IN THE SUPREME COURT OF FLORIDA

SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, an agency of the state of Florida,

Petitioner,

vs. Case No. 81,712

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

Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

On Review from the District Court of Appeal,
Second District
State of Florida

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PRELIMINARY STATEMENT

This Brief on the Merits is respectfully submitted by the Respondents, Duane and Linda Nanz, Neal and Jody Bedford, Warren and Alice Wilson, and Russell and Gale Murphree (hereinafter "Nanz, et al." or simply "respondents") pursuant to this Court's order dated May 18, 1993. Any references to the record on appeal will be identified by the symbol "R." followed by the page number of the record on appeal before the District Court of Appeals, Second District of Florida.

STATEMENT OF THE CASE AND FACTS

Respondents filed their Complaint in this action on August 28, 1991, alleging that Petitioner and Hillsborough County were negligent in their operation, control, and maintenance of a drainage system, and this negligence proximately caused Respondents' properties to be flooded prior to, during, and following rainfalls occurring September 7, 1988 through September 13, 1988.(R. 1-19). Respondents disagree with petitioner's assertion that the rainfalls referenced here were "rainfalls of historic magnitudes"; that is for a trier of fact to decide.

Petitioner responded by filing a Motion To Dismiss in which it contended, in addition to other assertions that are not relevant to this appeal, that Florida Statute 373.443 (1987) provides absolute immunity to Petitioner which "takes precedence over any immunity that may be available, or any waiver of sovereign immunity that may be available under F.S. 768.28." Southwest Florida Water Management District's (hereinafter "SWFWMD") Motion to Dismiss. (R. 26-31). Hillsborough County also pursued a Motion to Dismiss on the basis of F.S. 373.443 and other grounds.(R. 20-25).

A hearing on both Motions To Dismiss was held February 6, 1992. The trial court allowed briefs by all parties and then ruled in Defendants' favor, granting SWFWMD's Motion To Dismiss February 27, 1992 and granting Hillsborough County's Motion To Dismiss March 17, 1992.(R. 32-33, R. 37-38). A Motion For Reconsideration And Rehearing regarding the Order Dismissing Case

With Prejudice against SWFWMD was filed on March 6, 1992.(R. 34-36). A Motion For Reconsideration And Rehearing regarding the Order Dismissing Plaintiffs' Complaint against Hillsborough County was filed on March 24, 1992.(R. 39-41). Subsequently, on May 4, 1992, the trial court rendered an Order On Plaintiffs' Motions For Reconsideration And Rehearing, finding that it did not have jurisdiction to hear respondents' motions because a Notice Of Appeal was filed prior to a hearing on said motions.(R.47-48). Following entry of an Order Approving Stipulation To Permit Respondents To File Amended Notice Of Appeal on May 26, 1992, an Amended Notice Of Appeal was filed on May 29, 1992.(R. 54-55).

Oral argument before the District Court of Appeals, Second District, was held on February 17, 1993. The Second District Court of Appeals reversed and remanded the decision of the trial court. Nanz, et al., vs Southwest Florida Water Management District, et al., 18 Fla. L. Weekly, D884 (Fla.2d DCA, March 31, 1993).

Hillsborough County did not appeal the decision of the District Court of Appeal. The Order Dismissing Plaintiffs' Complaint entered by the trial court granting Hillsborough County's Motion to Dismiss was not based on F.S. 373,443, nor was the District Court's ruling which reversed and remanded the case to the trial court. Therefore, Hillsborough County is not a party to this appeal.

On SWFWMD's Suggestion for Certification, the District Court of Appeals certified the following question to this Honorable Court as one 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)?

Although the District Court expressly referred to Section 373.443, Florida Statutes (1989) in its certified question to this Court, the statute in effect at the time of Petitioner's acts and omissions giving rise to the subject litigation was Section 373.443, Florida Statutes (1987).

Petitioner and two amici, South Florida Water Management District (hereinafter sometimes "SFWMD") and St. John's River Water Management District (hereinafter sometimes SJRWMD") have already filed briefs on the merits. Pursuant to the order of this Honorable Court dated May 18, 1993, Respondents do hereby and serve their Answer Brief on the Merits.

SUMMARY OF ARGUMENT

Section 373.443, Fla. Stat. (1987) provides:

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 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 dams, impoundments, reservoirs, appurtenant work, or works regulated under this chapter.

(4) Measures taken to protect against failure during emergency.

F.S. 373.443, set out in its entirety above, is contained in Part IV of Chapter 373 of the Florida Statutes (The "Florida Water Resources Act of 1972"). The Florida Water Resources Act of 1972 is patterned after "A Model Water Code". The purposes and reasons behind the drafting of A Model Water Code, and therefore the legislative intent behind the drafting and enactment of Chapter 373, was to establish a statewide, comprehensive program for the regulation and management of all Florida water resources by a centralized agency (the DER) which could delegate considerable powers to the water management districts under it. Chapter 373, including Part IV of same (of which F.S. 373.443 is a part), provides for an extensive system of granting permits and promulgating rules and regulations. This was the intent of the legislature when it enacted Chapter 373.

F.S. 373.443, enacted as part of this vast regulatory scheme, was not written to grant unlimited immunity to the DER or its water management districts, but was drafted instead to grant these

governmental entities limited immunity from liability "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." Nanz, et. al. v. Southwest Florida Water Management District, et. al., 18 Fla. L. Weekly D884, 885 (1993).

Petitioner and amici argue that this Court must look to the relationship between 33 U.S.C. Section 702(c) (1970) (hereinafter Section 702(c)) and the Federal Tort Claims Act to assist it in analyzing the relationship of F.S. 373.433 and F.S. 768.28. However, F.S. 373.443 is not "patterned after" Section 702(c); it is patterned after Section 4.13 of A Model Water Code, as petitioner and amici concede. Additionally, Section 702(c) is not "the federal counterpart" of F.S. 373.443, nor does it contain language that is nearly identical to the state statute. Moreover, the purpose of the Federal Flood Control Act, of which Section 702(c) is a part, differs substantially from the purpose and legislative intent behind the enactment of the Florida Water Resources Act of 1972. Case law interpreting the broad, all encompassing language of Section 702(c) is not of assistance to this Court in interpreting F.S. 373.443, which limits immunity from liability to four carefully delineated circumstances.

The meaning of F.S. 373.443 is clear on its face, and this Court need not resort to the myriad rules of statutory construction cited by petitioner and amici in analyzing F.S. 373.443. F.S. 373.443, as drafted and as viewed in pari materia with the rest of Chapter 373 and in light of this Court's rulings in Commercial

Carrier Corp. and Trianon Park Condominium, clearly and unquestionably indicates that the water management districts of this state are immune from liability for certain limited acts and omissions which are now known to be planning activities.

Petitioner and amici argue that the District Court improperly narrowed the scope and operation of F.S. 373.443 by improperly interpreting the word "control". They argue that unless the word "control" is defined to include operational level activities, F.S. 373.443 has no meaning, because the government was already immune from liability for decisional level activities in 1972 without resort to F.S. 373.443.

This argument assumes, incorrectly, that the law of governmental immunity was eminently clear in 1972 when F.S. 373.443 was enacted. To the contrary, Florida law with regard to sovereign immunity was in turmoil in 1972. Under the holding in Modlin, and in the absence of F.S. 373.443, a state Court might have ruled that a governmental entity was liable if a permit was negligently granted or an order negligently enforced and the party who was negligent owed a special duty to the injured party.

F.S. 373.443 was not enacted to give the DER and the water management districts under it total immunity from tort. The plain and ordinary language of the statute clearly shows that although the DER and its water management districts are immune from liability for certain planning level activities, this grant of immunity does not extend to and include operational level acts and omissions such as those which are at issue in this case.

STATEMENT OF CERTIFIED QUESTION ON APPEAL

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)?

ARGUMENT I

THE LEGISLATURE, BY ENACTING FLORIDA STATUTE 373.443, DID NOT INTEND THAT A WATER MANAGEMENT DISTRICT SHOULD BE IMMUNE FROM ALL LIABILITY.

Petitioners are correct when they assert that legislative intent is the pole star by which the Court must be guided in interpreting the provisions of a law. DeBolt v. Dept. of Health & Rehab. Services, 427 So.2d 221, 224 (Fla. 1st DCA 1983). Petitioners are also correct in their assertion that Chapter 373 of the Florida Statutes (the "Florida Water Resources Act of 1972") is patterned after "A Model Water Code". Maloney, F., et al., A Model Water Code (Univ. of Fla. Press, 1972) (hereinafter "A Model Water Code" or "Model Water Code"). It follows, then, that a study of the purposes and reasons behind the drafting of A Model Water Code will shed light on the legislative intent behind the drafting and enactment of Chapter 373.

In 1972, when A Model Water Code was drafted by Frank E. Maloney, Professor of Law and former Dean at the University of Florida, together with others, the State of Florida did not have a comprehensive statewide program for water resource management. Various legislative enactments throughout the years prior to 1972 had led to a fairly scattered patchwork of single purpose and multipurpose "drainage districts", "flood control districts", and various other 'water districts'. There was sometimes an unclear division of authority as between the hodge podge districts and their various subdistricts. See Maloney, F., et al., Water Law and

Administration - The Florida Experience (Univ. of Florida Press, 1968) at p. 299.

Actually, the first "multipurpose" water district created in Florida was created in 1949 and named the "Central and Southern Florida Flood Control District". This water management district (hereinafter sometimes WMD) was the predecessor to South Florida Water Management District (hereinafter sometimes SFWMD), an amicus curiae in this case.

> In 1961 another large-scale multipurpose water management district was created in Florida. This district was called the Southwest Florida Water Management District, a name which explicitly shows the multipurpose function. "The words 'flood control' . . . [were] omitted to point up the basic philosophy of comprehensive water management for all legitimate purposes." Water Law and Administration - The Florida Experience, p. 311 [cite, which is contained in a footnote, omitted].

In the minds of legislators and commentators, including Professor Maloney, these earlier multipurpose districts did not go far enough in establishing a statewide, comprehensive program for regulation and management of all Florida waters. Studies at the University of Florida continued under the direction of Professor Maloney, and in 1972 he and several co-authors drafted A Model Water Code with these basic requirements in mind for a proper state water resources planning program: centralized planning responsibility, planning on a scientific basis, coordination of water quality and consumptive use planning, and regulation of consumptive uses as a planning tool. See Commentary to A Model Water Code at page 69.

> Florida, formerly a common law riparian state, adopted comprehensive legislation in 1972 for water use and

> management. The Water Resources Act of 1972, which is codified at Chapter 373 of the Florida Statutes, is based on F. Maloney, R. Ausness and J. Morris, A Model Water Code, and provides for a two-tier administrative structure. The Department of Natural Resources (DNR) was given responsibility originally for administration of the Act at the state level with day-to-day management functions carried out by five regional water management districts.
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> Chapter 373, Florida Statutes, assigned the water management districts and the Department of Environmental Regulation [DER took over the DNR's water management authority in 1975] certain independent powers and authorities, but also required DER to delegate its water resource programs to the water management districts to the maximum extent possible. DER has proceeded to delegate consumptive use permitting (FLA. STAT. ch. 373, pt. II), and permitting for management and storage of surface waters (FLA. STAT. ch. 373, pt. IV) to all the water management districts. In addition, DER has delegated stormwater management (FLA. STATE. Sec. 373.103(8)) and regulation of dredging and filling of isolated wetlands (FLA. STAT. Sec. 373.414) to all the districts except Northwest Florida. DER has also delegated broad powers to the districts under FLA. STAT. Sec. 373.103(2) to (7), which include authority to cooperate with the federal government in flood control, reclamation, and conservation, to establish and regulate minimum flows and minimum water levels, and to cooperate with DER in preparation of the State Water Use Plan. Because each district has independent rule-making authority to implement these programs, rules and procedures vary from district to district. All rules formally promulgated by any district are published in Title 40 of the Florida Administrative Code.

Christie, Donna R., Florida [Water Rights] pp. 87-88, excerpted from Robert E. Beck, Editor-in-Chief, Waters and Water Rights (The Michie Company, 1991 Edition).

A Model Water Code, and therefore Chapter 373 of the Florida Statutes, were created to establish a comprehensive, statewide program for the permitting, regulation, and management of the state's water resources by a centralized agency (the DER) that could delegate considerable powers to the water management

districts under it. That both the Model Water Code and Chapter 373 established regulatory agencies with vast planning and rule-making powers is clear when one reads the following, which are just a few excerpts from a book co-authored by two of the major authors of A Model Water Code (Professor Maloney and Professor Ausness):

> The permitting system established by the Florida Water Resources Act of 1972 (FWRA) is the primary tool for implementing the Act's regulatory policies. The Act's use of permitting as a regulatory device is something of a novelty in Florida. Maloney, Frank E., et al., Florida Water Law (University of Florida Pub., 1980), p. 222 (emphasis added).
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> The Florida Water Resources Act provides for the regulation of consumptive uses of water in order to prevent harm to the water resources of an area and to assure that a use is compatible with the overall objectives of the particular district. An applicant for a consumptive use permit must establish the following before a permit may be granted . . . Florida Water Law, p. 224. (emphasis added).
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> The Code envisioned a mandatory permit system for which withdrawals of water for consumptive use, but the Florida Act merely authorizes such a system, rather than requiring it. Florida Water Law, p. 234. (emphasis added)
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> [The South Florida Water Management District] requires permits for all uses, diversions, or withdrawals of water which exceed 100,000 gallons per day. The governing board may impose any reasonable conditions upon permits which are necessary 'for the conservation, protection, management, and control of the waters of the district . . .' Florida Water Law, p. 235. (emphasis added).
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> The rules [of South Florida Water Management District] also contain a provision for 'general permits' for water use in conjunction with oil well drilling . . . Florida Water Law, p. 236. (emphasis added).
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> The SWFWMD [Southwest Florida Water Management District] has also implemented consumptive use permitting. Florida Water Law, p. 237. (emphasis added).
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> * * *
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> Permits are also required [for certain wells]. Florida Water Law, p. 238. (emphasis added).
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> * * *

> At the present time, the SJRWMD [St. John's River Water Management District, the other amicus curiae in this case] issues consumptive use permits . . . Any reasonable conditions necessary to conserve, protect, manage, or conduct the waters of the district will be imposed on the permit by the governing board. Florida Water Law, pp. 240-241. (emphasis added).
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> * * *
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> Part IV of the Florida Water Resources Act of 1972 [of which F.S. 373.443 is a part] provides for the management and storage of surface waters within the state. Regulation is achieved through a permit system which applies to the construction or alteration of dams, impoundments, reservoirs and any appurtenant works. Florida Water Law, p. 260. (emphasis added)
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> Permits are of two types: (1) those for construction or alteration of surface water 'works'; and (2) those for maintenance or operation of surface water 'works'. . . . Permits for maintenance or operation of surface water 'works' are permanent and transferrable to new owners upon 30 days notice . . . Florida Water Law, p. 261. (emphasis added).

A thorough reading of Florida Water Law, by Frank E. Maloney, et al., A Model Water Code, by Frank E. Maloney, et al., and Chapter 373 of the Florida Statutes clearly indicates that Chapter 373, including Part IV of same (of which F.S. 373.443 is a part), provides for an extensive system of granting permits and promulgating rules and regulations. This was the intent of the legislature when it enacted Chapter 373.

Turning to Section 373.443, Fla. Stat. (1987) (hereinafter F.S. 373.443) in particular: F.S. 373.443, as petitioners contend, is based upon Section 4.13 of A Water Model Code, which in turn is based in substantial part upon a California statute, California Water Code Section 6028 (hereinafter Section 6028).(A:1)

Section 6028 is very similar to Florida Statute 373.443, with this major difference: Section 6028 provides that "no action shall

be brought against the state or the department or its agents or employees for the recovery of damages caused by the partial or total failure of any dam or reservoir or through the operation of any dam or reservoir upon the grounds that such defendant is liable by virtue of any of the following: . . . ". Section 6028. The California law would appear to make it clear that in California no action can be brought against the state or department of the state based upon its operation of any dam or reservoir. Despite the explicit language of California statute, however, California state agencies can in fact be held responsible for their negligence in the operation of a dam on a number of tort theories, including nuisance, dangerous and defective condition of the property (California Government Code, Section 835), statutory liability (California Government Code, Section 815.6), and a theory of vicarious liability when a government agent or employee is negligent while acting within the scope of his employment, (California Government Code, Section 815.2).(A:2) See also Nestle v. City of Santa Monica, 101 Cal.Rptr. 568, 581; 6 Cal.3d 920; 496 P.2d 480 (Cal. 1972) and Lattin v. Coachella Valley County Water District, 15 Cal.Rptr. 300 (Cal. 4th DCA 1961).

Petitioner and amici argue stridently that the commentary to Section 4.13 is controlling here, where it states that "Section 4.13 indicates that the state or the water management district assumes no tort liability in carrying out the provisions of this chapter." Commentary to Section 4.13, A Model Water Code, p. 237. In so doing, petitioner and amici emphasize the words no tort

liability but ignore the words in carrying out the provisions of this chapter. The word "chapter", as used in the Commentary, refers to Chapter IV of A Model Water Code, as opposed to the entire Model Water Code. In any event, the provisions of Chapter IV of A Model Water Code, the entire Model Water Code, the provisions of Part IV of Chapter 373, and Chapter 373 in its entirety all clearly establish that Chapter 373 of the Florida Statutes was drafted for the purpose of granting to the Department of Environmental Regulation (DER) and the water management districts under the DER the power to grant permits, make rules, and promulgate regulations controlling the use of water within the boundaries of the state. F.S. 373.443 provides very simply, as stated by the District Court of Appeals in Nanz, et al. v. Southwest Florida Water Management District, 18 Fla. L. Weekly D884 (1993), "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." Nanz, et al., p. 885. [See also DeBolt v. Department of Health and Rehabilitative Services, 427 So.2d 221 (Fla.1st DCA 1983), wherein the Court reconciled F.S. 402.34, a statute similar to F.S. 373.443, with Section 768.28 of the Florida Statutes (hereinafter F.S. 768.28). In DeBolt, the Court found F.S. 402.34 to be in conflict with F.S. 768.28, but it resolved that conflict by looking to the legislative intent behind the enactment of F.S. 402.34.

> Where, as in this case, two statutes are found to be in conflict, rules of statutory construction must be applied

> to reconcile, if possible, the conflict. We are aided in this task by the maxim that "legislative intent is the pole star by which we must be guided in interpreting the provisions of a law."...In our attempt to discern the legislative intent behind the conflicting statutes, we must consider "the history of the Act, the evil to be corrected, the purpose of the enactment, and the law then in existence bearing on the same subject."...A review of the legislative history of section 402.34, as well as the wording of the statute, convinces us that the legislature's purpose was not to grant unlimited immunity to HRS from actions in tort but rather to provide the then newly created department with the "corporate" powers essential to its functioning.
>
> DeBolt, page 224

Chapter 373, as written in 1972 (with relatively minor changes since), was not written to grant unlimited immunity to SWFWMD or any other governmental entity, but rather "to vest in the Department of Environmental Regulation [and its water districts created by the 1972 Act] the power and responsibility to accomplish the conservation, protection, management, and control of the waters of the state . . .". F.S. 373.016(3).

ARGUMENT II

33 U.S.C. SECTION 702(C) AND ITS RELATIONSHIP TO THE FEDERAL TORT CLAIMS ACT SHOULD NOT BE CONSIDERED IN INTERPRETING FLORIDA STATUTE 373.443.

33 U.S.C Section 702(c) (1970), states in pertinent part, as follows:

[N]o 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.

Section 373.443, Fla. Stat. (1987) provides:

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 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 dams, impoundments, reservoirs, appurtenant work, or works regulated under this chapter.

(4) Measures taken to protect against failure during emergency.

SWFWMD and both amici in this case encourage the Court to look to 33 U.S.C. Section 702(c) (1970) (hereinafter Section 702(c)) and the Federal Tort Claims Act, 28 U.S.C. Section 2671, et seq. (1965) in analyzing the relationship of F.S. 373.443 and F.S. 768.28. The petitioner SWFWMD quotes from Brown v. State, 426 So.2d 76 (Fla. 1st DCA 1983) in support of this proposition, as follows: "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 its prototype has been given insofar as such construction comports with the spirit and policy of the Florida law relating to the same subject." Brown v. State, p. 88, nt. 19. (emphasis added). SWFWMD goes on to cite several other cases in support of this rule of statutory construction.

The words emphasized above show why SWFWMD's and the amici's argument in this regard must fail. The Florida Water Resources Act of 1972 is not patterned after the Federal Flood Control Act of 1936. Likewise, Florida Statute 373.443 is not patterned after Section 702(c), as can be seen just by comparing the two sections set forth above.

The cases presented by petitioner and the amici reflect that a state statute must be not only "patterned after" a federal statute, it must also contain language nearly identical to that of the federal statute before a Court will look to federal case law as a guide to interpretation of the state law. In the case now before this Court, the state statute is not "patterned after" the federal statute, but is instead patterned after A Model Water Code. Likewise, the state statute at issue here does not contain nearly identical language.

In International Brotherhood of Painters v. Anderson, 401 So.2d 824 (Fla.5th DCA 1981), the Court looked to case law interpreting federal statutes which were "the federal counterparts" of certain state statutes, both of which dealt with labor relations. International Brother of Painters, p. 831. In City of Orlando v. Florida Public Relations Comm'n, 435 So.2d 275 (Fla.5th

DCA 1983), the court again looked to a section of the federal National Labor Relations Act (NLRA) containing language that was "identical" to that of the relevant state statute. City of Orlando, p. 278. In Pasco County School Board v. Florida Public Employees Relations Comm'n, 353 So.2d 108 (Fla.1st DCA 1977), the reviewing Court looked yet again at a provision of the federal NLRA that was nearly identical to the state statute. Finally, in Brown v. State, supra, the Court analyzed sections of the Florida Evidence Code, Florida Statutes 90.401-403, in light of federal case law interpreting Rules 401, 402, and 403 of the Federal Rules of Evidence.

Additionally, the purposes of F.S. 373.443 and Section 702(c) differ substantially, as do the Acts within which they are contained.

"The [Federal Flood Control Act] was the nation's response to the disastrous flood in the Mississippi River Valley in 1927. That flood resulted in the loss of nearly two hundred lives and more than two hundred million dollars in property damage; almost seven hundred thousand people were left homeless. [Cite omitted]. The flood control system in the Mississippi River Valley in response to this catastrophe was the largest public works project undertaken up to that time in the United States." United States v. James, 106 S.Ct. 3116, 3122 (1986).

In other words, the Federal Flood Control Act was basically enacted for a single purpose, to wit: to avoid another catastrophic flood along the Mississippi River. The provisions of the Act were

later extended to include additional areas of the United States, and ultimately the provisions were applied to all federal flood control projects throughout the United States. See United States v. James, 106 S.Ct. 3116 (1986); see also National Mfg. Co. v. United States, 210 F.2d 263 (1954).

By contrast, as illustrated in Argument I above, Florida's Water Resources Act of 1972 was enacted for multiple purposes, flood control being only one of the many. The purposes of the Act are set out in Florida Statute 373.016(1) and (2)(1983), as follows:

> (1) The waters in the state are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use.
> (2) It is further declared to be the policy of the Legislature:
> (a) To provide for the management of water and related land resources;
> (b) To promote the conservation, development, and proper utilization of surface and ground water;
> (c) To develop and regulate dams, impoundments, reservoirs, and other works and to provide water storage for beneficial purposes;
> (d) To prevent damage from floods, soil erosion, and excessive drainage;
> (e) To preserve natural resources, fish, and wildlife;
> (f) To promote the public policy set forth in s. 403.021;
> (g) To promote recreational development, protect public lands, and assist in maintaining the navigability of rivers and harbors; and
> (h) Otherwise to promote the health, safety, and general welfare of the people of this state.

Additionally, Section 702(c) contains language that is far more broad and all encompassing than the language of F.S. 373.443. "The immunity provision in Section 702(c), enacted as part of the Flood Control Act of 1928, 45 Statute 534, 33 USC Section 701 et

seq., outlines the immunity in sweeping terms: '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.' (Emphasis added [by the court].) It is difficult to imagine broader language. . . [Congress'] choice of the language 'any damage' and 'liability of any kind'. . . undercuts a narrow construction. (Emphasis added [by the Court])." United States v. James, pp. 3120-3121.

"[W]hen Congress entered upon flood control on the great scale contemplated by the Acts it safeguarded the United States against liability of any kind for damages from or by floods or flood waters in the broadest and most emphatic language." National Mfg. Co. v. United States, 210 F.2d 263, 270 (8th Cir. 1954); cert. denied, 347 U.S. 967.

The Florida Legislature could have chosen to grant to the Department of Environmental Regulation and its water management districts sweeping, broad, and all encompassing immunity from liability as provided to the United States government by Section 702(c). However, the State of Florida did not do so, and instead chose to limit the liability of Florida's water management districts to the four circumstances that are explicitly set forth in F.S. 373.443 itself.

As stated earlier, the Florida statute does not even go so far as the California statute, which appears, at least at first blush, to provide some kind of immunity for operational activities. The Legislature could have chosen to use broader language or more specific language, but it did not do so, and instead by the clear

language of Section 373.443, the Legislature evidenced its intent to immunize water management districts in limited circumstances. As stated by the District Court, water management districts are immune from liability "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." Nanz, et al. v. Southwest Florida Water Management District, et al., 18 Fla. L. Weekly D884, 885 (1993).

Accordingly, petitioner's and the amici's attempts to have this Court base its analysis of F.S. 373.443 on the federal Court's analysis of Section 702(c) is misguided.

In a related argument, amicus curiae St. John's River Water Management District (SJRWMD) asserts that this Court should follow the holding of Paulsen v. County of Pierce, 664 P.2d 1202 (Wash. 1983). In that case, the Supreme Court of Washington interpreted a statute granting statutory immunity to counties for non-contractual acts and omissions relating to flood protection. The statute, RCW 86.12.037, is quoted in part in the case as follows:

"No action shall be brought . . . against any county . . . for any noncontractual acts or omissions . . . relating to the improvement, protection, regulation and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks and waters thereof . . .". Paulsen, p. 1205.

The differences in the language of the Washington statute and F.S. 373.443 are many and obvious, but the most compelling language differences is this: RCW 86.12.037 provides immunity to any county

"for any noncontractual acts or omissions" (emphasis added). In other words, counties are granted complete immunity from any causes of action except those sounding in contract.

F.S. 373.443 is not "patterned after" Section 702(c), nor RCW 86.12.037. Instead, it is patterned after A Model Water Code, and as such it must be interpreted in the light of the purposes expressed in A Model Water Code and the legislative intent behind the enactment of Chapter 373 itself. This was taken up in Argument I above.

ARGUMENT III

FLORIDA STATUTES 373.443 AND 768.28 CAN BE HARMONIZED TO GIVE EFFECT TO BOTH AND ALLOW A FIELD OF OPERATION FOR BOTH.

Petitioner and the amici compare Florida Statute 373.443 to Florida Statute 768.28, and they make the following arguments and observations:

"A law should be construed together and in harmony with any other statute relating to the same purpose, even though the statutes were not enacted at the same time." Wakulla County v. Davis, 395 So.2d 540, 542 (Fla. 1981). In the case now before the Court, F.S. 373.443 was enacted in 1972, whereas F.S. 768.28 was enacted in 1973.

The implicit repeal of an earlier statute by a later statute is not favored by the court. Caloosa Property Owners v. Palm Beach Board of County Commissioners, 429 So.2d 1260, 1265 (Fla.1st DCA 1983); see also DeBolt. That being true, it is presumed that later statutes are passed with knowledge of prior existing statutes, and a construction is favored which harmonizes the statutes and gives each one a field of operation, rather than a construction whereby the former statute is repealed by implication. Carcaise v. Durden, 382 So.2d 1236 (Fla.5th DCA 1980).

Finally, petitioner and amici assert, "[i]t is a well-settled rule of statutory construction that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in more general

terms; in such a situation, the more narrowly-drawn statute operates as an exception to or qualification of the general terms of the more comprehensive statute." Floyd v. Bentley, 496 So.2d 862, 864 (Fla.2d DCA 1986).

Based upon the above statutory construction rules, petitioner and amici then conclude that F.S. 373.443 is more narrowly drawn than F.S. 768.28, and is thus controlling in this case.

Respondents agree that all of the rules set forth above are in fact rules of statutory construction supported by Florida case law. Respondents disagree with the conclusion that the petitioner and amici reach.

With all due respect, the various water management districts seek to have their cake and eat it too by shotguning all of the statutory construction rules referenced above (and several others) in an effort to analyze and pick apart the plain language of F.S. 373.443. On the one hand, petitioner and amici urge this Court to harmonize F.S. 373.443 and F.S. 768.28 so that both can be given a field of operation, but on the other hand, petitioner and amici ask this Court to find that these statutes conflict in some way, so that the more specific of the two statutes prevails. Petitioner and amici cannot have it both ways.

Respondents argue that the better and more applicable rule of statutory construction to be used in this case is yet another statutory construction rule that petitioner and amici have set forth themselves, to wit: 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 Company, v. Redding, 131 So.2d 1, 2 (Fla. 1961).

F.S. 373.443, as drafted and as viewed in pari materia with the rest of Chapter 373 and in light of this Court's rulings in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979) and Trianon Park Condominium v. City of Hialeah, 468 So.2d 912 (Fla. 1985), clearly and unquestionably indicates that the water management districts of this state will be immune from liability for what are now known to be planning activities. "Since the legislature is presumed to know the meaning of the words it utilizes and to convey its intent by the use of specific terms, this Court must apply the plain meaning of those words, if they are unambiguous." Caloosa, p. 1264.

The legislature, in drafting Florida Statute 373.443, could have utilized all encompassing language, as did the federal statute, and to a lesser extent the Washington statute, if it had wanted to do so. The legislature could also have chosen to utilize the word "operation" as did the California statute. The legislature clearly distinguished between the words "control or regulation", as used in F.S. 373.443, and the words "maintenance or operation", as used, for example, in F.S. 373.416. Chapter 373 is replete with examples of owners and operators who must obtain permits in order to own and operate various water control devices. Who grants those permits? Who "controls or regulates" the owners and operators? The DER and the water management districts. Chapter 373 clearly distinguishes between the planning functions of the water

management districts and the operational functions of the owners of works, dams, reservoirs, etc., and in drafting F.S. 373.443, it is clear that what the legislature had in mind was to grant immunity to the water management districts for what we now know, in light of this Court's ruling in Commercial Carrier, are planning activities. In 1972, when Chapter 373 was first enacted into law, it was not so clear that the activities referenced in F.S. 373.443 would be considered to be planning activities of a governmental unit. Respondents take that up in their next argument.

In the meantime, Respondents would state to this Honorable Court that the legislature knew what it said when it stated that petitioner and other water management districts are immune from liability in the limited circumstances delineated in F.S. 373.443. If the legislature had intended the water management districts to be immune from liability for their negligence, the legislature would have said so. It did not.

ARGUMENT IV

THE SECOND DISTRICT COURT OF APPEALS DID NOT IMPROPERLY NARROW THE SCOPE OF F.S. 373.443 BY IMPROPERLY DEFINING THE WORD "CONTROL".

Petitioners and amici argue that the Second District Court of Appeals improperly narrowed the scope and operation of Florida Statute 373.443. In particular, argue the water management districts, the District Court of Appeals improperly narrowed the definition of the word "control". As argued by the petitioner, "[T]he District Court limited the immunity provided under Section 373.443 to situations where water management districts exercise regulatory type control . . . [but] ignores that 373.443 (3) and (4) also gives the water management districts immunity for operational control of its dams, impoundments and the works in both emergency and non-emergency situations". Petitioner's Brief on the Merits, p. 24.

Petitioner and amici then go on to argue that if the "narrow" construction of the District Court of Appeals is allowed to stand, then F.S. 373.443 has no meaning, because the government is immune from liability for the planning activities of a governmental agency without need to resort to F.S. 373.443. The argument, as presented by counsel for amicus curiae South Florida Water Management District, runs as follows: "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." Brief of South Florida Water Management District, p. 9.

This latter argument assumes, incorrectly, that the law of governmental immunity was eminently clear in 1972 when F.S. 373.443 was first enacted, and that all of the actions referenced in F.S. 373.443 were "planning" functions of government and were as such immune from liability. This argument completely ignores the fact that Florida law with regard to sovereign immunity was in turmoil in 1972, and F.S. 768.28 was in fact enacted in 1973 in an effort by the legislature to clear up some of this turmoil. The planning/operational dichotomy now in effect in this state did not come about until this Court's ruling in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979). It was not until this Court's ruling in Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985) that it became clear that the permitting process was in fact a governmental function that was immune from liability.

When F.S. 373.443 was enacted in 1972, a "special duty"/"general duty" dichotomy was in effect in the State of Florida. Modlin v. City of Miami, 201 So.2d 70 (Fla. 1967). The Modlin case held that the issuance of building permits was not a governmental function immune from liability, to wit: "[B]oth the issuance of building permits and the subsequent inspection of construction in progress constitute enforcement of the building code . . . [S]ince enforcement is typically the task of the

executive, it can hardly be viewed as falling within the area of municipal tort immunity reserved by the Hargrove caveat, i.e., judicial, quasi-judicial, legislative and quasi-legislative functions." Modlin, p. 73. The Modlin Court then went on to hold that under the facts of that particular case, the City of Miami was not liable because the building inspector that allegedly negligently inspected a store mezzanine which fell on and killed a patron owed no 'special' duty to the patron (no duty in any way different from that owed to any other member of the public). Modlin, p. 76.

In other words, in 1972, when F.S. 373.443 was enacted, this Court, or another state Court, in the absence of F.S. 373.443, might have ruled that the state or district, or any agents or employees of the state or district, were liable if a permit was negligently granted or an order negligently enforced and the party who was negligent owed a special duty to the injured party.

Petitioner and amici argue that we should look at the plain meaning of the words of the statute and then come to the conclusion that the word "control" means "operate". Respondents contend that use of the word "control" in F.S. 373.443(c) does not, in and of itself, reach out with open arms and encompass all operational level activites. Such an interpretation improperly extends and modifies the express terms of the statute. Holly v. Auld, 450 So.2d 217 (Fla. 1984).

Petitioner and amici argue that every word used in a statute must be given effect. Respondents assert that this Court should

also consider the words that could have been used by the legislature but were not.

The legislature could have followed the all encompassing langugage of the federal statute, which was in effect long before the enactment of Chapter 373, but it did not do so. The legislature could have used language similar to that found in the Washington statute, but it did not do so. The legislature did not utilize the language referencing operational activity that can be found in the California statute, from which A Model Water Code, Section 4.13, was substantially taken.

Ironically, the words "maintenance or operation" do appear in F.S. 373.443, when the statute grants to the DER and the water management districts immunity from liability for "the issuance or enforcement of any order relative to maintenance or operation". F.S. 373.443(2). The legislature could have just as easily drafted this subsection to read "the issuance or enforcement of any order relative to maintenance or operation, or the actual maintenance or operation of dams, impoundments, reservoirs, appurtenant work, or works . . .". However, the legislature did not do so.

Chapter 373.443 was not enacted to give the DER and the water management districts under it total immunity from tort. If one reads F.S. 373.443 as the petitioner and amici argue it should be read, the DER and its water management districts would not even be liable for gross negligence or intentional torts in their operation of dams, impoundments, reservoirs, and other works employed to regulate and control surface waters in this state. In asking this

Honorable Court to interpret F.S. 373.443 as they do, petitioner and amici are requesting that the Court rewrite the plain and ordinary language of the statute. This is better left to the legislature, which has chosen, up to this date, not to include operational level activities in its grant of immunity from liability under F.S. 373.443.

CONCLUSION

For the reasons stated above, respondents respectfully assert that the District Court of Appeals for the Second District ruled properly in this case, and respondents pray for an order and judgment of this Court affirming the decision of the District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by first class U.S. Mail, postage fully pre-paid, to the following persons at the addresses shown below, this 2d day of July, 1993.

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