IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

v. **CASE NO. 93,065**

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.

_____/

BRIEF OF ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, AS AMICUS CURIAE

On Petition for Review of a Decision of The District Court of Appeal, Third District of Florida

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STATEMENT OF THE CASE AND FACTS

The Attorney General adopts the Statement of the Case and Facts set out in the brief of the Department of Natural Resources (now the Department of Environmental Protection).

For purposes of this amicus brief, the salient facts may be succinctly summarized. The plaintiffs, Juan A. Garcia, Jr., and his natural parents, filed suit against the Department of Natural Resources ("DNR") following an accident that rendered Juan A. Garcia, Jr., a quadriplegic. Mr. Garcia was injured when he dove into the Atlantic Ocean in the South Beach area of Miami Beach and struck his head, allegedly on debris left from the demolition of the South Beach pier. In addition to DNR, the Garcias also sued the City of Miami Beach, Metro Dade County and the contractors involved in the pier demolition.

The district court of appeal found that as between Mr. Garcia and DNR it was not disputed that:

> 1. the State owned the beach in question; and
>
> 2. the State never formally designated South Beach as a public swimming area nor did the State ever operate, maintain or control South Beach as a swimming area.

(App. 2) DNR contended it had no duty of care with respect to the beach and adjacent submerged lands because it had never formally designated the beach as a public swimming area. Secondly, DNR contended that even if it had such duty, it had delegated the duty

to the City of Miami Beach pursuant to a written management agreement.

The trial court granted summary judgment to DNR, but, on appeal, the district court of appeal rejected these arguments and reversed the trial court.

THE INTEREST OF THE ATTORNEY GENERAL AS AMICUS CURIAE

As the State's chief legal officer and also as a member of the Board of Trustees of the Internal Improvement Fund, which body is vested with title to the State's sovereignty lands, the Attorney General believes the reasoning and the conclusions of the district court of appeal are seriously in error. The most disturbing aspect of the decision is the unprecedented test by which State liability is now to be determined. Despite the efforts of the district court of appeal to suggest otherwise, its ruling effectively makes the State the insurer of the safety of all persons using the State's beaches and other sovereignty lands:

> The 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**.

(App. 2) (emphasis added).

The district court's strained attempt to limit this duty serves only to underscore its wholly unattenuated nature:

> [T]he liability burden is not as tremendous as the State seems to believe. First, as our decision explains, the only beaches for which the State could possibly face liability for a breach of the duty of care are those beaches held out as **or actually used as public swimming beaches.**

(App. 3) (emphasis added). The same paragraph also notes that the State holds title to 682 miles of Florida beaches and adjacent submerged lands. This figure, in the context of the State's potential liability, is grossly understated in view of the vast areas of tidal sovereignty lands and navigable river and lake bottoms held in the same trust capacity by the State, much or all of which the public may use for swimming and other purposes.

The language of the district court of appeal, taken at face value, makes the State potentially liable for the breach of a duty of care with respect to any beach, tidal or navigable water body used by the public-**-in effect**, **for all sovereignty lands.** Such a duty has never been recognized under the Public Trust Doctrine. Nor, under this Court's many decisions, would such a duty exist pursuant to the State's waiver of sovereign immunity unless consciously and deliberately assumed by government as a planning level decision.

The Attorney General is concerned both for the integrity of the Public Trust Doctrine and for what has heretofore been

generally understood as a **limited** waiver of sovereign immunity that created no new duties of care. For the reasons set forth in the following argument, the decision of the district court of appeal should be reversed.

SUMMARY OF ARGUMENT

I. Under the Public Trust Doctrine, the State holds legal title to all tidal and navigable water bodies, including near-shore waters, in trust for the use and benefit of the people of the State for such purposes as navigation, fishing, swimming and similar uses. As legal title holder, the State has never owed a duty of care to those who use these waters. The waiver of sovereign immunity in section 768.28(1), Florida Statutes, did not create new duties of care. Furthermore, citizens do not hold sovereignty lands in trust for the use of others. The State, by holding title in trust in its sovereign capacity, does not engage in an activity for which a private citizen could be held liable. The statutory waiver of immunity in section 768.28(1) therefore does not apply to the State.

II. This Court has repeatedly held that a governmental body can have no legal duty of care with respect to the use of a swimming area unless it decides to designate and operate such an area and assume the attendant legal duties. It is undisputed in this case that DNR never designated or operated South Beach as a

swimming area. The trial court therefore correctly dismissed this action against DNR on the ground of sovereign immunity.

ARGUMENT

I. THE STATE HAS NO DUTY OF CARE TO THE PUBLIC MERELY BECAUSE IT HOLDS IN PUBLIC TRUST LEGAL TITLE TO NAVIGABLE AND TIDAL WATER BOTTOMS.

The district court of appeal devised a test that makes the State of Florida potentially liable for breach of a duty of care with respect to the public's use of **any** state sovereignty lands for purposes of swimming, and likely any other activity allowed by the Public Trust Doctrine. Even if this duty were limited only to beaches--or to beaches "commonly used by the public," whatever that terminology may mean--it would still be without precedent and justification in the law of this state, just as it would be impossible of performance. In short, the language of the district court of appeal, despite its disclaimer, makes the State the insurer of the safety of all persons exercising their rights under the Public Trust Doctrine.

This Court has historically recognized that lands under navigable or tidal waters "are the property of the states, or of the people of the states in their united or sovereign capacity," and these lands are held "for the use of all the people...for purposes of navigation, commerce, fishing, and other useful

purposes....” *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 So. 353, 355 (1908). “The State holds the foreshore **in trust** for its people for the purposes of navigation, fishing and bathing.” *White v. Hughes*, 139 Fla. 54, 190 So. 446 (1939) (emphasis added). The Public Trust Doctrine derives from the common law of England and “the doctrine of the so-called ‘inalienable trust’ whereby the sovereign held the legal title for the equitable use of his subjects.” *Hayes v. Bowman,* 91 So.2d 795, 799 (Fla. 1957). As *Hayes* points out:

> **[I]t is well settled in Florida that the State holds title to lands under tidal navigable waters and the foreshore thereof (land between high and low water marks). As at common law, this title is held in trust for the people for purposes of navigation, fishing, bathing and similar uses.** Such title is not held primarily for purposes of sale or conversion into money. Basically it is trust property and should be devoted to the fulfillment of the purposes of the trust, to-wit: the service of the people.

Id. at 799 (emphasis added). *See also Bryant v. Lovett,* 201 So.2d 720 (Fla. 1967) (the tidal and submerged lands of the state and the uses thereof are held in trust for the people of the state).

One may examine these and the many other cases that address the Public Trust Doctrine without ever finding a hint that the State, because it holds legal title in trust for the people, owes a duty of care as a matter of law to citizens who “commonly use” the foreshore for swimming or other purposes consistent with the

trust. Such a duty has never been associated with that doctrine or the public's "common use" of the foreshore.

White v. Hughes, supra, by its very silence may be taken as a case in point. There, the State designated as a highway the foreshore of the Atlantic beaches in Duval County, subject to the public's paramount right to use the beach and foreshore for bathing and recreation. The plaintiff, injured by an automobile while lying on the foreshore, sued the driver for redress. There was no suggestion that the State's ownership, or even its designation of the foreshore as a highway, carried with it a duty to warn bathers or to regulate vehicles, both of which, for all that is apparent, "commonly used" the foreshore.

The district court of appeal misconstrued the case it relied on for establishing the State's new and extraordinary duty of care. *Andrews v. Department of Natural Resources,* 557 So.2d 85 (Fla. 2d DCA 1988), *rev. denied*, 567 So.2d 434 (Fla. 1990), reversed a summary judgment in favor of the State and ruled that a factual issue existed as to whether DNR had designated a certain area in a state park as a swimming area. If so, DNR had a duty to warn of the dangerous currents at that particular beach. *Andrews* does not by any means recognize a duty of care owed anyone just by virtue of the State's ownership of the foreshore, nor does any other case.

The district court seemingly understood neither the Public Trust Doctrine nor the nature and extent of the State's waiver of

sovereign immunity. The Public Trust Doctrine is unique in the law, and by its very nature it has no counterpart in the law of private property. The State holds title in trust for the benefit of the people, not like a private property owner who is entitled to treat others as trespassers, licensees or invitees. The State has never had a duty of care that arises merely because of its ownership of sovereignty lands. Moreover, under the Public Trust Doctrine members of the public have the **right** to use the foreshore and all tidal and navigable waters. They have never been considered potential trespassers, licensees or invitees who exercise their rights at the sufferance of the State, nor has it ever been suggested that the State may confine the people's use of sovereignty lands to those areas it can afford to inspect and furnish with lifeguards.[1]

The statutory waiver of sovereign immunity simply has no application to this unique attribute of the sovereign and waiver did not create a new duty for the State. As section 768.28(1), Florida Statutes, plainly states, the waiver of immunity applies only to a wrongful act or omission for which a private person would be liable. Private citizens do not hold vast amounts of submerged sovereignty land in trust for the use of all other citizens. The

[1]Of course, the State may choose to operate a state park, in which case it would have responsibilities like those of private landowners, and persons using the facility might be considered trespassers or invitees depending on the circumstances.

State, in holding title to such lands in its sovereign capacity, does not engage in an activity for which a private citizen could be held liable. The statutory waiver did not change the nature of the trust. As this Court has said repeatedly, the State's waiver of sovereign immunity created **no new duties** of care. *See Kaisner v. Kolb,* 543 So.2d 732, 733 (Fla. 1989) (citing *Trianon Park Condominium Ass'n v. City of Hialeah,* 468 So.2d 912, 917 (Fla. 1985)). As *Trianon Park* holds, "for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged conduct." 468 So.2d at 917. In this case there is neither.

For all these reasons, this Court must reject the "ownership/common use by citizens test" devised by the court of appeal. That test, seen for what it is, simply engrafts an unparalleled duty of care upon the Public Trust Doctrine. If the State is to assume such a duty, it should be by a considered legislative decision, not judicial fiat. Particularly is this so when the duty as a practical matter is impossible to perform, so that the State by creation of the duty becomes the insurer of public safety.

II. DNR DID NOT WAIVE ITS SOVEREIGN IMMUNITY IN THE ABSENCE OF A DECISION TO DESIGNATE AND OPERATE SOUTH BEACH AS A SWIMMING AREA OR TO ASSUME JOINT RESPONSIBILITY FOR A SWIMMING AREA DESIGNATED BY THE CITY OF MIAMI BEACH.

There is no conflict in the controlling case law. Before a governmental body can have a legal duty of care with respect to use of a swimming area and the dangers that may inhere therein, it must make a conscious decision to designate and operate that swimming area and to assume the legal duty. *See Warren v. Palm Beach County,* 528 So.2d 413 (Fla. 4th DCA 1988), *cause dismissed*, 537 So. 2d 570 (Fla. 1988); *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986) (county created designated swimming area where dangerous currents existed and failed to post lifeguards); *Avallone v. Board of County Com'rs of Citrus County,* 473 So.2d 1002 (Fla. 1986) (county operated park/swimming facility but did not provide lifeguards); *Andrews v. Department of Natural Resources, supra* (factual issue as to whether DNR had designated certain beach in state park as swimming area precluded summary judgment). The *Avallone* decision clearly states the underlying rationale:

> A government unit has the discretionary authority to operate or not operate swimming facilities and is immune from suit on that discretionary question. **However, once the unit decides to operate the swimming facility,** it assumes the common law duty to operate the facility safely, just as a private individual under like circumstances.

493 So.2d at 1005 (emphasis added).

In this case, DNR never designated South Beach as a public swimming area or operated a facility of any kind at South Beach, as the district court of appeal was compelled to acknowledge. (App. 2) Having made this discretionary planning level decision not to designate or operate a swimming area, DNR was entitled to claim the protection of sovereign immunity. The decision below attempted to avoid this result, however, by claiming that DNR had a nondelegable, operational level duty of care toward swimmers notwithstanding its **recognized** planning level decision and its agreement to allow the City of Miami Beach to manage beach property in its operation of a swimming facility. The district court's reasoning fails on several grounds.

First, as shown, the State had no duty of care at all towards swimmers arising by virtue of its ownership of the near shore waters where the plaintiff's injury occurred. With respect to sovereignty lands, the State is a trustee, not a landlord.[2] As a matter of law, a duty of care does not arise unless the State decides to operate a swimming facility, which it never did. Contrary to the language of the decision, the State could not "retain" a common law duty to operate the beach safely when it

[2]The district court's reliance on ***Goldin v. Lipkind,*** 49 So.2d 539 (Fla. 1950), for the landlord analogy is curious wholly apart from the fact that the sovereign, as trustee, in no way resembles a landlord. In ***Goldin*** it was not the hotel owner but the innkeeper who leased and operated the hotel who was liable for not keeping common areas lighted and free of obstructions.

never had that duty in the first instance. Only the City had a duty of care in this case, because it was the City that undertook to manage South Beach as a public facility and swimming area.

Although it was not the express reasoning of the lower court, it seems implicit in the decision that once the City decided to operate the swimming area on beach property covered by the management agreement, both the City and the State somehow became operationally liable. Clearly, under the law no duty of care could have arisen **before** the City's decision. But there is no basis in the law for inferring that the City's decision to waive **its** immunity and assume certain duties perforce waives the immunity of the State and thereby thrusts those same duties upon the State. This not only does violence to logic--that one unit of government can waive the legal immunity of another--but also to the doctrine this Court has been at pains to work out--that it is the prerogative of each governmental body to consciously decide what discretionary operational duties it will take on.

This doctrine is firmly imbedded in the first sentence of section 768.28(18), Florida Statutes, providing that no agency "**waives any defense of sovereign immunity**, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state." (emphasis added) DNR's acknowledgment through the management agreement that the City could invite the public to a designated facility under City

management was not a decision by DNR to assume any duty of care and therefore could not under section 768.28(18) constitute a waiver of sovereign immunity.

There is no evidence that DNR ever agreed to share any duty the City had to remedy or warn of hazardous swimming conditions. Indeed, the State is not equipped to share such responsibilities with the scores of local governments that designate swimming areas along the many beaches of the state and it is even less equipped to assume sole responsibility for undesignated beaches. Inspecting the near-shore waters of every beach for transient debris would not only be an impossible undertaking in the first instance, but largely futile even where carried out given the constant effects of wind, tide and current. The only discernible purpose for imposing such a duty on DNR in addition to the local governments would be to provide insurance coverage for every beach and swimming area regardless of designation, and not, in any realistic sense, to enhance safety. The State, however, has never undertaken to certify the safety of all beaches and other sovereignty lands used by the public or warn of all possible hazards. A court's attempt to impose that duty would, as this Court recognized in both *Trianon* and *Kaisner*, usurp the function of other branches of government and violate separation of powers. *See* 468 So.2d at 918 and 543 So.2d at 737. Whether the State should undertake such a responsibility is preeminently a decision for the legislature.

In an effort to mitigate the future impact of its decision, the district court of appeal suggested that in future management agreements local government entities could be required "to indemnify the State in the event the State is found liable solely due to its ownership of the beach." There are several problems with this. First, there is no reason to think a management agreement would apply to an undesignated beach. The test for liability prescribed by the lower court applies to **all** sovereignty submerged lands "commonly used" by the public. The State's potential exposure is not going to be much reduced by indemnity clauses in management agreements.

A more fundamental problem, of course, is the district court's reliance on two cases in which ordinary private landowners were held to have a nondelegable duty to keep their premises safe, from which the court apparently derived the State's nondelegable sovereign lands duty and its suggestion of indemnification as palliative.[3] The State has no comparable duty of care simply because in its sovereign capacity, it holds all tidal and navigable waters in trust. At issue in this appeal are DNR's entitlement to sovereign immunity and the unfounded duty the lower

[3]The district court cited *Mortgage Guarantee Ins. Corp. v. Stewart,* 427 So.2d 776 (Fla. 3d DCA 1983), and *Atlantic Coast Dev. Corp. v. Napoleon Steel Contractors*, 385 So.2d 676 (Fla. 3d DCA 1980).

court indiscriminately tacked on the Public Trust Doctrine, not the lure of indemnification.

Finally, to the extent the lower court was attempting to suggest that a local government could indemnify the State against the State's own failure to either discover hazards or warn of those it knew about, it again misread section 768.28(18). That section prohibits contracts in which one government party agrees to indemnify or insure another government party for that second party's negligence. If the State fails in a duty of care, it will bear the liability, not the local government. There is no way to mitigate the financial impact of this decision on the State.

CONCLUSION

The decision below makes the State the guarantor of the safety of all persons who exercise their right to use the foreshores of our beaches and other sovereignty lands. It creates a duty of care that is impossible of performance and in its application to all sovereignty lands "used by the public" without reasonable bounds. The decision is wrong, and it should be reversed with directions to reinstate the trial court's order of dismissal.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by U.S. Mail on BRUCE G. HERMELEE, Esquire, Hermelee & Sharp, 25 S.E. 2nd Avenue, Suite 1135, Miami, Florida 33131; JOEL D. EATON, Esquire, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130; and JENNIFER G. ALTMAN, Esquire, One International Plaza, Suite 2800, Miami, Florida 34131-2144; this _____ day of _____, 1998.

_____
Louis F. Hubener
Assistant Attorney General

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APPENDIX