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IN THE SUPREME COURT OF FLORIDA

Southwest Florida Water
Management District,

Petitioner,

v. Case No. 81, 712

Duane Nanz, et al.

Respondents.

INITIAL BRIEF OF AMICUS CURIAE
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT
IN SUPPORT OF SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT

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STATEMENT OF THE CASE AND FACTS

The District accepts of Statement of the Case and Facts in Petitioner Southwest Florida Water Management District's Initial Brief.

SUMMARY OF ARGUMENT

The plain language of §373.443, Fla. Stat., grants tort immunity to the state and water management districts for certain operational activities. The enactment of §373.443 in 1972, and its later amendment in 1989, evidence the legislative intent that §373.443 operate as an exception or qualification to the limited waiver of sovereign immunity for all governmental entities provided in §768.28, Fla. Stat. Likewise, the legislature intended for §373.443 to immunize a specialized class of water management district activities, not all water management actions, which should control over the later enactment of §768.28, which governs a larger general class of activities of all governmental entities.

In an attempt to harmonize the statutory provisions, the Second District Court of Appeals erroneously overlaid the planning level/operational level analysis of §768.28 onto §373.443 effectively amending the plain language of §373.443 and thus removing the intended immunity of certain operational water management district actions and essentially making §373.443 a purposeless act of the legislature.

Additionally, the decision erred in narrowing the language of §373.443(3)(4), Fla. Stat., as applying only to "control or regulation" of the identified works regulated under Chapter 373, Fla. Stat., as only through "permits, regulations, and orders" of a water management district. Again, the language of §373.443 contains no such limitation and plainly provides immunity for control or regulation of works by the water management districts themselves in fulfilling their water management duties under Chapter 373.

Therefore the Court should reverse the decision of the Second District Court of Appeals and hold that §373.443 immunizes a water management district from negligence in the execution of its operational level activities covered by the statutory provision.

ARGUMENT

SECTION 373.443, FLORIDA STATUTES (1989), GRANTS IMMUNITY TO A WATER MANAGEMENT DISTRICT FROM NEGLIGENCE IN THE EXECUTION OF CERTAIN OPERATIONAL LEVEL ACTIVITIES

I. The Second District Court Decision

The Second District Court of Appeal in Nanz, et al. v. Southwest Water Management District, et al., 18 Fla. L. Weekly D884 (Fla. 2d DCA March 31, 1993), (A:1) determined that the water management tort immunity provision of §373.443, Fla. Stat. (1989), is in conflict with the general waiver of sovereign immunity provision of §768.28, Fla. Stat. (1989), and therefore §373.443, Fla. Stat., despite its plain language, does not allow a water management district complete tort immunity for the specific operational activities covered in the statutory provision. To harmonize the conflict, the district court overlaid the planning level\operational level immunity dichotomy established by this Court in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979), and its progeny, to limit the scope of immunity of §373.443, Fla. Stat., to only cover planning level functions involving the issuance of permits, the adoption of rules, or the control exercised by reason of permits, rules, and orders that may lead to injuries. Nanz, supra at D885 (A:2). Additionally, the district court also erroneously amended the broad language of §373.443(3), Fla. Stat., by interpretatively limiting the phrase "[c]ontrol or regulation of stormwater management systems, dams,

impoundments, reservoirs, appurtenant work, or works regulated under this chapter" as providing immunity only for "control or regulation" by reason of district permits, rules or orders directed to third parties, rather than also encompassing the operational "control or regulation" of works of the water management districts themselves in managing Florida's waters.

The District Court erred in failing to abide by the plain language of the §373.443, Fla. Stat., which grants complete tort immunity for particular water management district operational activities, and by superimposing the operation of §768.28, Fla. Stat., onto §373.443, Fla. Stat., and thereby implicitly repealing the provision by making it a superfluous act of the legislature. The legislature clearly intended §373.443 to operate as an exception to §768.28 for certain water management district operational activities.

II. Sections 373.443 and 768.28, Fla. Stat. (1989)

Section 373.443, Fla. Stat. (1989), provides (A:3):

> 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.

The enactment of §373.443, Fla. Stat., predates the enactment of §768.28, Fla. Stat. Section 373.443 was enacted in 1972 as part of the "Florida Water Resources Act of 1972". See Ch. 72-299, Part IV §13, at 1123, Laws of Florida. Chapter 373, Fla. Stat, as well as the language in §373.443, is derived from the Model Water Code, which served as the model legislation for Chapter 373. F. Maloney, et al., Florida Water Law 1980, at 270 (Univ. of Fla. 1980); F. Maloney, et al., "Florida's 'Reasonable Beneficial' Water Use Standard: Have East and West Met?", 31 Fla. L. Rev. 253, 275 (Winter 1979); R. Ausness, "The Influence of the Model Water Code On Water Resources Management Policy in Florida", 3 J. Land Use & Envir. L. 1, 3 (Spring 1987). The commentary to §4.13 of the Model Water Code, from which §373.443 was born, states that the intent of the provision is "that the state or the water management district assumes no liability in carrying out the provisions of this chapter." See commentary to Model Water Code §4.13, p. 237; (App:5).

Section 768.28, Fla. Stat., Florida's limited waiver of sovereign immunity provision, was subsequently enacted in 1973 by

Chapter 73-313, Laws of Florida, to be effective on January 1, 1975. Chapter 74-235, §3, at 664, Laws of Florida, later amended the Act to make it effective for the State on July 1, 1974, and for other agencies and subdivisions of the State on January 1, 1975. Section 768.30, Fla. Stat.

A rather curious, yet pivotal, event occurred when Chapter 73-313, Laws of Florida, was codified into the 1973 Florida Statutes. Paragraph 14 of §1 of Chapter 73-313 enacted by the legislature stated: "Any law of this state that is inconsistent with any part of this act is repealed to the extent of its inconsistency." Chapter 73-313, §1, at 713, Laws of Fla. (A:6). However, when Chapter 73-313 was codified into the 1973 statutes, there was no paragraph 14 in §768.28, Fla. Stat, (1973). (A:7). No amending act was found by amicus curiae reconciling the absence of the repealer provision of Chapter 73-313 from the statute codified in the 1973 statutes, or later statutes. Furthermore, the legislature did not later reenact the repealer provision into §768.28, Fla. Stat. The consequence of this apparent inadvertence is that the repealer provision, paragraph 14 of Chapter 73-313, Laws of Florida, was itself repealed by the reenactment of the Florida Statutes . Section 11.2422, Fla. Stat. Since the legislature did not later reenact a repealer provision into §768.28, Fla. Stat., then the legislature has shown an intent for §768.28 not to repeal prior tort immunity statutes which may coexist as exceptions to §768.28. Palm Harbor Special Fire Control District v. Kelly, 516 So.2d 249

(Fla. 1989)(the legislature is presumed to pass later laws with full awareness of all prior laws).

Importantly in 1989, with presumed knowledge of §768.28, Fla. Stat., and its judicial interpretation, the Legislature made a substantive amendment to §373.443(3), Fla. Stat., by incorporating the defined term "stormwater management system" as an additional type of water management system regulated or controlled by a district that is subject to the immunity protection of the provision. Section 373.443(3) covers certain operational activities of the water management districts in controlling and regulating works. Chapter 89-279, § 23, at 1619, Laws of Florida and Chapter 89-279, § 11, Laws of Florida. (A:8).

III. The Proper Harmony of Sections 373.443 and 768.28, Fla. Stat.

A. §768.28 Has Not Implicitly Repealed §373.443

There is a presumption that laws are passed with knowledge of all prior laws already on the books, as well as a presumption that the legislature neither intended to keep contradictory enactments in force nor to repeal a prior law without an express intention to do so. Woodgate Development Corp. v. Hamilton Investment Trust, 351 So.2d 14 (Fla. 1977). The Second District Court of Appeal opinion did not find that §373.443, Fla. Stat., had been implicitly repealed by the enactment of §768.28, Fla. Stat. Cf. Debolt v. Dept. of Health & Rehabilitative Services, 427 So.2d 221 (Fla. 1st

DCA 1983)(in dicta the court found §768.28 implicitly repealed §402.34, Fla. Stat., even though the court had already held in the decision that §402.34 was not a tort immunity provision). Nevertheless, the peculiar harmonizing of the two independent statutes by the district court in effect makes §373.443 superfluous as merely a purposeless restatement of the limited waiver of sovereign immunity provided by §768.28. City of North Miami v. Miami Herald Publishing Co., 468 So.2d 218 (Fla. 1985)(courts should not presume that the legislature enacts pointless statutes); Smith v. Piezo Technology and Professional Administrators, 427 So.2d 182 (Fla. 1983)(it is presumed that a statutory provision is intended to have a useful purpose). The Second District Court of Appeal failed to properly harmonize the plain language of §373.443 which governs a special class of immunized activities of a water management district with the larger class of immunized activities of all government entities covered by §768.28, particularly in light of the legislature's recognition of the continued validity of §373.443 when it substantively amended the provision in 1989.

Although the legislature totally revised the area of sovereign immunity with the passage of §768.28, legislative history also reveals that the legislature did not intend to repeal existing immunity statutes. Ingraham v. Dade County School Board, 450 So.2d 847 (Fla. 1984)(§768.28 totally revised the area of sovereign immunity). As discussed above, the legislature either intentionally or inadvertently removed the repealer provision initially contained in the enactment of §768.28 without later

reenactment which evidences an intent that prior immunity statutes, such as §373.443, may coexist and operate independently with §768.28. See Chapter 73-313, § 1, paragraph 14, at 713, Laws of Florida and §768.28, Fla. Stat. (1973). (A:6,7). This intent is reinforced by the legislature's substantive amendment of the operational provision in §373.443(3) in 1989, over 16 years after the passage of §768.28 and ten years after this Court's decision in Commercial Carrier, supra. See Chapter 89-279, § 23, at 1619, Laws of Fla. (A:8). For example, in Caloosa Property Owners Association, Inc. v. Palm Beach County Board of Commissioners, 429 So.2d 1260 (Fla. 1st DCA), rev. denied, 438 So.2d 831 (Fla. 1983), the district court determined that §380.07(2), Fla. Stat., governing standing rights to appeal a cabinet order, was not implicitly repealed by the later enactment of the comprehensive Administrative Procedures Act in Chapter 120, Fla. Stat., because the legislature had amended §380.07(2) after the passage of Chapter 120 thus evidencing a legislative intent not to have repealed the provision. See also, Carcaise v. Durden, 382 So.2d 1236 (Fla. 5th DCA), rev. denied, 389 So.2d 1108 (Fla. 1980)(later amendment of prior law shows statute not intended to be implicitly repealed).

This Court in the seminal case of Commercial Carrier, supra, relied upon other jurisdictions interpretations of similar sovereign immunity waiver statutes to determine the proper scope of Florida's waiver of sovereign immunity statute §768.28. Particularly the Court was persuaded by the federal interpretation of the similar Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and

2671-2680, as well as the State of Washington's interpretation of its similar waiver law. See Commercial Carrier, supra, at 1016 and 1018; Trianon Park Condominium Association v. City of Hialeah, 468 So2d 912, 918 (Fla. 1985). Such analysis is likewise useful in the current issue before the Court.

As a result of recent disastrous flooding in the Mississippi River Valley, Congress enacted the Flood Control Act of 1928 in order to authorize a broad federal flood control program. 33 U.S.C. §701, et seq. To place a ceiling on potential liability for the negligent construction and operation of the flood control projects, Congress provided in §702(c) of the Act a sweeping immunity provision stating: "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 purpose of §702(c) was to clearly reaffirm that sovereign immunity would protect the United States from any liability associated with flood control. United States v. James, 478 U.S. 597, 106 S. Ct. 3116, 92 L. Ed. 2d 483 (1986). Later in 1946, Congress enacted the Federal Torts Claims Act (FTCA) to waive the government's traditional all-encompassing immunity from tort actions. Rayonier, Inc. v. United States, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 2d 354 (1957). Of course, eventually, like the case at bar, lawsuits would arise requiring scrutiny of the relationship between an earlier immunity provision covering a special class of activities and a later immunity provision covering a general class of activities.

In Florida East Coast Railway Co. v. United States, 519 F.2d 1184 (5th Cir. 1975), the railway company brought suit for damages to its tracks allegedly caused by a washout resulting from a federal flood control project. The district court determined that the government was statutorily immune from liability under 33 U.S.C. §702(c). On appeal, the railway argued that §702(c) had been implicitly repealed by the later enactment of the FTCA which does not bar such suits. The 5th Circuit Court concluded that §702(c) had not been implicitly repealed because the FTCA did not list that statute as being specifically revoked and thus affirmed the lower court decision giving §702(c) the force and effect intended by Congress as an exception to the FTCA. Accord, Powers v. U.S., 787 F. Supp. 1397 (M.D. Ala. 1992).

A similar issue arose regarding the State of Washington's waiver statute. In Paulson v. County of Pierce, 664 P.2d 1202 (Wash. 1983), certain cabin owners behind a county constructed and maintained dike brought suit for damages from floodwaters when the dike was breached. The lower court found the county liable which presented an issue on appeal as to whether a 1921 statute granting immunity to counties for operational acts and omissions relating to flood protection was implicitly repealed by the state's 1967 statute that waived sovereign immunity of political subdivisions for tortious acts to the same extent as if they were a private person. The Washington Supreme Court determined that under the plain language of the later general waiver statute the court would not imply a repeal of the earlier law because implied repeals were

disfavored by Washington courts and, additionally, the court determined that it's interpretation of legislative intent was supported by the 1967 general waiver law which contained a list of statutes repealed that did not contain the 1921 law. Accordingly, the court found that the case was barred by the 1921 law despite the presence of the later general waiver statute.

The preceding cases are persuasive authority in the present case. Section 373.443, Fla. Stat., like 33 U.S.C. §702(c) and the 1921 Washington law, provides a special grant of sovereign immunity for a particular category of activities which the Legislature feels are of particular importance to the citizens of the district and state to ensure that certain water management activities authorized by Chapter 373 are achieved without excessive exposure of the public purse. Like Florida East Coast Railway and Paulson, supra, the intentional absence of an express repeal of prior special immunity laws in the later waiver statute braces the intent that the two laws are to operate separately by giving the intended effect to both. In the instant case, the district court erroneously severed the intended immunity protection for the special class of operational activities identified in the §373.443 by reconstructing the plain words to fuse the provision into §768.28.

B. §373.443 Operates As a Limited Exception to §768.28

It is also a well-settled rule of statutory construction, that a special statute covering a particular subject matter is controlling over a later general statutory provision covering the same subject in general terms. The specialized statute operates as an exception to or a qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any. Adams v. Culver, 111 So.2d 665 (Fla. 1959). Courts have a duty to adopt a scheme of statutory construction that harmonizes and reconciles two apparently conflicting statutes and **to find a reasonable field of operation that will preserve the force and effect of each.** Floyd v. Bentley, 496 So.2d 862 (Fla. 2d DCA 1986), rev. denied, 504 So.2d 767 (Fla. 1987). In the instant case, the district court decision smothers the field of operation of §373.443 by a blanket application of §768.28 over it and consequently negating the force and effect of §373.443 which immunizes a certain class of water management district operational activities that the legislature clearly intended to protect from liability.

The Second District Court of Appeal decision in the case at bar is in conflict with the Third District Court of Appeal decision in Betancourt v. Metropolitan Dade County, 393 So.2d 21 (Fla. 3d DCA), rev. denied, 402 So.2d 608 (Fla. 1981). In Betancourt the issue was whether §325.29, Fla. Stat. (1977), which immunized motor

vehicle inspectors from liability for any post-inspection defect or failure of vehicle equipment, could coexist and operate independently of §768.28, Fla. Stat. (1977). (A:9). The district court found that §325.29 was not implicitly repealed by §768.28 and that the two immunity provisions could coexist as evidenced by the legislature's continued reenactment of the two provisions. Importantly, the district court did not engraft the planning level/operational level immunity dichotomy of §768.28 onto §325.29 as done by the Second District Court of Appeal in the instant case, but reasonably determined that the plain language of §325.29 immunized the particular class of operational inspection activities of motor vehicle inspectors. The district court held that the Florida Constitution authorizes the legislature to remove the sovereign immunity of the state and its agencies and then make exceptions from that waiver as it did by the enactment of §325.29, Fla. Stat. Consequently, the district court found there was no legal impediment to the simultaneous and harmonious coexistence of §§325.29 and 768.28, Fla. Stat. (Parenthetically, the Legislature expressly repealed §325.29 after this decision. See Chapter 81-212, § 1, at 840, Laws of Florida.) The district court in Betancourt adhered to the plain language of §325.29 to give the provision its own reasonable field of operation to preserve its intended force and effect as a constitutionally permissible exception to the limited waiver of sovereign immunity provided by §768.28, Fla. Stat. In short, the district court determined that it is the constitutional prerogative of the legislature to sever

particular tortious activities of governmental bodies from the limited waiver of immunity of §768.28. Conversely, in the instant case, the Second District Court of Appeal determined that §373.433, Fla. Stat., which the legislature also enacted and amended as an exception to §768.28, cannot coexist with §768.28 without some judicial refinement to its plain language to make it no different than §768.28.

Section 373.443 is a specialized statute covering a narrow field of particular water management activities operating as an exception to the general waiver provisions of §768.28. Adams, supra . Section 373.443 only grants immunity relating to activities of a water management district regarding failure of any stormwater management systems, dam, impoundment, reservoir, appurtenant work, or works. Other operational activities of a water management district unrelated to failure of these types of works would not be protected and therefore would be subject to the planning level/operational level dichotomy of §768.28. Consequently, §373.443 and §768.28 may harmoniously coexist in a field of operation for each without superimposing §768.28 upon §373.443 and effectively obviating its intended operational immunity protections. For instance, in McClelland v. Cool, 547 So.2d 975 (Fla. 2d DCA 1989), the Second District Court of Appeal determined that the immunity provision §768.28(9)(a), Fla. Stat., controlled over the conflicting immunity worker's compensation provision of §440.11(1), Fla. Stat., not because §768.28(9)(a) supplanted the operational immunity intended by §440.11(1), as

done by the same district court in the instant case, but simply because the more specific statute controls over the conflicting general law in order to preserve the sphere of operation of each statute. In that case the widow of a D.O.T. employee killed on a road project sued certain D.O.T. supervisors for negligent supervision. The issue before the district court was whether the more lenient immunity provision of §440.11(1), applicable to all public or private employees, controlled or whether the narrower immunity provision of §768.28(9)(a), applicable only to suits against co-workers of an government agency, was controlling. The district court held that the more specific §768.28(9)(a) specifically governing suits against employees of the state controlled over the more general §440.11(1) which generally covers all employees. The district court did not smother the field of operation of §440.11(1) to reconcile the conflict, but merely gave a field of operation to each statute under the facts of the case to effectuate the intent of the legislature. Likewise, in the case at bar, the Second District Court of Appeal should have applied the same principle and barred the suit under the more specific immunity provision of §373.443, Fla. Stat. applicable to the facts of this case rather than applying the broad general terms of §768.28 which would apply to other operational activities of the water management districts outside the scope of §373.443. See also, Palm Harbor Special Fire Control District v. Kelly, 516 So.2d 249 (Fla. 1987)(statute specifically covering a special subject controls over statute that applies to a general class of subjects); Moore

International Trucks, Inc. v. Foothill Capital Corp., 560 So.2d 1301 (Fla. 2d DCA 1990)(specific statute covering liens on motor vehicles controls over general statute covering liens on personal property).

C. The District Court Erroneously Narrowed the Language in §373.443(3)(4)

It is self-evident that the language in §373.443 (1),(2), Fla. Stat., (A:3), grants immunity for planning level actions of a water management district related to permit issuance and enforcement regarding the construction, maintenance, alteration, or operation of the works identified in the provision as similarly immune under §768.28 as interpreted by this Court in Trianon Park, supra, and its progeny. However, in erroneously harmonizing §373.443 with §768.28, the district court decision went further by removing the clear protection of certain operational activities set forth in §373.433 (3),(4), Fla. Stat., (A:3) by narrowly holding that these provisions only apply immunity protection for water management district control or regulation of the identified works "by reason of their permits, regulations, and orders that lead to injuries."

The plain language of §373.443(3),(4), Fla. Stat., (A:3) is not limited to control or regulation of works through "permits, regulations, and orders." Citizens of the State of Florida v. Public Service Commission, 425 So.2d 534 (Fla. 1982)(courts should not depart from the plain language of the legislature); Leigh v. State ex rel. Kirkpatrick, 298 So.2d 215 (Fla. 1st DCA 1974)(when

terms of a statute are plain the legislature is presumed to have meant what it said). This subsection plainly grants immunity for the water management district control or regulation of works regulated under Chapter 373 whether by permit, rules, orders, **or other authority under Chapter 373.** In addition to their "regulatory" powers over persons who construct or operate works, the districts themselves may: develop and regulate their own works to provide water storage for beneficial purposes, §373.016(2)(c), Fla. Stat.; alter or improve waterways, construct dikes, dams, reservoirs and other works, regulate and control water levels in district owned or maintained water bodies, §373.086(1), Fla. Stat.; construct and operate works for aquifer storage, §373.087, Fla. Stat.; construct, operate and maintain works of the district, §§373.0695 and 373.103(3), Fla. Stat.; control and regulate water levels in waters controlled by the district, §373.103(4), Fla. Stat.; construct, operate and maintain water production and transmission facilities, §373.1961(3), Fla. Stat.; implement projects to restore certain priority water bodies; and finance these district activities with ad valorem monies, §373.503, Fla. Stat. Accordingly, the terms "control or regulation" in § 373.443(3) is not limited to regulatory permitting activities of the districts but also broadly encompasses immunity for operational control or regulation of waters by the districts themselves as to works regulated by the districts under Chapter 373. The Legislature intended §373.443(3),(4), Fla. Stat., like §325.29, Fla. Stat., in Betancourt, supra, to be an exception to the waiver

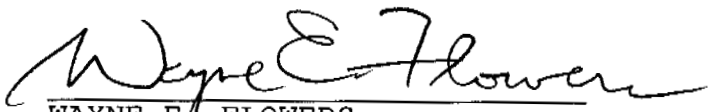
of immunity under §768.28 by granting complete tort immunity for carrying out the provisions of Chapter 373 by the methods specified in the provision. See Model Water Code, §4.13, at 237 (A:5). This intent is manifested by the legislature's amendment to §373.443 in 1989 to broaden its scope. (A:8).

Therefore, the district court erroneously limited the plain language of §373.443(3)(4) in order to reconcile the provision with §768.28, when the legislative clearly intended a separate field of operation for each.

D. Conclusion

The Second District Court of Appeal erred in reversing the order of the trial court and determining that §373.443, Fla. Stat., does not bar the plaintiffs' complaint below. Amicus curiae, St. Johns River Water Management District, respectfully submits that the decision be quashed and the trial court order be reinstated.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing INITIAL BRIEF AMICUS CURIAE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT by U.S. Mail to RICHARD TSCHANTZ, Southwest Florida Water Management District, 2379 Broad St., Brooksville, Florida, 34609-6899 and J. THOMAS MCGRADY, Esquire, Southwest Florida Water Management District, Post Office Box 14373, St. Petersburg, Florida, 33733, TED A. BARRETT, ESQUIRE, Duane Nanz, et al., 499 Patricia Ave., Suite C, Dunedin, Florida, 34698 and ROBERT WARCHOLA, Asst. County Attorney, Post Office Box 1110, Tampa, Florida, 33601 on this 14th day of June, 1993.

Wayne E. Flowers

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