

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

WALLACE BROTTM, GLADYS ELDER,
KARL HAMNER, ROBERT CHATTEL,
JODY GOODALE, as Personal Representative
for the Estate of ROBERT GOODALE, and
JOHN PROVENSANO, as Personal Representative
for the Estate of KATHERINE PROVENSANO,
DEBRA JONES and PEGGY NOELL, as Personal
Representative for the Estate of FRANK NOELL,

CASE NO.: 6:06-CV-306-ORL-31-KRS

Plaintiffs,

v.

CRESCENT RESOURCES, LLC., a foreign
corporation; and RINEHART DEVELOPMENT
& INVESTMENT GROUP, LLC, a Florida
corporation,

Defendants.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT RINEHART'S
MOTION TO DISMISS WITH PREJUDICE OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT**

Plaintiffs hereby respectfully file this Response in Opposition to Rinehart Development & Investment Group LLC's Motion to Dismiss with Prejudice or in the Alternative for Summary Judgment and Incorporated Memorandum of Law. For the reasons set forth below, Defendant's Motions should be denied.

By filing this responsive memorandum, Plaintiffs do not waive or abandon their position that this Court does not have jurisdiction over this cause, as set forth in Plaintiffs' timely filed motion for remand, presently pending before the Court.

A. Pertinent facts

1. Facts giving rise to Plaintiffs' claims, as alleged in their Amended Complaint

This action arises out of bodily injuries which occurred as a result of hazardous waste discharges and/or other conditions of pollution which occurred at property located in Seminole County, Florida at 400 Rinehart Road, Lake Mary, Florida 32746 (the "Contaminated Site"), which is more specifically identified in Composite Exhibit A to the Amended Complaint. (Amended Complaint, ¶ 2; Composite Exhibit A to Amended Complaint). The Plaintiffs' Amended Complaint alleges that at times material each of the Plaintiffs (or the decedents of Plaintiffs' representatives) was exposed to excessive levels of hazardous substances, pollutants, and toxic chemicals at the Contaminated Site, as a direct and proximate result of which Plaintiffs sustained severe bodily injuries and illnesses, including contraction of cancer. (Amended Complaint, ¶¶ 23-30). The Plaintiffs, or their decedents, all are or were Florida citizens. (Amended Comp., ¶¶ 3-10).

Defendant Crescent Resources, LLC is a North Carolina corporation and is a current owner of portions and/or parcels of the Contaminated Site. (Amended Complaint, par 14). Defendant Rinehart Development & Investments Group, LLC is a Florida corporation authorized to do business and doing business in Seminole County, Florida, and is a current owner of portions and/or parcels of the Contaminated Site. (Amended Complaint, ¶ 15).

On February 8, 2006, Plaintiffs filed suit in state court in the Eighteenth Judicial Circuit in and for Seminole County, Florida against the two *current owners* of the Contaminated Site, Defendants Crescent and Rinehart, seeking damages pursuant to Chapter 376 of the Florida Statutes for their

injuries resulting from exposure to excessive levels of hazardous substances. Plaintiffs' Amended

Complaint alleges :

17. At times material herein, a manufacturing facility and a waste water treatment plant (hereinafter collectively referred to as "the Plant") were located on the Contaminated Site. The waste water treatment plant, which included two water reservoirs, was utilized for the disposal of water utilized at the Plant. The Plant constituted a facility within the meaning of §376.3014, Fla. Stat.

18. At times material herein, water wells were also located on the Contaminated Site which supplied water utilized by the Plant in various ways, including as a source of drinking water, for use in food preparation, for washing facilities, and for use in manufacturing processes and functions.

19. At times material herein, the land, premises, and waters at the Contaminated Site were subjected, in violation of Chapter 376 of the Florida Statutes, to ongoing discharges, spills and escapes of pollutants, hazardous substances, and toxic chemicals, including but not limited to Trichloroethylene (hereinafter "TCE"), Trichloroethane & Secondary Butyl Alcohol, Dichloroethylene (hereinafter "DCE"), Dichlorodifluoromethane, Freon (TMS), Freon TF, Chlorofluorocarbon, Conap #1132 Polyester Conformal Coating Toluene, Conformal Coating-(Conap) #1132, and Fluorocarbon. Said pollutants, hazardous substances, and toxic chemicals were dumped and/or discharged on and around the Contaminated Site.

20. Hazardous waste was also stored at the Contaminated Site in violation of federal and state environmental laws and in ways which caused further contamination of the land, premises, water, and ground water at and around the Contaminated Site with hazardous pollutants and toxic chemicals, including 1, 1, 2, 2-Tetrachloroethane, Benzene, Ethylbenzene, Toluene, Xylene M-Tert-Butylether, 1, 1-Dichloroethane, Bis(2-ethylhex)-phthalate, and volatile organic compounds, TCE and DCE. TCE and DCE are known carcinogens, and harmful and inherently dangerous to humans.

21. At times material herein, the ongoing discharges, spills, and escapes of hazardous substances, pollutants, and toxic chemicals at the Contaminated Site resulted in the presence of such hazardous substances, pollutants, and toxic chemicals in levels hazardous to human health and safety, such that persons who were present at the Contaminated Site, including Plaintiff, were exposed to levels of toxic hazardous substances capable of causing serious adverse health effects, including cancer.

22. As a direct and proximate result of the improper disposal and/or discharge of the various toxic chemicals, pollutants and hazardous materials at the Contaminated Site as set forth above, the Plant, land, water, premises, and groundwater at the Contaminated Site became contaminated from a discharge or other condition of pollution covered by §§ 376.30-376.319, Fla. Stat. and highly hazardous to human health.

32. At and prior to the time that Defendant Rinehart Development & Investment Group, LLC purchased the properties it now owns at the Contaminated Site, Defendant Rinehart Development & Investment Group, LLC knew that the Contaminated Site was contaminated from a discharge or other condition of pollution covered by §§ 376.30-376.319, Fla. Stat. Defendant Crescent Resources, LLC had actual or constructive knowledge of said contamination at and prior to the time of said Defendant's purchase through its means and obligations of pre-purchase due diligence, through public availability of governmental filings and orders with respect to the Contaminated Site, and through its access to numerous available sources in the business of providing pre-acquisition environmental audits and environmental insurance products.

Plaintiffs' Amended Complaint further alleges that the toxic chemicals, pollutants and hazardous substances present on the properties purchased and now owned by Defendants Crescent and Rinehart at the Contaminated Site: (a) are pollutants and hazardous substances within the meaning of Chapter 376 of the Florida Statutes; (b) were the result of discharges and other conditions of pollution covered by §§ 376.30-376.319, Fla. Stat. and highly hazardous to human health; and (c) that Plaintiffs sustained bodily injuries as a direct and proximate result of the contamination, toxic chemicals, pollutants and hazardous substances from a discharge or other condition of pollution covered by §§376.30-376.319, Fla. Stat. present on the properties owned by Defendant Rinehart Development & Investment Group, LLC at the Contaminated Site.

2. Facts set out in Defendant Rinehart's affidavits

In support of its alternative motion for summary judgment, Defendant Rinehart filed the affidavits of Thomas Kelly and Gulamabbas Abdulhussein. The affidavits recite only that Defendant

Rinehart did not own the property in question at the time that Plaintiffs were exposed to contamination there, and that Defendant Rinehart accordingly did not cause the contamination the resulted in Plaintiffs' injuries.

The affidavits do not address the pivotal subject of whether the Defendant had actual or constructive knowledge of the contamination at the time it purchased the property. As set forth in the memorandum of law below, controlling Florida Supreme Court precedent holds that in creating the statutory strict liability cause of action contained in §376.313, Fla. Stat.: "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.**"

Aramark Uniform and Career Apparel, Inc. v. Easton, 894 So. 2d 20, 25 (Fla. 1995).

B. Memorandum of law

- 1. Defendant Rinehart's first argument - that it is entitled to dismissal or summary judgment because it did not cause the contamination on the subject property - is wrong as a matter of law**

Defendant Rinehart's first argument completely disregards the binding 2005 decision of the Florida Supreme Court in *Aramark, supra*. Defendant argues that the strict liability cause of action created by §376.313, Fla. Stat. requires plaintiffs to prove that landowner-defendants, such as current contaminated site owner Defendant Rinehart, *caused* the pollution or contamination which injured the plaintiffs. As set forth in this section, *Aramark* clearly and specifically addressed this

very question, and held that plaintiffs do **not** have to prove that a landowner-defendant caused the contamination that resulted in the plaintiffs' injuries.

Defendant Rinehart's argument seeks to circumvent the *Aramark* holding with the inaccurate circular contention that plaintiffs must prove that a defendant-landowner caused the contamination because there is still a requirement under §376.313 that the plaintiff's injuries be "proximately caused" by the contamination. Plaintiffs' have clearly alleged that their injuries were proximately caused by the contamination, so Defendant Rinehart argues that since it was not the owner when the contamination occurred, there is no "proximate cause" of Plaintiffs' injuries for which it could be held liable under the strict liability cause of action created by §376.313.

This argument, however, inappropriately confuses the *cause* of the injures and the *cause* of the contamination, when the Florida Supreme Court was quite clear in *Aramark* in explaining the required elements of proof as to causation under §376.313. In *Aramark*, the Court specifically held that the §376.313 strict liability cause of action does **not** require proof that the contamination which proximately causes the injuries was itself caused by the defendant. The *Aramark* Court framed its inquiry succinctly, as follows:

We must decide whether a statute [§376.313] that allows suits for damages resulting from pollution **creates a cause of action imposing liability without proof that the defendant caused the pollution, or merely modifies existing common law causes of action, which require proof of causation.**

894 So. 2d at 21. After providing an extensive statutory analysis, the Florida Supreme Court held in *Aramark* that §376.313(3) did indeed create a strict liability cause of action under which "a defendant can be held liable **even without proof that it caused the pollutive discharge.**" 894 So.

2d at 22. The *Aramark* Court based this conclusion in part upon the statutory language providing that:

[I]t 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.

894 So. 2d at 22, quoting §376.313(3).

The *Aramark* Court distinguished the new strict liability cause of action from prior common law claims for pollution, such as trespass, negligence and nuisance, on the basis that those claims required a showing of causation by the defendant, while the new strict liability claim did *not* contain such a causation requirement, stating:

Each of these [common law] claims, however, requires proof that the defendant caused the pollution resulting in the damages ... [S]ection 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.

894 So. 2d at 23-24.

The *Aramark* decision also noted that the Florida Legislature’s creation of statutory affirmative defenses further demonstrates the Legislature’s intent that the §376.313(3) strict liability claim it created does *not* require a plaintiff to prove that the defendant *caused* the contamination:

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.

894 So. 2d at 25. Causation of the contamination by the current property owner is thus *not* a required element of a plaintiff's §376.313 strict liability claim. The *Aramark* Court's conclusion, which sent the *Aramark* case back to the trial court, leaves no doubt about the matter:

[T]his case should be remanded to the circuit court to apply section 376.313(3) as a strict liability statute, **without requiring proof that the petitioners caused the contamination on their own property**, and to determine whether any of the statutory exceptions and defenses apply.

894 So. 2d at 28. *See also The St. Joe Company v. Leslie*, 912 So. 2d 21, 24 (Fla. 1st DCA 2005)(claim under §376.313 “does not require proof of causation,” *citing Aramark*).¹

Defendant Rinehart's argument that the *Aramark* decision *does* require proof of causation is just wrong. Defendant Rinehart cites inapposite cases such as *Tran v. Toyota Motor Corp.*, 420 F.3d 1310 (11th Cir. 2005) and *Cassisi v. Maytag Co.*, 396 So. 2d 1140 (Fla 1st DCA 1981) in support of its “causation” argument. *Tran* and *Cassisi* are common law products liability cases that only address the irrelevant issue of what proof of proximate causation of injuries is required in product defect cases. As stated above, the *Aramark* Court specifically noted that the §376.313 cause of action was a distinct statutory creation, and *not* merely a modification of common law causes of

¹As detailed in the following section, under *Aramark*, in order for the current owner of contaminated property to avoid liability to the victims of the pollution, it must affirmatively prove both that it did not cause the contamination *and* that it did not know about the contamination when it bought the property. *Aramark*, 894 So. 2d at 25. Defendant Rinehart's affidavits do not refute the allegation that it purchased the property with actual or constructive knowledge of the contamination. Instead, its legally incorrect position is that such knowledge is “irrelevant.” (Defendant Rinehart's Motion at page 7).

action that require proof of causation, e.g., by negligence or by a product defect.

Moreover, the *Aramark* Court framed its inquiry as follows: “We must decide whether a statute that allows suits for damages **resulting from** pollution creates a cause of action imposing liability without proof that the defendant **caused** the pollution.” 894 So. 2d at 21. The cases cited by Defendant Rinehart relate only to the “resulting from” portion of the foregoing. Of course it is the case that, regardless of whether the defendant in question caused the pollution, plaintiffs must still establish that their injuries were proximately caused by exposure to the pollution (whoever originally caused it). And, Plaintiffs herein have specifically alleged that their injuries were “**a direct and proximate result** of the contamination of such toxic chemicals, pollutants and hazardous substances from a discharge or other condition of pollution covered by §§376.30-376.319, Fla. Stat. present on the properties owned by Defendant Rinehart Development & Investment Group, LLC at the Contaminated Site.” (Amended Complaint, Counts II, IV, VI, VIII, X XII, XIV, XVI). For present purposes, those allegations must be taken as true as they are the only facts to date on the subject (since Defendant’s affidavits do not address or refute the Plaintiffs’ allegations that their injuries were proximately caused by the contamination on the subject property). *See, e.g., Murphy v. FDIC*, 208 F.3d 959, 962 (11th Cir. 2000); *Kirby v. Siegelman*, 195 F.3d 1285, 1289 (11th Cir.1999)(“When considering a motion to dismiss for failure to state a claim, a court must accept the allegations in the complaint as true, construing them in the light most favorable to the plaintiff.”)

Defendant Rinehart’s “proximate cause” argument impermissibly ignores a binding decision

of the Florida Supreme Court², and thus provides no basis for the dismissal of this cause or for entry of summary judgment in Defendant Rinehart's favor.

2. Defendant Rinehart's second argument - that, without more, it must be deemed without liability under §376.313 if it is undisputed that a third party caused the contamination - is also wrong because it disregards the requirement under *Aramark* that Defendant also show that it was without actual or constructive knowledge of the contamination when it bought the property

In *Aramark*, the Florida Supreme Court specifically recognized that the strict liability claim created by the Legislature under §376.313(3) imposes liability upon the current owners of contaminated property unless they can prove *both* that they did not cause the contamination **and** that they did not know about it when they bought they property. 894 So. 2d at 25. The entire basis of the *Aramark* holding is that, compared to victims of pollution, prospective property owners are in a superior position to protect themselves through pre-purchase due diligence, indemnity agreements, environmental insurance and the like, and therefore, cannot knowingly purchase polluted property and escape liability for the damages caused by the pollution thereon. As the *Aramark* Court stated:

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,**

²In a diversity action, the substantive law of the forum state is applicable. *See, e.g., McMahan v. Toto*, 256 F.3d 1120, 1131 (11th Cir. 2001)("Federal jurisdiction in this case is based on diversity of citizenship, and the forum state is Florida. ...[I]f the matter is substantive, then we will apply the law of the forum state. *See Erie*, 304 U.S. at 78, 58 S.Ct. at 822 (a federal court sitting in diversity applies state substantive law)"); *Maryland Casualty Co. v. Williams*, 377 F.2d 389, 392 (5th Cir. 1967)("Except in matters governed by federal law, when as here a federal court's jurisdiction is predicated upon the diversity of citizenship of the parties, the federal court must apply the substantive law of the state in which it is sitting.")

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.

Aramark, supra, 894 So. 2d at 25.

Plaintiffs alleged Defendant Rinehart's actual or constructive knowledge of the contamination prior to, and at the time of, purchasing the property:

At and prior to the time that Defendant Rinehart Development & Investment Group, LLC purchased the properties it now owns at the Contaminated Site, Defendant Rinehart Development & Investment Group, LLC **knew that the Contaminated Site was contaminated from a discharge or other condition of pollution** covered by §§ 376.30-376.319, Fla. Stat. Defendant Crescent Resources, LLC **had actual or constructive knowledge** of said contamination at and prior to the time of said Defendant's purchase through its means and obligations of pre-purchase due diligence, through public availability of governmental filings and orders with respect to the Contaminated Site, and through its access to numerous available sources in the business of providing pre-acquisition environmental audits and environmental insurance products.

(Amended Complaint, Par. 32). This allegation must be taken as true for purposes of Defendant Rinehart's motion to dismiss. *See, e.g., Murphy v. FDIC*, 208 F.3d 959, 962 (11th Cir. 2000). It must also be taken as true for purposes of Defendant Rinehart's alternative motion for summary judgment as the affidavits filed by Rinehart do not in any way address or refute this allegation.

Defendant Rinehart instead argues only that because Rinehart did not *own* the property until after the Plaintiffs stopped working at the facility, it did not *cause* the contamination. Defendant contends, incorrectly, that this fact alone allows it to avoid liability based upon the “third party defense” of §376.308(2)(d), and that “Rinehart’s alleged knowledge of the contamination at the time it purchased the Property is irrelevant.” (Defendant Rinehart’s Motion, page 7).

Defendant Rinehart cites no authority in support of the argument that its prior knowledge of the contamination is ‘irrelevant’. On the contrary, to make the argument, Defendant Rinehart must pointedly ignore the Florida Supreme Court’s holding in *Aramark*, quoted above, which explains the rationale for the strict liability cause of action which allows 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 25.

Aramark is the controlling precedent. Under *Aramark*, Defendant Rinehart’s knowledge of the contamination prior to and at the time of its purchase of the property is by no means “irrelevant.” Defendant Rinehart must affirmatively prove its lack of actual or constructive knowledge to avoid liability under the strict liability cause of action created by §376.313. Accordingly, there is no basis for either the dismissal of this action or for the entry of summary judgment.

3. Defendant Rinehart’s final argument - that §376.313 does not apply to personal injury claims - also ignores controlling Florida law precedent and is without merit

Defendant Rinehart incorrectly argues that the strict liability cause of action under §376.313 does not apply to claims for personal injuries. In *Cuninham v. Anchor Hocking Corp.*, 558 So.2d

93 (Fla. 1st DCA 1990), *rev. denied*, 574 So. 2d 139 (1990), it was specifically recognized, in a decision as to which the Florida Supreme Court denied review³, that the cause of action *is* applicable to all damages caused by pollution, including personal injuries. This Court is bound by Florida's intermediate appellate court decisions absent some persuasive indication that Florida's Supreme court would decide the issue differently. *See, e.g., Insurance Co. of N. America v. Lexow*, 937 F.2d 569, 571 (11th Cir.1991)(" In applying state law, we adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise"). *See also, e.g., KMS Restaurant Corp. v. Wendy's Intern., Inc.*, 361 F.3d 1321, 17 (11th Cir., 2004); *McMahan v. Toto*, 311 F.3d 1077, 1080 (11th Cir.2002); *Davis v. National Medical Enterprises, Inc.*, 253 F.3d 1314,1319 (11th Cir. 2001); *Stateline Power Corp. v. Kremer*, 404 F. Supp.2d 1373(S.D. Fla. 2005). As indicated, Florida's Supreme Court denied review of the First District's 1990 decision in *Cunningham*, indicating no inclination to disagree. In fact, the Supreme Court *cited* *Cunningham* in *Aramark*, again indicating no disagreement with the holding that §376.313 applies to personal injury claims.

The *Cunningham* Court reached its conclusion about §376.313 after discussing various statutes that were *not* applicable to the plaintiff's claims for personal injuries arising from exposure to toxic substances, stating:

However, another portion of Chapter 376, Florida Statutes, Sections 376.30 through 376.319, deals with environmental **and health hazards**, as well as with danger and

³The "review denied" portion of the citation to *Cunningham* was omitted by Defendant Rinehart. (Defendant Rinehart's Motion, page 13)

damage to surface and ground waters posed by the storage, transportation, and disposal of pollutants. Section 376.30(2)(b), Florida Statutes, declares the legislative intent to deal with discharge of pollutants **that pose a great danger to citizens** of the state. Section 376.313, Florida Statutes (“Nonexclusiveness of remedies and individual cause of action for damages under ss. 376.30-376.319”), provides, in part, as follows:

(1) The remedies in ss. 376.30-376.319 shall be deemed to be cumulative and not exclusive.

(3) Notwithstanding any other provision of law, nothing contained in ss. 376.30-376.319 prohibits any person from bringing a cause of action in a court of competent jurisdiction for **all damages** resulting from a discharge or other condition of pollution covered by ss. 376.30-376.319. Except as otherwise provided in subsection (4), 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

We find no basis for holding the above-quoted provisions inapplicable under the allegations of the complaint’s paragraph 33, quoted supra, which includes allegations that appellees violated Chapter 376 by permitting pollutants to discharge upon the land and premises, and by permitting the following to occur:

[T]he pollutants stannic chloride and titanium tetrachloride to leak or spill onto said premises so as to combine with water or moisture and form airborne hydrochloric acid; by permitting chemical sprays of said pollutants, along with oil laced with sulphur and graphite, to seep, leak, smoke and splatter upon the premises, and by emptying and discharging gaseous or particulate pollutants directly onto their premises and their land, **where the plaintiffs were working.**

558 So. 2d at 97.

Cunningham is also entirely in keeping with the plain language and the purpose of the statutory scheme to deal with discharge of pollutants that pose a danger to citizens of the state, *see* §376.30(2)(b), and the provision of §376.313(3) allowing “any person” to bring “a cause of action

in a court of competent jurisdiction for **all damages** resulting from a discharge or other condition of pollution.”

No court has held that the strict liability cause of action is inapplicable to personal injuries, and, as noted, the Florida Supreme Court declined the opportunity to review *Cunningham’s* determination that it is plainly applicable to such injury claims.⁴ Moreover, the fact that deeming “all damages” to include damages from personal injuries would grant private parties greater rights than the regulatory authorities’ enforcement rights relating to clean-up and enforcement is of no moment, as was made clear in *Aramark*. There, the court stated:

Even if our interpretation did grant greater rights to private parties than to the DEP, our conclusion would not change. Valid reasons exist for reducing proof requirements for those directly affected by pollutive agents. In fact, many statutes grant private parties the right to sue for damages, while granting public agencies only the right to enjoin the unlawful conduct. ...The DEP's powers are regulatory and concern the conduct of specific violators...The primary purpose of a DEP suit is to enforce the statute and eliminate the pollution. The main purpose of a private suit is to compensate the innocent victim of pollution...Therefore, even if Aramark were correct that our interpretation of the statute would allow private parties to sue where the DEP could not, that would simply reflect the legislative policy decision to allow private parties, the actual victims of pollution, greater ability to recover damages from the owners of contaminated property.

⁴ *Cunningham* was also cited, with no question raised as to the validity of its holding, in *Kaplan v. Peterson*, 674 So. 2d 201, 204 (Fla. 5th DCA 1996): “In *Cunningham v. Anchor Hocking Corp.*, 558 So.2d 93 (Fla. 1st DCA), *rev. denied*, 574 So.2d 139 (Fla.1990), **the court held that section 376.313 creates an individual cause of action for persons injured by a defendant's release of hazardous materials which causes environmental as well as health hazards**. The court held that the allegations of the complaint were sufficient to state a cause of action pursuant to section 376.313: ‘[T]he toxic substances utilized by the defendants was a pollutant within the meaning of chapter 376; the defendant's plant was a facility within the meaning of the statute; the defendants violated the statute by discharging the pollutants on the land at the plant; and the plaintiff-employees were injured personally by such discharge.’ ” 674 So. 2d at 204.

894 So. 2d at 27-28. “All damages” includes damages from personal injuries under the statutory language and the case law.

In arguing that §376.313 does not apply to personal injury claims, Defendant Rinehart’s motion to dismiss or for summary judgment ignores Florida law precedent that is binding on this Court. This argument, too, is without merit and provides no basis for dismissing Plaintiffs’ claims or for granting summary judgment to Defendant Rinehart.

CONCLUSION

Based on the foregoing facts and authorities, Plaintiffs respectfully submit that Defendant Rinehart’s motion to dismiss or for entry of summary judgment in its favor should be denied. And, for the reasons set forth in Plaintiffs’ pending motion for remand, this cause should be remanded to state court due to this Court’s lack of diversity jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on April 17, 2006, the foregoing Plaintiffs' Memorandum in Opposition to Defendant Rinehart's Motion for Dismissal with Prejudice or in the Alternative for Summary Judgment was electronically filed with the Clerk of the Court by using the CM/ECF system and sent by facsimile to: Alfred J. Bennington, Jr., Esquire and Michael L. Gore, Esquire, Shutts & Bowen, LLP, P.O. Box 4956, Orlando, Florida 32802-4956, Counsel for Defendant Crescent Resources, LLC; and Daniel C. Johnson, Esquire, Carlton Fields, PA, P.O. Box 1171, Orlando, Florida 32802-1171, Counsel for Defendant Rinehart Development & Investment Group, LLC.
