SUPREME COURT OF FLORIDA

MARGARET E. BUTLER, etc.,

Petitioner,

vs. CASE NO. 67,869

SARASOTA COUNTY, FLORIDA, etc.,

Respondent.

_____/

ON REVIEW FOR DIRECT CONFLICT FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

BRIEF OF AMICUS CURIAE THE ATTORNEY GENERAL IN SUPPORT OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Amicus, the Attorney General, adopts the Statement of the Case and Facts set forth in the brief of Sarasota County.

SUMMARY OF ARGUMENT

Sarasota County has no duty to modify the natural conditions of the beach shoreline as part of its "maintenance and operation" responsibilities. Such action is a planning-level function for which it enjoys sovereign immunity.

There is no evidence showing that concealed perils and the failure to warn of them caused or contributed to the drowning here at issue. There is no evidence that such perils even existed. There is no evidence that the currents, tides and other conditions at South Lido Beach are any different, or more dangerous, than those affecting any other beach in Florida.

ARGUMENT

SARASOTA COUNTY IS ENTITLED TO SOVEREIGN IMMUNITY UNDER THE FACTS OF THIS CASE.

Petitioner does not argue that the District Court was incorrect in concluding that the decision of whether or not to have lifeguards or safety equipment is a planning-level function. Accord, Avallone v. Board of County Commissioners, 467 So.2d 826, 827 (Fla. 5th DCA 1985). Accordingly, it is presumed that Petitioner concedes this point.

The focus of Petitioner's briefs is on the nature of the duty owed by the County by virtue of it being the owner and operator of South Lido Beach. The established rule is that:

> The owner of a piece of land in its natural condition is generally not accountable for physical results due to extraordinary or ordinary forces of nature, as long as he has not interfered with the natural conditions, but when he undertakes to make artificial changes he may become liable for his negligence, if any.

Gifford v. Galaxy Homes of Tampa, Inc., 194 So.2d 25, 28 (Fla. 2nd DCA 1967) aff'd in pertinent part 204 So.2d 1 (Fla. 1967) quoting 65 C.J.S. Negligence § 74 at 964 (1966). In this case, the County did not alter the natural lay of the land along the shore; nor were any changes made that would effect the tides or currents. (R 290). Therefore, under the general rule cited, the County cannot be held liable for Henry Lee Sanders' drowning.

Even the application of the traditional rules of premises liability involving artificial conditions results in a conclusion of no liability.

> The duty of a landowner to an invitee is to use ordinary care to maintain the premises in a reasonably safe condition for use in a manner consistent with the invitation, and to warn of latent perils which are known or should be known to the owner but which are not known to the invitee or which, by the exercise of due care, could not be known to him. Hickory House v. Brown, 77 So.2d 249 (Fla. 1955).

Rice v. Florida Power and Light Co., 363 So.2d 834, 839 (Fla. 3rd DCA 1978).

Petitioner's briefs repeatedly refer to the County's "maintenance and operation" of the beach as being the function challenged. However, this Court has explained that a governmental entity's duty to "maintain" is limited to upkeep type activities in relation to existing facilities and does not perceive "maintenance", in the sense that it is sometimes used, to mean capital improvement type functions. Department of Transportation v. Neilson, 419 So.2d 1071, 1078 (Fla. 1982). Thus, beach excavation or the relocation or elimination of a swimming area, like the provision of lifeguards or safety equipment, are planning level functions not encompassed by the County's duty to "maintain" the beach. There is absolutely no evidence in the record to the effect that a lack of maintenance (in the sense of upkeep) of the premises contributed to the death of Henry Lee Sanders.

Thus, liability in this case could not be based upon the negligent failure to maintain the beach.

Negligent maintenance of the premises not being an issue, the question then is whether the evidence shows the failure to warn of "concealed perils" which Henry Lee Sanders could not have discovered through the exercise of due care. Maldonado v. Jack M. Berry Grove Corp., 351 So.2d 967, 970 (Fla. 1977); Cassel v. Price, 396 So.2d 258, 264 (Fla. 1st DCA 1981). "A hidden danger or peril is nothing more than an unreasonably dangerous condition that [a person on the premises] could not reasonably be expected to discover or appreciate." Zipkin v. Rubin Construction Co., 418 So.2d 1040, 1044 (Fla. 4th DCA 1982). There is no question that the law does not impose on a landowner the obligation to warn of every possible source of injury existing on the property. Rather, it is only where "conditions involve an 'unreasonable risk'" that a duty arises. Meyer v. Be-Macs Services, 452 So.2d 672, 674 (Fla. 2nd DCA 1984) quoting Cassel v. Price, 396 So.2d at 264. Gifford v. Galaxy Homes of Tampa, Inc., 194 So.2d at 27; 65 C.J.S. Negligence § 63(53) at 758, § 74 at 962 (1966). "A condition cannot be deemed to involve an unreasonable risk . . . 'unless it inherently presents a hidden and unusual element of danger in such a way as to constitute a trap . . .'" Cassel v. Price, 396 So.2d at 263 quoting Jackson v. Whitmire Construction Co., 202 So.2d 861, 863 (Fla. 2nd DCA 1967) (emphasis added); E.g., 65 C.J.S. Negligence § 63(53) at

758 (1966). To be "hidden" means "hidden from the knowledge as well as from the sight and must be one which could not be discovered by the exercise of reasonable care. Grall v. Risden, 167 So.2d 610, 613 (Fla. 2nd DCA 1964).

It is clear that an ordinary body of water is not considered to be inherently unreasonably dangerous. Newby v. West Palm Beach Water Co., 47 So.2d 527 (Fla. 1950):

> [O]wners of artificial lakes, fish ponds, mill ponds, gin ponds and other pools, streams and bodies of water, are not guilty of actionable negligence on account of drowning therein unless there is some unusual element of danger lurking about them not existent in ponds generally.

Id. at 528 (emphasis added); Hendershot v. Kapok Tree Inn, 203 So.2d 628, 629 (Fla. 2nd DCA 1976). The Second District Court of Appeal has recently stated this rule as follows:

> A property owner generally cannot be held liable for dangerous conditions which exist in natural or artificial bodies of water unless they are so constructed as to constitute a trap or unless there is some unusual danger not generally existent in similar bodies of water.

Hughes v. Roaring 20's, Inc., 455 So.2d 422, 424 (Fla. 2nd DCA 1984); 65 C.J.S. Negligence § 63(100) at 849 (1966).

In the instant case, the conditions Petitioner apparently blames for Henry Lee Sanders' death, varying currents, strong tides and drop-offs, do not pose the "unreasonable risk" to users of the beach that the law requires in order to impose on the

County a duty to warn. The evidence relating to the currents, tides and drop-offs at the accident location consisted exclusively of the following testimony: By affirmative responses to leading questions, the manager of the County's beach patrol testified that there are "varying currents of significant strength" and "strong tides from time to time at the beach" and that "the surfaces underlying the water contained drop-offs" (R 218). Partly because of the currents and tides, it was his "feeling or state of mind" that swimming should not have been allowed.[1] (R 219) Similarly, the County's Director of Parks and Recreation acknowledged that he knew that "the tides run through" the area, and "that the currents and tides increase hazards to swimmers" (R 285-86). He also admitted that he "considered the body of water off South Lido Beach unsafe" (R 285), consistent with his view that "all bodies of water are hazardous" (R 289).

Tellingly, there had never been a prior drowning (R 288), nor was evidence submitted of any near drownings, or even unusual occurrences associated with the currents, tides or drop-offs during or prior to the six years the County operated the beach (R 214). There was also no expert testimony to prove that the drop-offs, tides or currents were significantly different than what one would reasonably be expected to anticipate at any pass along the Gulf Coast. "Children as well as adults generally know

[1]This opinion was properly objected to as he was not an expert and his state of mind was not relevant.

that going into a body of water constitutes danger". 65 C.J.S. Negligence § 63(64) at 788 (1966). It is common knowledge that in the coastal waters of Florida, at passes in particular, it is not unusual for there to be currents and tides of varying degrees of intensity and areas where the bottom slopes steeply. It certainly would be no surprise to anyone to find the tide moving away from shore. In short, there is nothing in the record to support a conclusion that the nature of the currents, tides or drop-offs at South Lido Beach exposed Henry Lee Sanders to an unusual peril which he could not have discovered through the use of due care.

Furthermore, the evidence failed to prove that there were unusually strong tides or currents at the time of the accident, that there was a drop-off in the vicinity, that any of those factors were a cause of Henry Lee Sanders' death or that a warning would have prevented it. There was no testimony by the children who witnessed the drowning that they had to fight hard to stay on their feet or to keep from being swept away. Nor did they mention that the water suddenly got deeper. One of the children describing the accident did say the water was pulling the decedent back but only "a bit" (R 270). Two of the children said they noticed nothing unusual about the water (R 272, 276), and one mentioned only that it "was spinning around" (R 330), hardly a characteristic attributable to currents, strong tides or drop-offs.

All the testimony proves was that the decedent was not a strong swimmer (R 306) and that he was out in water over his head (R 216, 270, 276). There was not enough evidence to allow a conclusion to be reached as to the cause of the drowning. There are any number of plausible scenarios as to why Henry Lee Sanders drowned. He may have gotten tired, or panicked, or had a cramp, for example. To conclude that unusually strong tides, currents or drop-offs were a cause of death would require one to infer that those conditions existed at the time and place of the accident; to then infer that without those factors the drowning would not have occurred; and, finally, to infer that a warning about those conditions would have prevented the accident. Such a piling of inference on inference is impermissible. E.g., Food Fair Stores, Inc. v. Trussell, 131 So.2d 730, 733 (Fla. 1961). Consequently, the jury could not have properly found liability based upon a failure to warn of the tides, currents or drop-offs.

CONCLUSION

Petitioner's arguments find no support in either the law or the evidence. The decision of the Second District Court of Appeal should be affirmed.

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 Federal Express to **ROBERT JACKSON McGILL, ESQUIRE**, P. O. Box 1725, Venice, Florida 34284 and by U.S. Mail to **JOHN P. GRAVES, JR., CHARTERED**, Suite 400, 1970 Main Street, Sarasota, Florida 33578 and **ALAN S. ZIMMET, ASSISTANT CITY ATTORNEY**, P. O. Box 4748, Clearwater, Florida 33518 this 7th day of July, 1986.

LOUIS F. HUBENER
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