O/a 9-9-86 orig.

IN THE SUPREME COURT
STATE OF FLORIDA

MARGARET E. BUTLER, as Personal Representative of the Estate of HENRY LEE SANDERS, a minor,

Petitioner,

vs.

SARASOTA COUNTY, FLORIDA, a corporate body politic,

Respondent.

FILED
SID J. WHITE
MAR 19 1986
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By _____ Chief Deputy Clerk

CASE NO.

APPLICATION FOR CONSTITUTIONAL CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF

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QUESTION PRESENTED

WHETHER OR NOT THE DECISION OF THE SECOND DISTRICT COURT COURT OF APPEALS HOLDING THAT SOVEREIGN IMMUNITY PRECLUDES GOVERNMENTAL TORT LIABILITY FOR THE NEGLIGENT OPERATION OF A BEACH-PARK FACILITY BY THE RESPONDENT, SARASOTA COUNTY, FLORIDA?

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

WHEN THE LETTER "R" IS USED IN THIS BRIEF IN SHALL REFER TO THE RECORD ON APPEAL.

This Petition stems from the wrongful drowning death of Henry Lee Sanders, a minor, which occurred on June 10, 1981, at a public beach facility operated by the Respondent, Sarasota County, Florida.

During the year 1974, the Respondent County received title to an area of land and beach known as South Lido Beach. (R-214). Shortly after acquiring the title to the property, the County began operating it as a public beach facility. (R-214). In operating the facility, the County made improvements to the land and also marked out a swimming area in the water at the park through the use of buoys. (R-214).

After the County opened up and operated the beach facility, and before the death of Henry Lee Sanders, the County, through its agents, became aware that the waters of the beach had strong tides, varying currents, and contained sudden dropoffs. (R-218). Robert Hall, Respondent's Manager of the Beach Patrol, was of the opinion that swimming should never have been permitted at this beach. (R-219). Additionally, Walter Rothenback, the Respondent's Director of Parks and Recreation, was also aware of the hazards presented to swimmers at this park facility by the currents and tides. (R-285-286). Mr. Rothenback felt that the body of water off of the beach facility was unsafe and he was

also aware that children of tender years and other persons who were unable to swim would be using the park facility. (R-285).

During the time that the Respondent operated the beach-park facility, prior to Henry Lee Sanders' death, it never posted any warnings to swimmers using the waters in the park facility warning them of the known hazards present in the recreational beach facility. (R-214).

On June 10, 1981, Henry Lee Sanders went to the Respondent's beach facility with his aunt and seven other young people. (R-277). Approximately thirty minutes after arriving at the park, Henry was swimming between the buoys set out in the water by the Respondent. R-275-276). As he was swimming and playing, the water began pulling him back and also was pulling him under the water. (R-269-270). The child tried to swim back to the other children but the current pulled him away causing him to drown. (R-270).

On March 14, 983, a Complaint for wrongful death was filed against the Respondent in the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida. (R-1-6). The Complaint alleged that the Respond-ent was negligent and careless in the operation of its park facility by failing to warn of dan-gerous conditions, failing to provide lifeguards or other types of protection, and failing to provide safety or rescue type equipment to be used in emergencies. (R-2).

That the Respondent subsequently answered the Complaint, (R-11-12, 66-68), and a trial was held on August 15 and 16 of 1984. (R-107-485). At the conclusion of the trial, a jury verdict was returned in favor of the Petitioner and against the Respondent, (R-556-557), which resulted in the entry of a Final Judgment in favor of the Petitioner and against the Respondent in the amount of $87,500.00. (R-562).

On November 16, 1984, the Respondent filed a Notice of Appeal to the Second District Court of Appeal challenging the Final Judgment. (R-563). On July 26, 1984, the Second District Court issued an opinion reversing the Final Judgment entered by the lower Court basing its reversal on a finding that the Respondent did not create the hazard causing Henry Lee Sanders' death. (See Appendix 1 of this Brief.) After the issuing of the opinion, a Motion for Rehearing was filed by Petitioner and was subsequently denied on October 8, 1985, (see Appendix 2 of this Brief).

The Petitioner timely served a Petition to invoke this Court's jurisdiction on October 31, 1985, (see Appendix 3 of this Brief), and this Court, on February 25, 1986, entered an Order accepting jurisdiction of this cause. (See Appendix 4 of this Brief.)

SUMMARY OF ARGUMENT

The Second District Court of Appeals erred in this matter by holding that under the doctrine of sovereign immunity Sarasota County, Florida, is not liable for the negligent operation of a beach-park facility.

When the Respondent in this matter undertook to operate and maintain a public beach-park facility it was clearly performing an "operational level" function for which there was a common law duty to maintain the premises in a reasonably safe condition and to warn of all known dangers which were not readily apparent to the swimmers using the facility.

Under the criteria set forth by this court in Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), and Commerical Carrier Corporation v. Indian River County, 371 So. 2d 1010 (Fla. 1979), the Legislature by enacting Florida Statute 768.28 waived any sovereign immunity on the part of the county for these operational type activities for which there was a common law duty and thereby rendered the county liable in tort in the same manner as a private person would have been under like circumstances.

ARGUMENT

THE LOWER COURT ERRED IN HOLDING THAT SOVEREIGN IMMUNITY PRECLUDES GOVERNMENTAL TORT LIABILITY FOR THE NEGLIGENT OPERATION OF A BEACH-PARK FACILITY BY SARASOTA COUNTY, FLORIDA.

The opinion of the Second District Court of Appeals in this matter holding that a governmental agency which negligently operates a beach-park recreational facility is immune from tort liability because of the doctrine of sovereign immunity is clearly erroneous.

By the enactment of Florida Statute 768.28, the Florida Legislature has expressed a desire to lift the cloak of immunity granted to governmental agencies for torts committed by the government and render them liable in the same manner as a private citizen would be under like circumstances.

The extent of the Legislature's waiver of governmental immunity is set forth in two provisions of the statute. 768.28 (1) provides:

> "In accordance with section 13, Art. X, State Constitution, the State, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for tort, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, <u>if a private person, would be liable to the claimant in accordance with the general laws of this state</u>, may be

prosecuted subject to the limitations specified in this act." 768.28 (1), Fla. Stat. (1985). (Underlining added for emphasis.)

Florida Statute 768.28 (5) sets forth the limitations discussed in Section 1 of the statute and further provides:

"The State and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, . . . ". 768.28 (5) Fla. Stat. (1985). (Underlining added for emphasis.)

Since the enactment of Florida Statute 768.28 in 1973, the Appellate Courts of this state have been attempting to set forth the legislative intent behind 768.28 and to establish some systematic rules for the lower courts to use in determining whether or not a particular type of negligent conduct was contained within the waiver of sovereign immunity or is contained within the particular type of activities for which the Legislature did not waive sovereign immunity by the enactment of the statute. Commercial Carrier Corporation v. Indian River County, 371 So. 2d 1010 (Fla. 1979), Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985).

In Trianon Park, supra, this court's latest discussion on sovereign immunity, the court attempted to set forth certain basic principles regarding the general law of sovereign immunity, and to further set out a systematic method to be used in determining whether or not the alleged negligent conduct on the part of the government may be the subject of governmental tort liability under Florida Statute 768.28.

In setting forth the basic principles regarding the general law of sovereign immunity, the court set forth five basic principles, i.e.:

> First, in order for there to be governmental tort liability, there must be an underlying common law or statutory duty of care with respect to the alleged negligent conduct;
>
> Second, Florida Statute 768.28 did not establish any new duty of care for governmental entities, its sole purpose was to waive governmental immunity or breaches of existing common law duties of care;
>
> Third, there is no common law duty for either a private person or governmental entity to enforce laws for the benefit of an individual or specific group of individuals;
>
> Fourth, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government, absent a violation of constitutional or statutory rights;

Fifth, the discretionary functions of government are inherent in the act of governing and are immune from suit.

Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912, 917 (Fla. 1985).

After setting forth these principles, the court then set out a step by step systematic method, incorporating these principles, to determine whether or not a specific activity or conduct on the part of the government may subject it to governmental tort liability under the waiver set forth in Florida Statute 768.28.

The first step of this approach requires that the activity or conduct of the government must be placed into one of four categories, i.e. (I). Legislative, permitting, licensing, and executive officer functions; (II). Enforcement of laws and the protection of the public safety; (III). Capital improvements and property control operations; (IV). Providing professional, educational and general services for the health and welfare of the citizens.

If the activity or conduct for which tort liability is being sought against the government falls into either category (I) or (II), there would be no liability on the part of the government for these particular activities by virtue of there being no waiver of sovereign immunity for purely governmental activities for which there has never been any common law duty of care. However, should the conduct or

activity upon which tort liability is predicated fall into either category (III) or (IV) there may or may not be governmental tort liability depending upon the analysis made in the remaining steps of the court's systematic method.

After deciding that the alleged activity or conduct falls in either category (III) or (IV) the next step of the court's approach requires a determination as to whether or not there is an underlying common law or statutory duty relative to the alleged conduct. If there is no such duty, then there is no tort liability on the part of the government; however, if there is a statutory or common law duty for the alleged conduct then there may be governmental tort liability depending upon the outcome of the final step of this approach.

The last step in the Trianon Park approach involves a reiteration of the guidelines set forth in Commercial Carrier Corporation v. Indian River County, 371 So. 2d 1010 (Fla. 1979), and requires the court to determine whether or not the conduct or activity on the part of the government is an "operational level" activity for which tort liability may be imposed, or a "planning-judgmental" type activity for which no tort liability may be imposed upon the government. In making this determination, the court reiterated the Evangelical Brethren test set forth in Commerical Carrier, as an aid in determining whether or not a particular activity is "operational level" or "planning-judgmental level" activity.

The Evangelical Brethren test requires one to analyze the activity upon which tort liability is being sought relative to the following four questions:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy program or objective?
>
> (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
>
> (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
>
> (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

If all of these questions can be answered in the affirmative, then the governmental conduct is discretionary and no

tort liability may be imposed. If one or more of the questions call for a negative answer, then further inquiry may be necessary to establish whether or not the activity itself is "operational" or "planning-judgmental". Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P. 2d, 440 (1965).

If one or more of the questions call for a negative answer, then court must look to other matters to determine whether or not the activity or conduct itself is "operational" or "planning-judgmental". The Evangelical Brethren test is not conclusive, but is only a method to aid courts in determining whether a particular activity is "operational" or "planning-judgmental". Trianon Park Condominium Association, Inc. v. City of Hialeah, supra.

If after having gone through this analysis, and having determined that the conduct on the part of the government for which tort liability is being sought falls into category (III) or (IV) in step one, and having determined that there is a statutory or common law duty relative to the conduct in step two, and having determined that the conduct itself is an "operational" type activity under step three; then under the criteria of this court in Trianon Park, there may be governmental tort liability imposed for the conduct of a governmental agency and/or its employees acting within the scope of their employment.

When applying the systematic approach of Trianon Park to the instant case, it is clear the conduct upon which the

tort liability was imposed by the jury in this case was clearly an operational level activity with a common law duty on the part of the governmental agency, and therefore, governmental tort liability may be imposed.

In applying the first step of the Trianon Park criteria; i.e. categorizing the activity or conduct on the part of the government into one of the four main categories, it is clear that the activity of owning and operating a beach-park facility falls into category (III), Capital Improvement and Property Control functions, and therefore, governmental tort liability may be imposed, depending upon the remaining criteria.

Step two of the Trianon Park process requires the court to determine whether or not there is a common law or statutory duty relative to the operation of a beach-park recreational facility by Sarasota County, Florida. It is without question in this State that the owner or possessor of real property to which the public is invited, has the duty to use reasonable care in maintaining the premises in a reasonably safe condition and to give persons using the property warning of any latent and concealed dangers known to the owner, or which by the exercise of due care should have been known to him, and which were not known to the invitee and which by the exercise of due care could not have been known by the person using the premises. Hall v. Holland, 47 So. 2d 889 (Fla. 1950), Hickory House v. Brown, 77 So. 2d 249 (Fla. 1955), McNulty v. Hurly, 97 So. 2d 185 (Fla. 1957),

Ralph v. City of Daytona Beach, 471 So. 2d 1 (Fla. 1983).

Factually, in this case it is clear that Sarasota County was the owner and operator of the beach-park facility at South Lido Beach, (R-214), further, that its agents marked out swimming areas in the waters of the beach-park facility through the use of buoys, (R-214-215), and lastly, they were aware of the hazards posed to swimmers in the park facility by the currents and tides. (R-219, 285-286). Based upon these facts, there clearly was a common law duty on the part of the county to make the premises reasonably safe or to warn of the known dangers to swimmers using the park facility.

By virtue of the activities and conduct of Sarasota County and this particular case having met the first two steps to imposing tort liability for the conduct or activity necessary that the final step, i.e. deciding whether or not the activity on the part of the County is an "operational activity" or "planning-judgmental activity", must be taken. In this particular case it is not necessary for the court to go through the Evangelical Brethren test adopted by Commercial Carrier, and reiterated in Trianon Park, because the courts of this state have previously determined that the operation and maintenance of playgrounds or recreational activities by a governmental agency is a "proprietary or operational type function" as distinguished from a "planning-judgmental" type function. Woodford v. City of St. Petersburg, 84 So. 2d 25 (Fla. 1955), Lisk v. City of

West Palm Beach, 36 So. 2d 196, (Fla. 1948), Bucher v. Dade County, 354 So. 2d 89 (Fla. 3d DCA 1977), Ralph v. City of Daytona Beach, 471 So. 2d 1 (Fla. 1983) and City of Miami v. Ameller, 472 So. 2d 728 (Fla. 1985).

Based upon the foregoing criteria, it is clear that the activity of the county in this case meets all of the criteria for the imposition of governmental tort liability under the Legislature's waiver of sovereign immunity under Florida Statute 768.28, and therefore, the District Court of Appeals opinion reversing the jury verdict and judgment of the trial court on the grounds of sovereign immunity is clearly erroneous and should be reversed.

CONCLUSION

Based upon the foregoing argument, it is clear that the Second District Court of Appeals erred in holding that Sarasota County is immune under the doctrine of sovereign immunity from governmental tort liability for the negligent operation of a beach-park facility. Petitioner therefore requests this court issue its Order quashing the decision of the Second District Court of Appeals with directions to the lower court to reinstate the judgment entered by the trial court in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to ROBERT C. WIDMAN, ESQUIRE, 2070 Ringling Blvd., Sarasota, Florida 33577 on this 17th day of March, 1986.

Robert Jackson McGill

ROBERT JACKSON McGILL