IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,065

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

Petitioner,

vs.

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.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENTS' BRIEF ON JURISDICTION

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I. STATEMENT OF THE CASE

The State's statement of the case goes well outside the four corners of the decision sought to be reviewed, and it relies upon an inch-think appendix containing numerous documents from the record proper. Most respectfully, this was improper. *See Reaves v. State*, 485 So.2d 829, 830 n. 3 (Fla. 1986). We are therefore constrained to restate the case for the reorientation of the Court. For the convenience of the Court, we have appended a copy of the district court's decision to the brief. We will confine our restatement to the face of that decision.

South Beach is undeniably a public swimming area of international renown. It is owned by the State of Florida and operated by the City of Miami Beach under a management agreement in which the State delegated operational control and management of the beach to the City, and in which the City agreed to indemnify the State for any liability it might incur if the beach were negligently operated by the City. When the City demolished the South Beach pier, it failed to remove all the debris from the ocean bottom. On February 1, 1989, Juan Garcia, Jr., an invitee using the beach for its intended purpose, dove into the ocean, struck his head on a piece of the debris, and was rendered quadriplegic.

Juan, Jr. and his parents sued the State, the City, and various others. The State ultimately obtained a summary judgment in its favor by convincing the trial court of two things: (1) that it owed Juan, Jr. no duty of care because it had never formally "designated" South Beach as a public swimming area; and (2) that, if it owed Juan, Jr. a duty of care, it had delegated that duty to

the City. On appeal, a unanimous panel of the district court rejected both contentions.

With respect to the first contention, the district court held that the duty of care owed by an owner of a public swimming area does not turn upon the presence or absence of a formal "designation" of the area as such; rather, it turns upon whether the area is *in fact* held out or used as a public swimming area (as South Beach undeniably is, and as the State has conceded it to be). It was in connection with this holding that the district court cited the decision upon which the State now relies for its attempted demonstration of conflict. The State asserts in its statement of the case (at p. 3) that the district 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)." If this statement were true, our brief would not even have been this long. Most respectfully, the statement is not true.

The district court did *not* acknowledge conflict of any sort. It simply cited *Warren* with an introductory signal. It did *not* use the signal "*contra*" or "*but see*"; it used the signal "*but cf.*" *Cf.* means "[c]ited authority *supports a proposition different from the main proposition but sufficiently analogous to lend support*," and *but cf.* means "[c]ited authority *supports a proposition analogous to the contrary* of the main proposition." *The Bluebook: A Uniform System of Citation*, p. 23 (16th Ed. 1996). We will parse the *Warren* decision in the argument which follows, and explain why the district court concluded that it presented only an analogous

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problem, and was *not* contrary to its holding in the instant case.

With respect to the second contention, the district court simply applied *thoroughly* settled principles of law to the facts before it. It noted that §768.28, Fla. Stat., explicitly imposed the same duties upon the State as those imposed upon private landowners. It noted that landowners owe a duty to their invitees to maintain their premises in a safe condition for their intended use. And it noted that this duty is non-delegable -- i. e., the performance of the duty may be delegated to another, but liability for its breach by the delegate cannot. It concluded accordingly that the State owed Juan, Jr. a non-delegable duty to ensure that South Beach was maintained in a safe condition for its intended use, and that the trial court had erred in concluding otherwise.

The district court also rejected the State's contention that it was immune from suit. Following two prior decisions of this Court squarely on point, it held that the duty to operate a public swimming area safely is an operational level duty, not a planning level duty. *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986); *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986). The district court also rejected the hyperbolic and entirely unfounded claim which the State has resurrected here, that its application of settled legal principles to the facts before it created a duty "never before" imposed upon the State and exposed it to "unlimited liability." It explained that it is thoroughly settled that the owner of a public swimming area owes a non-delegable duty of care to its invitees; that the State's duty of care extends only to those beaches held out or

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actually used as public swimming areas; and that the State could protect itself from financial loss, as it did in the instant case, by including a right to be indemnified from loss in the beach management agreements by which it delegates its duty of care to other governmental entities.

II. ISSUE PRESENTED ON JURISDICTION

WHETHER THE DISTRICT COURT'S DECISION IS IN "EXPRESS AND DIRECT CONFLICT" WITH *WARREN V. PALM BEACH COUNTY*, 528 SO.2D 413 (FLA. 4TH DCA), *CAUSE DISMISSED*, 537 SO.2D 570 (FLA. 1988).

III. SUMMARY OF THE ARGUMENT

The district court's decision is not even arguably in "express and direct conflict" with *Warren*; the State's various quarrels with the merits of the decision are without merit; and review should be denied.

IV. ARGUMENT

THE DISTRICT COURT'S DECISION IS NOT IN "EXPRESS AND DIRECT CONFLICT" WITH *WARREN V. PALM BEACH COUNTY*, 528 SO.2D 413 (FLA. 4TH DCA), *CAUSE DISMISSED*, 537 SO.2D 570 (FLA. 1988).

In this Court at least, the State appears to have abandoned the first contention it made below, that no duty of care can be imposed upon a governmental entity unless it has formally "designated" an area as a public swimming area. Because there is no statute providing any process or procedure whereby public swimming areas can be formally "designated" as such, and because there is no requirement either in the statutory or decisional law for such a formal "designation," this contention amounted to a contention that, by the simple expedient of not doing something which the law does not require it to do, a governmental entity can relieve itself

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of an obligation which the law otherwise squarely imposes upon it. Recognizing that this contention is insupportable, the State has at least conceded the correctness of the district court's initial conclusion -- that the duty of care owed by an owner of a public swimming area does not turn upon the presence or absence of a formal "designation" of the area as such, but turns upon whether the area is *in fact* held out or used as a public swimming area.

There is nothing in *Warren* which is even arguably inconsistent with this perfectly straightforward conclusion that a public swimming area is a public swimming area is a public swimming area whether formally "designated" as such or not. Nevertheless, the State contends that the district court's decision is in "express and direct conflict" with *Warren*. Most respectfully, as did the district court, we disagree.

In *Warren*, Palm Beach County operated Lake Osborne as a public park. A local ordinance prohibited swimming in county-owned parks except in areas designated as swimming areas by official signs and markings. Swimming was not permitted in Lake Osborne; there were no signs permitting swimming, and park rangers had instructions to prevent swimming. Nevertheless, the plaintiff dove into the lake at its shoreline and suffered a spinal injury rendering him a quadriplegic. He sued the County for failing to post warnings about the hazardous diving conditions. The jury found the County not negligent.

In his motion for new trial, the plaintiff challenged the correctness of a jury instruction given by the trial court. The propriety of the challenge depended upon whether Lake Osborne was

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being operated as a public swimming facility. The trial court ruled that the County "was not operating a swimming facility at Lake Osborne" (528 So.2d at 415) and that the instruction had therefore been correct -- and it denied the motion for new trial. On appeal, the plaintiff argued that Lake Osborne *was* a public swimming facility, that the County therefore owed him the duty of care that owners of public swimming areas owe to their invitees, and that the jury instruction had been erroneous as a result.

Unfortunately, the only evidence that the plaintiff was able to muster to support imposition of the duty he claimed was evidence that the lake "was commonly used for boating and water-skiing" (*id.*). There was no evidence that the lake's shoreline was commonly used as a swimming or diving area. The district court simply declined to extrapolate the latter from the former to conclude that the shoreline was in use as a public swimming area, and it therefore rejected the plaintiff's challenge to the jury instruction.

In the instant case, South Beach is undeniably in open and notorious use as a public swimming area, so the *Warren* Court's refusal to extrapolate common use as a swimming area from common use as a boating and water-skiing area is beside the point. Moreover, it is perfectly clear from *Warren* that, *had* Lake Osborne been in open and notorious use as a public swimming area, as South Beach is, the Court would have concluded that the County *did* owe the plaintiff the duty of care he claimed. In fact, this Court's decisions in *Avallone* and *Butler*, which hold precisely that, would have given it no choice in the matter.

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Most respectfully, the difference between *Warren* and the district court's decision in the instant case is not in their holdings; the difference is in the bodies of water in which the two plaintiffs suffered their tragic diving accidents. In *Warren*, the plaintiff suffered his injury at the shoreline of a lake which was not in use as a public swimming area; in the instant case, Juan, Jr. suffered his injury at a world famous beach which was undeniably in use as a public swimming area. Although the *results* in the two decisions are different, the decisions are perfectly consistent in their legal conclusions -- and the State's contention that the decisions are in "express and direct conflict" is, we respectfully submit, plainly without merit.

What the State is *really* arguing here is an entirely different point. In essence, it is quarreling with the merits of the district court's conclusion that the duty of care which arises from the operation of a public swimming area is non-delegable. The State's argument, as we understand it, goes like this: concededly, a duty of care arises from operation of a public swimming area; in this case, the City held out and operated South Beach as a public swimming area, so it owed Juan, Jr. a duty of care; but because only its delegate held out and operated South Beach as a public swimming area, and it did not, it owed him no duty of care -- and the district court therefore erred in imposing a "new duty of care" upon it, "never before" recognized by the law.

Of course, this is an argument with the merits of the district court's conclusion that the duty of care arising from the operation of a public swimming area belongs to its owner and is non-delega-

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ble; it is not a claim of conflict, so it is irrelevant to the question before the Court at this juncture -- whether this Court has jurisdiction to review the decision. Relevant or not, however, the State's position on this point is plainly wrong. The district court's conclusion is simply the tail end of a string of simple, settled legal principles, and its logic is unassailable.

A private landowner owes a duty to its invitees to maintain its premises in a reasonably safe condition for their intended use. *Post v. Lunney*, 261 So.2d 146 (Fla. 1972). That duty is non-delegable -- i. e., performance of the duty can be delegated, but liability for its breach by the delegate cannot. *Goldin v. Lipkind*, 49 So.2d 539 (Fla. 1950); *U.S. Securities Services Corp. v. Ramada Inn, Inc.*, 665 So.2d 268 (Fla. 3d DCA), *review denied*, 675 So.2d 121 (Fla. 1996). Governmental landowners owe precisely the same duties to their invitees as private landowners do (and the duty is an operational level duty where the safety of public swimming areas is concerned). Section 768.28(1) & (5), Fla. Stat.; *Butler, supra*; *Avallone, supra*. It therefore logically follows that the State, as owner of South Beach, owed Juan, Jr. a non-delegable duty to maintain South Beach in a reasonably safe condition for its intended use as a public swimming area. It could delegate performance of that duty to the City if it wished, but it could not delegate its liability for a breach of that duty by its delegate. Most respectfully, the district court's decision is correct.[1/]

[1/] There is, incidentally, nothing new or novel about this conclusion. The decisional law uniformly holds that, where a private person would owe a non-delegable duty, the parallel duty

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The State also quarrels with the district court's observation that it can protect itself from financial loss by including an indemnification provision in its beach management agreements. It cites a 1978 Attorney General's Opinion as support. Of course, this Court does not have jurisdiction to review decisions which conflict with such an Opinion, so the contention has nothing to do with the jurisdictional question before the Court. The contention is also wrong. There was a time when it was generally accepted that, although governmental entities could enter into contracts, they possessed sovereign immunity from any action to enforce those contracts. As a result, at least prior to 1984, the Attorney General frequently opined that indemnification agreements were unenforceable against governmental entities. The Opinion upon which the State now relies falls into that category. Not one of those pre-1984 Opinions is valid today, however, because this Court changed the law in 1984, when it held that the State no longer enjoyed sovereign immunity from the enforcement of contracts fairly authorized by the powers granted by general law. *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So.2d 4 (Fla. 1984).

The beach management agreement in issue here was entered into under the authority of Chapter 161, Fla. Stat. (1981), in connection with the State's beach and shore preservation program. At that time, §161.101(3), Fla. Stat. (1981), explicitly authorized

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owed by a governmental entity is non-delegable as well. *See, e. g., City of Coral Gables v. Prats*, 502 So.2d 969 (Fla. 3d DCA), *review denied*, 511 So.2d 297 (Fla. 1987); *Newsome v. Department of Transportation*, 435 So.2d 887 (Fla. 1st DCA 1983), *review denied*, 459 So.2d 314 (Fla. 1984); *Hubbard Construction Co. v. Orlando/Orange County Expressway Authority*, 633 So.2d 1154 (Fla. 5th DCA 1994).

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the State to "enter into cooperative agreements and otherwise cooperate with, and meet the requirements and conditions (including but not limited to, *execution of indemnification agreements*) of federal, state, and other local governments and political entities . . . for the purpose of improving, furthering, and expediting the beach and shore preservation program" (emphasis supplied). (The current version of this statute is identical, and can be found at §161.101(4), Fla. Stat. (1997)). In short, the district court was plainly correct in observing that the State could protect itself from financial loss by including an indemnification provision in its beach management agreements.[2/]

V. CONCLUSION

It is respectfully submitted that no conflict has been demonstrated, and that review should be denied.

Respectfully submitted,

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[2/] For a more detailed demonstration of the error of the State's position on this point, see our response to the State's motion for rehearing in the district court, at pages 3-9 of the document at Tab 10 of the petitioner's appendix.

Appendix

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1998

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,

Appellants,

vs.

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

Appellee.

CASE NO. 96-3588

LOWER TRIBUNAL NO. 91-26591

Opinion filed February 25, 1998.

An appeal from the Circuit Court for Dade County, Jon I. Gordon, Judge.

Needle, Gallagher & Areces; Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin and Joel D. Eaton for appellants.

Hermellee & Stieglitz and Bruce G. Hermellee and Esperanza V. Cervantes; Sarah Helene Sharp (Jacksonville), for appellee.

Before NESBITT, GODERICH, and GREEN, JJ.

NESBITT, J.

The issue in this appeal is whether the State has a duty of

care towards swimmers at a public beach, where that beach is state-owned, but is controlled and operated by a municipality in accordance with a management agreement between the State and the municipality. Because we find that the duty of care owed by owners of property, including owners of bodies of water, cannot be delegated, we hold that the State owed a duty of care to swimmers at the state-owned, municipality-controlled beach involved in this case. Therefore, we reverse the summary judgment entered in favor of the State, which dismissed the State agency from this personal injury lawsuit.

On February 1, 1989, Juan A. Garcia, Jr., (Garcia) was seriously injured when he dove into the Atlantic Ocean along the "South Beach" area of Miami Beach. He struck his head on debris on the ocean bottom which had allegedly been left there after the demolition of the South Beach pier. His injuries rendered him quadriplegic. In the ensuing tort suit, Garcia and his parents sued the contractors involved in the pier demolition, the City of Miami Beach (City), Metro Dade County (n/k/a Miami Dade County), and the State Department of Natural Resources (n/k/a Department of Environmental Protection) (State).

There are two issues of material fact not in dispute between the State and Garcia--(1) that the State owns the beach area in question; and (2) that 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.

The State moved for summary judgment below on the alternative

grounds that (1) since *the State* had never formally designated the beach in question as a public swimming area, it had no duty of care pursuant to its ownership of the beach and the adjacent submerged lands; and (2) even if the State did owe such a duty, it had delegated that duty in its entirety to the City pursuant to a written management agreement between the State and the City concerning the beach and waters of South Beach. The trial court granted summary judgment to the State. Because we find that neither of the State's contentions has merit, we reverse.

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. See Andrews v. Department of Natural Resources, 557 So. 2d 85, 88-89 (Fla. 2d DCA 1990); but cf., Warren v. Palm Beach County, 528 So. 2d 413 (Fla. 4th DCA 1988).

In the instant case, although South Beach is not formally designated by the State as a public swimming area, it is held out to be a public swimming area by the City and is, in fact, used as a public swimming area. We disagree with the State's argument that since it is *the City, and not the State*, that holds South Beach out as a public swimming area, the State can avoid liability for any breach of the duty of care. The management agreement demonstrates

that the State was aware of and, in fact, anticipated that the City would operate South Beach as a public swimming area.

Despite the fact that it was the City, and not the State, that maintained, operated and controlled South Beach as a public swimming area, the State as the owner of South Beach remained responsible--and therefore liable. This is because a property owner's duty of care towards invitees is a nondelegable duty. See Goldin v. Lipkind, 49 So. 2d 539, 541 (Fla. 1950); U.S. Securities Serv. Corp. v. Ramada Inn, Inc., 665 So. 2d 268, 270 (Fla. 3d DCA 1995); W. Page Keeton et al., Prosser & Keeton on The Law of Torts, § 71, at 511-12 (5th ed. 1984). The management agreement between the City and the State, while delegating the operation of the beach to the City, could not delegate the ultimate responsibility to provide a duty of care and, thus, could not absolve the State of liability as a matter of law.

Simply, the *performance* of a duty may be delegated, but the actual *responsibility* for the duty may not. See Mortgage Guarantee Ins. Corp. v. Stewart, 427 So. 2d 776, 780 (Fla. 3d DCA 1983); Atlantic Coast Dev. Corp. v. Napoleon Steel Contractors, 385 So. 2d 676, 679 (Fla. 3d DCA 1980). This is true even where, as here, there was no allegation that the State either caused or knew of the dangerous condition which resulted in Garcia's injury and where, as here, it was alleged that the City and its contractors were the actual wrongdoers through their negligent failure to either properly remove the pier debris from the water or to warn the public of the danger from that debris.

The State argues that its decision to permit the City to operate South Beach was a planning level decision, protected from suit by the sovereign immunity statute. Though we agree that the decision to enter into the management agreement granting control of the beach to the City was a planning level decision, the duty implicit in property ownership--the duty of care towards invitees--is a common law, operational level duty which waives the State's sovereign immunity. See Trianon Park Condominium Ass'n v. City of Hialeah, 468 So. 2d 912, 917 (Fla. 1985). In other words, although a discretionary, planning level decision to permit the City to operate South Beach was made, the State retained the common law duty to operate the beach and its swimming area safely. See Butler v. Sarasota County, 501 So. 2d 579, 579-80 (Fla. 1986), citing Avallone v. Board of County Commissioners of Citrus County, 493 So. 2d 1002, 1005 (Fla. 1986). This duty exists at the operational level. Id. The duty of care owed by the State is the same as the duty owed by a private owner with regard to operating (or permitting another to operate) a public swimming area on its property--that is, the duty to operate that beach and swimming area safely (or to see that it is operated safely). See § 768.28(5), Fla. Stat. (1995); Avallone, 493 So. 2d at 1005.

Finally, we reject the State's assertion that the above-stated imposition of liability creates an intolerable financial burden on the State which, we acknowledge, "owns" or holds title to 682 miles of Florida beaches and adjacent submerged lands in trust for Florida citizens. We realize that the State cannot practically be

expected to be the insurer of safety for every person swimming at each of these beaches where, as here, the beaches are located within and controlled by other government entities. Nonetheless, the 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. Further, the State may protect itself from financial losses--as it did here--by including an indemnification clause in its beach management agreements with other government entities, requiring these entities to indemnify the State in the event the State is found liable solely due to its ownership of the beach.

As discussed above, we find that the State *did* have a duty of care towards invitees such as Garcia who were using South Beach for its intended purpose, i.e., swimming. This duty arose from the State's ownership of the beach and its knowledge that it was being operated by the City as a public swimming area. The duty was not and could not be delegated to the City. Therefore, we reverse the summary judgment below and remand for a trial on the merits.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 17th day of July, 1998, to: Bruce G. Hermelee, Esq., and Sarah Helene Sharp, Esq., Hermelee and Sharp, 25 S.E. 2nd Ave., #1135, Miami, Fla. 33131; Jennifer G. Altman, Esq., Zack, Sparber, Kosnitsky, Spratt & Brooks, P.A., One International Plaza, Suite 2800, Miami, FL 33131; and to Louis F. Hubener, Esq. and Amelia L. Beisner, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Suite PL-01, Tallahassee, FL 32399-1050.

By: Joel D. Eaton
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