Appeal 017

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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.
_____/

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**PETITIONER'S BRIEF ON THE MERITS**

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

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## STATEMENT OF CERTIFIED QUESTION ON APPEAL

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

## PRELIMINARY STATEMENT

This Brief on the Merits is respectfully submitted by the petitioner, SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, pursuant to this Court's order dated May 18, 1993. In this brief the parties will be referred to by their names as set forth below in the Statement of the Case and Facts, and by the positions they occupy before this Court. 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 Appeal, Second District of Florida.

## STATEMENT OF THE CASE AND FACTS

Defendant/petitioner, SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT (hereinafter "SWFWMD"), seeks to have reviewed a decision of the Second District Court of Appeal, dated March 31, 1993, on the grounds that the decision of the District Court of Appeal passed upon a question of great public importance.

The petitioner was the original defendant before the trial court and was the appellee before the District Court of Appeal. The respondents, DUANE and LINDA NANZ, NEAL and JODY BEDFORD, WARREN and ALICE WILSON, and RUSSELL and GALE MURPHREE, (hereinafter collectively "NANZ"), were the original plaintiffs before the trial court and were the appellants before the District Court of Appeal.

The case sub judice arises out of rainfalls of historic magnitude which began on September 7, 1988, and lasted through September 13, 1988. As a result, the respondents filed their complaint against SWFWMD alleging that their properties were flooded during and following the rainfall, due to the negligence of SWFWMD in the installation, operation, control and maintenance of natural bodies of water consisting of Baker Creek, Pemberton Creek and Lake Thonotosassa, including failure to properly maintain, operate and open flood gates and/or locks.

In response to NANZ's complaint, SWFWMD filed a motion to dismiss, contending that it was immune from liability to the respondents, pursuant to Section 373.443, Florida Statutes (1987), which expressly stated:

> **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.

The appeal to the District Court of Appeal by the respondents was from an order of the Circuit Court of Hillsborough County dismissing the respondents' complaint with prejudice.

In this case of first impression, the District Court of Appeal, Second District, reversed and remanded the decision of

the Trial Court. Nanz v. Southwest Florida Water Management District, 18 Fla. L. Weekly D884 (Fla. 2d DCA March 31, 1993) In its opinion, the District Court of Appeal interpreted that "the immunity granted the water management districts under Section 373.443 appears to be related to the planning functions of SWFWMD as opposed to its operational activities." Id. at D885. Based on its interpretation of Section 373.443 and the allegations of the complaint, the District Court of Appeal concluded that the liability of SWFWMD was subject to traditional tort analysis under Section 768.28, Florida Statutes. Id.

On SWFWMD's suggestion for certification, the District Court of Appeal certified the following question to this 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 §373.443 (1989) in the certified question to this Court, SWFWMD would clarify that §373.443 (1987) controlled at the time of the flood giving rise to the subject litigation. SWFWMD would further clarify that any other reference to §373.443 (1989) in this initial brief on the merits is solely for purposes of statutory construction and interpretation.

Upon the order of this Court dated May 18, 1993, petitioner, SWFWMD, files and serves this Brief on the Merits.

## SUMMARY OF ARGUMENT

In the case sub judice, the gravaman of the respondents' Complaint against SWFWMD is that the water management district negligently failed to open certain floodgates and/or locks in sufficient time to prevent flooding of respondents' property during the severe rainstorm of September 7, 1988 through September 13, 1988. On the basis of these allegations, the trial court correctly dismissed the Complaint with prejudice, determining that SWFWMD was immune from liability pursuant to Fla. Stat. §373.443 (1987). Section 373.443 expressly provided:

> **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.

On appeal, the District Court improperly reversed the decision of the trial court, concluding that the grant of immunity to water management districts under §373.443 was limited to "planning functions." While it is well settled that a "planning function/operational function" analysis is appropriate to determine the scope of the **waiver of sovereign immunity**, under Fla. Stat. §768.28 (1989), this same analysis is inappropriate to

determine the scope of the **grant of immunity** to the water management districts under §373.443.

Under well established rules of statory construction and interpretation, it is clear that §373.443 controls in the instant case. First and foremost, the legislature was clear and unambiguous in its intent that water management districts remain free from liability for their management and control of surface waters. The legislature strongly reaffirmed this intention in 1989 when it extended the scope of immunity granted under §373.443. In addressing this exact issue, the federal district courts, federal courts of appeal and the United States Supreme Court have all held that the enactment of the Federal Tort Claims Act (waiving immunity) had no effect whatsoever on a previously enacted grant of immunity under the Federal Flood Control Act. Additionally, any perceived conflict between §768.28 and §373.443 must be resolved in favor of §373.443, as it is the more narrowly drawn statute.

Finally, the District Court's interpretation of §373.443 improperly narrowed a clear and unambiguous statute. In so doing, the Court ignored the legislative mandates set forth in §§373.616--373.6161 that the provisions of the Florida Water Resources Act be **liberally** construed, and the judicial mandate that any waiver of sovereign immunity be **strictly** construed.

Respondents' Complaint against SWFWMD is precisely that type of case from which the legislature intended the state and water management districts remain immune. Floods and property

damage from flood waters are a peril of life in Florida. As such, the state has undertaken, as only the state can, to provide water management and flood control works for the general welfare of its citizens. Clearly, the enormous commitment of resources for the management and control of surface waters requires the state to limit its exposure to liability.

## Point One

**SECTION 373.443, FLORIDA STATUTES (1987), PROVIDES IMMUNITY TO FLORIDA'S WATER MANAGEMENT DISTRICTS WITH RESPECT TO THEIR MANAGEMENT AND CONTROL OF SURFACE WATERS.**

In 1972, the Florida legislature enacted the Florida Water Resources Act. 1972 Fla. Laws ch. 299; Fla. Stat. §§373.012--373.619 (1987). Declaring that the waters of the state of Florida are among its basic resources, the legislature passed this act, in part, to:

- provide for the management and control of the state's water;
- develop and regulate dams, impoundments, reservoirs, and other works;
- prevent damage from floods and excessive drainage;
- promote the health, safety and general welfare of the people of Florida . . .

Fla. Stat. §373.016(1), (2)(a), (c), (d), (h) (1987).

Significantly, the legislature expressly provided for an immunity from liability to the State and water management districts, as follows:

> **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.

Fla. Stat. §373.443 (1987).

However, in the case sub judice, the District Court of Appeal concluded that any interpretation of §373.443 which allows SWFWMD "complete tort immunity" would conflict with §768.28, Florida Statutes (1989). Section 768.28 was passed by the Florida legislature in 1973 (one year subsequent to the passage of §373.443) as a limited waiver of sovereign immunity in tort actions against the State, its subdivisions and agencies. 1973 Fla. Laws ch. 313; Fla. Stat. §768.28 (1989).

Although the waiver of sovereign immunity under §768.28 is specifically limited to the extent provided in the Statute, it does provide for the recovery of damages in tort, for loss of property caused by negligent or wrongful acts or omissions of any employee of the agency or subdivision. Id. Thus, there appears to be a conflict between §373.443 (granting immunity) and §768.28 (waiving immunity) with respect to the liability in tort of a water management district for property damage caused by its acts or omissions. **Any apparent conflict, however, is illusory.**

a. The legislature intended that water management districts remain immune from liability for the management and control of surface waters, in spite of the subsequent enactment of §768.28.

The paramount rule of statutory construction is that legislative intent is the "polestar" by which statutes are to be

construed. Parker v. State, 406 So. 2d 1089, 1092 (Fla. 1982); State v. Webb, 398 So. 2d 820, 824 (Fla. 1981); DeBolt v. Department of Health and Rehabilitative Services, 427 So. 2d 221, 224 (Fla. 1st DCA 1983). In analyzing legislative intent, it is often necessary to analyze not only the intent expressed in a statute, but also the history of the statute, as well as committee reports and other congressional indicia of legislative intent.

The history of Chapter 373, Fla. Stat., reveals that this Chapter was substantially derived from "A Model Water Code." Frank E. Maloney et al., A Model Water Code (1972) [hereinafter Model Water Code]; see 1972 Fla. Laws ch. 299. Significantly, §4.13 of the Model Water Code contains virtually identical language to §373.443, Fla. Stat. Of further significance is the interpretive commentary to §4.13 of the Model Water Code which 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.

Model Water Code at §4.13.

As stated above, the policy of the Florida legislature, by enacting the Florida Water Resources Act, was in part to prevent floods and excessive drainage. Fla. Stat. §373.016(2)(d) (1987). In the case sub judice, the gravamen of the respondents' complaint is that SWFWMD negligently failed to open certain flood gates and/or locks in sufficient time to provide drainage for the respondents' lands, thereby causing flood damage during the

severe rainstorm event of September 7, 1988 through September 13, 1988.

As indicated by the Model Water Code, the purpose of §373.443 is "that the state or water management districts assume no liability in carrying out the provisions of this chapter." Model Water Code at §413. It is the position of SWFWMD that the purpose of the immunity under §373.443 is a "good Samaritan" rationale, whereby the government agreed to act in the capacity of providing flood relief, on the proviso that it would not be exposed to the tremendous potential liability which might ensue in the event of flood damages caused by negligent control or a structural failure.

Moreover, analysis of the legislative intent concerning any continued immunity provided in §373.443 following the subsequent enactment of §768.28 is simplified by the 1989 amendments to §373.443. In 1989, the Florida legislature expressly extended the immunity granted to the water management districts by adding "storm water management systems" to the list of systems whose management and control are immune from liability. 1989 Fla. Laws ch. 279; Fla. Stat. §373.443 (1989). By extending the scope of immunity in 1989, the legislature made clear its intention that §373.443 retain its full force and effect following the enactment of §768.28.

In addition to the foregoing, there is a presumption of sovereign immunity absent an express waiver by the legislature. Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4,

5 (Fla. 1984). Thus, it follows that in its codification of the water management districts' immunity from liability under §373.443 **prior** to the enactment of §768.28, the legislature was unequivocal in its intent that these entities remain free from liability for damages resulting from their:

- Control or regulation of dams, impoundments, reservoirs, appurtenant work or works.
- Measures taken to protect against failure during an emergency.

Fla. Stat. §373.443(3), (4) (1987).

Despite §768.28, §373.443 demonstrates that sovereign immunity remains the rule in Florida, rather than the exception. Pan-Am Tobacco Corp., 471 So. 2d at 5. By its very terms, §373.443 defines and dictates the circumstances in which the state's water management districts are immune from tort. Simply put, §373.443 governs, and liability does not attach as a result of a water management district's control or regulation of surface waters, or as a result of measures taken to protect against failure in an emergency. Therefore, use of the traditional tort analysis under §768.28 is inapplicable to those situations falling within the ambit of §373.443.

> b. Where Florida and federal statutes are substantially similar, and the Florida statute was enacted after the federal statute, construction of the federal law by the federal courts is persuasive in construing §373.443.

In Brown v. State, 426 So. 2d 76 (Fla. 1st DCA 1983), the court stated:

> 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.

Id. at 88, n. 19; Accord, City of Orlando v. Florida Public Employees Relations Comm'n, 435 So. 2d 275 (Fla. 5th DCA 1983), (citing, International Brotherhood of Painters v. Anderson, 401 So. 2d 824 (Fla. 5th DCA 1981)).

Section 373.443, Fla. Stat., is similar in purpose to the immunity provided federal government by the United States Flood Control Act of 1928, which states in pertinent part that:

> . . . 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 . . .

33 U.S.C. §702(c) (1970).

This section has been construed to provide the federal government with immunity from liability for flood damages resulting from the operation of federally constructed flood control projects, regardless of whether negligence is alleged or proven. See Florida East Coast Railway Co. v. United States, 519 F. 2d 1184 (5th Cir. 1975); Peterson v. United States, 367 F. 2d 271 (9th Cir. 1966); National Manufacturing Co. v. United States, 210 F. 2d 263 (8th Cir. 1954), cert denied, 347 U.S. 967; Clark v. United States, 218 F. 2d 446 (9th Cir. 1954).

The rationale for federal government maintaining immunity with regard to flood control activities is aptly stated in National Manufacturing, the leading case in this area, as follows:

> 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 damages from or by floods or flood waters 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 catastrophies 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 the flood occurs, notwithstanding the great government works undertaken to minimize them. . . .
>
> 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 undertaking to reduce flood damages. . . .
>
> 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.** (Emphasis added)

210 F. 2d at 270, 271.

In National Manufacturing, it is significant to note that the case involved allegations of negligence for alleged failure to warn of impending flood conditions. Applying its "good Samaritan" rationale, the court found that immunity was applicable. Likewise, this same "good Samaritan" rationale was accepted in Florida East Coast Railway Co., Clark and Peterson, supra.

Although the interaction between the immunity granted to the state and water management districts under §373.443 and the waiver of immunity under §768.28 is an issue of first impression before this Court, federal courts, including the United States Supreme Court, have also had the opportunity to address substantially the same issue.

As previously set forth herein, §702(c) of the United States Flood Control Act is similar in purpose to §373.443, Fla. Stat. (1987). Subsequent to the enactment of §702(c), Congress passed the Federal Tort Claims Act which, like Florida Statute §768.28, constituted a limited waiver of the federal government's sovereign immunity. 28 U.S.C. §2671 (1965). See United States v. James, 106 S. Ct. 3116 (1986); Florida East Coast Railway Co. v. United States, 519 F. 2d 1184 (5th Cir. 1975); Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979).

In Florida East Coast Railway Co. v. United States, 519 F. 2d (5th Cir. 1975), the Fifth Circuit Court was confronted with the issue of whether federal immunity under §702(c) of the Flood Control Act was implicitly repealed by the Federal Tort Claims Act. Contrary to the contention of the appellant, the Court concluded that the specific statute granting immunity was not implicitly repealed by passage of the Federal Tort Claims Act. Id. at 1191. In reaching this conclusion, the Court reasoned that repeal by implication would not be lightly assumed, in view of the importance of §702(c) to the overall flood control

program. Id. at 1192. Thus, §702(c) remained in full force and effect, creating an exception to the waiver of immunity granted by the Tort Claims Act. Id. at 1192-1193.

In 1986, the United States Supreme Court had occasion to address the scope of federal immunity under §702(c) in United States v. James, 478 U.S. 597 (1986). James arose from the drowning deaths of recreational boaters who died when they were swept through discharge points of reservoirs on federal flood control projects after discharge gates were opened to alleviate a potential flood. Id. at 3118.

In James, the Supreme Court began its analysis by noting that the plain language of the statute is the starting point in statutory interpretation. Id. at 3120. The Supreme Court further noted that it has consistently held that the language of the statute itself is conclusive in the absence of clear legislative intent to the contrary. Id. at 3121. Finally, the Court recognized that the applicable principle in this case was that a specific waiver of immunity was required in order to allow a tort action. Id. at 3123. On these facts, the Supreme Court held that under §702(c), the Federal Government was immune from liability, reasoning that ". . . our role is to effectuate Congress' intent, . . . If that provision [§702(c)] is to be changed, it should be by Congress and not by this Court. Id. at 3125.

Finally, in Powers v. United States, 787 F. Supp. 1397 (M.D. Ala. 1992), the District Court addressed the issue of governmental immunity under §702(c) in a situation where the plain-

tiff brought claims under the Federal Tort Claims Act as a result of damages suffered from flooding. The District Court, citing United States v. James and Florida East Coast Railway Co. v. United States, supra, noted that federal immunity under §702(c) was not abrogated by the subsequent enactment of the Federal Tort Claims Act. Powers, 787 F. Supp. at 1399.

Significantly, the District Court in Powers stated that the threshold determination was whether a pending cause of action was within the scope of the immunity protection provided under §702(c). Id. at 1399. If §702(c) applied to the action, then the action was barred and subject to dismissal, notwithstanding the provisions of the Federal Tort Claims Act. Id. at 1399. In Powers, the Court held that §702(c) applied, and dismissed the action against the United States. Id. at 1401.

As clearly illustrated by the above authorities, a statute granting immunity in a specific instance is not in conflict with, nor is it repealed by, a subsequently enacted waiver of immunity. More particularly, these same federal authorities dictate that federal immunity for actions involving flood control is an exception to subsequent statutes which generally waive sovereign immunity.

The reasoning applied in the federal authorities, supra, directly applies to, and is persuasive authority in the instant case. Again, where a state and federal statute are nearly identical, and the former is enacted after the latter, construction of the federal law by the Supreme Court will be given great

weight. Hightower v. Bigoney, 156 So. 2d 501, 505 (Fla. 1963); Davis v. Strople, 39 So. 2d 468, 470 (Fla. 1949) (Barnes, J., concurring in part, dissenting in part); O'Loughlin v. Pinchback, 579 So. 2d 788, 791 (Fla. 1st DCA 1991). Indeed, this Court in construing §768.28 in Commercial Carrier Corp., supra, found persuasive the United States Supreme Court's construction of the similar Federal Tort Claims Act. Commercial Carrier Corp., 371 So. 2d at 1016-1017.

In the case sub judice, §373.443 of Florida's Water Resources Act, like §702(c) of the Federal Flood Control Act, is a grant of immunity to Florida's water management districts **under specific circumstances**. Furthermore, §373.443 is an exception to §768.28's general waiver of sovereign immunity, just as §702(c) is an exception to the general waiver of sovereign immunity under the Federal Tort Claims Act.

Of final significance, the Federal Tort Claims Act contains an express exception for discretionary acts. 28 U.S.C. §2680(a) (1965); see also Commercial Carrier Corp., 371 So. 2d at 1017. It is well settled that Florida's waiver of sovereign immunity impliedly excepts discretionary acts. Commercial Carrier Corp., 371 So. 2d at 1022. In spite of such an express exception for discretionary acts, none of the federal cases which construed §702(c) (granting immunity) and the Federal Tort Claims Act (waiving immunity) advanced an operational/planning level analysis, as did the District Court in the case at bar. Instead, the threshold question was the application of §702(c). Powers,

787 F. Supp. at 1399. Again, if §702(c) was found to apply, then there was no need for analysis under the Federal Tort Claims Act.

Like the federal cases, the threshold inquiry was at the trial court, and should be, the applicability of §373.443. If §373.443 applies, as it does in the instant case, then traditional tort analysis under §768.28 is inappropriate and unnecessary.

## Point Two

**CONFLICT, IF ANY, BETWEEN §373.443 AND §768.28 IS RESOLVED IN FAVOR OF IMMUNITY FOR THOSE CAUSES OF ACTION WITHIN THE SCOPE OF §373.443.**

a. The legislature intended that the state and water management districts retain limited immunity under §373.443 subsequent to the enactment of §768.28.

As stated supra, the District Court of Appeal in the case sub judice concluded that any interpretation of §373.443 which allows SWFWMD "complete tort immunity" would conflict with §768.28. Nanz v. Southwest Florida Water Management District, 18 Fla. L. Weekly at D885.

Assuming arguendo that §373.443 and §768.28 are in conflict, it is the Court's duty to adopt an interpretation which harmonizes the statutes and which gives effect to both. Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987); Carawan v. State, 515 So. 2d 161, 168 (Fla. 1987); Wakulla County v. Davis, 395 So. 2d 540, 542 (Fla. 1981). This

duty arises from the presumption that the legislature passes subsequent enactments with full awareness of all prior enactments. Palm Harbor, 516 So. 2d at 250. Furthermore, it is presumed that the legislature intended the previous enactment to remain in force absent evidence to the contrary. Id.

The analysis in Palm Harbor was utilized by the court in Betancourt V. Metropolitan Dade County, 393 So. 2d 21 (Fla. 3d DCA 1981), which closesly parallels the instant case. In Betancourt, the appellant's decedent sued Dade County alleging negligent inspection by a county inspection station. Subsequently, the trial court **dismissed the complaint with prejudice**, finding the County immune from liability pursuant to §325.29, Fla. Stat. (1977), which granted immunity to motor vehicle inspectors and inspection stations.

On appeal, the issue before the District Court was the relationship between §325.29 and the subsequently enacted §768.28. In affirming the trial court's dismissal of the complaint with prejudice, the District Court held that there was "no impediment to the simultaneous and harmonious co-existence of sections 325.29 and 768.28 . . ." Id. at 22. The District Court further held that the legislature has the power to waive sovereign immunity generally, while retaining specific exceptions to the waiver. Id.

In light of the foregoing, the specter of conflict between §373.443 and §768.28 disappears. What emerges is the presumption that the Florida legislature, by enacting §768.28,

intended a limited waiver of sovereign immunity in tort, while simultaneously intending that immunity remain in effect for the State and water management districts for their management and control of surface waters under §373.443. Thus, §373.443 and §768.28 are not incompatible, incongruous, or even in conflict.

Read in pari materia, §373.443 and §768.28 simply and clearly delineate when the State and water management districts are and are not liable in tort. Again, when an action arises as a result of the water management districts' control on regulation of the surface waters, or as a result of measures taken to protect against failure in an emergency, §374.443 controls and liability does not attach. However, for actions against water management districts beyond the scope of §373.443, §768.28 applies to the extent permitted by the Statute and relevant case law.

b. Section 373.443, as a specific statute providing immunity to the state and water management districts, controls over the general waiver of sovereign immunity provided in §768.28 for all causes of action within the scope of §373.443's immunity protection.

In Florida, it is a basic tenet of statutory construction that a statute covering a specific subject controls over a general statute. Gretz v. Florida Unemployment Appeals Commission, 572 So. 2d 1384, 1386 (Fla. 1991); Palm Harbor Special Fire Control Dist., 516 So. 2d at 251; Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959). Therefore, the effectiveness of a prior, more specific statute is retained unless it is the manifest

intention of the legislature that a subsequent, general statute should supersede it. State v. Dunmann, 427 So. 2d 166, 168 (Fla. 1983); Floyd v. Bentley, 496 So. 2d 862, 864 (Fla. 2d DCA 1986).

In the instant case it is clear that §373.443 is a more narrowly drawn statute than §768.28. Section 373.443 grants immunity to the state and water management districts, but only with respect to the management and storage of surface waters. Fla. Stat. §373.443 (1987). On the other hand, §768.28 is a broad-based waiver of sovereign immunity for liability in torts applying to the state, as well as its agencies and subdivisions. Fla. Stat. §768.28 (1989). Nevertheless, §768.28 cannot be construed as a complete waiver of sovereign immunity. Trianon Park Condominium Ass'n, Inc. v. City of Hialeah, 468 So. 2d 912, 917 (Fla. 1985). Indeed, the actual language of §768.28 limits the waiver to the extent specified in the act. Fla. Stat. §768.28(1) (1989).

On the foregoing authorities, it is apparent that §373.443, as the more narrowly drawn, specific statute, controls over the general waiver of sovereign immunity provided in §768.28 in all causes of action within the scope of its immunity protection.

## Point Three

**THE SECOND DISTRICT COURT OF APPEAL ERRED IN ITS INTERPRETATION OF §373.443.**

a. The District Court of Appeal improperly narrowed the scope of immunity granted to the state and water management districts under §373.443.

In Florida it is well settled that courts are without power to adopt an interpretation of an unambiguous statute which extends, modifies or limits its express terms. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984); See also Lacentra Trucking, Inc. v. Flagler Federal Savings and Loan Association of Miami, 586 So. 2d 474 (Fla. 4th DCA 1991). Such an interpretation would be an abrogation of legislative power. Holly, 450 So. 2d at 219.

Again, the express terms of §373.443 provide immunity to the state and water management districts for:

(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.

Fla. Stat. 373.443 (1987).

In its opinion, the Second District Court interpreted §373.443 to provide immunity to the water management districts 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." (Emphasis supplied.) Nanz v. Southwest Florida Water Management District, 18 Fla. L. Weekly D884, D885 (Fla. 2d DCA March 31, 1993).

By engrafting the phrase "by reason of their permits, regulations and orders . . .", the District Court has interpreted subsections (3) and (4) of §373.443 completely out of the Statute. In particular, the District Court's interpretation of §373.443 fails to consider the scope of the word "control."

"Control" is defined in Webster's Seventh New Collegiate Dictionary (1971) as follows:

> 1a: An act or instance of controlling
> 1b: Skill in the use of a tool, instrument, technique or artistic medium
> 1c: Direction, regulation, and coordination of production, administration, and other business activities.

In the instant case, the District Court limited the immunity provided under §373.443 to situations where water management districts exercise regulatory type control as exemplified by subsections (1) and (2) of §373.443. However, the District Court ignores that §373.443(3) and (4) also gives water management districts immunity for operational control of its dams, impoundments and works in both emergency and non-emergency sitations. Thus, the District Court has improperly modified and limited the plain and unambiguous language of the immunity statute, which contradicts the rule enunciated in Holly.

As seen above, the District Court has improvidently concluded that the scope of §373.443 constitutes "planning functions of SWFWMD as opposed to its operational activities." Nanz,

18 Fla. L. Weekly at D885. This Court in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), adopted an operational/planning level analysis in order to give depth and breadth to and to determine the extent of the waiver of sovereign immunity under §768.28, which was enacted subsequent to §373.443. Thus, it follows that the operational/planning level analysis is judicially specific to §768.28, but inapplicable to §373.443. As illustrated by Powers v. United States and Betancourt v. Metropolitan Dade County, supra, the terms of §373.443 are the proper threshold inquiry, rather than a resort to traditional tort analysis.

b. The District Court failed to utilize both judicial and legislative mandates in its construction of §373.443 and §768.28.

In Florida, sovereign immunity is the rule rather than the exception. Pan-Am Tobacco Corp., 471 So. 2d at 5. Thus, a waiver of sovereign immunity, as granted by §768.28, is strictly a matter of legislative largesse. Tampa-Hillsborough County Expressway Auth. v. K. E. Morris Alignment Serv. Inc., 444 So. 2d 926, 928 (Fla. 1983). Accordingly, this Court has mandated that such a waiver be strictly construed in favor of the state and against the claimant. Id. at 928; Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977).

In contrast, §373.443 is an express grant of immunity from the legislature. This grant of immunity is an integral

portion of an overall legislative plan to provide for the management, conservation and utilization of the state's waters under the Florida Water Resources Act. Fla. Stat. §§373.012--373.619 (1987). In order to effectuate the express public policy of the Act, the legislature mandated that **each provision** of the Act "shall be liberally construed in order to effectively carry out its purposes." Fla. Stat. §373.616. Furthermore, the legislature emphasized this point by also mandating that **the entire** Act be "construed liberally for effectuating the purposes described herein, . . . " Fla. Stat. §373.6161; See also Pinellas County v. Lake Padgett Pines, 333 So. 2d 472, 479 (Fla. 2d DCA 1976).

In light of the foregoing, any analysis of §373.443 and §768.28 must consider both the judicial mandate that §768.28 be strictly construed in favor of the state, together with the legislative mandate that §373.443 be liberally construed in order to effectuate the purposes of the Act. Viewed in tandem, it becomes clear that both judicial and legislative mandates require that §373.443 provide immunity to the water management districts in the case at bar.

However, in its decision the District Court's perfunctory analysis merely states the conclusion that "[t]he immunity granted appears to be related to the planning functions of SWFWMD . . . ." Nanz, 18 Fla. L. Weekly D886 (Fla. 2d DCA March 31, 1993). Although we are left to guess at the Court's reasoning, it is evident that they simply failed to accord §373.443 the liberal construction dictated by the legislature. Furthermore,

it is also evident that the Court failed to strictly construe §768.28, in favor of the state. Consequently, the District Court's decision failed to follow express judicial and legislative mandates. As such, the District Court's decision is erroneous.

## Point Four

SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT IS IMMUNE FROM SUIT IN THE INSTANT CASE PURSUANT TO §373.443.

In order to effectuate the purposes of the Florida Water Resources Act, the legislature specifically empowered the water management districts to "establish, maintain, and regulate water levels in all canals, lakes, rivers, channels, reservoirs, streams, or other bodies of water owned or maintained by the district . . . ." Fla. Stat. §373.086(1) (1987).

It bears repeating that §373.443 (1987) expressly provided 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 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 works, or **works** regulated under this chapter.
(4) **Measures taken to protect against failure during emergency.**

Fla. Stat. §373.443 (1987). (Emphasis added.)

Finally, §373.403(3) and (5) define "impoundment" and "works," respectively, as:

(3) "Impoundment" means any lake, reservoir, pond, or other containment of surface water occupying a bed or depression in earth's surface and having a discernible shoreline.

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

In the instant case, Paragraph 12 of the respondents' Complaint alleged that SWFWMD "undertook the installation, operation, control, and maintenance of a drainage system" which consists of natural bodies of water, including Pemberton Creek and Baker Creek, which flow into Lake Thonotosassa. (R. 3) Clearly, this allegation declares that SWFWMD was engaged in the **management and control** of surface waters as defined by Fla. Stat. §373.019(10) (1987). Therefore, the allegation places the Complaint within that part of the Florida Water Resources Act to which §373.443 applies.

Moreover, respondents' specific allegations of negligence against SWFWMD, contained in Paragraphs 15A through C bring the Complaint within the scope of immunity provided to SWFWMD under §373.443. (R. 4-5). In Paragraph 15A of the Complaint,

the respondents allege that SWFWMD "failed to properly maintain, operate and open flood gates and/or locks." (R. 4). Certainly, flood gates and locks are "structures" under the statutory definition of "works" within §373.403(5). Further, in Paragraph 15B of the Complaint, the respondents allege that SWFWMD "failed to properly regulate the flow of water in the creeks, rivers, canals, and lakes . . . [so as to] block the natural flow of water . . . ." (R.4). Put simply, Paragraphs 15A and 15B of the respondents' Complaint together allege that SWFWMD failed to control the water level of Lake Thonotosassa. As noted above, SWFWMD is empowered by the legislature to control water levels in all lakes and reservoirs. §373.086(1) (1987). The control and regulation of lakes and reservoirs is made expressly immune from liability under §373.443(3). Accordingly, SWFWMD is immune from liability for allegations 15A and 15B.

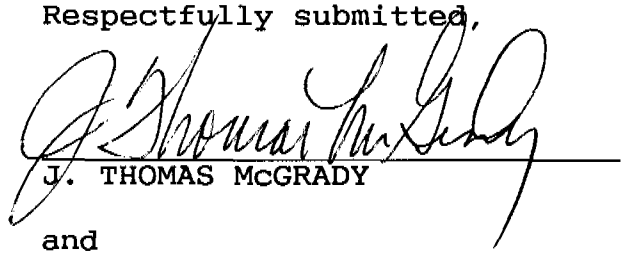
Paragraph 15C alleges that SWFWMD "failed to properly dredge, clean, and otherwise operate, control, and/or maintain the drainage system . . . ." (R. 5). It is clear from the face of the Complaint that Pemberton Creek and Baker Creek connect to and drain water into Lake Thonotosassa. (R. 3). Thus, both creeks fall within the definition of "works" pursuant to §373.403(5). Concurrently, both Pemberton and Baker Creeks also fall within the definition of "impoundment" under §373.403(3). Because this allegation pertains to SWFWMD's control or regulation of a work or impoundment, SWFWMD remains immune from liability.

To summarize, the specific allegations of the respondents' Complaint against SWFWMD all fall within the scope of immunity of §373.443(3), (4), which grant SWFWMD immunity for control or regulation of impoundments and works and during emergency situations. Accordingly, the decision of the District Court, Second District, should be quashed with instructions to reinstate the Order of the trial court dismissing the Complaint with prejudice.

## CONCLUSION

In light of the foregoing arguments and authorities, it is clear that the District Court of Appeal, Second District, erred in reversing the Order of the trial court dismissing the Complaint with prejudice. Accordingly, the petitioner, SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, respectfully submits that the decision of the District Court be quashed, and the Order of the trial court dismissing the Complaint with prejudice be reinstated.

Respectfully submitted,



J. THOMAS McGRADY

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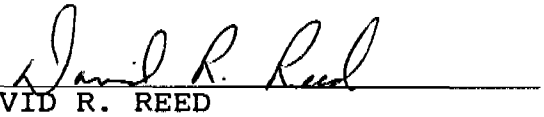

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by U. S. Mail to Mr. Ted A. Barrett, 499 Patricia Av., Suite C, Dunedin, FL 34698, on this 14th day of June, 1993.

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