

United States Court of Appeals Eleventh Circuit

CASE NO. 06-13587-JJ; CASE NO. 06-13588-JJ;
CASE NO. 06-13589-JJ; CASE NO. 06-14206-JJ

CONSOLIDATED

ANNETTE FLORENCE, WILLIAM BURKE,
LETHESA RELIFORD as Personal Representative of
the Estate of Ceola Reliford, and ROBERT BURNS,

Appellants,

v.

CRESCENT RESOURCES, LLC. and RINEHART
DEVELOPMENT & INVESTMENT GROUP, LLC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

INITIAL BRIEF OF APPELLANTS

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Florence, et al. v. Crescent Resources, etc., et al.
Case Nos. 06-13587-JJ, 06-13588-JJ, 06-13589-
JJ, and 06-14206-JJ

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

The undersigned counsel of record for Appellants, in compliance with FRAP 26.1 and 11th CIR. R. 26.1-1, hereby certifies that the following listed persons, parties, and corporations have an interest in the outcome of this appeal.

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Florence, et al. v. Crescent Resources, etc., et al.
Case Nos. 06-13587-JJ, 06-13588-JJ, 06-13589-
JJ, and 06-14206-JJ

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs/Appellants respectfully request oral argument. The district court's rulings have deprived the Plaintiffs of their chosen, and entirely proper, forum in Florida state court. More significantly, the district court has disposed of Plaintiffs' suits altogether and entered final judgment in favor of the Defendants. The basis for the district judge's rulings is his opinion that a Florida statute should not be applied as written, and that the Florida Supreme Court's leading decision as to interpretation of the statute is, in fact, a misinterpretation.

The Florida Supreme Court is the final arbiter of Florida law - not a federal district judge sitting in diversity in an improvidently removed case. Because Plaintiffs presently stand stripped of their Florida law claims against these Defendants, one of whom is a Florida corporation, Plaintiffs respectfully seek to appear at oral argument to address any questions the Court may have about the issue presented, which is clearly of pivotal importance to Plaintiffs' rights of redress.

TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT	C-1 of 2
STATEMENT REGARDING ORAL ARGUMENT	i
TABLE OF CITATIONS	iii
STATEMENT OF JURISDICTION	vii
A. Basis for the district court’s jurisdiction	vii
B. Basis for the court of appeals’ jurisdiction	vii
C. Filing dates establishing timeliness of appeal	vii
D. Assertion that the appeal is from a final order or judgment that disposes of all parties’ claims	viii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
1. Course of proceedings	2
2. Statement of the facts	7
3. Standard of review	11
SUMMARY OF ARGUMENT	13
ARGUMENT	18
CONCLUSION	38
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)	39
CERTIFICATE OF SERVICE	39

TABLE OF CITATIONS

	Page
<i>Acosta v. Richter</i>	
671 So.2d 149 (Fla.1996)	23, 29
<i>*Aramark Uniform and Career Apparel, Inc. v. Easton</i>	
894 So. 2d 20 (Fla. 2004)	<i>passim</i>
<i>Bank of Heflin v. Miles</i>	
621 F.2d 108 (5th Cir.1980)	34
<i>Bearint ex rel. Bearint v. Dorell Juvenile Group, Inc.</i>	
389 F.3d 1339 (11th Cir.2004)	11
<i>Bonner v. Prichard</i>	
661 F.2d 1206 (11th Cir.1981)	34
<i>Brottem v. Crescent Resources LLC et al.</i>	
2006 WL 1529327, 19 Fla. L. Weekly Fed. D 786 (M.D. Fla. 2006)	6, 10, 25, 29
<i>Butero v. Royal Maccabees Life Ins. Co.</i>	
174 F.3d 1207 (11th Cir.1999)	11
<i>Butler v. Polk</i>	
592 F.2d 1293 (5th Cir.1979)	33
<i>Cotton States Mut. Ins. Co. v. Anderson</i>	
749 F.2d 663 (11th Cir. 1984)	34
<i>Crowe v. Coleman</i>	
113 F.3d 1536 (11th Cir.1997)	26, 36
<i>Cunningham v. Anchor Hocking Corp.</i>	
558 So. 2d 93 (Fla. 1st DCA), <i>review denied</i> , 574 So. 2d 139 (Fla.1990)	19

<i>Cunningham v. Gen. Motors Corp.</i> 561 So.2d 656 (Fla. 1st DCA 1990)	20
<i>Durrance v. Sanders</i> 329 So.2d 26 (Fla. 1st DCA 1976)	20
<i>Edic v. Century Prods. Co.</i> 364 F.3d 1276 (11th Cir.2004)	11
<i>Gulfstream Park Racing Ass’n, Inc. v. Tampa Bay Downs, Inc.,</i> __ So. 2d __, 2006 WL 2690152, *6 (Fla. 2006)	30
<i>Hawkins v. Ford Motor Co.</i> 748 So. 2d 993 (Fla.1999)	30
<i>Hechtman v. Nations Title Ins. of N.Y.</i> 840 So. 2d 993 (Fla.2003)	30
<i>*Henderson v. Washington Nat. Ins. Co.</i> 454 F.3d 1278 (11th Cir. 2006)	11, 36, 37
<i>Jairath v. Dyer</i> 154 F.3d 1280 (11th Cir. 1998)	11
<i>Jones v. LMR Intern., Inc.</i> 457 F.3d 1174 (11th Cir. 2006)	11, 33
<i>Kaplan v. Peterson</i> 674 So. 2d 201 (Fla. 5th DCA 1996), review dismissed, 687 So. 2d 1305 (Fla.1997)	19
<i>Lucero v. Operation Rescue</i> 954 F.2d 624 (11th Cir.1992)	11
<i>McKusick v. City of Melbourne</i> 96 F.3d 478, 482 (11th Cir.1996)	11

<i>Morrison v. Allstate Indem. Co.</i> 228 F.3d 1255 (11th Cir. 2000)	35
<i>Mostoufi v. Presto Food Stores, Inc.</i> 618 So. 2d 1372 (Fla. 2d DCA 1993)	19
<i>National Fire Ins. Co. of Hartford v. Fortune Const. Co.</i> 320 F.3d 1260 (11th Cir. 2003)	11
<i>Pacheco de Perez v. AT & T Co.</i> 139 F.3d 1368 (11th Cir. 1998)	34
<i>Parks v. New York Times Co.,</i> 308 F.2d 474 (5th Cir.1962)	36
<i>Price v. Time, Inc.</i> 416 F.3d 1327(11th Cir. 2005)	11
<i>Salve Regina College v. Russell</i> 499 U.S. 225 (U.S. 1991)	11
<i>Sarfati v. Wood Holly Assocs.</i> 874 F.2d 1523 (11th Cir.1989)	12
<i>Shamrock Oil & Gas Corp. v. Sheets</i> 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)	37
<i>State v. Bradford</i> 787 So.2d 811 (Fla.2001)	21
<i>Towne Realty, Inc. v. Safeco Ins. Co. of America</i> 854 F.2d 1264 (11th Cir. 1988)	35
<i>Williams v. Wainwright</i> 650 F.2d 58 (5th Cir. 1981)	34

OTHER AUTHORITIES:

28 U.S.C. §1291 vii

28 U.S.C. §1332 vii

Comprehensive Environmental Response, Compensation, and Liability Act
42 U.S.C.A. §§9601-9628 13

Federal Water Pollution Control Act
33 U.S.C.A. §§1251-1387 13

FRAP 28(a)(4)(D) viii

Water Quality Assurance Act of 1983, Ch. 83-310, Laws of Fla. 8, 13, 18

§376.302, Fla. Stat. 18

§376.303, Fla. Stat. 18

§376.3071, Fla. Stat. 18

*§376.308, Fla. Stat. *passim*

*§376.313, Fla. Stat. *passim*

§376.315, Fla. Stat. 32

§§376.30-376.319, Fla. Stat. *passim*

STATEMENT OF JURISDICTION

A. Basis for the district court's jurisdiction

The basis for the district court's jurisdiction asserted by Defendant/Appellee Crescent Resources, LLC, a foreign corporation, was diversity of citizenship under 28 U.S.C. §1332 and an assertion that Defendant/Appellee Rinehart Development & Investment Group, LLC was fraudulently joined as a defendant. Plaintiffs/Appellants disagree that there is any basis for federal jurisdiction and disagree that there was any fraudulent joinder of Defendant/Appellee Rinehart. Plaintiffs/Appellants contend that their cases should be remanded to state court, where they were properly filed.

B. Basis for the court of appeals' jurisdiction

This Court's jurisdiction is based on 28 U.S.C. §1291, which grants the United States Courts of Appeals jurisdiction of appeals from final decisions of the United States district courts.

C. Filing dates establishing timeliness of appeal

The appeals herein are taken from four identical decisions issued by the U.S. District Court for the Middle District of Florida in related cases that have been consolidated by this Court for purposes of these appellate proceedings. The dates of the final judgments entered by the district court in each of the cases, and the dates of filing of Plaintiffs/Appellants' notices of appeal are as follows:

- (1) **Annette Florence v Crescent Resources, LLC et al.**
Florida Middle District Case No. 6:06-cv-422-Orl-31-JGG,

Final Judgment entered: June 20, 2006
Notice of Appeal filed: June 23, 2006

- (2) **William Burke v Crescent Resources, LLC et al.**
Florida Middle District Case No. 6:06-cv-424-Orl-31-JGG

Final Judgment entered: June 20, 2006
Notice of Appeal filed: June 23, 2006

- (3) **Lethesa Reliford as Personal Representative of
the Estate of Ceola Reliford v Crescent Resources, LLC et al.**
Florida Middle District Case No. 6:06-cv-426-Orl-31-JGG

Final Judgment entered: June 20, 2006
Notice of Appeal filed: June 23, 2006

- (4) **Robert Burns v Crescent Resources, LLC et al.**
Florida Middle District Case No. 6:06-cv-423-Orl-31-JGG

Final Judgment entered: August 1, 2006
Notice of Appeal filed: August 1, 2006

D. Assertion that the appeal is from a final order or judgment that disposes of all parties' claims

Pursuant to FRAP 28(a)(4)(D), undersigned counsel for Appellants asserts that these appeals are from final judgments entered by the district court disposing of all claims among the parties. The final judgments were entered based on the district courts' orders denying Plaintiffs/Appellants' motions for remand, dismissing with prejudice Plaintiffs/Appellants' claims against Defendant/Appellee Rinehart

Development & Resources, LLC, and granting final summary judgment in favor of Defendant/Appellant Crescent Resources, LLC.

STATEMENT OF THE ISSUES

Whether the district court erred in denying Plaintiffs' motions for remand where Plaintiffs have a Florida statutory cause of action against a named Florida defendant, both under the wording of the Florida statute and under the interpretation given the statute by the Florida Supreme Court.

Whether the district court erred in substituting its opinion of what seemed a reasonable interpretation for the actual wording of a Florida statute and for the Florida Supreme Court's interpretation of the statute.

Whether the district court erred in dismissing Plaintiffs' claims against one Defendant with prejudice and entering final summary judgment for the remaining Defendant in an improvidently removed case in which there is no basis for exercise of federal jurisdiction.

STATEMENT OF THE CASE ¹

1. Course of proceedings

Plaintiffs/Appellants Florence, Burns, Reliford, and Burke (“Plaintiffs”) filed suits against Defendant/Appellee Rinehart Development and Resources, LLC, a Florida corporation, and Defendant/Appellee Crescent Resources, LLC, a foreign corporation, in Florida state court; specifically, in the Eighteenth Judicial Circuit Court in and for Seminole County, Florida. (**Florence-422-2-1-8; Burns-423-2-1-8; Reliford-426-2-1-8; Burke-424-2-1-8**). The suits asserted claims for damages arising from personal injuries and wrongful deaths caused by exposure to hazardous substances stored on land owned by the Defendants at which a manufacturing facility and waste water treatment plant in Lake Mary, Florida had previously been operated.

¹ These four consolidated appeals arise out of injuries or deaths caused by exposure to hazardous substances. The complaints are substantively identical in all four cases, as are all of the motions, memoranda, and orders entered by the district court. In order to make record references as helpful and concise as possible, Appellants provide the references to all four records, and add the name of the particular Appellant and an abbreviated version of the district court case number before the docket entry and page numbers, as follows: (**Florence-422-2-1-8; Burns-423-2-1-8; Reliford-424-2-1-8; Burke-424-2-1-8**). The actual case numbers are 6:06-cv-422-Orl-31-JGG, 6:06-cv-423-Orl-31-JGG, 6:06-cv-424-Orl-31-JGG, and 6:06-cv-426-Orl-31-JGG. With the Court’s indulgence, we make reference just to the bolded portion of the case numbers since the remainder is identical and it may make for harder reading if the case numbers are included in full. Unless otherwise indicated, all emphasis in this brief is supplied by undersigned counsel.

(Florence-422-2-1-8; Burns-423-2-1-8; Reliford-426-2-1-8; Burke-424-2-1-8). Plaintiffs based their claims on §376.313, Fla. Stat., which provides a strict liability cause of action against owners of real property for damages caused by surface or ground water contaminants on the property. **(Florence-422-2-1-8; Burns-423-2-1-8; Reliford-426-2-1-8; Burke-424-2-1-8).**

Defendant Crescent Resources filed notices of removing the cases to the U.S. District Court for the Middle District of Florida. **(Florence-422-1-1-9; Burns-423-1-1-9; Burke-424-1-1-9; Reliford-426-1-1-9).** The claimed basis for the removal was ‘fraudulent’ joinder of Florida Defendant Rinehart. **(Florence-422-1-1-9; Burns-423-1-1-9; Burke-424-1-1-9; Reliford-426-1-1-9).** The ‘fraudulent’ joinder argument was that Plaintiffs could not state a cause of action against Rinehart under §376.313, Fla. Stat. and/or would not be able to prevail against Rinehart because of a statutory defense afforded to certain defendants under the statute. **(Florence-422-1-1-9; Burns-423-1-1-9; Burke-424-1-1-9; Reliford-426-1-1-9).**

As detailed further in the argument section below, the statutory defense upon which Crescent sought to rely allows defendants to use the fact that the contamination in question was caused by a third party to act as a defense under certain conditions described in the statute, conditions which the Defendants *and* the district court have expressly acknowledged could never be met by Defendants Rinehart and Crescent

under the facts of these cases. (See **Florence-422-18-1-4**; **Burns-423-19-1-4**; **Burke-424-17-1-4**; **Reliford-426-20-1-4**). The argument made by Crescent, and accepted by the district court, was that the statutory conditions placed upon the defense by the Florida Legislature should just be ignored as to these Defendants because otherwise, Crescent opined, the defense would not make sense for current owner defendants like themselves who had not caused the contamination. (**Florence-422-16-20-28**; **Burns-423-17-20-28**; **Burke-424-15-20-28**; **Reliford-426-18-20-28**).

Plaintiffs filed motions to remand the cases to state court, asserting that Defendant Crescent had no basis for removing the case because Plaintiffs have perfectly valid §376.313 claims against both Defendants, to whom the statutory defenses do not apply, based on the terms of the statute itself and based on the interpretation of the statute set out by the Florida Supreme Court in *Aramark Uniform and Career Apparel, Inc. v. Easton*, 894 So. 2d 20 (Fla. 2004). (**Florence-422-14-1-21**; **Burns-423-15-1-21**; **Burke-424-13-1-21**; **Reliford-426-16-1-21**). Plaintiffs denied Defendant Crescent's accusations of 'fraudulent' joinder, and sought orders remanding their cases to Florida state court and awarding fees and costs for Defendant Crescent's improvident removal. (**Florence-422-14-1-21**; **Burns-423-15-1-21**; **Burke-424-13-1-21**; **Reliford-426-16-1-21**). Defendant Crescent filed a memorandum in opposition. (**Florence-422-16-1-29**; **Burns-423-17-1-29**; **Burke-**

424-15-1-29; Reliford-426-18-1-29).

Additionally, and with no explanation as to why the motions were not simply filed with the state court, Defendant Crescent filed motions to dismiss Plaintiffs' complaints against Crescent with prejudice, or, in the alternative, for summary judgment in Crescent's favor, advancing the identical argument that it had made as to Rinehart, i.e., that §376.313 does not afford a cause of action to Plaintiffs and/or that the conditional 'third party' defense afforded by §376.313 would (if the statutory conditions were ignored) make it impossible for the Plaintiffs to recover against Crescent. (**Florence-422-15-1-20; Burns-423-16-1-20; Burke-424-14-1-20; Reliford-426-16-1-21**). Plaintiffs filed a response in opposition. (**Florence-422-17-1-16; Burns-423-18-1-16; Burke-424-16-1-16; Reliford-426-19-1-17**).

The district court entered orders denying Plaintiffs' motions to remand their cases to state court, dismissing Plaintiffs' claims against Defendant Rinehart with prejudice, and granting Defendant Crescent's motion for final summary judgment. (**Florence-422-18-1-4; Burns-423-19-1-4; Burke-424-17-1-4; Reliford-426-20-1-4**). The district court rejected the defense argument that Plaintiffs could not state a claim against Defendant Rinehart under §376.313, Fla. Stat., but ruled that the statutory 'third party' defense (as modified by the district court, at Defendant's suggestion, to delete the conditions placed by the statute) would prevent Plaintiffs from recovering

such that Rinehart would be deemed to have been fraudulently joined, and that the Plaintiffs' suits against Rinehart were dismissed with prejudice. (**Florence-422-18-1-4**; **Burns-423-19-1-4**; **Burke-424-17-1-4**; **Reliford-426-20-1-4**). The district court held that summary judgments would be granted to Defendant Crescent for precisely the same reasons that Plaintiffs' claims against Defendant Rinehart had been dismissed, i.e., that because of the statutory 'third party' defense (as modified by the district court), Plaintiffs had no possibility of making a recovery against Crescent under §376.313. (**Florence-422-18-1-4**; **Burns-423-19-1-4**; **Burke-424-17-1-4**; **Reliford-426-20-1-4**).

The district court's orders denying remand, dismissing Rinehart, and granting summary judgment for Crescent in these four cases adopt by reference an order entered by the district court in companion cases brought by other victims of the surface and ground water pollution on Defendants' properties. *See Brottem v. Crescent Resources LLC et al.*, 2006 WL 1529327, 19 Fla. L. Weekly Fed. D 786 (M.D. Fla. 2006). In the *Brottem* order, the district court made the same rulings as to denial of plaintiffs' motions for remand and entry of a dismissal with prejudice as to the claims against Rinehart.² We mention the *Brottem* order here because it contains

² For reasons not pertinent here, Defendant Crescent did not move for dismissal or summary judgment in *Brottem*, as reflected in the *Brottem* order's recital as to the motions being addressed in the order.

the district court's full legal analysis of the issues, which is then adopted in the orders that were entered in the instant cases. (See **Florence-422-18-1-4**; **Burns-423-19-1-4**; **Burke-424-17-1-4**; **Reliford-426-20-1-4**).

Because all of the Plaintiffs' claims were disposed of by the orders dismissing Plaintiffs' claims against Rinehart with prejudice and granting summary judgment in favor of Crescent, the district court entered final judgments on the dates set out in the Statement of Jurisdiction above. (**Florence-422-20-1**; **Burns-423-25-1**; **Burke-424-19-1**; **Reliford-426-22-1**). On the dates also set out in the Statement of Jurisdiction, Plaintiffs timely initiated these appeals. (**Florence-422-21-1-2**; **Burns-423-26-1-2**; **Burke-424-20-1-2**; **Reliford-426-23-1-2**).

2. Statement of the facts

The material facts are for the most part alleged in Plaintiffs' Complaints, and have not been disputed by the Defendants.

Plaintiffs and their deceaseds sustained injuries or death as a result of exposure to hazardous wastes and toxic chemicals stored on property located in Lake Mary, Florida, and owned by Defendants Crescent and Rinehart. (**Florence-422-2-1-8**; **Burns-423-2-1-8**; **Reliford-426-2-1-8**; **Burke-424-2-1-8**). The property was previously used as a manufacturing facility and waste water treatment plant. (**Florence-422-2-3**; **Burns-423-2-3**; **Reliford-426-2-3**; **Burke-424-2-3**). Plaintiffs or

their deceaseds were exposed to the toxic waste while working at the facility. (**Florence-422-2-4; Burns-423-2-4; Reliford-426-2-4; Burke-424-2-4**).

Plaintiffs' Complaints asserted strict liability claims against the Defendants under §376.313, Fla. Stat., originally enacted as part of the Water Quality Assurance Act of 1983, *see* Ch. 83-310, Laws of Fla., alleging that: (1) the toxic chemicals and pollutants present on the property now owned by the Defendants (referenced as the "Contaminated Site") are hazardous substances within the meaning of Chapter 376 of the Florida Statutes; (2) as a result of the contamination of the Site with hazardous substances, the Plaintiffs suffered injuries; (3) the Defendants currently own property that is part of the Contaminated Site; and (4) because the Defendants own portions of the Contaminated Site, they are strictly liable for the Plaintiffs' injuries under the provisions of §376.313, Fla Stat. (**Florence-422-2-1-8; Burns-423-2-1-8; Reliford-426-2-1-8; Burke-424-2-1-8**). Plaintiffs' Complaints also alleged that at the time the Defendants purchased the property in question they had either actual or constructive knowledge that the property was contaminated from discharges of hazardous substances and other pollutants covered by §§376.30-376.319, Fla. Stat. (**Florence-422-2-4-5; Burns-423-2-4-5; Reliford-426-4-5; Burke-424-2-4-5**).

It is important for understanding the facts of these cases to note that §376.313(3) provides that, subject to certain exceptions not relevant here, "it is not necessary for

[a person injured by hazardous waste] to plead or prove negligence in any form or manner. Such person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred.” §376.313(3), Fla. Stat. As discussed further in the argument section below, it is also important to know that the Florida Supreme Court, resolving a conflict amongst Florida’s appellate courts, held that §376.313 creates a statutory strict liability claim, requiring no proof of negligence or that the defendant *caused* the discharge of hazardous substances:

Section 376.313(3) departs from the common law by creating a damages remedy for the non-negligent discharge of pollution without proof that the defendant caused it. The only proof required is the fact of the prohibited discharge or other pollutive condition and that it has occurred. The absence of a causation requirement in the statute cannot be viewed as a legislative oversight. In other statutes within the same scheme (sections 376.30-376.319), where the Legislature wanted to hold a party responsible only if it actually caused the contamination, it so provided. Therefore, we must assume that the omission of a causation requirement in section 376.313(3) was deliberate.

Aramark, supra, 894 So. 2d at 24.

In support of its removal papers and its motions for dismissal or summary judgment, Defendant Crescent filed affidavits to show that Defendants Crescent and Rinehart did not cause the discharges of hazardous substances that resulted in Plaintiffs’ injuries because they acquired property at the Contaminated Site after Plaintiffs had last been exposed to the hazardous substances at the Site. (**Florence-**

422-15-22-27; Burns-423-16-22-27; Burke-424-14-22-27; Reliford-426-17-22-27).

It is the fact that Defendants did not cause the discharges of hazardous substances upon which the Defendants (**Florence-422-15-1-20; Burns-423-16-1-20; Burke-424-14-1-20; Reliford-426-16-1-21**), and ultimately the district court, relied in reasoning that Plaintiffs could never recover from Rinehart and Crescent. (**Florence-422-18-1-4; Burns-423-19-1-4; Burke-424-17-1-4; Reliford-426-20-1-4**). The reasoning was based upon an interpretation of a statutory defense to §376.313 claims provided in §376.308, Fla. Stat. *Id.*

In order to avoid duplication, we discuss the particulars of the district court’s analysis where pertinent in the argument section below. For present purposes, the additional facts material to appellate review by this Court are the following. As reflected in its orders, the district court expressly decided to disregard the Supreme Court’s interpretation of §376.313 set out in its 2004 *Aramark* decision, and expressly decided to ignore some of the language of the Florida statute to reach the result the district court felt made sense, stating: “In this case, ignoring the two listed elements of subsection (2)(d) [of §376.308, Fla. Stat.] in a case involving someone in Rinehart’s position is the only reasonable interpretation of the statute.” *Brottem*, 2006 WL 1529327, *6 .

3. Standard of review

The issues presented in this appeal are subject to *de novo* review, as set forth in this section.

Review of the district court's denial of [a] plaintiff's motion for remand is *de novo*: "We review *de novo* the district court's denial of a plaintiff's motion to remand, as it involves a question of subject-matter jurisdiction." *Jairath v. Dyer*, 154 F.3d 1280, 1281-1282 (11th Cir. 1998). *See also Henderson v. Washington Nat. Ins. Co.*, 454 F.3d 1278, 1281 (11th Cir. 2006). Questions of jurisdiction are reviewed *de novo*. *See Jones v. LMR Intern., Inc.*, 457 F.3d 1174, 1177 (11th Cir. 2006); *McKusick v. City of Melbourne*, 96 F.3d 478, 482 (11th Cir.1996), *citing Lucero v. Operation Rescue*, 954 F.2d 624, 627 (11th Cir.1992).

Further, review of a district court's determinations of state law is *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225 (U.S. 1991); *Price v. Time, Inc.*, 416 F.3d 1327(11th Cir. 2005); *Bearint ex rel. Bearint v. Dorell Juvenile Group, Inc.*, 389 F.3d 1339, 1345 (11th Cir. 2004); *Edic v. Century Prods. Co.*, 364 F.3d 1276, 1287 (11th Cir. 2004).

Finally, review of a district court's dismissal of state law claims is *de novo*, *see Jones v. LMR Intern., Inc.*, 457 F.3d 1174, 1177 (11th Cir. 2006); *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207, 1211 (11th Cir.1999), and review of a

district court's rulings on motions for summary judgment is *de novo*. See *National Fire Ins. Co. of Hartford v. Fortune Const. Co.*, 320 F.3d 1260, 1267 (11th Cir. 2003); *Sarfati v. Wood Holly Assocs.*, 874 F.2d 1523, 1525 (11th Cir. 1989).

SUMMARY OF ARGUMENT

Not long after the federal government passed the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§9601-9628 (“CERCLA”) and the Federal Water Pollution Control Act, 33 U.S.C.A. §§1251-1387, born of growing awareness of the extent to which the citizens and environment of the United States had been, and were continuing to be, harmed by pollution of the country’s lands, air, and waters with toxic chemicals and other hazardous substances, Florida enacted its own statutes addressing issues of past and future environmental harm and its damage to citizens. Among the Florida statutes was §§376.30-376.319, enacted as part of the Water Quality Assurance Act of 1983. *See* Ch. 83-310, Laws of Fla. Section 376.313 of the Act provides a strict liability cause of action for citizens of Florida whose persons or property have been harmed by contamination of Florida’s surface and ground waters with hazardous substances.

The §376.313 statutory cause of action expressly provides that it is not necessary for a plaintiff suing under the Act “to plead or prove negligence in any form or manner. Such person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred.” §376.313(3), Fla. Stat. As expressed by the Florida Supreme Court in its 2004 decision in *Aramark, supra*, resolving a prior conflict in Florida law as to whether §376.313 created a new

statutory cause of action or merely modified existing common law remedies, the Act not only *did* create a new strict liability claim without regard to fault, but also deliberately dispensed with any requirement that there be a showing that the defendant caused the contamination: “On its face ... section 313.376 departs from the common law by creating a damages remedy for the non-negligent discharge of pollution without proof that the defendant caused it.” 894 So. 2d at 24.

The statute thus allows injured victims of pollution to recover from current owners of property with polluted ground or surface waters regardless of the fact that the pollution or contamination may have been caused by prior owners, by adjacent landowners, or by the acts of other third parties which result in pollutive conditions. The statute does, however, preserve such owners’ rights to seek contribution and indemnity from those who may actually have caused the pollution. §376.313(3), Fla. Stat.

As explained by the Florida Supreme Court, the Florida Legislature acted deliberately in allocating the burdens created by *prior* pollution, requiring current owners to be the parties responsible for paying victims of pollution, and allowing them to seek whatever reimbursement may be available from parties who were responsible for creating the pollutive conditions: “The apparent purpose of section 376.313(3) is to make it easier for victims of pollution to recover for damages

resulting from a pollutive discharge or conditions of pollution.” 894 So. 2d at 25. The Court explained the reason for the Legislature’s choice in making current owners liable without regard to their lack of fault:

As between the owner of contaminated property and a victim of pollution, the current owner is in a superior position to protect itself through pre-purchase due diligence and negotiation of indemnities with the seller. Prospective purchasers of contaminated property also have recourse to an entire industry providing pre-acquisition environmental audits and environmental insurance products that protect against third party damage claims. They are in the best position both to protect against the contingent liability attached to purchasing such property and to discover the cause of the pollution.

894 So. at 25.

The Legislature did provide certain defenses to §376.313 claims based on a defendant’s lack of fault, but the defenses are specifically limited by statutorily delineated conditions. First, as to pollution caused by *prior* owners, the statute provides what has been called an ‘innocent purchaser’ defense, but that defense is expressly limited to purchasers of property contaminated with drycleaning solvents or petroleum products, §376.308 (1)(c). Second, as to pollution caused by a third party while property is in the hands of a current owner, the statute provides what has been called a ‘third party’ defense, but the availability of that defense is expressly conditioned on a defendant showing by a preponderance of the evidence that:

1. The defendant exercised due care with respect to the pollutant

concerned, taking into consideration the characteristics of such pollutant, in light of all relevant facts and circumstances.

2. The defendant took precautions against any foreseeable acts or omissions of any such third party and against the consequences that could foreseeably result from such acts or omissions.

§376.308(2)(d). These showings can only be made by defendants whose contamination occurs *while* they already own the property. Conversely, the showing can never be made by purchasers of property with pre-existing contamination, like the Defendants in these cases.

The Plaintiffs here brought strict liability claims under §376.313 against Defendants Rinehart and Crescent as the current owners of the property whose contaminated ground and surface waters injured the Plaintiffs. Defendant Rinehart is a Florida corporation, and Plaintiffs thus had every right to bring their Florida statutory claims in Florida state Court.

Defendant Crescent's improvident removal was based entirely on incorrect arguments about Plaintiffs' ability to succeed in their claims against Florida corporation Rinehart. Crescent argued that §376.313 does not provide a private right of action, an argument clearly rejected by the Florida Supreme Court in *Aramark*. Crescent's alternative argument was that Rinehart (and Crescent) could never be held liable to Plaintiffs because of the defenses afforded under the statute. This argument

was also without merit because the ‘innocent purchaser’ defense is concededly not even available to these Defendants; the contamination alleged is neither from drycleaning solvents nor from petroleum products. The Defendants, also concededly, can never make the showings required to avail themselves of the ‘third party’ defense.

Defendant Crescent’s removal ultimately rested only upon its contention that the district court should ignore the statutory conditions placed on the ‘third party defense’, and that, after doing so, the district court should find that the Plaintiffs had ‘fraudulently joined’ Rinehart as a defendant to defeat diversity jurisdiction. There, the Defendant went too far. Neither the Defendants nor the district court were in a position to re-write a Florida statute, and the district court erred in accepting the Defendants’ invitation to do so.

Since all of the district court’s rulings were based on its impermissible revision of the Florida statute in question, all of the rulings were in error. The final judgments based on the orders dismissing Defendant Rinehart and entering summary judgment for Defendant Crescent should be vacated for lack of subject matter jurisdiction. The order denying Plaintiffs’ motion for remand should be reversed, with directions to consider Plaintiffs’ motions for attorneys’ fees and costs for improvident removal and thereafter to remand the Plaintiffs’ cases to state court.

ARGUMENT

The issues presented in this appeal arise from the district court's interpretation of a Florida statute versus what the statute says and how the Florida Supreme Court has interpreted the statute. We thus begin by discussing the statute, its history and background, and the manner in which it has been interpreted by Florida's state courts.

The statute in question, §376.313, Fla. Stat., is found within §§376.30-376.319, Florida Statutes, originally enacted as part of the Water Quality Assurance Act of 1983. *See* Ch. 83-310, Laws of Fla. These particular statutes comprise a comprehensive statutory scheme designed to protect Florida's surface and ground waters. The statute's provisions prohibit the discharge of "pollutants or hazardous waste substances into or upon the surface or ground waters of the state or lands," §376.302(1)(a), Fla. Stat.; grant authority to the Florida Department of Environmental Protection ("DEP") to implement rules regulating facilities that store hazardous materials or pollutants, §376.303, Fla. Stat.; and create funds and programs designed to facilitate the restoration of contaminated sites, §376.3071(3), Fla. Stat. The statutory scheme provides for both civil and criminal penalties. §376.302(2)-(3), Fla. Stat.

Section 376.308 authorizes the DEP to sue polluters and force the cleanup of contaminated sites. Section 376.313, entitled "nonexclusiveness of remedies and

individual cause of action for damages under ss. 376.30-376.319,” allows private parties to sue for damages “resulting from a discharge or other condition of pollution covered by ss. 376.30-376.319.” § 376.313(3).

Section 376.313(3) as to private suits for damages states in full:

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

There was, for a time, a split among the Florida district courts of appeal on the issue of whether §376.313(3) created a statutory cause of action or merely modified existing common law remedies. *Compare Kaplan v. Peterson*, 674 So. 2d 201, 205 (Fla. 5th DCA 1996), *review dismissed*, 687 So. 2d 1305 (Fla.1997) and *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 98-99 (Fla. 1st DCA), *review denied*, 574 So. 2d 139 (Fla.1990), which held that §376.313(3) creates a cause of action, with *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372, 1376- 77 (Fla. 2d DCA 1993), which held that it did not.

The Florida Supreme Court resolved the conflict in *Aramark Uniform and Career Apparel, Inc. v. Easton*, 894 So. 2d 20 (Fla. 2004). The *Aramark* Court set out the conflict issue before it as follows:

The issue we must resolve is whether section 376.313(3) creates a cause of action or merely modifies existing causes of action by dispensing with the standard of care (negligence) requirement. If it creates a cause of action, a defendant can be held liable even without proof that it caused the pollutive discharge.

894 So. 2d at 23.

The *Aramark* Court then analyzed the issue from several perspectives, beginning with a comparison of the statutory language with available common law causes of action that might exist as to damage caused by pollution or hazardous substances, e.g., negligence, nuisance, and trespass. The Court looked to whether §376.313 provides something other or further than the common law, as a difference in the remedies, the Court noted, would indicate a legislative intent to create a statutory cause of action:

Each of these [common law] claims, however, requires proof that the defendant caused the pollution resulting in the damages. *See, e.g., Durrance v. Sanders*, 329 So.2d 26, 29 (Fla. 1st DCA 1976) (noting that a plaintiff in a nuisance action must demonstrate that the nuisance was the natural and proximate cause of the injury); *Cunningham v. Gen. Motors Corp.*, 561 So.2d 656, 659 (Fla. 1st DCA 1990) (stating that strict liability in tort requires the product's user to establish the existence of proximate causal connection between the condition of the manufacturer's product and his injuries or damages). ***In contrast, section 376.313(3) provides, with***

exceptions not relevant here, that “in any such suit, it is not necessary for such person to plead or prove negligence in any form or manner. Such person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred.”

On its face, therefore, section 376.313(3) departs from the common law by creating a damages remedy for the non-negligent discharge of pollution without proof that the defendant caused it. The only proof required is “the fact of the prohibited discharge or other pollutive condition and that it has occurred.”

894 So. 2d at 23. The Court pointed out that settled principles of Florida statutory construction required the statute’s omission of a causation requirement to be taken as deliberate:

The absence of a causation requirement in the statute cannot be viewed as a legislative oversight. In other statutes within the same scheme (sections 376.30-376.319), where the Legislature wanted to hold a party responsible only if it actually caused the contamination, it so provided. *See* §376.308(1)(a), Fla. Stat. (2002)(allowing the DEP to sue “[a]ny person who *caused* a discharge or other polluting condition”)(emphasis added); *see also State v. Bradford*, 787 So.2d 811, 819 (Fla.2001)(noting that under “well-settled principles of statutory construction, this Court has held that ‘[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended”). Therefore, we must assume that the omission of a causation requirement in section 376.313(3) was deliberate. We believe this sufficient evidence in itself that the statute creates a new cause of action.

894 So. 2d at 24.

The *Aramark* Court also went on to discuss the statute’s enumeration of specific affirmative defenses as further evidence of the legislative intent to create a statutory

cause of action:

The statute's enumeration of specific and exclusive defenses provides further evidence that the Legislature intended to create a cause of action rather than to modify existing ones. The last sentence of section 376.313(3) states that "[t]he only defenses to such cause of action shall be those specified in s. 376.308." The phrase "such cause of action" obviously refers to the cause of action created in the preceding sentences. The statute then lists the only defenses allowed to the new cause of action--those specifically listed in section 376.308.

894 So. 2d at 24.

The *Aramark* Court then discussed the affirmative defenses contained in §376.308, a subject directly pertinent to these appeals because the district court's rulings are all - erroneously we contend - based on the 'third party' defense from §376.308. The *Aramark* Court's comments on the §376.308 defenses were:

The defenses available under the statute allow defendants in certain circumstances to avoid liability if they can prove they did not cause or know about the pollution. ***The "innocent purchaser defense,"*** detailed in section 376.308(1)(c), ***protects a purchaser*** of contaminated petroleum and drycleaning sites ***if the purchaser can show:*** (1) that it acquired title to property contaminated by the activities of a previous owner, operator, or third party; (2) ***that it did not cause or contribute to the discharge; and (3) that it did not know of the polluting condition at the time it acquired title.***

Because the innocent purchaser defense is limited to petroleum and drycleaning sites, purchasers of other contaminated sites remain liable unless they fall within one of the other defenses listed in section 376.308. Of these, the "third party defense" allows defendants to escape liability if they can show that a third party's act or omission caused the contamination. See § 376.308(2)(d), Fla. Stat. (2002). The third party must be someone "other than an employee or agent of the defendant or other than one whose

act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the defendant.” *Id.*

894 So. 2d at 24-25.

The *Aramark* Court then summed up its conclusions about the purpose and intent of the statute, including the manner in which the statutory defenses were intended to work:

The Legislature’s creation of the innocent purchaser and third party defenses demonstrates that it intended to place the burden on the owners of polluting property to prove they did not cause the pollution, rather than require innocent victims of pollution to prove they did. Such defenses would be superfluous if a plaintiff had to prove, as part of the cause of action, that the defendant caused the contamination. See *Acosta v. Richter*, 671 So.2d 149, 153-54 (Fla.1996)(stating that a statute should be interpreted to give effect to all of its provisions).

*The apparent purpose of section 376.313(3) is to make it easier for victims of pollution to recover for damages resulting from a pollutive discharge or conditions of pollution. To that end, the Legislature placed the burden on the owners of contaminated property to affirmatively prove their lack of involvement with, and knowledge of, the pollution, or to avail themselves of another affirmative defense. As between the owner of contaminated property and a victim of pollution, the current owner is in a superior position to protect itself through pre-purchase due diligence and negotiation of indemnities with the seller. Prospective purchasers of contaminated property also have recourse to an entire industry providing pre-acquisition environmental audits and environmental insurance products that protect against third party damage claims. **They are in the best position both to protect against the contingent liability attached to purchasing such property and to discover the cause of the pollution.***

The Legislature balanced the competing interests of owners of contaminated property and victims of contamination, such as adjacent

landowners, *by allowing victims to maintain an action against the owners of contaminated property, while allowing such owners to avoid liability if they can prove they did not cause the contamination and did not know about it when they bought the property.*

894 So. 2d at 24-25.³

Plaintiffs' claims against Defendants Crescent and Rinehart here are based on the §376.313 statutory cause of action, recognized in *Aramark*, which requires Plaintiffs to prove only the fact of the hazardous contamination of surface or ground waters on the property. A §376.313 claim does *not* require the Plaintiffs to prove negligence on the part of the Defendants or that the Defendants caused the contamination. The district court, in fact, correctly recognized that §376.313 allows for claims against current owners even where the contamination was caused solely by predecessor owners:

The Court notes that in *Aramark*, the Florida Supreme Court rejected the appellant owner's argument that Chapter 376 could only be enforced against an owner who either caused a discharge or owned or operated a facility at the time of a discharge, finding instead that Section 403.727(4) [incorporated by reference in §376.308] permits the owner and operator of

³ The district court's orders inaccurately accuse Plaintiffs of "conveniently" misquoting this statement in the Supreme Court's *Aramark* decision. The orders are identical in all four cases, but, using the order in Reliford as an example, the district court said: "However, in citing this language, the Plaintiff conveniently omitted the commas around the 'and knowledge of' language found in the original text (see Doc. 19 at 5), thereby giving that language a different meaning than it truly has." (**Reliford-426-20-4**). The *Aramark* decision, however, says what it says, and Plaintiffs did not misquote it.

a facility to be found liable for damages arising from the discharge of a hazardous substance and that, as owner of the facility, the [*Aramark*] appellant could be subject to liability without proof of causation. *Aramark*, 894 So. 2d at 27. It thus appears that the “owner and operator of a facility” language of Section 403.727(4) includes entities such as Rinehart who purportedly holds “innocent purchaser” status.

Brottem, supra, WL 1529327, *5, n 13.

Plaintiffs thus had viable state law claims against **both** foreign corporation Crescent and **Florida corporation** Rinehart, with no ‘fraudulent joinder’ about it. And, the district court’s orders expressly acknowledged that the district court could not rule out the possibility that Plaintiffs can establish a cause of action against Rinehart and Crescent under §376.313, Fla. Stat., as interpreted by *Florida’s* courts:

Although none of these cases specifically address the issue here - that of the employees of previous owners/users of a contaminated site suing a new, purportedly ‘innocent’ owner of a site - they do present the distinct possibility that a Florida court could find that a private cause of action exists under Florida law for the personal injury damages suffered by the Plaintiffs.

See Brottem, supra, 2006 WL 1529327, *4.

The fact that Plaintiffs have a cause of action against both Defendants (or, as the district court more begrudgingly referred to it, a ‘distinct possibility’ that Florida courts would find that they have such a cause of action) is significant for evaluating Defendant Crescent’s ‘fraudulent joinder’ basis for removal. “In a removal case alleging fraudulent joinder, the removing party has the burden of proving that either:

(1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court.” *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir.1997).

Defendant Crescent specifically did not contend that Plaintiffs or their counsel actually engaged in fraudulent pleading of jurisdictional facts, the second of the two alternatives articulated in *Crowe, supra*. (**Florence-422-1-4; Burns-423-1-4; Burke-424-1-4; Reliford-426-1-4**). And, it affirmatively appears in the record before this Court that Defendants did not meet the first *Crowe* alternative either by making a showing that “there is no possibility the plaintiff can establish a cause of action against the resident defendant”; in fact, the district court specifically found to the contrary.

The only remaining argument advanced by Defendant Crescent, which *was* accepted by the district court, was that Plaintiffs would be unable to overcome the statutory ‘third party’ defense set out in §376.308(2)(d). It is here that the district court erred, Plaintiffs respectfully submit, by accepting Defendant’s argument that the district court should ‘interpret’ the statutory defense in a manner that disregards the statute’s language and disregards the *Aramark* decision.

As set forth above, §376.308 has an ‘innocent purchaser’ defense and a ‘third

party' defense. The 'innocent purchaser' defense - which allows a defendant to escape liability if it can show (1) that it acquired title to property contaminated by the activities of a previous owner, operator, or third party; (2) that it did not cause or contribute to the discharge; and (3) that it did not know of the polluting condition at the time it acquired title - is available *only* to purchasers of property polluted by drycleaning contaminants or by petroleum, two classes of purchasers to which special dispensations are afforded throughout the statute, including in §376.308 and §376.313.

The significance of the fact that the innocent purchaser defense is expressly made available only to drycleaning and petroleum contamination purchasers is that the defense is thus *not* available to other purchasers, like Defendants here. Plaintiffs here alleged that the Defendants did have pre-purchase knowledge of the pollutive conditions. And, under the *Aramark* decision, the Defendants had constructive knowledge of the pollutant conditions *as a matter of law* because they were in a position to take measures during the purchase process to anticipate their §376.313 liability. Such measures, as the *Aramark* Court pointed out, could include making arrangements for indemnification by the seller, purchase of environmental insurance, or appropriate negotiation of a purchase price that reflects the potential liabilities from the contamination existing on the property.

As to the ‘third party’ defense, §376.308(2)(d) is very specific as to what must be shown to prove the defense. And, it is *not* just that the contamination was caused by a third party, as the district court erroneously held. The ‘third party’ defense as provided in the actual terms of the statute is as follows:

(2) In addition to the defense described in paragraph (1)(c)[the petroleum/drycleaning innocent purchaser defense], ***the only other defenses of a person specified in subsection (1) are to plead and prove that the occurrence was solely the result of*** any of the following or any combination of the following:

* * * (d) ***An act or omission of a third party***, other than an employee or agent of the defendant or other than one whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the defendant, except when the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier or by rail, ***and the defendant establishes by a preponderance of the evidence that:***

1. The defendant exercised due care with respect to the pollutant concerned, taking into consideration the characteristics of such pollutant, in light of all relevant facts and circumstances.

2. The defendant took precautions against any foreseeable acts or omissions of any such third party and against the consequences that could foreseeably result from such acts or omissions.

§ 376.308(2)(d).

This statutory language, by its terms, extends the ‘third party’ defense only to current owners whose property suffers pollution or contamination at the hands of a

third party *during their ownership*, and only if the current owner can show that it exercised due care to prevent the pollutant from affecting the property and to prevent the third party from causing the pollutant to affect the property. Owners who have acquired property that is *already* contaminated fall into the category described by the *Aramark* Court as being in a better position than victims of the contamination to bear the financial consequences because they can exercise “pre-purchase due diligence and negotiation of indemnities with the seller.” 894 So. 2d at 24.

The district court here had to acknowledge the limitations the statute places on the availability of the ‘third party’ defense. “On its face, the statutory scheme eliminates Rinehart because Rinehart cannot prove the enumerated elements required by the third party defense (due care and precautions).” *Brottem, supra*, 2006 WL 1529327, *6, n.14. Rather than applying the statute as written, however, *the district court decided to write the limitations on the third party defense out of the statute* as to defendants like Rinehart who have knowingly purchased property that is contaminated: “In this case, ignoring the two listed elements of subsection (2)(d) in a case involving someone in Rinehart’s position is the only reasonable interpretation of the statute.” *Brottem, supra*, 2006 WL 1529327, *6, n.15.

Plaintiffs respectfully submit that, in deciding not to apply all of the terms of the statute as written, the district court overstepped its bounds. *See Acosta v. Richter*, 671

So. 2d 149, 153-54 (Fla.1996)(stating that a statute should be interpreted to give effect to all of its provisions). As the Florida Supreme Court has recently reiterated:

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.

Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc., __ So. 2d __, 2006 WL 2690152, *6 (Fla. 2006), quoting *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla.2003). See also, e.g., *Hawkins v. Ford Motor Co.*, 748 So. 2d 993 (Fla.1999).

The statute here is clear on its face, and all portions of the statute can be read in harmony if the statute is applied as written and without deleting any of its language so as to afford greater protection to certain categories of defendants not singled out for such protection by the Florida Legislature. The Supreme Court in *Aramark* expressly addressed the category of purchasers who purchase property that is already contaminated, noting that they are in a position, through the exercise of due diligence and reasonable care in the purchase process, to make financial arrangements for the known potential §376.313 liabilities that come with the purchase of properties that have existing contamination. Except as to existing contamination from drycleaning solvents or petroleum products, purchasers of contaminated property will be held

strictly liable to contamination victims without recourse to a ‘third party’ defense. The Florida Legislature has determined to allocate the financial burden of the contamination to such purchasers, with their rights of indemnity and contribution preserved.

In stating the legislative intent of the statute, the Florida Legislature set out the following with respect to its deliberate allocation of financial burdens under the statute, including the §376.313 imposition of financial responsibility to victims of contamination on purchasers of property that is already contaminated:

376.30. Legislative intent with respect to pollution of surface and ground waters

(2) The Legislature further finds and declares that:

(a) *The storage, transportation, and disposal of pollutants, drycleaning solvents, and hazardous substances within the jurisdiction of the state and state waters is a hazardous undertaking;*

(b) *Spills, discharges, and escapes of pollutants, drycleaning solvents, and hazardous substances that occur as a result of procedures taken by private and governmental entities involving the storage, transportation, and disposal of such products pose threats of great danger and damage to the environment of the state, to citizens of the state, and to other interests deriving livelihood from the state;*

(c) *Such hazards have occurred in the past, are occurring now, and present future threats of potentially catastrophic proportions, all of which are expressly declared to be inimical to the paramount interests of the state as set forth in this section; and*

(d) Such state interests outweigh any economic burdens imposed by the Legislature upon those engaged in storing, transporting, or disposing of pollutants, drycleaning solvents, and hazardous substances and related activities.

§376.30, Fla. Stat. The Legislature also expressly provided for liberal construction of the statute to effectuate its purpose of addressing damage to Florida's environment and citizens from pollution of Florida's ground and surface waters:

376.315. Construction of ss. 376.30-376.319

Sections 376.30-376.319, being necessary for the general welfare and the public health and safety of the state and its inhabitants, shall be liberally construed to effect the purposes set forth under ss. 376.30-376.319 and the Federal Water Pollution Control Act, as amended.

§376.315, Fla. Stat.

The district court here improperly disregarded the actual provisions of the Florida statute it had undertaken to interpret; disregarded the expressed legislative intent of the statute; and disregarded the Florida Legislature's mandate of liberal construction in favor of redressing harm caused by pollution in Florida's surface and ground waters. These mis-steps were erroneous in themselves for *any* court engaging in statutory construction. They were especially misplaced in the context of deciding to accept jurisdiction on the strength of a defendant's 'fraudulent joinder' assertion.

The district court was charged with ruling on Crescent's extremely attenuated charges of 'fraudulent misjoinder', which in turn were based on a facially improper

request by the Defendant that the district court interpret a Florida statute in a manner that would require the court to disregard some of the statute's language in order to reach the conclusion that a 'fraudulent' joinder had occurred and that a basis for exercise of federal subject matter jurisdiction accordingly existed. As discussed next, the district court's decision to accept the Defendant's suggestion of re-writing a Florida statute violated virtually every precept of the law of removal and remand, particularly in the highly restricted area of alleged 'fraudulent joinder.'

At best the impermissible interpretation suggested by the Defendant and espoused by the district court (i.e., the interpretation impermissibly deleting language from the statute) was based on a perception of some ambiguity as to how the statute should be interpreted, but that fact would not support the district court's decision not to remand the case: "In reviewing matters concerning removal and remand, 'it is axiomatic that ambiguities are generally construed against removal.'" *Jones v. LMR Intern., Inc.*, 457 F.3d 1174, 1177 (11th Cir. 2006), *citing* *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir.1979).

The burden of establishing fraudulent joinder is a heavy one. Where a plaintiff states even a colorable claim against the resident defendant, joinder is proper and the case should be remanded to state court. [cites omitted] . The determination of whether a resident defendant has been fraudulently joined must be based upon the plaintiff's pleadings at the time of removal, supplemented by any affidavits and deposition transcripts submitted by the parties. *Id.* In making its determination, the district court must evaluate

factual allegations in the light most favorable to the plaintiff ***and resolve any uncertainties about the applicable law in the plaintiff's favor.***

Pacheco de Perez v. AT & T Co., 139 F.3d 1368, 1380 (11th Cir. 1998).

The district court did not resolve all uncertainties about the statute in the Plaintiffs' favor, and did not leave it to the Florida's state courts to interpret the statute. "It is well-settled that state courts have the right to construe their own statutes, and federal courts are bound by that state interpretation." *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 667 (11th Cir. 1984), citing *Bank of Heflin v. Miles*, 621 F.2d 108, 113-114 (5th Cir.1980)(internal quotations omitted). "Questions of interpretation of state statutes are within the special authority of the state supreme court[.]" *Williams v. Wainwright*, 650 F.2d 58, 61 (5th Cir. 1981).⁴

In addition to the actual wording of the statute, which the district court expressly stated it was ignoring, the Florida Supreme Court has said: "The Legislature balanced the competing interests of owners of contaminated property and victims of contamination, such as adjacent landowners, by allowing victims to maintain an action against the owners of contaminated property, *while allowing such owners to avoid liability if they can prove they did not cause the contamination and did not*

⁴ FN3. In *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

know about it when they bought the property.” 894 So. 2d at 24-25. “Because the Florida Supreme Court has said that, it is Florida law.” *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1266 (11th Cir. 2000). Purchasers of property that is already contaminated at the time of purchase have at least constructive knowledge of that contamination under *Aramark*, and thus cannot avoid liability.

Even if the district court felt that the Supreme Court’s statement was *dicta*, the district court was bound to follow it:

Inssofar as this passage addresses escape clauses and yet the case apparently did not involve any escape clauses, the statement is a *dictum*. Even so, when considering a diversity case under state law, we are bound to decide the case the way it appears the state’s highest court would, and we would be violating that duty to ignore the fact that this statement was made.

Towne Realty, Inc. v. Safeco Ins. Co. of America, 854 F.2d 1264, 1269, n 5 (11th Cir. 1988).

Or, if the district court felt that Florida law was in a state of confusion about the reach of the statutory defenses - based on the Florida Supreme Court’s statements in *Aramark* or otherwise - it was the district court’s duty to remand the case to state court to allow the Florida courts to resolve any questions about whether Plaintiffs’ validly pled cause of action under §376.313, Fla. Stat. is unalterably and unequivocally eradicated by a statutory defense:

Defendants contend that Georgia law creates no cause of action against a

landowner for the failure to abate a continuing nuisance caused by his property where the landowner did not create the nuisance: again, no one claims that Coleman caused gasoline to spill onto his land. And, Georgia case law may be in conflict on this issue. But, at this point in the procedural history of the case - that is, on a motion for remand, our analysis (as well as the district court's) must be limited to determining whether Plaintiffs have even an arguable claim. So, ***any ambiguity or doubt about the substantive state law favors remand to state court.***

Crowe v. Coleman, supra, 113 F.3d at 1539.

In *Henderson v. Washington Nat. Ins. Co.*, 454 F.3d 1278, 1283 (11th Cir. 2006), this Court recently reiterated and applied these very principles in reversing an order that denied a plaintiff's motion to remand, like the order entered by the district court here:

Recalling the standard for our review of a motion to remand a case on fraudulent joinder grounds, we may deny the motion only if the defendants have proven by clear and convincing evidence, *see Parks [v. New York Times Co.]*, 308 F.2d [474,] 478 [(5th Cir.1962)], that there is "***no possibility***" that [the plaintiff] "can establish a cause of action against the resident defendant " *Crowe*, 113 F.3d at 1538 (emphasis added). After examining [the plaintiff's] complaint, and even assuming *arguendo* a fraudulent concealment requirement exists, we are unable to say that there is "no possibility" that the Alabama state court would find that Henderson has sufficiently pled a case for tolling.

454 F.3d at 1283. This Court went on to say:

[W]e hold that the district court erred in finding fraudulent joinder and denying [the plaintiff's] remand motion. In this case, the decision as to the sufficiency of the pleadings is for the state courts, and ***for a federal court to interpose its judgment would fall short of the scrupulous respect for the institutional equilibrium between the federal and state judiciaries that our***

federal system demands. Cf. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09, 61 S. Ct. 868, 872, 85 L. Ed. 1214 (1941). We therefore reverse the district court's denial of the motion to remand.

454 F.3d at 1284.

Here, as in *Henderson*, the district court's denial of the motion to remand should be reversed. And here, as in *Henderson*, such reversal means that there was no basis for the district court's exercise of federal jurisdiction. The district court's final judgments based on its dismissals of Defendant Rinehart and entry of summary judgments for Defendant Crescent should accordingly be vacated.

CONCLUSION

Based on the foregoing facts and authorities, Plaintiffs/Appellants respectfully submit that the judgments of the district court should be vacated, and that the orders denying Plaintiffs/Appellants' motions for remand should be reversed, with directions for the district court to consider Plaintiffs' motions for attorney's fees and costs for improvident removal and thereafter to remand the Plaintiffs' cases to state court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7). This brief contains 8,987 words.

S/

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Initial Brief of Appellants was sent by U.S. mail this 26th day of September, 2006 to: Alfred J. Bennington, Jr., Esquire, Michael L. Gore, Esquire and David A. Shontz, Esquire, Shutts & Bowen, LLP, P.O. Box 4956, Orlando, Florida 32802-4956, Counsel for Appellee Crescent Resources, LLC; Daniel C. Johnson, Esquire, Carlton Fields, PA, P.O. Box 1171, Orlando, Florida 32802-1171; Counsel for Appellee Rinehart Development & Investment Group, LLC; and Sylvia H. Walbolt, Esquire, Carlton Fields, P.A., 4221 West Boy Scout Boulevard, Suite 100, Tampa, Florida 33607, Co-Counsel for Appellee Rinehart Development & Investment Group, LLC.

S/