Case No. 93,065

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

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

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Case No. 93,065

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SUMMARY OF THE ARGUMENT

The district court erred when it applied premises liability law to find the State liable, even though the State had never designated, operated, maintained or controlled any portion of the waters in which Juan A. Garcia was injured as a swimming area. Premises liability law does not apply to the State as holder in trust of all of the submerged lands, because no private landowner has ever owed a commensurate common law or statutory duty to the public. Indeed, it would be grossly unfair and unworkable to apply premises liability law when the State has not designated, operated, maintained or controlled a swimming area, because the State cannot protect itself from unlimited liability by claiming that the people, who are the owners of the submerged land, are mere trespassers, invitees or licensees.

The Garcias' facile arguments have done nothing to assist this Court in weighing the effect that the district court's opinion will have on the State's ability to function as sovereign. By providing that the State owes a duty when the public has made a conscious decision to use sovereign submerged lands for swimming, the district court has made the State the insurer of risks that it never sought to undertake, violating the laws governing sovereign immunity and imposing an insuperable burden on the State. The district court opinion must be quashed.

ARGUMENT

A. The Garcias' "simple and straightforward" argument cannot justify the hopelessly flawed district court opinion, because the Garcias' argument is itself hopelessly flawed.

Rather than immediately respond to the arguments presented by the State of Florida, Juan A. Garcia and his parents chose to first present their own position. Their lengthy argument boils down to the following syllogism:

> the State owned the submerged lands in which Mr. Garcia was injured;
>
> this area was a swimming place of international renown;
>
> therefore, the State owed Juan A. Garcia the non-delegable duty that private landowners owe to invitees to maintain premises in a safe condition.

Answer Brief at p. 14. The Garcias' argument may be, as they assert, "simple and straightforward", but, like many syllogisms, it is also wrong.[1]

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[1] The Garcias also have made numerous factual misrepresentations. Perhaps most critical, they have asserted that their allegation that Mr. Garcia was injured because he hit debris left from demolition of the South Beach pier is fact. Answer Brief at page 2. Although there is no doubt that the Garcias would like to treat this allegation as fact, because it

The State's relationship to persons using land that the State holds in trust for the people of Florida is utterly unlike the relationship between private landowners and persons who come upon their property. As the Garcias acknowledge, the law protects private landowners by tying the duty that they owe to persons located on their premises to whether the persons are trespassers, licensees or invitees. Answer Brief at page 35, relying on *Post v. Lunney*, 261 So.2d 146 (Fla. 1972) and *Wood v. Camp*, 284 So.2d 691 (Fla. 1973). No such distinctions can be made on behalf of the State as the holder in trust of all of Florida's submerged lands, because the people of Florida -- not the State -- are the legal owners of the submerged lands. §253.001, Fla. Stat.; R. 1158. Because the people of Florida are the true owners of the submerged lands, the people of Florida have an equal and unlimited right to use and enjoy those lands.

To wit: Juan A. Garcia was not and could never be the State's invitee simply because he had entered submerged lands,

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makes their arguments more compelling, in the multitudinous depositions taken in this action (including the depositions of each and every eyewitness to the accident), the Garcias never established that Mr. Garcia was injured when his head struck a chunk of concrete debris, and not the sandy bottom.

because he *owned* that land.

The Garcias have attempted to inflame this Court with their repeated assertion that the State, by making this argument, is asking this Court to turn back the clock, so that the State will once more be a "king" who can do wrong with impunity. This is not only inflammatory, it simply is not true. The State acknowledges that it can be liable in tort. However, as oft repeated by this Court, the State also rightly asserts that it may liable only in the same manner and to the same extent as a private individual who has breached a common law or statutory duty of care under like circumstances might be liable. Because no private landowner holds vast tracts of land in trust for the use of all of the people of Florida, it is axiomatic that there has never existed an underlying common law or statutory non-delegable duty of care for this activity. The State cannot be liable to the Garcias, simply by virtue of its role under the Public Trust Doctrine.

The State only assumes the non-delegable duty of care owed by a private landowner when it designates, operates, maintains or controls any portion of the submerged lands as a swimming area, thereby becoming more than a passive land holder. *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986) and *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).

In making their "simple and straightforward" argument, the Garcias have completely ignored the undisputed fact that the State *never* designated, operated, maintained or controlled the area in which Mr. Garcia was injured as a swimming beach. Perhaps this is because the fact that the State never designated, operated, maintained or controlled the area in which Mr. Garcia was injured as a swimming beach is dispositive of the fact that the State is not liable to the Garcias. In *Butler*, this Court found that the state would owe a duty to operate a swimming beach safely if it "owned the beach area in question *and* [had] improved and maintained the area as a swimming facility." 501 So.2d at 579 (emphasis supplied). In *Avallone*, this Court premised liability on the governmental entity's decision to operate a swimming facility. 493 So.2d at 1005.

Nor are these opinions "king" makers; it is well-settled that designation or operation of a swimming area is an essential predicate to a private owner's liability for swimming injuries. *Saga Bay Property Owners Ass'n v. Askew*, 513 So.2d 691, 692-693 (Fla. 3d DCA 1987)(private owner not liable for drowning in part of lake that was undeveloped and in its natural state), *rev.*

denied, 525 So.2d 876 (Fla. 1988).

Indeed, even premises liability cases do not base a duty on mere passive ownership of land. For example, in *Golden v. Lipkind*, 49 So.2d 539, 541 (Fla. 1950), and in *U.S. Security Services Corporation v. Ramada Inn, Inc.*, 665 So.2d 268, 269 (Fla. 3d DCA 1996), liability was based not on ownership of the area in which damages were sustained, but on operation of a hotel that was not run in compliance with Florida law.

The sophistry of the Garcias' argument is highlighted by their subsequent assertion that the district court's opinion has not subjected the State to unlimited liability as the wholesale insurer of public safety because "[t]he duties owed by private landowners do not make them insurers of the safety of all persons on their property for any purpose; the duties vary depending upon the status of the plaintiff on the property -- whether trespasser, licensee, or invitee." Answer Brief at page 35. Again, unless the State has designated, operated, maintained or controlled an area of its submerged lands for swimming, no person injured therein will have the legal status of trespasser, licensee, or invitee, because the people of Florida are the owners of and have the unlimited right to use those submerged lands. Therefore, there is no legal basis for applying this three-tier analysis to limit the non-delegable duty of care that

the district court wrongly imposed on the State.

It is notable that not one of the cases on which the Garcias rely to argue that the State is protected from unlimited liability by the three-tier analysis that protects private owners is predicated on the State owing a duty of care simply because of its role as trustee of the submerged lands. Rather, each and every one of these opinions involves a governmental entity that owned and exerted control over the area in which the injury was sustained. *Barrio v. City of Miami,* 698 So.2d 1241 (Fla. 3d DCA 1997)(injuries sustained on beach owned and operated by city), *review denied* 705 So.2d 569 (Fla. 1998); *Mueller v. South Florida Water Management District*, 620 So.2d 789 (Fla. 4th DCA)(injuries sustained on property owned by SFWMD), *review denied*, 629 So.2d 135 (Fla. 1993)*; Lukancich v. City of Tampa*, 583 So.2d 1070 (Fla. 2d DCA 1991)(injuries sustained in alley owned and maintained by city); *Davis v. City of Miami,* 568 So.2d 1301 (Fla. 3d DCA 1990)(injuries sustained in city park); *Dougherty v. Hernando County*, 419 So.2d 679 (Fla. 5th DCA 1982)(injuries sustained in dive from bridge owned or maintained by governmental entity in park owned or maintained by same), *review denied*, 429 So.2d 5 (Fla. 1983); *Savignac v. Department of Transportation,* 406 So.2d 1143 (Fla. 2d DCA 1981)(injuries sustained in dive from bridge

constructed and owned by DOT), *review denied*, 413 So.2d 875 (Fla. 1982); *Wilkinson v. Duval County School Board*, 377 So.2d 245 (Fla. 1st DCA 1979)(injuries sustained from faulty skylight in county-owned building); and *City of Boca Raton v. Mattef*, 91 So.2d 644 (Fla. 1956)(injuries sustained while painting city water tower). The Garcias could not provide this Court with such a citation, because the district court's decision to impose a non-delegable duty of care on the State simply because it owns the submerged lands pursuant to the Public Trust Doctrine is, literally, without precedent.

Again, the Garcias' syllogism for the State's liability, while perhaps pleasingly "simple and straightforward", is legally flawed. The State's liability must be predicated not on its ownership of all of Florida's submerged lands, which it holds in trust for the people of Florida, but on its decision to designate, operate, maintain or control the relevant submerged land as a swimming beach. There is no issue as to the material fact that the State never designated, operated, maintained or controlled the area in which Mr. Garcia was injured for swimming; the City of Miami Beach did. In fact, the City has responded to the Garcias' claims by paying them up to the statutory cap. Therefore, the trial court correctly entered summary judgment in favor of the State. This Court should quash the decision of the

district court, and reinstate the summary judgment entered in favor of the State.

B. The district court opinion must be quashed because it provides that the State owes a duty not only when the *State* makes a conscious decision to operate a swimming area, but when the *public* has made a conscious decision to use sovereign submerged lands for swimming.

In purporting to address the Initial Brief served in this appeal, the Garcias' have resorted to describing the State's arguments as "pot shots." The Garcias' ploy is to boldly mis-state case law and the State's position, in lieu of actually responding to the arguments made in the Initial Brief. This amounts, quite frankly, to a series of cheap shots that do nothing to assist this Court in assessing the district court opinion on its merits.

First, the Garcias mock the State for noting that the "premises" in question are a vast body of water, and assert that the State has taken the position that owners of bodies of water never owe a duty of care. The fact that an injury is sustained in a body of water is significant. Because a body of water is inherently dangerous, there is nothing that its owner can do to guarantee absolute safety, bar filling in the body of water.

Saga Bay, 513 So.2d at 692-693. For this reason, the owner of a body of water only owes a non-delegable duty of care under limited circumstances, such as, for example, when the owner has designated, operated, maintained or controlled the area for swimming. *Id.*

The distinction that the State has made is critical in evaluating the district court's opinion for two reasons. First, the submerged lands are vast, encompassing the sandy beaches from the mean high waterline or erosion control line on the coast to up to three miles into the water on every inch of coastline in Florida. Art. X, §§ 1 and 11, Fla. Const.; R. 1162, 1198-99. Second, the submerged lands are hard to control, because the State does not own most of the upland landholdings, which would enable it to control access to and use of the submerged lands. For example, in the instant case, the City of Miami Beach owned the upland holdings, and controlled egress with metered parking spaces and lifeguards.

The Garcias next harp on the fact that the State has correctly noted that it never designated the area for swimming, incorrectly arguing that public use of the beach as a swimming area gives rise to a non-delegable duty on the part of the State. Most erroneously, the Garcias maintain that *Andrews* stands for the proposition that the lack of formal designation of a swimming

area does not exonerate a governmental entity from liability. This is to grossly mis-state *Andrews*, in which the Second District Court of Appeal simply reversed a summary judgment entered in favor of the State, because there was record evidence that the State had, in fact, designated the relevant beach as a swimming area. Contrary to the Garcias' position, the common law (with the exception of the instant district court opinion) is monolithic in holding that a governmental entity does not owe a duty of care until it has held the relevant body of water out as a swimming area. *Avallone*, 493 So.2d 1002*; Butler*, 501 So.2d 579; *Warren v. Palm Beach County*, 528 So.2d 413 (Fla. 4th DCA 1988); and *Andrews,* 557 So.2d 85.

The Garcias next suggest that the availability of management agreements to indemnify the State and the common-law duty to indemnify a passive tortfeasor cure the admittedly broad liability created by the district court's opinion. Again, whether legal or not, a whole host of such agreements or a common-law right to indemnification could never protect the State from the overwhelming burden imposed on it by the district court's opinion, because the opinion provides that the State owes a non-delegable duty of care whenever the public "commonly" uses submerged lands as swimming areas. The district court has not defined what "commonly used" means. There is no basis for

construing "commonly used" areas to mean only those areas for which the State has obtained contractual or may obtain common-law indemnification. Therefore, the existence of such agreements, or even the possibility of common-law indemnification, does not protect the State from owing a duty of care -- pursuant to the district court opinion -- to the public whenever the public unilaterally designates a portion of the submerged lands as a swimming area.[2]

Finally, the Garcias simply do not address the effect that the district court's decision will have on the State.[3] First,

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[2] Contrary to the Garcias' arguments, the State did address the management agreement before it moved for rehearing. However, the inadequacy (not to mention, illegality) of such agreements was highlighted when the district court issued an opinion that established a far broader duty of care on the State than that which even the Garcias had alleged existed.

[3] Perhaps this is because the outcome of this appeal, as to the Garcias, will only determine whether the Garcias are entitled to fees as the prevailing party on appeal. Because the Garcias have recovered the maximum damages recoverable by law from a governmental entity (the City of Miami Beach), there will be no trial on the merits of this action. The State has brought

they fail to read the opinion beyond the context of their claim. In fact, the opinion imposes a duty of care that the Garcias never even sought to impose on the State, because it makes the State liable for injuries occurring anywhere that the people of Florida, by virtue of use, have "designated" as a swimming area. Therefore, under the district court opinion, the State would be liable not only for injuries sustained in an area such as South Beach, but for injuries sustained in any portion of the water ways, from the Perdido River down to the very tip of the Florida Straits.

Second, the Garcias suggest that the State is protected by the statutory cap on governmental liability. The essence of this argument is that it is acceptable to hold an insurer liable for a risk that the insurer did not undertake so long as the amount of coverage is within its policy limits. This, of course, is preposterous.

Third, the Garcias have compared the duty of care that the district court has imposed on the State to the duty of care that

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this appeal solely because the district court opinion addresses issues of wide public interest and the duties of public officials. *Ervin v. Capital Weekly Post, Inc.*, 97 So.2d 464, 466 (Fla. 1957).

the State owes as the owner of thousands of vehicles, thousands of miles of roads, and a considerable number of buildings. The Garcias suggest that if the State can face the duty of care that arises from these extensive holdings, then it can bear the responsibility of insuring public safety on every cubic inch of its submerged lands. Of course, this comparison is absurd, because the State elects and chooses to own and to regulate vehicles, roads, and buildings (a citizen would be restrained from taking a State truck for a ride, while there is no basis for not permitting a citizen to swim in the Atlantic). Had the State chosen to establish all of its thousands of miles of sovereign submerged lands as beaches, then the State would likewise have undertaken to owe a duty of care to anyone using those beaches. This, of course, the State has not done, and the Garcias' comparison fails.

The fact is, when the district court issued an opinion in which it provided that the public's congregate activities rather than the State's affirmative designation, operation, or maintenance of a swimming area could give rise to potential liability, the district court turned well-settled law on its ear. Until now, it was undisputed that the State, as sovereign, determined when the State would be amenable to suit. *Cauley v. City of Jacksonville*, 403 So.2d 379, 381 (Fla. 1981). Until now,

the critical issue in determining the State's liability in this context was not whether it owned the relevant body of water, but whether it had designated the body of water as a swimming area. *Andrews*, 557 So.2d at 88; *Avallone,* 493 So.2d at 1005; and *Butler*, 501 So.2d at 579-580. The district court opinion must be quashed because it provides that the State owes a duty not only when the State has made a conscious decision to operate a swimming area, but when the *public* has made a conscious decision to use sovereign submerged lands for swimming. Such a result is not just unprecedented. It is untenable.

CONCLUSION

The district court's decision imposes an insuperable duty of care on the State that never before existed in common law. This Court should quash the district court's decision and remand for reinstatement of the trial court's summary judgment.

Case No. 93,065

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 December, 1998, to:

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