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.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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

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TABLE OF CONTENTS

Page(s)

Table of Contents . . . . . i, ii

Table of Citations . . . . . iii, iv

Argument -- Point One on Appeal 1-8

THE FLORIDA WATER RESOURCES ACT EMPOWERS THE WATER MANAGEMENT DISTRICTS TO DO MORE THAN ISSUE PERMITS AND PROMULGATE REGULATIONS.

a. The Florida Legislature intended that water management districts remain immune from liability for their management and control of surface waters.

b. Section 373.443 and Cal. Water Code §6028 are similar in purpose and effect.

c. DeBolt is not disposative of the issues involved in the case at bar.

Argument -- Point Two 9-10

THE FLORIDA SUPREME COURT HAS UTILIZED ANALOGOUS FEDERAL STATUTES AND CASE LAW TO AID IN ITS ANALYSIS OF NOVEL LEGAL ISSUES.

Argument -- Point Three 10-12

THE APPLICATION OF §373.443 IS A THRESHOLD DETERMINATION SUCH THAT THERE ARE NO IMPEDIMENTS TO THE SIMULTANOUS AND HARMONIOUS CO-EXISTENCE OF §373.443 AND §768.28.

a. Sections 373.443 and 768.28 do not conflict.

b. The plain language of §373.443 provides immunity to SWFWMD in the present case.

Argument -- Point Four 12-14

THE DISTRICT COURT OF APPEAL IMPROPERLY NARROWED THE SCOPE OF IMMUNITY GRANTED TO THE STATE AND WATER MANAGEMENT DISTRICTS UNDER §373.443.

TABLE OF CONTENTS, Continued

Page(s)

Conclusion 14-15

Certificate of Service 15

Appendix

TABLE OF CITATIONS

Cases	Page(s)
Betancourt v. Metropolitan Dade County, 393 So. 2d 21 (Fla. 3d DCA 1981)	8, 10
Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362 (Fla. 1977)	11
Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979)	9, 10, 13
DeBolt v. Department of Health and Rehabilitative Services, 427 So. 2d 221 (Fla. 1st DCA 1983)	6, 7
Holly v. Auld, 450 So. 2d 217 (Fla. 1984)	11, 14
Nanz v. Southwest Florida Water Management District, 617 So. 2d 735 (Fla. 2d DCA 1993)	10, 13
Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249 (Fla. 1987)	7
Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984)	13
Rabin v. Lake Worth Drainage Dist., 82 So. 2d 353 (Fla. 1955)	13
United States v. James, 478 U.S. 597 (1986)	10

Statutes	Page(s)
Florida Statutes	
§325.29 (1977)	8
§373.086(1)(1987)	2
§373.426(2)(1987)	4
§373.439 (1987)	4
§373.443 (1987)	6, 7, 9, 11
§373.443(3) (1987)	4, 14
§373.443(4) (1987)	14

TABLE OF CITATIONS, Continued

Statutes, Continued — **Page(s)**

§373.616 (1987) 11
§373.6161 (1987) 11
§402.34 (1977) 7
§768.28 (1989) 7, 8, 9, 11

California Water Code
§6028 (1971) 5

Federal Statutes
33 U.S.C. §702(c) (1970) 9

Other Authorities

Frank E. Maloney, et al. A Model Code, (University of Florida Press, 1972) 1, 3, 4, 5

Frank E. Maloney, et al., Florida Water Law (University of Florida Pub. 1980) 1, 2

Point I

THE FLORIDA WATER RESOURCES ACT EMPOWERS THE WATER MANAGEMENT DISTRICTS TO DO MORE THAN ISSUE PERMITS AND PROMULGATE REGULATIONS.

a) The Florida Legislature intended that water management districts remain immune from liability for their management and control of surface waters.

It is undisputed that the Florida Water Resources Act, Florida Statutes §§373.012--373.619 (1987) (hereinafter "the Act" or "Chapter 373"), is substantially derived from "A Model Water Code." Frank E. Maloney, et al., A Model Water Code (1972) (hereinafter Model Code). Respondents advocate a "thorough reading" of the Model Code, Chapter 373, and Frank E. Maloney et al., Florida Water Law (1980) (hereinafter Florida Water Law), as necessary to an understanding of the legislative intent behind Chapter 373. While SWFWMD joins in respondents' call for a thorough reading of these writings, it disagrees with the respondents' ultimate conclusion that Chapter 373 is nothing more than a vast mechanism created for issuing permits and promulgating regulations.

To support their interpretation of the legislative intent behind Chapter 373, respondents selectively cite those portions of Florida Water Law pertaining to the Model Code which reference permits, permitting, rules and regulations. Respondents' interpretation, however, ignores that Chapter 373 is

greater in scope than simply granting permits and promulgating rules and regulations. Specifically, Chapter 373 also empowers water management districts to own and operate dams, reservoirs, etc. Fla. Stat. §373.086(1) (1987).

A complete reading of Florida Water Law reveals that the quoted portion of this treatise in respondents' brief is drawn entirely from one subsection of the work which deals exclusively with "water use permits." Furthermore, Florida Water Law contains a specific section concerning the water management districts as created by Chapter 373. In this section the authors note:

> The governing boards [of the water management districts] are also granted broad powers to carry out public works projects within their districts.
>
> *****
>
> The legislature expressed its clear intention more than once that water management districts should have the power to conserve, protect, manage and control the waters of the state . . . Those powers include authority to: . . . plan, construct, operate and maintain works of the district, [and] determine, establish and control the level of waters to be maintained in all bodies of water controlled by the district . . . .

Florida Water Law at 210-211 (citations omitted)

Of greater significance to the resolution of the question before this Court are the provisions of Chapter 373 itself. Section 373.086(1) states:

> (1) In order to carry out the works for the district, and for effectuating the purposes of this chapter, the governing board is authorized to clean out, straighten, enlarge,

> or change the course of any waterway, natural or artificial, within or without the district; **to provide** such canals, levees, dikes, **dams**, sluiceways, **reservoirs**, holding basins, floodways, pumping stations, bridges, highways, and other works and facilities which the board may deem necessary; 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; to cross any highway or railway with works of the district and to **hold, control, and acquire** by donation, lease, or purchase, or to condemn any land, pulic or private, needed for rights-of-way or other purposes, and may remove any building or other obstruction necessary for the **construction, maintenance, and operation** of the works; and to hold and have **full control** over the works and rights-of-way of the district.

Contrary to the respondents' assertions, the legislature, by enacting Chapter 373, clearly intended that water management districts take an active role, not only in the permitting and regulation of privately owned works, but also in the construction, operation and maintenance of public works for the public benefit.

In their analysis of the Model Code, respondents contend that the immunity provided for by §4.13, from which §373.443 was derived, is limited by the commentary to §4.13 which includes the phrase "in carrying out the provisions of this chapter." From this, the respondents continue with their ultimate conclusion that the immunity is limited to situations involving issuing permits and promulgating regulations.

A closer review of the commentary to Chapter 4 of the Model Code reveals that "[t]his chapter is concerned neither with the mechanics of use permits nor with the underlying policy thereof. Instead, it deals with the management and storage of surface water and with the works necessary to these ends." Model Code at 220.

Indeed, several sections of Chapter 373, Part IV, which contains the immunity provision and which was partially derived from Model Code Chapter 4, concern areas beyond permits and regulations. For example, Fla. Stat. §373.426(2) (1987) allows the water management districts to assume the operation and control of abandoned dams, reservoirs, impoundments, etc. Fla. Stat. §373.439 (1987) directs the water management districts in the event of an emergency. Finally, the immunity provision itself states that no action can be brought against a water management district for control or regulation of dams, reservoirs, etc., regulated under **this chapter**. Fla. Stat. §373.443(3) (1987). Thus, the plain language of the immunity statute encompasses the whole of Chapter 373 pertaining to the management and control of surface waters.

Moreover, in discussing the general powers and duties of the water management districts, the Model Code authorizes governing boards to "[c]onstruct, maintain and operate works for flood control and water resource development and exercise all the rights of ownership over waters contained within such works." Model Code §1.17(5) at 132. Commentary to this subsection notes

that "[s]ubsection (5) gives the district the power to construct works and exercise control over the waters therein." Id. Here the word "control" clearly encompasses operational activities. Thus, the Model Code and Chapter 373 clearly indicate that the immunity provision applies to more than just the water management districts' issuance of permits and promulgation of regulations.

(b) Section 373.443 and Cal. Water Code §6028 are similar in purpose and effect.

Respondents' comparison of §373.443 with its California counterpart also lacks comprehensive analysis. California's immunity provision states **in its entirety 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 ground that such defendant is liable by virtue of any of the following:
> (a) The approval of the dam or reservoir.
> (b) The issuance or enforcement of orders relative to maintenance or operation of the dam or reservoir.
> (c) Control and regulation of the dam or reservoir.
> (d) Measures taken to protect against failure during an emergency.

Cal. Water Code §6028 (West 1971).

Similarly, §373.443 states in its entirety that:

> 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). Viewed as a whole, the California statute is not as dramatically different from §373.443 as respondents argue. The two statutes simply use different language to accomplish the same goal, to wit: to immunize water management districts from liability in the exercise of both their regulatory and operational control of dams, reservoirs, etc.

Respondents further argue that, despite its immunity statute, California water management districts can still be held liable in tort for nuisance, dangerous and defective condition of property, statutory liability, and vicarious liability. While this may be correct in California, respondents did not allege any similar causes of action against SWFWMD in their complaint. Accordingly, this argument is not germane to the issues presented by the certified question.

> (c) DeBolt is not disposative of the issues involved in the case at bar.

Respondents rely on DeBolt v. Department of Health and Rehabilitative Services, 427 So. 2d 221 (Fla. 1st DCA 1983) as a case analagous to the instant case. However, respondents' reliance is misplaced for two reasons. First, in DeBolt the issue before the District Court was the relationship between

§768.28 and Fla. Stat. §402.34 (which ostensibly provided immunity to HRS). However, §402.34, entitled "Body corporate", was only intended to provide HRS with its corporate powers and the capacity to administer Chapter 402. DeBolt, 427 So. 2d at 224. The exclusion of suits in tort in the "Body corporate" statute was not a specific grant of immunity but was merely an expression of the immunity laws as they existed in 1969 when the statute was first enacted. See Id. at 224-225, 226. In contrast, §373.443 is entitled "Immunity from liability." The entire statute specifically pertains to the state and water management districts immunity from liability under particular circumstances. Thus, §373.443 and §402.34 are dissimilar in both purpose and effect.

Second, despite respondents' contention that the District Court "reconciled" §768.28 with §402.34, Answer Brief at p. 15, DeBolt is clearly a case of implied repeal. DeBolt, 427 So. 2d at 225. Implied repeal is disfavored by this Court, Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987), and respondents have not argued implied repeal in this case. Therefore, it is inconsistent for respondents to analogize DeBolt to the case sub judice in their Argument I, while simultaneously maintaining in their Argument III that implied repeal is not favored by the Court. Answer Brief pp, 24, 25.

The most analagous case, which was neither rebutted nor distinguished by the respondents, is Betancourt v. Metropolitan

Dade County, 393 So. 2d 21 (Fla. 3d DCA 1981) rev. denied 402 So. 2d 608 (Fla. 1981). The issue before the District Court in Betancourt was the relationship between Fla. Stat. §325.29 (1977) granting immunity to automobile inspectors and inspections stations, and the subsequently enacted §768.28 waiving immunity. In affirming the Trial Court's **dismissal with prejudice**, the District Court found "no impediment to the simultaneous and harmonious co-existence of Sections 325.29 and 768.28 . . . ." Id. at 22. The District Court noted that, while the legislature had the power to waive sovereign immunity generally, it also had the power to retain specific exceptions to the waiver. Id. Thus, the District Court created a threshold through which the liability question must pass. If the immunity statute applied, the state was immune, and there was no need for further analysis under §768.28. Because the immunity statute did apply in Betancourt, the District Court did not engage in an operational/planning level analysis. Similarly, in the present case the Trial Court determined that §373.443 applied and, therefore, an inquiry under §768.28 was unnecessary.

Point II

THE FLORIDA SUPREME COURT HAS UTILIZED ANALOGOUS FEDERAL STATUTES AND CASE LAW TO AID IN ITS ANALYSIS OF NOVEL LEGAL ISSUES.

Respondents' argument that this Court should not consider 33 U.S.C. Section 702(c) and its relationship to the Federal Tort Claim Act (FTCA) in interpreting Florida Statute §373.443 is misguided.

This Court in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), looked to the FTCA and related cases to aid in the interpretation of §768.28. Id. at 1016-1018. Although much of the language of these two statutes is similar, Id. at 1017, there is no contention that §768.28 was patterned after the FTCA. In Commercial Carrier, this Court recognized that §768.28 and the FTCA were enacted for a similar purpose. Similarly, SWFWMD contends that §373.443 and §702(c) were "similar in purpose." Petitioner's Brief on the Merits, p. 13.

Moreover, the principles involved in the instant case are exactly the same as the principles involved in the federal cases. Like the case sub judice, the federal cases analyzed the principles of sovereign immunity, together with the waiver of sovereign immunity. While it is undisputed that the Florida legislature was more restrictive in its grant of immunity under §373.443, the intent of §373.443, like §702(c), was to reaffirm

sovereign immunity. See United States v. James, 478 U.S. 597 (1986)(Purpose of §702(c) was to reaffirm Corps of Engineers' immunity for flood control projects). The federal cases show, as did Betancourt, supra, that the immunity statute provides the threshold through which the analysis must pass. Therefore, this Court found federal cases interpreting the FTCA in Commercial Carrier persuasive, supra, federal cases analyzing §702(c) vis-a-vis the FTCA are likewise persuasive in interpreting §373.443 vis-a-vis §768.28.

Point III

THE APPLICATION OF §373.443 IS A THRESHOLD DETERMINATION SUCH THAT THERE ARE NO IMPEDIMENTS TO THE SIMULTANEOUS AND HARMONIOUS CO-EXISTENCE OF §373.443 AND §768.28.

a) Sections 373.443 and 768.28 do not conflict.

In the case sub judice, the District Court concluded that any interpretation of §373.443 which allows "complete tort immunity" would conflict with §768.28. Nanz v. Southwest Florida Water Management District, 617 So. 2d 735, 736 (Fla. 2d DCA 1993). Notwithstanding respondents' statements to the contrary, SWFWMD maintains that §373.443 provides immunity only under specifically enumerated circumstances such that §§373.443 and 768.28 do not conflict. Petitioner's Brief on the Merits pp. 9, 19, 20-

21. SWFWMD's use of the rules of statutory construction was only necessary to fully address the District Court's opinion.

SWFWMD's original Brief on the Merits clearly shows that its statutory construction arguments result in far more than respondents' overly simplistic conclusion that §373.443 is more narrow than §768.28. While SWFWMD maintains that §373.443 is the more narrowly drawn statute (unrebutted by respondents) and, therefore, controlling in this case, other well settled rules of statutory construction are simply different pathways leading to the same conclusion that §373.443 controls. Again, courts are without power to adopt an interpretation of an unambiguous statute which extends, modifies or limits its terms (unrebutted by respondents), Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984); a waiver of sovereign immunity should be strictly construed in favor of the state and against the claimant (unrebutted by respondents), Carlile v. Fresh Water Fish Comm'n, 354 So. 2d 362, 364 (Fla. 1977); the provisions of Chapter 373 must be liberally construed (unrebutted by respondents), Florida Statute §§373.616, 373.6161 (1987).

All of these cited rules point to the inevitable conclusion that §373.443 is the threshold through which any analysis in this case must pass. Because §373.443 applies to the case at bar, analysis under §768.28 is inappropriate and unnecessary.

b) The plain language of §373.443 provides immunity to SWFWMD in the present case.

Respondents also argue that this Court should rely on the plain language of §373.443. However, respondents undertake no plain language analysis. Instead, immediately after asking this Court to look to the plain language, respondents subvert their argument by directing the Court to language **not** in the statute. This inconsistency is repeated in respondents' Argument IV, where they again ask the Court to look beyond the plain meaning of §373.443 and contemplate words the legislature **could have used.** Respondents cannot have it both ways.

SWFWMD has always held, as did the Trial Court, that the plain language of §373.443 clearly provides immunity in the case sub judice. Indeed, in SWFWMD's Brief on the Merits, Point Four is simply an application of the plain language of §373.443 to the allegations of the Complaint in the instant case. **§373.443 speaks for itself.** The plain language of §373.443 grants immunity to SWFWMD in the case sub judice.

Point IV

THE DISTRICT COURT OF APPEAL IMPROPERLY NARROWED THE SCOPE OF IMMUNITY GRANTED TO THE STATE AND WATER MANAGEMENT DISTRICTS UNDER §373.443.

Respondents argue that the law regarding sovereign immunity was in turmoil in 1972 when §373.443 was enacted. In so stating, respondents misperceive the status of the law at that time. In Florida, the law was, and remains, that sovereign

immunity is the rule absent an express waiver to the contrary. Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4, 5 (Fla. 1984). Although respondents adequately demonstrate that the immunity of **municipalities** was in flux in 1972, they cite no cases to support the argument that when §373.443 was enacted, a water management district was subject to **municipal** tort liability. See Rabin v. Lake Worth Drainage Dist., 82 So. 2d 353 (Fla. 1955)(Drainage district has complete tort immunity). The scope of **municipal** sovereign immunity has never had the breadth of the sovereign immunity of the state. See Commercial Carrier, 371 So. 2d at 1015-1016. As such, cases interpreting municipal sovereign immunity are clearly not applicable to the issues concerning the sovereign immunity of the state.

Respondents and the District Court would limit the immunity granted to SWFWMD by §373.443 to "the permits they grant, the regulations they promulgate, or the control they exercise by reason of their permits, regulations and orders . . . ." Nanz, 617 So. 2d at 786. In so doing, respondents would distinguish SWFWMD's immunity for permits granted and regulations promulgated from their immunity for control exercised in granting permits and promulgating regulations. Such a distinction is illogical and ill-conceived. SWFWMD exercises control whenever it grants or denies permits, SWFWMD exercises control whenever it promulgates regulations, and SWFWMD exercise control whenever it owns and operates dams, reservoirs, etc. Thus, the practical effect of the interpretation espoused by the respondents and the

District Court is to delete §373.443(3) from the statute. Further, neither the respondents nor the District Court make any provision for emergency situations, effectively deleting §373.443(4) from the statute. Such an interpretation improperly narrows the statute. Holly v. Auld, 450 So. 2d 217 (Fla. 1984).

Finally, respondents claim that SWFWMD seeks "total immunity from tort." Again, respondents misstate SWFWMD's arguments. SWFWMD is only immune from tort liability for its management and control of surface waters. Petitioner's Brief on the Merits, pp. 18, 21, 22. However, for tort actions against SWFWMD beyond the scope of §373.443, §768.28 applies and liability attaches to the extent permitted by the statute and relevant case law.

CONCLUSION

By enacting Chapter 373, the Florida legislature empowered the newly created water management districts to take an active role, not only in the permitting and regulation of privately owned works, but also in the construction, operation and maintenance of public works for the public benefit. In so doing, the legislature intended that water management districts remain immune from liability for regulatory and operational control exercised in their management and control of surface waters, as evidenced by §373.443. Therefore, the District Court of Appeal, Second District, erred when it narrowed the immunity granted by

§373.443 to include only planning level functions. Accordingly, the petitioner, SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, respectfully requests that the decision of the District Court be quashed, and the Order of the Trial Court dismissing the Complaint with prejudice be reinstated.

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 22nd day of July, 1993.

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