IN THE
SUPREME COURT OF THE
STATE OF FLORIDA

Case No. 93,065

On Appeal from a Decision of the
Third District Court of Appeal

THE STATE OF FLORIDA, DEPARTMENT
OF NATURAL RESOURCES, n/k/a DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Petitioner,

v.

JUAN A. GARCIA, JR., JUAN A. GARCIA
and BARBARA GARCIA, as the natural
parents of JUAN GARCIA, JR., JUAN A. GARCIA,
Individually, and BARBARA GARCIA, individually,

Respondents

INITIAL BRIEF OF PETITIONER THE STATE OF FLORIDA, DEPARTMENT OF NATURAL RESOURCES n/k/a DEPARTMENT OF ENVIRONMENTAL PROTECTION

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STATEMENT OF THE CASE AND OF THE FACTS

By virtue of its sovereignty, the State of Florida holds title to all of the lands located under the navigable waters ("submerged lands") within the State's boundaries in trust for all of the people of Florida. Art. X, § 11, Fla. Const.; R.[1] 1162. These holdings are vast; they include the sandy beaches from the mean high waterline or erosion control line on the coast to up to three miles into the water, from the center of the Perdido River in Escambia County, to the mouth of the St. Mary's River in Nassau County, to three leagues due south of the Marquesas Keys in the Straits of Florida. Art. X, § 1, Fla. Const.; R. 1162, 1198-99. Juan A. Garcia and his parents sued the State after Mr. Garcia was injured when he dove into the submerged lands located east of the City of Miami Beach. R. 297-317. This appeal arises from a decision of the Third District Court of Appeal in which the district court reversed a summary judgment entered in favor of the State and held that the State could be liable for injuries occurring anywhere in its extensive holdings provided that the public had used the relevant submerged lands for swimming, even if the State had never either formally designated or operated, maintained or controlled the area as a swimming facility. R. 5547, 5550.

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[1] "R." denotes references to the record.

Ownership and Management of Submerged Lands

When Florida became a state in 1845, it was put on an equal footing with the thirteen original states by becoming the holder in trust of the submerged lands located within its territorial boundaries for the protection and benefit of the people of Florida. R. 1162. The submerged lands are held in the name of the Board of Trustees of the Internal Improvement Trust Fund, which is a constitutional board comprised of the governor, secretary of state, comptroller, treasurer, attorney general, commissioner of education, and commissioner of agriculture. §253.02(1), Fla. Stat.; R. 1159-1160. The board is charged with the responsibility of putting the submerged lands to the use and benefit of the people of Florida, who are the legal owners of the submerged lands. §253.001, Fla. Stat.; R. 1158.

The State typically does not designate or operate, maintain or control any of these submerged lands as swimming facilities unless the submerged lands are part of a state park. R. 1163. This is because the State only has the upland landholdings to enable it to control access to and use of the submerged lands in state parks. R. 1203. When the State does decide to operate submerged lands as a swimming facility, the management plans for

the relevant state park must define the swimming facility and address how it will be operated safely. R. 1147. The State controls access to the park and swimming facility and may regulate the behavior of the public using the swimming facility. FLA. ADMIN. CODE ANN. 62D-2.014(1997). Users have to pay a park fee, and swimming may be restricted when a dangerous condition exists. R. 1203-1204.

The State usually allows local governments to manage submerged lands contiguous to the local governments' upland landholdings. R. 1198. The City of Miami Beach actively pursued and acquired the right to manage the submerged lands that are relevant to this appeal. R. 1198-1199. It is undisputed that, by contrast, the State never either designated or operated, maintained, or controlled these submerged lands as a swimming facility. R. 5546.

History of the Action in the Trial Court

Juan A. Garcia and his parents sued the State and six other parties[2] after Mr. Garcia was injured when he dove into the

[2] The Garcias have recovered the maximum damages recoverable by law from governmental entities. However, because

submerged lands adjacent to First Street and Ocean Drive in the City of Miami Beach, an area popularly known as South Beach. R. 297-317. In their Fourth Amended Complaint for Damages, the Garcias alleged that Mr. Garcia was injured because he hit debris left from demolition of the South Beach pier. R. 300 (¶16). They asserted that the State should be liable to them for Mr. Garcia's injuries because of the State's ownership and alleged maintenance, operation, and control of the submerged lands east of South Beach, its alleged agreement with the United States to preserve a coastal area that included these submerged lands, and its alleged involvement in the permitting process that authorized the City of Miami Beach to demolish the South Beach Pier. R. 307-310.

It is undisputed that the State of Florida never either formally designated or operated, maintained, or controlled the submerged lands off of South Beach as a swimming area. R. 5546.

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the district court has imposed a new duty of care on the State for which the State cannot obtain contractual indemnification, this appeal involves issues of wide public interest and the duties of public officials and therefore is not moot. *Ervin v. Capital Weekly Post, Inc.*, 97 So.2d 464, 466 (Fla. 1957).

The State of Florida moved for summary judgment, asserting in relevant part that it could not be liable to the Garcias as a matter of law because it never designated or maintained the submerged lands as a swimming area and its permitting functions do not give rise to tort liability. R. 974-1023. The Garcias opposed the motion by arguing that the State of Florida could be liable because it owned and retained significant control over the submerged lands east of South Beach, it knew that South Beach was a popular swimming area, it had a non-delegable duty as the owner of the submerged lands, and it knew, through its permitting process, that there was debris in the water. R. 5518-5543. The trial court granted the State's motion for summary judgment. R. 5516-5517.

History of the Action on Appeal

When the trial court entered final summary judgment in favor of the State of Florida, the Garcias appealed this matter. R. 1313-1316. On appeal, the Garcias argued the State was not immune from suit because, as the landowner of the property, it owed invitees such as Mr. Garcia a duty of care. App.[3] 1 (Brief

[3] "App." denotes references to the Appendix to the

of Appellants, p. 4). The Garcias opined that because there was no statutory procedure for designating submerged lands as swimming facilities, the State's assertion that it could not be liable because it had never designated the relevant submerged lands as a swimming facility was "a semantic ploy of no substance at all." *Id.* at p. 5. They asserted that the State should be liable to them because South Beach was world-renowned. *Id.* at p. 7.

In response, the State argued that it had waived its sovereign immunity in tort only as to negligent governmental conduct for which an underlying common law or statutory duty of care existed. App. 2. (Appellee's Answer Brief at p.7). Because the owner of a body of water owes no common law or statutory duty of care to swimmers unless the owner has designated the body of water as a swimming area, the State could not be liable to the Garcias solely by virtue of its ownership of the submerged lands in which Mr. Garcia was injured. *Id.* at pp. 7-9. The State noted that, although there is an administrative provision setting

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Initial Brief of Petitioner the State of Florida, Department of Natural Resources n/k/a Department of Environmental Protection.

forth the degree and manner in which the State may control public use of its state parks, the State had never designated or operated the submerged lands east of South Beach as a swimming area. *Id.* at pp. 9-11. The State also asserted that it could not be liable to the Garcias for the discretionary-level act of allowing the City of Miami Beach to operate the submerged lands east of South Beach or to demolish a pier. *Id.* at pp. 12-15.

The district court reversed the summary judgment and remanded this matter for trial on the merits. R. 5546. The district court held that the State owed Mr. Garcia a nondelegable duty of care as the owner of the submerged lands because the public had commonly used those waters as a swimming area. R. 5548. Although it acknowledged that the State could not "practically be expected to be the insurer of safety for every person" swimming in submerged lands and that the State had never either formally designated the relevant submerged lands as a swimming area or operated, maintained or controlled the submerged lands as a swimming area, the district court explained that:

> [t]he test for whether or not liability may exist for the owner of a body of water is not, as the state suggests, whether or not that body of water has been formally designated as a public swimming area. Rather, any body of water held out to be a public swimming area and/or commonly used by

> the public as a swimming area may give rise to liability for its owner, even if that area was not formally designated as a public swimming area.

R. 5546-5547. The district court explained that the liability burden resulting from this approach "is not as tremendous as the State seems to believe" because the "only" beaches for which the State might be liable for a breach of the duty of care would be "those beaches held out as *or actually used as* public swimming beaches." R. 5550 (emphasis supplied). The district court opined that the State could limit its exposure by obtaining indemnification agreements from the local governmental entities that it permitted to manage submerged lands for the use of local citizens. *Id.* The State sought rehearing or clarification or both of the meaning of "actually held out as or actually used as a public swimming beach", of the term "public swimming beach", and of the propriety of indemnification clauses between the State of Florida and local governmental entities. R. 5551-5558. After this motion was denied, the State filed its Notice to Invoke Discretionary Jurisdiction because the district court's decision was in express and direct conflict with decisions of this Court and other district courts on the same question of law. R. 5570-5571.

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This Court accepted jurisdiction pursuant to Article V, section 3(b)(3), of the Florida Constitution.

SUMMARY OF THE ARGUMENT

When it opined that the State of Florida owes a duty of care when the public has "commonly used" a body of water for swimming, the district court departed from well-settled precedent to make the State potentially liable for any swimming injuries occurring in any of the waters that it holds in trust for the people of the State of Florida, from the banks of the Perdido River in the northwest, to the flats extending from the mouth of the St. Mary's River in the northeast, to the myriad secluded beaches scattered throughout the southernmost Keys. The indemnification agreements that the district court posits would protect the State from unlimited potential liability are proscribed by law and limited in scope. Therefore, the practical implication of the district court's decision is that the State can only protect itself by filling in or fencing in all of its navigable waters.

The trial court correctly entered summary judgment in favor of the State of Florida because there was no issue as to the material fact that the State of Florida had never either designated the submerged lands in which Mr. Garcia was injured as a swimming facility or operated, maintained or controlled this body of water as a swimming facility. This Court should quash

the district court's decision and remand this action for reinstatement of the summary judgment.

ARGUMENT

ISSUE ON APPEAL:

I. WHETHER THE DISTRICT COURT ERRED IN IMPOSING A NEW DUTY OF CARE ON THE STATE OF FLORIDA BY FINDING THAT IT OWED A NON-DELEGABLE DUTY AS THE OWNER OF ANY SUBMERGED LANDS THAT THE PUBLIC COMMONLY USES FOR SWIMMING.

A. The State alone determines when it is amenable to suit.

It is the State as sovereign that decides when the State is amenable to suit. *Cauley v. City of Jacksonville*, 403 So.2d 379, 381 (Fla. 1981). When the State waived its sovereign immunity to tort claims by enacting section 768.28, Florida Statutes, the State did not establish new duties of care for governmental entities; it simply agreed to be liable in tort to the same extent that a private person might be liable at common law or by statute. *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912, 917 (Fla. 1985). Therefore, the extent to which the State might be liable to Mr. Garcia depends on the extent to which a private owner of a body of water would have owed a duty of care under the same circumstances. §768.28(1) and (5), Fla. Stat.; *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986).

B. The district court's decision imposes a new duty of care on the State that violates its prerogative as sovereign to determine when it can be sued and creates an express and direct conflict with decisions of this Court and other district courts on the same question of law.

The district court erred by applying opinions that do not address the duty of care arising from ownership of a body of water. As a result, the district court has imposed a duty of care on the State that does not exist for private owners of bodies of water and which is in express and direct conflict with Florida precedent on the same question of law. This Court should quash the district court's decision and remand this action for reinstatement of the summary judgment.

Because of the special hazards inherent to a body of water, an owner would have to "fill the [body of water] or fence it in order to guard against being liable" if the owner were held to the same standard as that applicable to land owners. *Saga Bay Property Owners Ass'n v. Askew*, 513 So.2d 691, 692-693 (Fla. 3d DCA 1987), *rev. denied*, 525 So.2d 876 (Fla. 1988)(involving private owner). As this would be untenable, the critical issue in determining when the owner of a body of water might be liable is not whether it owns the body of water, but whether it designated the body of water as a swimming area. *Andrews v. Dep't*

of Natural Resources, 557 So.2d 85, 88 (Fla. 2d DCA)*, rev. denied*, 567 So.2d 434 (Fla. 1990) *relying on Avallone v. Bd. of County Comm'rs*, 493 So.2d 1002, 1005 (Fla. 1986) *and Butler*, 501 So.2d at 579-580.

Therefore, until the decision entered by the district court, governmental liability had hinged on whether the governmental entity operated the body of water as a swimming facility. In *Avallone*, this Court held that once a government unit decided to operate a swimming facility, it assumed the common law duty to operate the swimming facility safely. 493 So.2d at 1005. In *Butler*, this Court noted that a county waived its sovereign immunity and was charged with a duty of care once it improved and maintained a beach that it owned as a swimming facility. 501 So.2d at 579-580. In *Andrews*, the Second District Court of Appeal reversed a summary judgment that was entered because there was record evidence to suggest that the State had held out the relevant body of water as a swimming facility. 557 So.2d at 88-89.

Significantly, the district court concedes that it is undisputed that the State of Florida never either designated or operated, maintained, or controlled the submerged lands off of

South Beach as a swimming area. R. 5546. Therefore, the district court should have relied on *Warren v. Palm Beach County*, 528 So.2d 413 (Fla. 4th DCA 1988) to find that the State never waived its sovereign immunity, and could not be liable to Mr. Garcia for his injuries. In *Warren*, the Fourth District Court of Appeal affirmed a judgment entered on a verdict in favor of Palm Beach County in an action brought after a swimmer was paralyzed when he dove into a lake that the county had maintained as part of a public park and which had been used for water sports. The *Warren* court was not persuaded by evidence that the public used the lake. *Id.* at 415. It found that the county could not have been held liable as a matter of law because it had not created a designated swimming area. *Id.*

Instead of adhering to *Warren*, the district court below based its decision on cases that do not address the duty of care owed by the owners of bodies of water. *Golden v. Lipkind*, 49 So.2d 539, 541 (Fla. 1950) and *U.S. Security Services Corporation v. Grant*, 665 So.2d 268, 270 (Fla. 3d DCA 1996), *rev. denied*, 675 So.2d 121 (Fla. 1996), stand for the unassailable but irrelevant tenet that the "law imposes on hotels, apartments, innkeepers, etc., the duty to keep their buildings, premises, and appliances"

in a reasonably safe condition. *Atlantic Coast Development Corporation v. Napoleon Steel Contractors*, 385 So.2d 676 (Fla. 3d DCA 1980)(operation of crane) and *Mortgage Guarantee Insurance Corporation v. Stewart*, 427 So.2d 776, 780 (Fla. 3d DCA 1983), *rev. denied*, 436 So.2d 101 (Fla. 1983)(premises liability), stand for the equally unassailable and equally irrelevant proposition that an otherwise blameless private party who entrusted the performance of a non-delegable duty to another private party can obtain indemnification for liability arising from breach of the non-delegable duty.

By focusing on opinions regarding liability and indemnification for breach of non-delegable duties of care, the district court failed to recognize the common law limitations on when owners of bodies of water actually owe such a duty of care. The resulting decision expressly and directly conflicts with *Avallone*, 493 So.2d 1002*, Butler*, 501 So.2d 579, *Saga Bay*, 513 So.2d 691, *Warren*, 528 So.2d 413, and *Andrews,* 557 So.2d 85 on the same question of law. This Court should quash the district court's decision and remand this matter for reinstatement of the summary judgment entered by the trial court.

C. The State cannot limit the financial losses that the district court's decision exposes it to by obtaining indemnification agreements from local governmental entities.

The district court blithely dismisses the State's concern that the duty of care established by the court imposes an intolerable financial burden on the State, by suggesting that the State can limit its financial losses by obtaining indemnification agreements from governmental entities that the State has allowed to manage submerged lands contiguous to their upland landholdings. R. 5550. The court is not only in danger of improperly entangling itself in fundamental questions of policy and planning by making this suggestion, but it has made a suggestion that cannot remedy the State's potential liability. *Kaisner v. Kolb*, 543 So.2d 732, 737 (Fla. 1989).

Such indemnification agreements are proscribed by law. Section 768.28(18), Florida Statutes, provides that contracts between state agencies and subdivisions "must not" contain indemnification provisions for negligent acts. "State agencies and subdivisions" include local governmental entities. §768.28(2), Fla. Stat. Therefore, the indemnification agreements that the district court posits could protect the State from financial losses for the negligent breach of its non-delegable

duty to operate any submerged lands that the public elects to use for swimming would be void and unenforceable.

Assuming *arguendo* that such agreements were valid and enforceable, they would not protect the State from the overwhelming burden imposed on it by the district court. The district court has held that the State owes a duty of care whenever the public "commonly" uses submerged lands as swimming areas. The district court has not stated what "commonly used" means and certainly has not defined "commonly used" areas as only those areas that the State has entrusted to the management of other governmental entities. Therefore, the State faces potential financial losses by virtue of public use of any of the submerged lands that it holds in trust for the people of the State of Florida. Even a raft of indemnification agreements could not remedy such exposure.

The indemnification agreements that the district court suggested would ameliorate the State's heightened duty of care are no panacea. They are proscribed by law and therefore would be void. In addition, they would not be able to protect the State from financial losses arising from any and all swimming areas created by public use. This Court should quash the

decision of the court below, and remand for reinstatement of the trial court's summary judgment.

D. The district court's decision is in derogation of public policy because the State will have to attempt to limit public access to submerged lands that it holds in trust for the use and benefit of the people of the State of Florida.

Limiting the State's liability to only those instances when it has designated or operated the relevant submerged lands as a swimming facility is not "a semantic ploy of no substance at all." App. 6 (Brief of Appellants at p. 5). In fact, it is a critical element of the State's ability to meet its obligation to the people of the State of Florida to put the submerged lands that it holds in trust for them, to their use and benefit. By imposing a new duty of care on the State, the district court's decision will have a chilling effect on the State's use of submerged lands.

As a member of this Court noted, the State of Florida "is blessed with an abundance of natural rivers, lakes, streams, beaches, and woodlands." *Avallone*, 493 So.2d at 1010-1011 (McDonald, C.J., dissenting). The people of the State of Florida are the legal owners of these lands. R. 1158. The Board of

Trustees of the Internal Improvement Trust Fund, which is a constitutional board comprised of the governor, secretary of state, comptroller, treasurer, attorney general, commissioner of education, and commissioner of agriculture, holds the submerged lands in trust for the people of Florida and is charged with the responsibility of putting these lands to the use and benefit of the people of Florida. §253.02(1), Fla. Stat.; R. 1159-1160.

The State has met this duty in relevant part by two methods. It designates submerged lands as swimming facilities when they are part of a state park, where the State has the upland landholdings to enable it to control access to and use of the submerged lands. R. 1163, 1203-1204; FLA. ADMIN. CODE ANN. 62D-2.014(1997). In addition, the State allows local governments to manage submerged lands contiguous to the local governments' upland landholdings. R. 1198.

The district court's decision threatens to stymie the State in meeting its responsibilities to the people of the State of Florida. As noted by the district court in an earlier decision, the unwelcome but necessary implication of imposing a duty of care on owners of bodies of water that is based on their mere ownership of such hazardous areas, is that the owners will have to either fence in or fill in the water in order to be certain of

avoiding liability. *Saga*, 513 So.2d at 692-693. Although an enormous task, it is arguable that the State would be wise, given the district court's decision, to restrict access to and use of the submerged lands not just in State parks, but without limitation throughout the State, and without regard for local access by the people of the State of Florida.

The alternative is to place state employees on the beaches, shoals, and shores that belong to the people of the State of Florida. Over ten years ago, a member of this Court asked in disbelief: "Should the State be required to place a lifeguard at every bend of every river which happens to run through our state parks?" *Avallone*, 493 So.2d at 1010-1011 (McDonald, C.J., dissenting). The district court's decision in the instant case now begs the question: Should the State be required to place a lifeguard at every bend of every body of water, from the banks of the Perdido River in the northwest, to where the St. Mary's River flows into the Atlantic, to the countless beaches lining the Florida Straits, whether or not they are even located in a state park or are operated by the State as a swimming facility?

The answer, clearly, is no. This Court should quash the decision of the district court and remand this action for reinstatement of the trial court's summary judgment.

CONCLUSION

The district court's decision imposes a duty of care on the state that did not heretofore exist in common law, and which is insuperable. This Court should quash the district court's decision and remand for reinstatement of the trial court's summary judgment.

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been sent by U.S. mail on this _____ day of October 1998, to:

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