SUPREME COURT OF FLORIDA

SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

DUANE NANZ, ET AL.,

Respondent.

CASE NO. 81,712

District Court of Appeal
2ND District - No. 92-01255

ON APPEAL FROM A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF SOUTH FLORIDA WATER MANAGEMENT DISTRICT AS AMICUS CURIAE FOR PETITIONER, SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT

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INTRODUCTION

This brief is filed by South Florida Water Management District (hereinafter "SFWMD" or "the District) as amicus curiae on behalf of petitioner, Southwest Florida Water Management District.

SFWMD is one of the five Florida water management districts delineated in chapter 373, Florida Statutes. Its geographic jurisdiction encompasses all or part of sixteen counties in central and southern Florida. Section 373.069, Florida Statutes.

STATEMENT OF THE CASE

SFWMD adopts the Statement of the Case filed by petitioner, Southwest Florida Water Management District.

STATEMENT OF THE FACTS

SFWMD adopts the Statement of the Facts filed by petitioner, Southwest Florida Water Management District.

SUMMARY OF ARGUMENT

The Honorable court below failed to apply the appropriate rules of statutory construction is construing section 373.443, Florida Statutes. The primary issue in this cause involves the meaning to be afforded the word "control", in section 373.443(3), Florida Statutes. The court below construed "control" to mean only that control which is exercised by a water management district (WMD) in the course of the surface water management permitting process. Such limitation is not, however, provided for by the language of the statute, which sets "control" separate and apart from "regulation" and separates the two words by the disjunctive "or."

Regulation necessarily implies and includes "control" within its meaning. To limit "control" to only that control which is exercised through the regulatory process, it is deprived of any operative effect and rendered useless surplusage, contrary to the rule of construction that all provisions of a statute should be afforded some operative effect, if possible.

Construing the immunity afforded by section 373.443, Florida Statutes, as limited to regulatory permitting activities renders the statute meaningless in the context of the law in existence at the time of enactment, as the common law at the time already immunized governmental entities from tort liability for governmental activities such as permitting.

The manifest purpose of section 373.443, Florida Statutes, was to immunize the state's WMDs from all forms of tort liability

associated with flood control activities, whether "operational" or "planning level" in the context of current law. The rationale for this immunity has been clearly established in numerous federal decisions that have construed the scope of a similar federal statute as being necessary to induce government to engage in the activity of attempting to protect the public against floods. This immunity was also construed in the context of a general waiver of tort immunity and has been upheld against arguments that it was impliedly repealed by the later enactment of a general waiver of tort immunity. The issues presented by this appeal are of great public importance, in that if the rationale advanced for federal flood control immunity is accepted by this Court, the lack of such immunity may act as a deterrent to WMD involvement in flood control activities.

Section 768.28, Florida Statues, should not be construed as effecting an implied repeal of the section 373.443 flood control immunity. Although later enacted, it is well established that a later enacted statute will not be construed as effecting an implied repeal of prior law in the absence of an irreconcilable repugnancy. Section 373.443, Florida Statues, is narrowly drawn, leaving the waiver afforded by section 768.28 a wide field of operation as to other forms of tort liability. As such, there is no basis for implied repeal.

ARGUMENT

I. WHETHER SECTION 373.443, FLORIDA STATUTES, IMMUNIZES THE WATER MANAGEMENT DISTRICTS FROM OPERATIONAL LEVEL NEGLIGENCE IN THE COURSE OF FLOOD CONTROL ACTIVITIES

A. Introduction

The statute which is at issue is this cause as to its construction provides as follows:

> 373.443 **Immunity from liability.**--No action shall be brought against the state or district, or any agents or employees of the state or district, for the recovery of damages caused by the partial or total failure of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works upon the ground that the state or district is liable by virtue of any of the following:
>
> (1) Approval of the permit for construction or alteration.
>
> (2) The issuance or enforcement of any order relative to maintenance or operation.
>
> (3) Control or regulation of stormwater management systems, dams, impoundments, reservoirs, appurtenant work, or works regulated under this chapter.
>
> (4) Measures taken to protect against failure during emergency.

This statute exists in substantially the same form today as when it was first enacted as a part of the Florida Water Resources Act of 1972, chapter 72-299, Laws of Florida, with the exception that chapter 89-279, Laws of Florida, added "stormwater management systems" to the statute.

The Second District Court of Appeal has certified as a question of great public importance:

DOES SECTION 373.443, FLORIDA STATUTES (1989), IMMUNIZE A WATER MANAGEMENT DISTRICT FROM NEGLIGENCE IN THE EXECUTION OF ITS OPERATIONAL LEVEL ACTIVITIES OR ARE SUCH ACTIVITIES AND SUBSEQUENT LIABILITY GOVERNED BY THE RELEVANT PROVISIONS OF SECTION 768.28, FLORIDA STATUTES (1989)?[1]

The Honorable court below rejected the interpretation of this statute advanced by defendant that the immunity afforded extended to alleged negligence in the conduct of flood control activities by a water management district (WMD). The court determined that the statute did afford immunity against alleged negligence involving regulatory activities, but that "control", as stated in the statute, was limited to "control they exercise by reason of their permits, regulations, and orders . . . ."[2] After narrowing the scope of the statute to preclude flood control activities directly engaged in by a WMD, the court, applying this Court's decision in ***Slemp v. North Miami***, 545 So.2d 256 (Fla. 1989), found the alleged negligence to be operational level negligence, governed by the rule established in ***Commercial Carrier Corp. v. Indian River County***, 371 So.2d 1010 (Fla. 1979).

The primary issue in this appeal is the meaning to be afforded the word "control" in the context of the statute. If the lower court was correct in interpreting "control" so as not to include direct operational control of water management

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[1] As will be further presented herein, SFWMD concurs that the scope of this statute is of great public importance, based upon the rationale that will presented herein as it the reasons for its enactment.

[2] See March 31, 1993 opinion, page 3, attached as appendix A.

facilities by a WMD, as opposed to indirect control of private or public facilities through the surface water management permitting process, then the remainder of the ruling follows from application of the ***Slemp*** decision and is correct. However, if the lower court incorrectly interpreted the statute in this regard in that direct flood control activities by a WMD are within its scope, then the question must be reached as to whether section 768.28, Florida Statutes, effected an implied repeal of section 373.443, Florida Statutes, as to flood control operations when enacted. If no implied repeal was effectuated, then the statute should be afforded its full force and effect to immunize the state's WMD's against alleged negligence in the course of flood control operations.[3]

B. Proper Construction of Section 373.443, Florida Statutes, Requires that the Word "control" Include Direct Operational Control of Water Management Facilities by a Water Management District

SFWMD would suggest that the statutory construction afforded by the court below renders the enactment of the statute meaningless in the context of the law in existence at the time of enactment, and therefore, should be rejected. One of the cardinal rules of statutory construction is that statutes should not be construed so as to be rendered meaningless and of no force or effect. In ***Johnson v. Feder***, 485 So.2d 409 (Fla. 1986) this

[3] The court below apparently rejected the argument advanced by plaintiffs as to implied repeal in determining that section 373.443, Florida Statutes, was operative and effective in affording absolute immunity as to regulatory permitting activities.

Court stated:

> We are compelled by well-established norms of statutory construction to choose that interpretation of statutes and rules which renders their provisions meaningful. Statutory interpretations that render statutory provisions superfluous "are, and should be, disfavored." *Patogonia Corporation v. Board of Governors of the Federal Reserve System*, 517 F.2d 803, 813 (9th Cir. 1975). *See also Smith v. Piezo Technology and Professional Administrators*, 427 So.2d 182, 184 (Fla. 1983)(courts must assume that statutory provisions are intended to have some useful purpose). Courts are not to presume that a given statute employs "useless language." *Times Publishing Company v. Williams*, 222 So.2d 470, 476 (Fla. 2d DCA 1969). *Id.* at 411.

If all section 373.443, Florida Statutes, did when enacted is immunize the state's WMDs from alleged negligence in the course of issuing regulatory permits for surface water management activities, then it did nothing, as this immunity already existed under the well established common law in existence at the time of enactment.

In ***Trianon Park Condominium Association, Inc. v. City of Hialeah***, 468 So.2d 912 (Fla. 1985) this Court held that as to "category I" activities, involving "Legislative, Permitting, Licensing, and Executive Officer Functions:"

> There has never been a common law duty establishing a duty of care with regard to how these various governmental bodies or officials should carry out these functions. These actions are inherent in the act of governing. *Id.* at 919.

The ***Commercial Carrier*** opinion was cited as authority in this regard. *Id.* The above proposition was also acknowledged in

Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967), which preceded the enactment of section 373.443, Florida Statutes.

> It is evident that under this principle the respondent city's inspector would not have been personally liable to Mrs. Modlin for damages resulting from the negligent performance of his duties. At the time he allegedly negligently performed the inspection, he owed no duty to Mrs. Modlin in any way different from that owed to any other member of the public. Therefore, the city is not liable under the doctrine of respondeat superior. *Id.* at 76.

Indeed, the *Commercial Carrier* decision addressed the state of the law at the time section 768.28 was enacted in referring to the case of *Gordon v. City of West Palm Beach*, 321 So.2d 78 (Fla. 4th DCA 1975), which involved the governmental-proprietary distinction, and provided that a municipality was immune as to non-proprietary functions. 371 So.2d at 1015.

The lower court's construction, therefore, affords section 373.443, Florida Statutes, no real field of operation in the context of the law in existence at the time of its enactment. In addition, applying the rules of statutory construction to the statutory language without regard to the context of the laws in existence at the time of enactment also leads to the conclusion that "control" must mean more than simply that control which is exercised in the course of the regulatory permitting process.

The key language in this regard is contained within ss. (3) which provides that the subject immunity applies to:

> (3) Control <u>or</u> regulation of stormwater management systems, dams, impoundments, reservoirs, appurtenant work, or works regulated under this chapter. (emphasis

added)

The lower court has read "or" in the conjunctive instead of the disjunctive. This is contrary to the well established rule that "or" should ordinarily be read in the disjunctive. In ***Piper Aircraft Corporation v. Schwendmann***, 564 So.2d 546 (Fla. 3d DCA 1990), citing ***Sparkman v. McClure***, 498 So.2d 892 (Fla. 1986), the court stated:

> Furthermore, a second general principle of statutory construction, as applied to the word "or", is that the courts will normally construe the word "or", as a disjunctive which indicates the legislature contemplated alternatives. *Id.* at 548. [4]

Thus, the word "control", should be considered as an alternative to "regulation" and not incorporated within, as construed by the court below.

Another applicable approach in this regard involves the rule that all language within a statute should be construed to provide operative effect, if possible. Court are, "if possible, bound to give effect to every provision of a statute in construing it." ***D. B. v. State***, 544 So.2d 1108, 1109 (Fla. 1st DCA 1989), *citing*, ***State v. Zimmerman***, 370 So.2d 1179 (Fla. 4th DCA 1979). ***Accord***, ***Villery v. Florida Parole & Probation Commission***, 396 So.2d 1107, 1111 (Fla. 1981). The word "control" is deprived of any operative effect if construed to mean control through the process of regulation, as this meaning is incorporated within the meaning

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[4] ***See Sparkman*** at 895. "The use of this particular disjunctive word in a statute or rule normally indicates that alternatives were intended." ***See also Brown v. Brown***, 432 So. 2d 704, 710 (Fla. 3d DCA 1983).

of the word "regulation."

"Regulation" is defined in Webster's Ninth New Collegiate Dictionary (1991) as:

> **2 a:** an authoritative rule dealing with details of procedure . . . **b:** a rule or order having the force of law issued by an executive authority of a government

Clearly, the above definition implicates "control" without any necessity for separate reference to this word.

If it is accepted that "control" stands separate and apart from "regulation" with regard to its operative effect, it follows that such control must involve direct control by a WMD of water management facilities. "Works" is statutorily defined in section 373.403(5), Florida Statutes, to mean:

> all artificial structures, including, but not limited to, ditches, canals, conduits, channels, culverts, pipes, and other construction that connects to, drains water from, drains water into, or is placed in or across the waters in the state.

The overflowing of a canal during a storm therefore constitutes partial or total failure of a "works."

The limited legislative history for this statute reflects that the legislature not only ratified this statute by allowing it to remain on the books essentially unaltered since 1972, it actually expanded the scope of its operation in 1989, thereby reinforcing a non-restrictive construction. Chapter 89-279, Laws of Florida, added "stormwater management system" to the operative purview of the statute. This is broadly defined to mean:

> a system which is designed and constructed or implemented to control discharges which are

> necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation, and water pollution or otherwise affect the quantity and quality of discharges from the system. ***Fla. Stat.*** § 373.403(10)(1991).

A "stormwater management system" also clearly includes canals, dams, and other facilities which control water flow and are designed to prevent flooding among their various purposes.[5]

In considering the scope of this statute some additional guidance is provided by the *Model Water Code*, from which chapter 373, Florida Statutes, was substantially derived.[6] The commentary to section 4.13, which contains virtually identical language to section 373.443, Florida Statutes, states:

> COMMENTARY. Section 4.13 indicates that the state or the water management district assumes no tort liability in carrying out the provisions of this chapter. This section was taken from a California statute.[7]

The rationale behind such immunity was cogently expressed by the court in ***National Manufacturing Co. v. United States***, 210 F.2d 263 (8th Cir. 1954), ***cert. denied***, 347 U.S. 967 (1954), with regard to the federal flood immunity statute, 33 U.S.C. § 702c, which provides that:

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[5] The WMD's authority to construct, operate and maintain project works is contained in sections 373.086 and 373.103(3), F.S.

[6] Maloney, Ausness & Morris, *A Model Water Code* (University of Florida Press, 1972).

[7] Section 4.13 of the *Model Water Code* is appended hereto in its entirety as Exhibit B.

> . . .no liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.

The court stated:

> Thus it appears on inspection of the two flood control Acts referred to that when Congress entered upon flood control on the great scale contemplated by the Acts it safeguarded the United States against liability of any kind for damage from or by floods or floodwaters in the broadest and most emphatic language. The cost of the flood control works itself would inevitably be very great and Congress plainly manifested its will that those costs should not have the flood damages that will inevitably recur added to them. Undoubtedly floods which have traditionally been deemed "Acts of God" wreak the greatest property destruction of all natural catastrophes and where floods occur after flood control work has been done and relied on the damages are vastly increased. But there is no question of the power and right of Congress to keep the government entirely free from liability when floods occur, notwithstanding the great government works undertaken to minimize them. 210 F.2d at 270.
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> * * *
>
> Undoubtedly that absolute freedom of the government from liability for flood damages is and has been a factor of the greatest importance in the extent to which Congress has been and is willing to make appropriations for flood control and to engage in costly undertakings to reduce flood damages. *Id.* at 271.
>
> * * *
>
> Heretofore the great contribution of the United States to the struggle that has continued for generations and will long continue, to conquer floods, has been made on the basis of federal non-liability for flood damages. **That has been the condition of the government's contribution.** *Id.* at 275.

(emphasis added)

The ***National Manufacturing*** case involved allegations of operational negligence by alleged failure to warn of impending flood conditions.

Following ***National Manufacturing***, numerous federal cases have held that the federal statute provides absolute immunity against liability for allegedly negligent flood control activities. ***United States v. James***, 478 U.S. 597, 106 S.Ct. 3116 (1986) (failure to maintain warning devices for boaters as to opening of flood gates); ***Pierce v. United States***, 650 F.2d 202 (9th Cir. 1980) (operation of dam during flood); ***Taylor v. United States***, 590 F.2d 263 (8th Cir. 1979) (operation of dam during flood); ***Callaway v. United States***, 568 F.2d 684 (10th Cir. 1978) (construction of bridge embankment); ***McClaskey v. United States***, 386 F.2d 807 (9th Cir. 1967) (operation of flood project during storm); ***Parks v. United States***, 370 F.2d 92 (2d Cir. 1966) (construction, operation and maintenance of flood control facility); ***Stover v. United States***, 332 F.2d 204 (9th Cir. 1964), ***cert. denied***, 379 U.S. 922 (sealing of "overflow escape" prior to flood); ***Clark v. United States***, 218 F.2d 446 (9th Cir. 1954) (inspection of dam prior to failure); ***B. Amusement Co. v. United States***. 180 F.Supp. 386 (Ct. of Claims 1960) (negligent dike design); ***Villarreal v. United States***, 177 F.Supp. 879 (D.C. Tex. 1959) (operation of spillway during flood).

The rationale expressed in ***National Manufacturing*** is equally applicable to the Florida WMD's. The South Florida Water

Management District operates a vast flood control project in conjunction with the U. S. Army Corps of Engineers, known as the "Central and Southern Florida Flood Control Project." *See* House Document 643, 80th Congress, 2d Session, (1949). SFWMD was established pursuant to chapters 25209 and 25270, Laws of Florida (1949) for the express purpose of acting as the "local sponsor" on behalf of the State of Florida with regard to said project.[8] If a WMD could be held liable in tort for damages resulting from negligent operation of flood control facilities during a severe storm, the potential liabilities could preclude government from engaging in the business of attempting to provide flood protection. It is also obvious that, despite governments' best efforts, severe storms will occur and cause flood damage, and protection is needed from claims which purport to attribute storm damage to negligent operation, etc.

In addition, the following statutory provisions should be noted as an aid in construing section 373.443, Florida Statutes:

> **373.616 Liberal construction.**--The provisions of this chapter shall be liberally construed in order to effectively carry out its purposes.
>
> **373.6161 Chapter to be liberally construed.**--This chapter shall be construed liberally for effectuating the purposes described herein, and the procedure herein prescribed shall be followed and applied with such latitude consistent with the intent thereof as shall best meet the requirements or necessities therefor.

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[8] *See* sections 1 and 2, chapter 25209, Laws of Florida (1949), codified as §§ 378.01, .02, Florida Statutes (1949).

The paramount rule of statutory construction that the legislative intent is the "pole star" by which the court should be guided. ***Parker v. State***, 406 S.2d 1089, 1092 (Fla. 1982); ***State v. Webb***, 398 So.2d 820, 824 (Fla. 1981). Legislative intent is determined primarily from the language of the statute. ***St. Petersburg Bank & Trust Co. v. Hamm***, 414 So.2d 1071, 1073 (Fla. 1982); ***S.R.G. Corp. v. Department of Revenue***, 365 So.2d 687, 689 (Fla. 1978). Words of common usage should be construed in their plain and ordinary sense. ***City of Tampa v. Thatcher Glass Corp.***, 445 So.2d 578, 579 (Fla. 1984); ***Milazzo v. State***, 377 So.2d 1161, 1162 (Fla. 1979). The word "control", in section 373.443(3), Florida Statutes, has a plan and ordinary meaning which relates to operational manipulation of the facilities.

When the meaning of a statute is evident from its plain and ordinary language, there is no need to resort to further rules of construction. ***Southeastern Utilities Service Co. v. Redding***, 131 So.2d 1, 2 (Fla. 1961); ***Overman v. State Board of Control***, 71 So.2d 262, 265 (Fla. 1954). However, resort to other rules further supports the District's interpretation of the subject provision. A statute should be construed in light of the manifest purpose to be achieved by the legislation. ***Tampa-Hillsborough County Expressway Authority v. K. E. Morris Alignment Service, Inc.***, 444 So.2d 926, 929 (Fla 1983). As indicated in the *Model Water Code*, the purpose of section 373.443, Florida Statutes, was "that the state or the water management district assumes **no tort liability** in carrying out the

provisions of this chapter" (emphasis added). This interpretive language is absolute and unqualified.

It is also well established that the construction of a statute given by agency officials charged with its administration should be given great weight and only overturned if clearly erroneous for the most cogent reasons. *See e.g., State ex rel Biscayne Kennel Club v. Board of Business Regulation*, 276 So.2d 823, 828 (Fla. 1973); *Florida Power Corp. v. State Department of Environmental Regulation*, 431 So.2d 684, 685 (Fla. 1st DCA 1983).

Finally, there is the rule expressed in *Brown v. State*, 426 So.2d 76 (Fla. 1st DCA 1983) that:

> It is well settled that if a state statute is patterned after the language of its federal counterpart, the statute will take the same construction in Florida courts as it prototype has been given insofar as such construction comports with the spirit in policy of the Florida law relating to the same subject. *Pasco County School Board v. Florida Public Employees Relations Commission*, 353 So.2d 108, 116 (Fla. 1st DCA 1977). *Id.* at 88, n. 19.

Accord City of Orlando v. Florida Public Employees Relations Commission, 435 So.2d 275, 278, n. 5 (Fla. 5th DCA 1983), *citing, International Brotherhood of Painters v. Anderson*, 401 So.2d 824 (Fla. 5th DCA 1981).

II. WHETHER SECTION 768.28, FLORIDA STATUTES EFFECTUATED AN IMPLIED REPEAL OF SECTION 373.443, FLORIDA STATUTES WITH REGARD TO IMMUNITY AGAINST TORT LIABILITY FOR FLOOD CONTROL ACTIVITIES

The general rule as to implied repeal was stated in *State v. Gadsden County*, 63 Fla. 620, 629; 58 So. 232, 235 (1912) as follows:

> While statutes may be impliedly as well as expressly repealed, yet the enactment of a statute does not operate to repeal by implication prior statutes unless such is clearly the legislative intent. An intent to repeal prior statutes or portions thereof may be made apparent **when there is a positive and irreconcilable repugnancy between the provisions of a later enactment and those of prior existing statutes.** But the mere fact that a later statute relates to matters covered in whole or in part by a prior statute does not cause a repeal of the older statute. **If the two may operate upon the same subject without positive inconsistency or repugnancy in their practical effect and consequences, they should each be given the effect designed for them unless a contrary intent clearly appears.** (emphasis added)

Accord State v. Dunmann, 427 So.2d 166, 168 (Fla. 1983).

In *Oldham v. Rooks*, 361 So.2d 140 (Fla. 1978), the court stated as follows with regard to repeal by implication:

> There is a general presumption that later statutes are passed with knowledge of prior existing laws, and the construction is favored which gives each one a field of operation, rather than having the former repealed by implication. *Id.* at 143.

Accord Alterman Transport Line, Inc. v. State, 405 So.2d 456, 460 (Fla. 1st DCA 1981). "It is well established that amendment by implication is not favored and will not be upheld in doubtful

cases." *State v. Quigley*, 463 So.2d 224 (Fla. 1985). "It is well settled in Florida that the courts will disfavor construing a statute as repealed by implication unless that is the only reasonable construction." *Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249, 250 (Fla. 1987).

In *Littman v. Commercial Bank & Trust Company*, 425 So.2d 636 (Fla. 3d DCA 1983), the court declined to find repeal by implication, stating as follows:

> In the absence of a showing to the contrary, it is presumed that all laws are consistent with each other and that the legislature would not effect a repeal of a statute without expressing an intention to do so. *Woodgate Development Corp. v. Hamilton Investment Trust*, 351 So.2d 14 (Fla. 1977); *State ex rel, School Board of Martin County v. Department of Education*, 317 So.2d 68 (Fla. 1975); *Mann v. Goodyear Tire and Rubber Co.*, 300 So.2d 555 (Fla. 1974)). Courts must assume that later statutes were passed with knowledge of prior existing laws, and will favor a construction that gives a field of operation to both rather than construe one statute as being meaningless or repealed by implication unless such a result is inevitable. *Villery v. Florida Parole & Probation Commission*, 396 So.2d 1107 (Fla. 1980); *State v. Zimmerman*, 370 So.2d 1179 (Fla. 4th DCA 1979); *State Department of Public Welfare v. Galilean Children's Home*, 102 So.2d 388 (Fla. 2d DCA 1958). **Where statutory provisions are irreconcilable, however, the general rule is that specific statutes on a subject take precedence over another statute covering the same subject in general terms.** *Bryan v. Landis*, 106 Fla. 19, 142 So. 650 (1932); *State v. Young*, 357 So.2d 416 (Fla. 2d DCA 1978), *rev'd on other grounds*, 371 So.2d 1029 (Fla. 1979). *Id.* at 638-39 (emphasis added).

There exists no "positive inconsistency or repugnancy" between section 373.443, Florida Statutes and section 768.28,

Florida Statutes. Section 373.443, Florida Statutes, does not purport to waive District tort liability in all areas, but instead, is limited to the specific instances of potential tort liability enumerated therein. The statute would not apply, for instance, if a WMD employee was engaged in an automobile accident, which would be within the field of operation of section 768.28, Florida Statutes, along with a variety of other forms of tort action. Thus, each statute can and should be construed to have its own field of operation, avoiding repeal by implication.

In addition, section 373.443, Florida Statutes, is a specific statute relating to a narrowly defined area, which should take precedence over a general waiver of tort liability. ***Rowe v. Pinellas Sports Authority***, 461 So.2d 72, 77 (Fla. 1984); ***Adams v. Culver***, 111 So.2d 665 (Fla. 1959). "When two statutes cover the same subject-matter, the more narrowly drawn statute controls." ***Moore International Trucks, Inc. v. Foothill Capital Corporation***, 560 So.2d 1301, 1303 (Fla. 2d DCA 1990). "The courts' obligation is to adopt an interpretation that harmonizes two related statutory provisions while giving effect to both." ***Carawan v. State***, 515 So.2d 161, 168 (Fla. 1987). ***See also Escambia County Council on Aging v. Goldsmith***, 465 So.2d 655, 656 (Fla. 1st DCA 1985).

It is well established that statutes in degradation of the common law should be strictly construed. ***See, e. g., Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc.***, 444 So.2d 926, 928 (Fla. 1983); ***Rabideau v. State***,

409 So.2d 1045, 1046 (Fla. 1982). The waiver of governmental immunity in section 768.28, Florida Statutes, is in derogation of the common law of absolute sovereign immunity, and therefore, should be strictly and narrowly construed. In ***Commercial Carrier Corporation v. Indian River County***, 371 So. 2d 1010 (Fla. 1979), despite the absence of any limiting provisions in section 768.28, Florida Statutes, the statute was construed as not waiving immunity from tort actions in areas traditionally subject to immunity as inherently governmental in nature.

It is also noteworthy that the legislature has expressly provided in two instances for Chapter 373 to be liberally construed in order to effectuate the purposes therein. Pursuant to the ***National Manufacturing*** rationale, the purpose of chapter 373, Florida Statutes, in protecting property from flooding is effectuated by affording the state's WMDs immunity from the potential liability associated with flood protection activities.

Plaintiffs relied below upon ***Debolt v. Department of Health & Rehabilitative Services***, 427 So.2d 221 (Fla. 1st DCA 1983). In ***Debolt*** the court denied the HRS claim of sovereign immunity pursuant to section 402.34, Florida Statutes, which provides that HRS had the power "to sue and be sued in actions in ex contractu but not in torts..." *Id.* at 223. The court noted that HRS had declined to raise the immunity defense in numerous cases previously decided. *Id.* at 224, n. 7. It also viewed the section based upon the legislative history as merely relating to a legislative purpose "not to grant unlimited immunity to HRS

from actions in tort but rather to provide the newly created department with the "corporate" powers essential to its function." *Id.* at 224. Most important, if the court had construed the subject provision as a general tort waiver applicable in all instances, there would have been a positive and irreconcilable repugnancy between that provision and section 768.28, Florida Statutes.

The petitioner WMD, however, did not assert a general tort waiver in all instances pursuant to section 373.443, Florida Statutes, and thus, *Debolt* is distinguishable. An examination of all of the cases cited as authority in *Debolt* indicates that repeal by implication was only found in those instances where there existed a definite and irreconcilable repugnancy between the later enacted statute and the prior law.

Also applicable in this regard is the previously cited rule of construction pertaining to similar federal enactments. Numerous cases have considered whether the Federal Tort Claims Act, 28 U.S.C. §§ 2674, 2680(a), which is identical in effect to section 768.28, Florida Statutes, ($200,000 waiver of immunity) and was enacted subsequent to 33 U.S.C. §702c, effected an implied repeal of federal flood immunity. The cases have uniformly ruled that such a repeal did not occur. ***See National Manufacturing Company v. United States***, 210 F.2d 263, 274-75 (8th Cir. 1954) and other authorities, *supra*, page 15. The court in ***National Manufacturing Company*** stated as follows:

> The contention for appellants is that there was repeal by implication but when

> consideration is given to the basic importance of Section 3 to the vast federal flood control appropriations and undertakings, it should not lightly be assumed that the fundamental policy was reversed by mere implication with nothing said about it. 210 F.2d at 274.

The policy implications with regard to the Florida WMDs are the same as those which affect the federal government pursuant to 33 U.S.C. Section 702c.

CONCLUSION

For the reasons stated above, SFWMD respectfully suggests that the Honorable court below erred in its construction of section 373.443, Florida Statutes, and that the opinion of said court should be reversed with directions given to affirm the judgment of dismissal entered by the trial court.

Respectfully submitted:

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FLORIDA BAR NO. 193830

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing INITIAL BRIEF OF SOUTH FLORIDA WATER MANAGEMENT DISTRICT AS AMICUS CURIAE FOR PETITIONER, SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT was furnished by United States mail to the person(s) listed below on the 11th day of June, 1993.

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SUPREME COURT OF FLORIDA

SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, Petitioner, v. DUANE NANZ, ET AL., Respondent.	CASE NO. 81,712 District Court of Appeal 2ND District - No. 92-01255

ON APPEAL FROM A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

APPENDIX TO INITIAL BRIEF OF SOUTH FLORIDA WATER MANAGEMENT DISTRICT AS AMICUS CURIAE FOR PETITIONER, SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, OFFICE OF COUNSEL

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INDEX TO APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DUANE and LINDA NANZ, NEAL and JODY BEDFORD, WARREN and ALICE WILSON, and RUSSELL and GALE MURPHREE,

Appellants,

v.

SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, an agency of the State of Florida, and HILLSBOROUGH COUNTY, a County in the State of Florida,

Appellees.

CASE NO. 92-01255

Opinion filed March 31, 1993.

Appeal from the Circuit Court for Hillsborough County; John M. Gilbert, Judge.

Ted A. Barrett and Alicen M. Barrett of Barrett and Barrett, Dunedin, for Appellants.

J. Thomas McGrady of Mattson, McGrady & Todd, P.A., St. Petersburg; Rick Tschantz, Brooksville, for Appellee, Southwest Florida Water Management District.

Robert R. Warchola, Assistant County Attorney, Tampa, for Appellee, Hillsborough County.

BLUE, Judge.

EXHIBIT A

The appellants correctly contend the court erred in dismissing their complaint with prejudice. The complaint alleged Southwest Florida Management District (SWFMD) and Hillsborough County were negligent in their operation, control and maintenance of a drainage system, and this negligence proximately caused appellant's properties to be flooded. The court found SWFMD to be immune from liability pursuant to section 373.443, Florida Statutes (1989), and found that Hillsborough County had no duty to act as alleged.

Section 373.443, Florida Statutes, provides:

> No action shall be brought against the state or district, or any agents or employees of the state or district, for the recovery of damages caused by the partial or total failure of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works upon the ground that the state or district is liable by virtue or any of the following:
>
> (1) Approval of the permit for construction or alteration.
>
> (2) The issuance or enforcement of any order relative to maintenance or operation.
>
> (3) Control or regulation of stormwater management systems, dams, impoundments, reservoirs, appurtenant work, or works regulated under this chapter.
>
> (4) Measures taken to protect against failure during emergency.

Interpreting this statute to allow SWFMD complete tort immunity would conflict with section 768.28, Florida Statutes (1989), which in general terms provides that the State of Florida

has "waive[d] sovereign immunity for liability for torts" for itself as well as for "its agencies or subdivisions." Where two statutes are found to be in conflict, rules of statutory construction must be applied to reconcile the conflict if possible. Debolt v. Dept. of Health & Rehab. Services, 427 So. 2d 221 (Fla. 1st DCA 1983).

We interpret section 373.443 to provide that the various water management districts shall not be held liable if the permits they grant, the regulations they promulgate, or the control they exercise by reason of their permits, regulations, and orders lead to injuries. The immunity granted appears to be related to the planning functions of SWFMD as opposed to its operational activities. In the instant case, liability is subject to traditional tort analysis under section 768.28 since the complaint alleges negligence on the part of SWFMD through its operational level activities. See Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979). We hold the court erred in dismissing the complaint on the basis that SWFMD was immune from suit.

We also hold that the court erred in granting Hillsborough County's motion to dismiss. We agree with the trial court's ruling that Hillsborough County had no duty to manage and control flood waters since sections 373.016 and 373.023, Florida Statutes (1989), delegate this responsibility to the Department of Environmental Regulation and the water management districts of this state. However, the issue in this case does not concern

whether Hillsborough County had a duty to act. The complaint alleges the county undertook the operation, control, and maintenance of a drainage system. If the county has undertaken to provide such a service, it assumes the responsibility to do so with reasonable care. Slemp v. North Miami, 545 So. 2d 256 (Fla.) (1989). We conclude Hillsborough County can be held liable for damage if as alleged it is negligently maintaining, controlling or operating a drainage system.

The appellants' complaint sufficiently alleged that it was the failure of SWFMD and Hillsborough County to properly maintain or operate the drainage system that caused damage to their property. Consequently, we reverse and remand to the trial court for further proceedings.

FRANK, A.C.J., and PATTERSON, J., Concur.

A
MODEL WATER CODE
WITH COMMENTARY

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Holland Law Center, University of Florida

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Associate Professor of Law
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with the assistance of
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Gainesville
UNIVERSITY OF FLORIDA PRESS
1972

COMMENTARY. This section allows the district to proceed with emergency work without unnecessary delay. It is taken from a California statute.[24]

§4.13 Immunity from Liability

(1) No action shall be brought against the state, or any of its agencies, or any agents or employees of the state, for the recovery of damages caused by the partial or total failure of any dam, impoundment, reservoir, work, or appurtenant work upon the ground that the state is liable by virtue of any of the following:

(a) approval of the permit for construction or alteration;

(b) the issuance or enforcement of orders relative to the maintenance or operation;

(c) control and regulation of the dam, impoundment, reservoir, work, or appurtenant work; or

(d) measures taken to protect against failure during emergency.

COMMENTARY. Section 4.13 indicates that the state or the water management district assumes no tort liability in carrying out the provisions of this chapter.

This section was taken from a California statute.[25]

§4.14 Applicability to Existing Works

(1) Any person owning or operating a dam, impoundment, reservoir, work, or appurtenant work shall register said work with the governing board within which district the work is located. Registration shall be on the forms provided by the governing board.

(2) All provisions of this chapter shall apply to all dams, impoundments, reservoirs, works, or appurtenant works in existence at the time of its effective date.

COMMENTARY. It is stated in §4.14 that the provisions of chapter 4 pertain to all existing works. Obviously, the water management district must be given the authority to regulate existing works if it is to carry out its responsibilities properly.

This subsection is original.

24. CAL. WATER CODE §§6110–13 (West 1971).
25. *Id.* at §6028.

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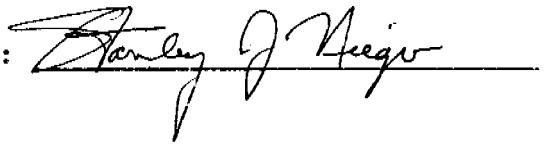
By: 

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