IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

Case No. 93,065

FILED
SID J. WHITE
JUN 15 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

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
______________________________/

PETITIONER'S AMENDED BRIEF ON JURISDICTION

**On Petition for Review of a Decision of the
Third District Court of Appeal**

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STATEMENT OF THE CASE AND OF THE FACTS

The State of Florida holds title to Florida's sovereign submerged lands, which are the sandy beaches from the mean high waterline or erosion control line on the coast to three miles into the water, in trust for its citizens. App.[1] 1 at p.5. Juan A. Garcia and his parents sued the State of Florida and six other parties after Mr. Garcia was injured when he dove into the sovereign submerged lands adjacent to First Street and Ocean Drive in the City of Miami Beach, in an area popularly known as South Beach. App. 2.

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. App. 2. They asserted that the State of Florida should be liable to them for Mr. Garcia's injuries because of the state's ownership and alleged maintenance, operation, and control of the sovereign submerged lands off of South Beach, its alleged agreement with the United States to preserve a coastal area that included these lands, and its alleged involvement in the permitting process that authorized the City of Miami Beach to demolish the South Beach Pier. Id.

It is undisputed that although swimmers flock to South Beach, the State of Florida has never either formally designated or operated, maintained, or controlled the sovereign submerged lands off of South Beach as a swimming area. Consistent with its obligation as trustee of the sovereign submerged lands to permit

[1] References to the Appendix are denoted with "App." and the number and page number of the applicable document.

local governmental agencies to operate these lands for the best and most enjoyable use of local citizens, the state did grant the City of Miami Beach the right to manage South Beach. App. 7.

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 sovereign submerged lands as a swimming area and its permitting functions do not give rise to tort liability. App. 3. The Garcias opposed the motion by arguing that the State of Florida could be liable because it owned and retained significant control over South Beach, it knew that South Beach was a popular swimming area, it had a non-delegable duty as the owner of the sovereign submerged lands, and it knew, through its permitting process, that there was debris in the water. App. 4 at pp. 4-7.

When the trial court entered final summary judgment in favor of the State of Florida, the Garcias appealed this matter to the Third District Court of Appeal. In Garcia v. Florida, 707 So.2d 1158 (Fla. 3d DCA 1998), the Third District Court of Appeal reversed the summary judgment and remanded this matter for trial on the merits. App. 1 at p. 6. The court reasoned that the state owed Mr. Garcia a nondelegable duty of care as the owner of the sovereign submerged lands, even though it had never designated them as a swimming area. Id. at p. 4. Acknowledging that the state could not "practically be expected to be the insurer of safety for every person" swimming in sovereign submerged lands, the court explained that the state could only be liable for a

breach of the duty of care that it owed as the owner of the sovereign submerged lands "held out or actually used" as public swimming beaches. Id. at pp. 5-6. The court found that the state could limit its exposure by obtaining indemnification agreements from the local governmental entities that it permitted to manage sovereign submerged lands for the use of local citizens. Id.

The heart of this decision is the court's assertion 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.

Id. at p. 3. The court acknowledged that this assertion expressly and directly conflicts with the Fourth District Court of Appeal's decision in Warren v. Palm Beach County, 528 So.2d 413 (Fla. 4th DCA 1988). Id.

The State of Florida timely moved for a rehearing or clarification of the court's decision, seeking 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. App. 9. at pp. 2 and 5. After this motion was denied, the State of Florida timely filed its Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF THE ARGUMENT

Until Garcia v. Florida, 707 So.2d 1158 (Fla. 3d DCA 1998), the general rule in tort had been that the owner of a body of water can be liable for a breach of its duty of care only if it held the body of water out as a swimming area. The court below has imposed a new duty of care on the State of Florida by finding that, even though the state never designated the sovereign submerged lands off of South Beach as a swimming area, the state may be liable to the Garcias simply by virtue of its ownership of this famous strip of land.

This decision exposes the state to unlimited liability. Because indemnification agreements are statutorily proscribed, the state cannot protect itself from the impact of this decision by obtaining indemnification agreements from other governmental entities. This decision expressly and directly conflicts with a decision of the Fourth District Court of Appeal and departs from other appellate decisions on this point of law. This Court should accept jurisdiction to resolve the express conflict among these various decisions.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL AND ALSO CONFLICTS WITH OTHER APPELLATE DECISIONS HOLDING THAT A SOVEREIGN CAN ONLY BE HELD LIABLE FOR INJURIES OCCURRING IN AN AREA THAT IT HAS DESIGNATED FOR SWIMMING.

1. The Third District Court of Appeal has imposed a duty of care on the state that has never before been imposed on any governmental entity or private owner, in express and direct conflict with a decision of the Fourth District Court of Appeal on the same point of law, in derogation of section 768.28, Florida Statutes, and in direct conflict with other appellate decisions.

This Court should accept jurisdiction in this matter because the Third District Court of Appeal's decision expressly and directly conflicts with Warren v. Palm Beach County, 528 So.2d 413 (Fla. 4th DCA 1988), conflicts with other appellate decisions, and expands the state's tort liability in derogation of section 768.28, Florida Statutes.

It is the state as sovereign, and not the public, that decides when the state is amenable to suit. Cauley v. City of Jacksonville, 403 So.2d 379, 381. The state's tort liability is governed by section 768.28, Florida Statutes, under which the state waived its sovereign immunity as to negligent governmental conduct for which an underlying common law or statutory duty of care existed. Trianon Park Condominium Ass'n v. City of Hialeah, 468 So.2d 912, 917 (Fla. 1985). In enacting this provision, the state "did not establish any new duty of care for governmental entities." 468 So.2d at 917. The extent to which the state

waived its immunity in tort for Mr. Garcia's injuries is determined by the common law duty of care imposed on private owners of bodies of water. §768.28(1) and (5), Fla. Stat.

Private owners are not held liable by virtue of their ownership alone; they do not owe a duty of care unless they have held the body of water out as a swimming area. Saga Bay Property Owners Ass'n v. Askew, 513 So.2d 691, 692-93 (Fla. 3d DCA 1987), rev. denied, 525 So.2d 876 (Fla. 1988). This Court has held that governmental entities waive sovereign immunity and assume a common law duty of care identical to that imposed on a private owner only when they decide to operate a body of water as a swimming area. Butler v. Sarasota County, 501 So.2d 579 (Fla. 1986). Therefore, whether a governmental body has waived its sovereign immunity and might be liable in tort for accidents occurring on a body of water depends on whether the governmental entity designated or operated 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 579-80.

Consistent with this authority, the Warren court found that a county was sovereignly immune from tort liability because it had not created a designated swimming area in a body of water that the public openly used as a swimming area. 528 So.2d at 415. The plaintiff had alleged that Palm Beach County should be liable for the injuries that he had sustained when he dove into

Lake Osborne because the county had maintained the lake as part of a public park and had failed to warn visitors about hazardous diving conditions in the lake. Id. at 414. In holding that the county was sovereignly immune from tort liability, the court found that "[i]t matters not that there was some evidence that ... the lake was commonly used for boating and water-skiing, and that there were no signs posted which specifically prohibited swimming and diving." Id.

By contrast, the Third District Court of Appeal has made the state liable for any injuries occurring anywhere on the 682 miles of sovereign submerged lands that it holds in trust for its citizens. Even though the Garcia court acknowledged that there was no issue as to the material fact that the state had never either designated or operated the sovereign submerged lands near South Beach as a swimming area, the court imposed a nondelegable duty of care on the state as the owner of the sovereign submerged lands. App. 1 at p. 4. It explained:

> [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.

App. 1 at p. 3.

The final summary judgment entered by the trial court comported with the common law principle that the owner of a body

of water is not liable unless it has held the body of water out as a swimming area. Although this Court has consistently noted that enactment of section 768.28, Florida Statutes, did not establish new duties of care for governmental units, the Third District Court of Appeal has imposed a new duty of care on the State of Florida by finding that, even though it never designated South Beach as a swimming area, it may be liable to Appellants simply by virtue of its ownership of same.

2. Statement as to why the Supreme Court should accept jurisdiction and review this appeal on its merits pursuant to Committee Notes to Rule 9.120(d).

The Garcia decision vests the decision as to whether the State of Florida should be amenable to suit in the public. Although it conceded that the state could not "practically be expected to be the insurer of safety for every person" swimming in sovereign submerged lands, the court found that the state could be liable for a breach of the duty of care that it owed as the owner of sovereign submerged lands "held out or actually used" as public swimming beaches. App. 1 at pp. 5-6. This means that the state is potentially liable when a member of the public uses any portion of its sovereign submerged lands as a beach. In addition, the Garcia opinion fails to specify what factors determine when beaches are "public" for the purpose of tort liability. Because the State of Florida holds the sovereign submerged lands in trust for the public to ensure the continued, unencumbered use of these lands for activities such as swimming,

all of the sovereign submerged lands are public. Therefore, the Garcia decision exposes the state to unlimited liability.

In addition, the Garcia decision will have a chilling effect on the state's discretionary functions. The State of Florida holds title to all of Florida's sovereign submerged lands in trust for its citizens. App. 1 at p. 5. In its capacity as trustee, it may permit local governmental agencies to manage the sovereign submerged lands for the best and most enjoyable use of local citizens. See generally, App. 7. The Garcia decision threatens to allow courts, "by way of tort law, [to] inappropriately ... entangle [themselves] in fundamental questions of policy and planning." Kaisner v. Kolb, 543 So.2d 732, 737 (Fla. 1989).

Finally, the state cannot protect itself from liability by requiring indemnification from local governmental entities. The Florida Constitution and sections 768.28(2) and 768.28(19), Florida Statutes, render such indemnification agreements void and unenforceable. E.g., Op. Att'y Gen. Fla. 78-20 (1978).

CONCLUSION

Because the decision of the court below directly and expressly conflicts with a decision of Florida's Fourth District Court of Appeal, and also conflicts with numerous other appellate decisions, this Court should accept jurisdiction to review and quash the district court's decision.

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing has been sent by U.S. mail on this 12th day of June, 1998, to:

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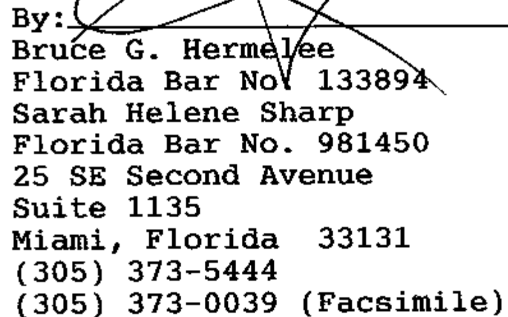

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