregard for the legislature's clear and unambiguously expressed intent would constitute judicial activism of the rankest sort.

Moreover, to attribute such an intent to the court would lead to a truly absurd result – that, while section 376.313(3) permits the recovery of damages by commercial fishermen for loss of income even though they do not own the property damaged by pollution, it does not permit the recovery of damages for serious, life-altering, injuries caused by a covered act of pollution. Even to contemplate that our supreme court would allow such an enormous injustice is inconceivable.

D. To the Extent the Court is Uncertain, It Should Ask the Supreme Court

Finally, while Mr. Lieupo believes that Appellant's argument lacks merit, and that the correct outcome is clear, to the extent this Court has any significant concern, it should certify a question of great public importance to the supreme court, affording it the opportunity to clarify its intent in *Curd*. *See* art. V, § 3(b)(4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(v).

CONCLUSION

The trial court correctly denied Appellant's motion for judgment notwithstanding the verdict based on the clear and unambiguous language of the pertinent statutes and nothing in *Curd* requires a different result. Accordingly, this Court should affirm. If, despite the clear and unambiguous language of the pertinent statutes, the Court has any significant concern as to the supreme court's intent in *Curd*, it should ask the supreme court to clarify its intent by certifying a question of great public importance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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