O/a 9-9-86

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.

CASE NO. 67,869

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

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Petitioner would rely upon his previous statement of the case and statement of the facts as set forth in the Petitioner's Initial Brief.

SUMMARY OF ARGUMENT

POINT I

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 Commercial 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.

This court's holdings in City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982), and Department of

Transportation v. Neilson, 419 So. 2d 1071 (Fla. 1982), are not applicable to the instant case because the activities on the part of the Respondent creating the duty of care which was breached were "operational activities" as opposed to "planning-judgmental activities".

POINT II

The Trial Court did not abuse its discretion in admitting into evidence a photograph of the decedent which it deemed to be relevant. The Respondent has failed to meet its burden of proof to demonstrate to this court that there has been a clear abuse of discretion in the admission of the one photograph and therefore the Final Judgment should be affirmed on this point.

POINT III

The Trial Court did not err in admitting evidence of damages suffered by decedent's mother. The court made adequate inquiry and determined that testimony of the Petitioner's economist was not given concerning net accumulations, but involved the loss of support claim. The complaints of the Respondent on this issue go to the weight of the evidence admitted as opposed to its admissibility and therefore the Trial Court's ruling and Final Judgment in this matter should be affirmed.

POINT IV

The Petitioner's claim in this matter is not barred as a matter of law by the doctrine of unforeseen intervening causation. The evidence in this case clearly established negligence on the part of the Respondent in maintaining its premises and further failing to warn of dangerous conditions it knew of, and which were not readily apparent to others invited to use its swimming beach-park facility. The risk of minor children venturing into the waters at the swimming beach-park facility unsupervised was within the scope of danger created by the Respondent's negligent conduct. This is especially foreseeable in light of the fact that the Respondent marked out a swimming area in dangerous waters, invited the public to the park to swim after knowing the waters were dangerous and not fit for swimming, and even further was aware that small children who lacked the ability to swim would be present at the beach-park. Under these circumstances it is clearly foreseeable that small children would venture into these waters and be exposed to serious bodily injury or death by drowning.

The question of whether or not an intervening cause is foreseeable so as to impose liability on the original wrong-doer is a question to be decided by the trior of fact. The jury in the instant case heard the evidence, and the Court's instructions on legal causation, and concurring causes, and

comparative negligence on the part of decedent's family members, and returned a verdict which in essence found that the family members' negligence was foreseeable and constituted thirty percent of the fault relative to the decedent's death.

POINT V

The Court's jury instruction relative to the duty of care that landowner or possessor owes to an invitee on its premises was a correct statement of law on this issue. The instruction basically followed the Florida Standard Jury Instruction on the matter and therefore it was not erroneous.

ARGUMENT

POINT I

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 Respondent's reliance upon Department of Transportation v. Neilson, 419 So. 2d 1071 (Fla. 1982), and City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982) to support a claim of sovereign immunity in the instant case is erroneous.

In order to properly respond to the arguments set forth by the Respondent on its sovereign immunity claim it is necessary to again utilize the principals and method of analysis set forth by this Court in Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985). As set forth in the Initial Brief, the first step of this analysis requires that the activity or conduct for which tort liability is being sought must be categorized into one of the four categories of governmental activities. In this instance tort liability was sought to be imposed against Sarasota County for its maintenance and operation of a swimming beach-park facility. This activity clearly falls within the category (III) activities as set forth in Trianon

Park, i.e., Capital Improvement and Property Control Functions. In Trianon Park, this court held that a governmental agency may be exposed to tort liability when performing an activity within this category.

After having determined that the conduct or activity is one for which tort liability may be imposed, assuming the remaining criteria are met, the second step of the analysis requires one to determine whether or not there is a common law or statutory duty relative to the maintenance and operation of the County's real property, i.e. the swimming beach-park facility. Clearly under the law of Florida, there is a duty upon a landowner or possessor to maintain his premises in a reasonably safe condition, and to warn of any dangerous condition on the premises which he knows of, or should know of, and which invitees on the premises do not know of, and through the use of due care would not know of. 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).

Once it has been determined that the conduct or activity is one upon which tort liability may be predicated, and that there is a common law duty relative to the activity or conduct, the last step of the Trianon Park analysis requires a determination as to whether or not Sarasota County's operation and maintenance of its real property in the form

of a swimming beach-park facility is an "operational activity" or "planning-judgmental activity". As set forth in the Initial Brief the courts of this state have previously determined that the operation and maintenance of recreational facilities by governmental agencies is a "proprietary-operational 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. 3rd 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).

It is only in this last step of the Trianon Park analysis that City of St. Petersburg v. Collom, and Department of Transportation v. Neilson come in to play in the consideration of a claim of sovereign immunity. In the instant case these decisions are not applicable because the analysis clearly leads one to the conclusion that the activity on the part of Sarasota County in the maintenance and operation of its beach-park facility was an "operational" activity for which sovereign immunity has been waived under Florida Statute 768.28.

If the courts in considering other claims of sovereign immunity have determined that under the first step of Trianon Park the activity is one upon which tort liability may be predicated, and under the second step that there is a common law or statutory duty relative to the activity or conduct, but, in the last step if it were determined that

the activity was a "planning-judgmental activity" the government would normally be immune from tort liability under this court's holding in Commercial Carrier Corporation v. Indian River County, 371 So. 2d 1010 (Fla. 1979). However, this Court in Collom and Neilson created an exception to this general rule by holding that even if the governmental entity is acting in a "planning-judgmental" capacity it may still be liable if the government while acting in that capacity creates a known dangerous hazard which is not readily apparent to those who might sustain injury as a result of it. In creating the exception the court held that when the government creates such a condition while operating at a "planning-judgmental" level there then arises an "operational" duty to warn of such condition for which a breach of such duty may subject the governmental entity to tort liability. City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982); Department of Transportation v. Neilson, 419 So. 2d 1071 (Fla. 1982).

Again, in the instant case Collom and Neilson are not applicable by virtue of its activities in maintaining and operating its swimming beach-park facility being "operational" rather than a "planning-judgmental" activity. However, even if one were to ignore the obvious conclusion that the Respondent's activities were "operational" as opposed to "planning" Collom would still require that the jury verdict in this case be upheld. Sarasota County clearly created a known dangerous condition by continuing to maintain and

operate a swimming beach in an area that it, through its agents and employees, knew was dangerous and unsafe for swimming, and these dangers were not readily apparent to swimmers that it knew would be coming to its beach-park facility. Duval County School Board v. Dutko, 11 F.L.W. 445 (Fla. 1st DCA 1986).

Lastly, Respondent argues concerning a breach of duty to provide lifeguards or safety equipment. In the instant case the duty imposed upon Sarasota County was not to have lifeguards or safety equipment, but the duty placed upon a landowner or possessor; i.e., to maintain its premises in a reasonably safe condition and to warn of any dangers of which he has knowledge and which are not readily apparent to those lawfully on the premises. The allegations of the Complaint were methods by which the Respondent breached this particular duty and were not a statement of the duty itself. The Court properly instructed the jury on the duties of Sarasota County in the instant case and did not instruct them on a duty to provide lifeguards or safety equipment or any other method by which the Respondent could have met its duty to make the premises reasonably safe.

By virtue of the County having been determined to be negligent by a jury while acting in an "operational" capacity, Florida Statute 768.28 renders it liable in the same manner as a private person acting in like circumstances, and the District Court of Appeals opinion reversing the jury

verdict and judgment in this case on the grounds of sovereign immunity is clearly erroneous and should be reversed.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE A PHOTOGRAPH OF THE DECEDENT.

It is well settled in Florida that the admissibility of photographic evidence is within the sound discretion of the Trial Court, and the Judge's ruling will not be overturned on appeal unless there is a showing of clear abuse. Wilson v. State, 436 So. 2d 908 (Fla. 1983).

In the instant case the Trial Court considered the Respondent's Motion in Limine relative to a group of photographs taken by law enforcement agencies involved in the investigation of the death, and restricted the Petitioner's use to one photograph which the Court deemed to be relevant. (R-196). This photograph, Plaintiff's Exhibit 5, was relevant and had probative value to show identity, size, the build of victim, manner of death, and also corroborated the testimony of Jay Kaiswerman.

Respondent relies upon Florida Statute 90.403 concerning the admissibility of the photograph and contends that photographs should have been inadmissible based upon this statute. In order to sustain its burden on appeal, Respondent must demonstrate to this Court that the probative value of the photograph was clearly and substantially out weighed by the danger of any unfair prejudice. Fla. Stat. 90.403. The Respondent in an effort to meet this burden

merely offers its opinion that the photograph was gruesome and offered purely for the purpose of inflaming the jury neither of which demonstrate a clear abuse of the Court's discretion in light of the probative value of the photograph.

POINT THREE

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF DAMAGES OF THE LOSSES SUFFERED BY MARGARET E. BUTLER.

The Respondent complains about two areas of evidence relative to the issue of damages. The first complaint is that Petitioner's attorney stipulated that the Plaintiff's economist was not offering testimony about the value of lost services and there was no other testimony or evidence relative to the value of lost services. On this issue Respondent's argument is without merit. The decedent's mother testified that Henry was accustomed to helping her with jobs around the house, (R-303), and spent about an hour per day doing so, and Respondent's expert, John Deter, testified that the present cash value of these services would be $11,050.00. (R-389).

At the jury instruction conference, requested instructions included an instruction on the loss of services as an element of damage. (R-411-414). The Respondent made no objection to any such instruction, and in fact concurred in the instruction. (R-411). The instruction on loss of services was given to the jury by the trial court. (R-475-477). Any complaints that Respondent voices now concerning this issue merely relate to the weight of the evidence not

to its admissibility and would be more proper for argument to the jury rather than to this court.

Respondent next urges that the testimony relative to loss of support should not have been admitted by the Trial Court because Respondent's lawyer believes it to be a subterfuge for net accumulations.

The Petitioner's economist, Dr. Davis, testified that his study and opinions did not involve a computation of net accumulations. (R-229). The Respondent raised by Motion in Limine the subject of net accumulations and the Trial Court ruled after permitting Appellant's counsel to cross examine Dr. Davis that Dr. Davis' opinions were not addressing the subject of net accumulations. (R-229). Thereafter Dr. Davis testified as to present value of funds available for support which evidence was introduced without objection. After the testimony was introduced Respondent's counsel objected on the grounds of relevance in that the Complaint did not include an allegation of loss of support. (R-247). At that time Respondent's counsel requested the Court to allow amendment to conform to the evidence on the issue of loss of support which appears to have been granted by the Court's ruling overruling the objection. (R-247).

The jury was instructed on the issue of damages and was clearly instructed on the issue of loss of support and how it was determined. (R-475-477). In the instruction conference, no objection was made by Respondent to the instruction. Additionally, the jury was not instructed on the

subject of net accumulation and no argument was made to the jury on that subject.

The deceased's mother testified as to the decedent's habits, industry and generosity. (R-301-303, 396). This testimony, in combination with Dr. Davis' testimony as to the funds available for support predicated an appropriate basis for the jury to consider and decide on the issue of these damages.

Again on this issue Respondent's argument clearly would go to the weight of Dr. Davis' testimony and not its admissibility. This is made even more apparent by the Respondents having offered evidence from its own economist in the form of a comparison between the two economists' theories in an effort to persuade the jury to follow its economist's opinion in this matter. (R-379).

POINT IV

HENRY LEE SANDERS' DROWNING DEATH WAS A FORESEEABLE CONSEQUENCE OF THE RESPONDENT'S NEGLIGENT MAINTENANCE AND OPERATION OF ITS BEACH-PARK FACILITY.

The Respondent erroneously contends that the alleged negligent supervision of the decedent by his family was an unforeseen intervening cause that should absolve it of any responsibility for the death which resulted from its original negligence.

It is well settled in Florida that if an intervening event or cause is foreseeable the original negligent actor may still be held liable for the consequences of his negligence. The decision on whether or not a particular intervening event or cause is foreseeable is ordinarily a question of fact to be decided by the trior of fact. Vining v. Avis Rent-A-Car Systems, Inc., 354 So. 2d 54 (Fla. 1978), Gibson v. Avis Rent-A-Car Systems, Inc., 386 So. 2d 520 (Fla. 1980), Stahl v. Metropolitan Dade County, 438 So. 2d 14 (Fla. 3rd DCA 1983).

In resolving the issue of whether or not the alleged inadequate supervision by the decedent's family was an unforeseen intervening cause of his death this court must determine whether or not the alleged inadequate supervision was foreseeable. In Gibson v. Avis Rent-A-Car Systems,

Inc., supra, the court in explaining and discussing foreseeability in reference to an intervening cause stated:

> "Another way of stating the question whether the intervening cause was foreseeable is to ask whether the harm that occurred was within the scope of the danger attributable to the Defendant's negligent conduct. A person who creates a dangerous situation may be deemed negligent because he violates a duty of care. The dangerous situation so created may result in a particular type of harm." id, p. 522.

The court went on to say that the question of whether or not the harm that occurs was within the scope of the risk may be answered in several ways; first, the Legislature may specify the type of harm for which a tort-feasor is liable, second, it may be shown that the particular Defendant had actual knowledge that the same type of harm had resulted in the past from the same type of negligent conduct, lastly, there is the type of harm that has so frequently resulted from the same type of negligence that "in the field of human experience" the same type of result may be expected again. Gibson v. Avis Rent-A-Car System, Inc., id at p. 522.

The Petitioner would contend that it is the last method of establishing the scope of risk that is applicable to the instant case. The Respondents had created a scope of danger attributable to their negligent conduct as evidenced by the testimony of the Defendants' personnel that it had marked out and defined a swimming area, (R-215-216, 286), the Supervisor of Beaches was aware of varying currents, strong tides, dropoffs, and was of the opinion that swimming should

not have been permitted in this area, (R-218-219), and the Director of Parks and Recreation knew that young children who could not swim or who could not swim well would be using the beach and he considered the beach to be unsafe. (R-284-285).

In applying the criteria set forth in Gibson, the Petitioner would contend it is certainly foreseeable that those charged with the responsibility of supervising small children at a swimming beach-park facility would not be able to constantly supervise them, so as to prevent them from entering the hazardous swimming area, which could subsequently lead to their drowning death as a result of Respondent's negligence.

Additionally, the Petitioner would point out that the foreseeability test set forth by this court in Gibson is currently in use as part of the Florida Standard Jury Instructions on this subject in the trial of negligence cases. Stahl v. Metropolitan Dade County, 438 So. 2d 14 (Fla. 3rd DCA 1983), Fla. Std. Jury Instr. (Civ.) 5.1(c). In the instant case the Petitioner requested such an instruction be given, however, Respondent objected to any such instruction resulting in the Petitioner agreeing to withdraw it in deference to this objection. (R-402). The jury was however instructed on legal causation and concurring causes. (R-473).

Although the Respondent did not seek a jury instruction on intervening causes, and in fact objected to such in-

struction, it did however seek an instruction on comparative negligence on the part of the decedent's family, (R-409-411), and such instruction was given. (R-474-475). The jury in weighing the instructions on legal cause, and comparative negligence, and the evidence relative to these instructions determined that the negligence attributable to decedent's family was foreseeable and constituted 30% of the relative fault which resulted in the decedent's death. (R-527-529).

The Respondent would urge this court to reject the Respondent's erroneous argument that as a matter of law any negligence on the part of the decedent's family was an unforeseen intervening cause, and to accept the decision of the trior of fact in this cause that any alleged negligence in supervision was foreseeable and therefore Respondent must be responsible for its share of the damages.

POINT 5

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE APPLICABLE LAW IN THIS CASE.

The Respondent has objected to the jury instruction requested by Petitioner, and given by the Trial Court, relative to the negligence issue on the part of Sarasota County.

As stated in Point I of this Brief the doctrine of sovereign immunity has been waived in this instance by Florida Statute 768.28. Once the waiver has occurred this case becomes a premises liability case and should not be treated differently than any other premises liability case simply by virtue of the landowner and operator being a public body.

The instruction given by the Court, and complained of by the Respondent in this Brief, is nothing more than a restatement of Florida Standard Jury Instruction 3.5(f), after the Court had determined that as a matter of law Henry Lee Sanders' status when visiting the park was that of an invitee.

This instruction clearly instructed the jury on the duty of care that a landowner or possessor owes to an invitee on the premises where there is a known dangerous condition that is not readily apparent to the invitee.

By virtue of the instruction being a fair representation of the law applicable to this case the Final Judgment should be affirmed.

CONCLUSION

Based upon the foregoing arguments, it is clear that the Second District Court of Appeals erred in holding that Sarasota County is immune from governmental tort liability under the doctrine of sovereign immunity for its negligent maintenance and operation of a beach-park facility. Additionally, Petitioner would assert that Respondent has failed to demonstrate reversible error on Points II through V of its Brief, therefore the Trial Court must be affirmed in this matter. 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 Boulevard, Sarasota, Florida 33577, ALAN S. ZIMMET, ASSISTANT CITY ATTORNEY, P.O. Box 4748, Clearwater, Florida 33518, Counsel for City of Clearwater which seeks to join in this matter as Amicus Curiae and PAMELA LUTTON-SHIELDS, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF LEGAL AFFAIRS, The Capitol, Suite 1502, Tallahassee, Florida 32301 who seeks to join in this matter as Amicus Curiae on this 30th day of April, 1986.

ROBERT JACKSON McGILL