ORIGINAL

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.
_____/

RESPONDENTS' BRIEF ON THE MERITS

NEEDLE, GALLAGHER, ARECES
& ELLENBERG, P.A.
1401 Brickell Avenue, Suite 900
Miami, Florida 33131
-and-
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN,
P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

By: JOEL D. EATON
Fla. Bar No. 203513

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LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
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I.
STATEMENT OF THE CASE AND FACTS

The State has filed two initial briefs in this Court -- one by private counsel and one by the Attorney General, who has appeared here in the guise of an *amicus curiae*.[1/] Both briefs contain incomplete statements of the case and facts which are more argument than statement, and we therefore cannot accept them as either adequate or proper. We will restate the case and facts as a result.

The respondents, Juan A. Garcia, Jr., and his parents, Juan A. Garcia and Barbara Garcia, were plaintiffs below in a negligence action arising out of a diving accident at South Beach, in Miami-Dade County, in which Juan Jr. was rendered quadriplegic. According to the allegations of their Fourth Amended Complaint (R. 297), South Beach is a public swimming area, under the jurisdiction and control of the State of Florida, Department of Natural Resources; Metropolitan Dade County; and the City of Miami Beach. At some time prior to Juan Jr.'s tragic accident, the City, for itself and the other governmental entities, contracted with an independent contractor to demolish the South Beach Pier, and to clean up and remove the debris from the ocean floor. Unfortunately, although the pier was demolished, the debris from the demolition was not fully removed.

[1/] Although our initial objection to the State appearing as *amicus curiae* for itself was overruled at an early stage of this proceeding, we remain puzzled by the fact that a single party has been permitted to file two briefs here -- and we remain convinced that a party cannot be both a party and a "friend of the Court" at the same time. That is apparently water over the dam, however. We mention it simply to alert the full Court to what has been permitted over our objection, with a suggestion that the Court's apparent policy in this regard be reconsidered in future cases.

Thereafter, in an effort to render the swimming area safe for its intended use, the City invited bids on a contract to remove the debris, and in May, 1988, it accepted the bid of another independent contractor. Unfortunately, because of ensuing negotiations, the contract was not immediately performed; and on February 1, 1989, while diving in the area, Juan Jr. was rendered quadriplegic when his head struck a chunk of the debris. The plaintiffs then sued a number of defendants, including the State of Florida, Department of Natural Resources. *See generally City of Miami Beach v. Dickerman Overseas Contracting Co., U.S.A.*, 659 So.2d 1106 (Fla. 3d DCA 1995), *review denied*, 669 So.2d 251 (Fla. 1996).

During the course of the proceedings, the State moved for summary judgment (R. 974). The motion conceded that the State owned the premises on which Juan Jr. was injured. The motion also did not challenge the absolutely undeniable fact that South Beach is a public swimming area of world renown. The motion contended nevertheless that the State was entitled to judgment in its favor for essentially two reasons: (1) because it had never formally "designated" South Beach as a public swimming area, it had no operational level duty to exercise care for the safety of invitees using its premises, and it was therefore immune from suit; and alternatively, (2) if it owed an operational level duty of care to Juan Jr., it had delegated that duty in its entirety to the City of Miami Beach, and could not be held legally responsible for the negligence of that "independent contractor."[2/]

[2/] The motion challenged other miscellaneous aspects of the plaintiffs' "duty" allegations as well. Because it is unnecessary to support those miscellaneous allegations in order to establish an actionable duty of care here, we will not trouble the Court with a distracting discussion of the non-essential aspects of the motion.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
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Attached to the motion was a "Management Agreement" between the State and the City concerning South Beach, dated February 3, 1982 (R. 983). The agreement recites that the State "holds title" to the premises in issue here, and that the agreement "does not convey any interest in real property" to the City; it grants "management responsibilities" to the City for 25 years; it requires the City to pay the State 25% of all revenues collected from private concessionaires "for the use of the State property"; it reserves to the State the right to manage the premises in any manner not inconsistent with a management plan to be submitted by the City; and it contains a "hold harmless" clause requiring the City to indemnify the State for "any and all liability or claims that may result from injuries to persons . . . arising out of this agreement and the use of the property by the CITY . . . ." Also attached to the motion was an affidavit reciting generally that the State had not "designated" South Beach as a public swimming area, and did not operate or control South Beach (R. 994).

The plaintiffs filed a response to the motion (R. 5518-44). The response argued, in essence, that because South Beach was a public swimming area as a matter of indisputable fact, the lack of a formal "designation" of same did not relieve the State of its operational level duty as a landowner to exercise reasonable care for the safety of invitees using its premises; that this duty was a "non-delegable duty"; and that the State was therefore not relieved of liability for breach of the duty simply because it had delegated "management responsibilities" to the City. The trial court agreed with the State; granted the State's motion for summary judgment; and entered a final judgment in the State's favor (R. 5516).

A timely appeal followed to the District Court of Appeal, Third District (R.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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1313). A unanimous panel of that Court reversed the State's judgment (R. 5545-50). With respect to the State's first contention, it held that the duty of care owed by the 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).

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 reasonably 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.

The district court also rejected the State's appellate contention that its duty of care existed only at the planning level, and that it was therefore 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. 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

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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to its invitees; that the State's duty of care extends only to those beaches held out or 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.

The State moved for rehearing and clarification (R. 5551-58). Following our response, the district court denied the motion (R. 5559-67, 5568). The State thereafter invoked this Court's discretionary review jurisdiction, contending that the district court's decision was 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). Although we remain convinced that the claimed "conflict" does not exist (as we will explain *infra*), the Court accepted jurisdiction.

II.
ISSUE PRESENTED ON REVIEW

WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THE STATE, AS OWNER OF THE PREMISES BEING OPERATED AS A PUBLIC SWIMMING AREA, OWED JUAN JR. A NON-DELEGABLE, OPERATIONAL LEVEL DUTY OF CARE AND WAS THEREFORE NOT IMMUNE FROM SUIT.

III.
SUMMARY OF THE ARGUMENT

A. Our position is simple and straightforward. A private landowner owes a duty to its invitees to maintain its premises in a reasonably safe condition for their intended use. 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.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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These points are thoroughly settled. When the State waived its immunity from suit in 1973, it became liable in tort "in the same manner and to the same extent as a private individual under like circumstances," and it therefore became subject to all of the common law principles generally lumped under the rubric of "premises liability" law. It logically follows that the State, as landowner, owes a duty to its invitees to maintain its premises in a reasonably safe condition for their intended use, and that this duty is non-delegable. And where public swimming areas are concerned, that a breach of this duty is an actionable, operational level breach is settled by this Court's decisions in *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986), and *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986). Most respectfully, the district court's decision simply follows these thoroughly settled propositions of law, and it is correct.

B.1. The State's arguments fail to come to grips with the settled legal principles upon which the district court's decision rests. Instead, the State's arguments are mostly miscellaneous potshots which miss the point. The arguments also appear to seek wholesale judicial resurrection of the long-discredited (and now statutorily-repealed) doctrine that "the King can do no wrong," and little else. The State's first argument, for example, is simply indefensible. *Saga Bay Property Owners Ass'n v. Askew*, 513 So.2d 691 (Fla. 3d DCA 1987), *review denied*, 525 So.2d 876 (Fla. 1988), does *not* say that owners of "bodies of water" owe lesser duties of care than *land*owners, as the State contends. The law is settled that the nature of the duty owed depends upon the status of the plaintiff on the property -- whether trespasser, licensee, or invitee -- and not upon whether the injury occurred on land or in water. The child who drowned in *Saga Bay* was at most a licensee,

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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if not a trespasser, and was therefore owed very little duty of care at all. In the instant case, Juan Jr. was plainly an invitee, owed a duty of reasonable care under the circumstances. That point is settled by *Avallone* and *Butler*, and the State's reliance upon *Saga Bay* is clearly misplaced.

2. The State's second argument -- that it can owe no duty of care to Juan Jr. because it never formally "designated" South Beach as a public swimming area -- is also without merit. There is no statute providing any process or procedure whereby swimming areas at ocean beaches can be formally "designated" as swimming areas by the governmental entities which own them. And there is nothing in *Avallone* or *Butler* which makes "designation" a condition precedent to the operational level duty of care which arises from ownership and operation of what is, as a matter of undeniable fact, a public swimming area. In addition, the City has certainly "designated" South Beach as a public swimming area by developing it, operating it, and holding it out for that purpose; and because the State's duty of care is non-delegable, any tort arising out of that "designation" must be actionable against the State as well, whether the State "designated" the beach to be what it undeniably is or not.

3. The State's quarrel with the district court's observation that it can protect itself against financial losses by including indemnification clauses in its beach management agreements is also without merit. To begin with, the observation was merely an aside, offered to placate the State's concerns; it had nothing to do with the holding of the decision itself, so right or wrong, it can provide no basis for a quashal of the decision. In addition, the argument was not raised in a timely manner below, so it is not properly before the Court. The argument is also simply

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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wrong. Both the beach management agreement and the very indemnification clause in issue here were fully authorized by statute -- and §768.28(18), Fla. Stat., does not say otherwise. This provision (first enacted in 1993, long after execution of the contract in issue and the incident in suit), prohibits a governmental entity from agreeing to indemnify a second governmental entity for the *second governmental entity's* negligence; it does not, on the facts in this case, prohibit a passive tortfeasor like the State from obtaining indemnity from an actively negligent tortfeasor like the City -- a remedy which would be available to the State under the common law in any event, with or without the contractual indemnity provision which it now challenges here.

4. The State's additional argument -- that the district court's decision will impose an "intolerable financial burden" upon it -- is neither relevant nor true. It is irrelevant because it is directed at the wrong institution. It cannot legitimately be directed to this Court because the legislature has already waived the State's immunity from suit, and this Court is bound to implement that waiver, like it or not. It is untrue (1) because, as the district court's decision carefully explains, the State's exposure is limited to only those beaches held out or actually used as public swimming areas; (2) because the State's liability is capped at a rather meager amount by §768.28, and any excess must be recovered through the legislative claims bill process; and (3) because the State may protect itself against financial losses by including an indemnification clause in its beach management agreements, exactly as it did in the instant case.

5. We also disagree with the State's contention that the Public Trust Doctrine is subverted by the district court's decision. Nothing in this doctrine

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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speaks to the issue of immunity from suit, and nothing in the district court's decision requires that all persons utilizing the State's property for recreational purposes be treated as invitees. Because §768.28 makes the State "liable for tort claims in the same manner and to the same extent as a private individual under like circumstances," the same three-tiered classification system presently applied to private landowners -- trespasser, licensee, invitee -- applies to the State as well.

Because the State holds title to the beaches under the Public Trust Doctrine, in trust for its citizens, the public cannot be denied their use; but this permission to use the beaches makes most beachgoers mere licensees, not invitees -- and the State's duty of care is thus ordinarily a limited one, to avoid willful and wanton harm and to warn of known dangerous conditions not open to ordinary observation. That is not a particularly onerous burden, and the Public Trust Doctrine is hardly subverted by it. The exposure of which the State complains is plainly limited by the district court's decision to only those beaches held out or actually used as public swimming areas -- and with respect to those types of beaches, this Court has already squarely spoken, in *Avallone* and *Butler*, that the citizenry is owed a duty of reasonable care under the circumstances.

IV.
ARGUMENT

THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT THE STATE, AS OWNER OF THE PREMISES BEING OPERATED AS A PUBLIC SWIMMING AREA, OWED JUAN JR. A NON-DELEGABLE, OPERATIONAL LEVEL DUTY OF CARE AND WAS THEREFORE NOT IMMUNE FROM SUIT.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

In our judgment, the conclusions reached by the district court were simple and straightforward, and simply required by thoroughly settled principles of law. We also think that the State has failed to come to grips with those settled legal principles, and that its arguments are mostly miscellaneous potshots which miss the point. It also appears to us that the State's arguments seek wholesale judicial resurrection of the long-discredited (and now statutorily-repealed) doctrine that "the King can do no wrong," and little else. In any event, because of the miscellaneous nature of the State's arguments, we cannot simply respond to them on their own terms. We prefer to defend the district court's decision by stating our own position first. We will address the State's miscellaneous arguments thereafter.

A. Our position.

Our position is simple and straightforward, and depends upon undisputed facts and thoroughly settled principles of law. As to the facts, it is undisputed that the State owned the premises in issue; that it conveyed no interest whatsoever in its real property to the City; and that it delegated only "management responsibilities" to the City (in exchange for a 25% cut of the revenues collected from private concessionaires). It is also undisputed that the State's property, South Beach, was being operated by the City as a public swimming area, and that tourists from all over the world were invited and encouraged to use it for that purpose.

As to the law, a private landowner indisputably 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). This duty extends to all who are invited on to the premises for any purpose -- and earlier distinctions drawn in the decisional

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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law between "business invitees," "public invitees," and "social guests" no longer exist. *Wood v. Camp*, 284 So.2d 691 (Fla. 1973). If South Beach had been owned by a private landowner, Juan Jr. would plainly have been an invitee, and he would undeniably have been owed a duty of reasonable care for his safety.

The duty of care he would have been owed would also have been a non-delegable duty -- a point which has recently been explained with considerable clarity as follows:

> The central flaw in [the landowner's] reasoning is that its duty to provide its business invitees with reasonably safe business premises . . . is a *non-delegable* duty which it cannot contract out of by hiring an independent contractor. Indeed, this has long been the law of Florida:
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> > "The law imposes on hotels, apartments, innkeepers, etc., the duty to keep their buildings, premises and appliances in a condition reasonably safe for the use of their guests, or at least those parts of the buildings and premises to which the guest[s] are invited and may reasonably be expected to use. *The duty of maintaining safe premises cannot be delegated to another."*
>
> *Goldin v. Lipkind*, 49 So.2d 539, 541 (Fla. 1950) (emphasis added). Moreover, this is a well-established principle of law recognized throughout the country. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 71, at 511-12 (5th ed. 1984).
>
> It is true, of course that a landowner may contract out the *performance* of his non-delegable duty to an independent contractor, but he cannot contract out of his ultimate legal *responsibility* for the proper performance of his duty by the independent contractor; the landowner is always responsible for the proper performance of his duty by the

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

independent contractor; the landowner is always responsible for the proper performance of this non-delegable duty, whether performed by himself, an employee, or an independent contractor. This is also the established law of Florida:

> "[T]he law has always permitted a person to hire an employee or an independent contractor to perform a non-delegable duty owed by that person to third parties [i.e. the duty of a landowner to invitees to maintain its premises in a reasonably safe condition]; *the law only precludes such person from escaping, by that devise, vicarious responsibility for the proper performance of that nondelegable duty."*

Mortgage Guarantee Ins. Corp. v. Stewart, 427 So.2d 776, 780 (Fla. 3d DCA), *rev. denied*, 436 So.2d 101 (Fla. 1983) (emphasis added).

> "Holding a particular undertaking to be nondelegable means that *responsibility*, i.e., ultimate liability, for the proper performance of that undertaking may not be delegated. The term nondelegable does not preclude delegation of the actual *performance* of the [nondelegable] task. 'Nondelegable' applies to the liabilities arising from the delegated duties if breached."

Atlantic Coast Dev. Corp. v. Napoleon Steel Contractors, Inc., 385 So.2d 676, 679 (Fla. 3d DCA 1980).

U.S. Securities Services Corp. v. Ramada Inn, Inc., 665 So.2d 268, 270-71 (Fla. 3d DCA), *review denied*, 675 So.2d 121 (Fla. 1996). That "this is a well-established principle of law recognized throughout the country" is reinforced, we would add, by its black-letter recognition in §415 of the *Restatement (Second) of Torts*. And

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

because this Court endorsed that universally accepted proposition a half-century ago in *Goldin v. Lipkind*, 49 So.2d 539 (Fla. 1950), it would appear to be beyond debate here.

There was a time, of course, when a *governmental* landowner could breach this non-delegable duty of care with impunity, because the doctrine of sovereign immunity shielded it from the consequences of its tortious conduct. Times changed in 1973, however, when the legislature enacted a limited waiver of the immunity from suit previously enjoyed by the State and its political subdivisions -- in §768.28, Fla. Stat. *See generally Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981); Gerald T. Wetherington and Donald I. Pollock, *Tort Suit Against Governmental Entities in Florida*, 44 Fla. L. Rev. 1 (1992).

Although this waiver was a limited one, since it contained some rather miserly damage caps and required that any excess be obtained through the legislative claims bills process, it explicitly extended the duties and liabilities of private persons to governmental entities, and made governmental entities liable in tort "in the same manner and to the same extent" as private persons:

> (1) . . . [T]he state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort . . . under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. . . .
>
> . . . .

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
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> (5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances . . . .

Section 768.28, Fla. Stat. The point of this plain language has not been lost on this Court. *See Butler v. Sarasota County*, 501 So.2d 579, 579 (Fla. 1986) ("The duty of care is no different for a public owner than a private owner"); *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So.2d 912, 917 (Fla. 1985) ("This effectively means that the identical existing duties for private persons apply to governmental entities").

Indeed, in *Trianon Park*, this Court rather squarely announced that, because of the plain language of the statute, the body of common law generally lumped under the rubric "premises liability" applied to governmental entities as well: " . . . once a governmental entity builds or takes control of property or an improvement, it has the same common law duty as a private person to properly maintain and operate the property." 468 So.2d at 921. The Court went on to explain that, "because there is a common law duty of care regarding how property is maintained and operated," "there may be substantial governmental liability" in this category of cases. *Id.* This point was more recently reinforced by the Court in *City of Jacksonville v. Mills*, 544 So.2d 190 (Fla. 1989).

In the instant case, it is undisputed that the State owns the premises on which Juan Jr. suffered his tragic injury. It is also undisputed that the premises are a public swimming area of international renown. There should therefore have been no legitimate dispute concerning the operational level nature of the duty of care which the State, as landowner, owed to invitees like Juan Jr. using the premises for

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

their intended purpose. That such a duty existed at the operational level, and that a breach of it was therefore actionable under Florida's waiver of sovereign immunity statute, is settled, we submit, by *Butler v. Sarasota County*, 501 So.2d 579, 579-80 (Fla. 1986):

> The district court below held that respondent possessed sovereign immunity in the operation of a swimming facility.
>
> It is uncontradicted that respondent owned the beach area in question and that it improved and maintained the area as a swimming facility. Respondent urges, and the district court below agreed, that this was a "judgmental, planning-level" decision and that respondent had no operational-level duty to operate the facility safely. This position is true in part but overlooks our holding in *Avallone [v. Board of County Commissioners*, 493 So.2d 1002 (Fla. 1986)] that
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> > [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 is obligated under like circumstances. . . .
>
> *Id.* at 1005.
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> The duty of care is no different for a public owner than a private owner. In this instance, the public owner did not create the specific dangerous condition but did create a designated swimming area where the dangerous condition existed.
>
> . . . .

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> We quash the opinion below and remand for reinstatement of the trial court's judgment.

See also Ralph v. City of Daytona Beach, 471 So.2d 1 (Fla. 1983) (sunbather invited to use public beach for recreational purposes was owed actionable, operational level duty of reasonable care, including provision for warning of known danger created by inadequately supervised vehicular traffic permitted on the beach).

And if, as *Butler* says, "[t]he duty of care is no different for a public owner than a private owner," then it simply must follow that, because a private landowner's duty of care is non-delegable, the public landowner's duty of care is non-delegable as well. The language of §768.28(5) -- "[t]he state . . . shall be liable for tort claims *in the same manner and to the same extent* as a private individual under like circumstances" (emphasis supplied) -- will admit of no other conclusion.

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 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) (city was properly held liable for its contractor's negligence, because the duty of care which it delegated to its contractor was non-delegable), *review denied*, 511 So.2d 297 (Fla. 1987); *Newsome v. Department of Transportation*, 435 So.2d 887 (Fla. 1st DCA 1983) (DOC's duty to supervise inmates was non-delegable, and the breach of that duty by its contractor was therefore actionable against the DOC), *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) (duty imposed upon governmental agency by contract is non-delegable and

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

actionable); *Savignac v. Department of Transportation*, 406 So.2d 1143 (Fla. 2d DCA 1981) (DOT was legally responsible for contractor's negligence in creating diving hazard in canal within DOT's right-of-way), *review denied*, 413 So.2d 875 (Fla. 1982). *Cf. Grim v. Donovan*, 498 So.2d 1050 (Fla. 4th DCA 1986) (complaint alleging breach of non-delegable duty imposed upon governmental agency by statute not subject to dismissal).

In our judgment, the conjunction of these several thoroughly settled legal principles simply required the conclusion reached by the district court below -- 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 by contract if it wished, but it could not delegate its liability for a breach of that duty by its delegate. And the breach of that duty was plainly operational level negligence, not planning level negligence; it was therefore actionable negligence, from which the State is not immune from suit. Most respectfully, the district court's decision is correct.

B. The State's arguments.

1. The State begins its miscellaneous potshots at the district court's decision with an argument that is simply indefensible. It recognizes at the outset, as it must, that it owes the same duties of care as private individuals do in like circumstances; it argues, however, that the duty of care owed by private *land*owners is different than the duty of care owed by private owners of "bodies of water" -- that private owners of "bodies of water" owe no duty of care at all, and the district court

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

therefore impermissibly imposed a "new" duty upon it, never before recognized in the common law. It purports to derive this argument from *Saga Bay Property Owners Ass'n v. Askew*, 513 So.2d 691 (Fla. 3d DCA 1987), *review denied*, 525 So.2d 876 (Fla. 1988). Most respectfully, this decision has been badly misunderstood, and it provides no support whatsoever for the argument.

The child who drowned in the artificial lake in *Saga Bay* was at most a licensee, if not a trespasser; he was *not* an invitee. And he did not drown in the small area of the very large lake which had been developed as a recreational swimming area; he drowned on the opposite side of the lake, which was undeveloped and in its natural state. The non-liability of the property owner turned on those facts, and those facts alone -- not on any difference between dry land and a "body of water." In fact, the decision squarely recognizes and carefully distinguishes a number of decisions imposing upon owners of public swimming and recreational areas, both private and governmental, a duty of reasonable care for the safety of their invitees: *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986); *Cutler v. City of Jacksonville Beach*, 489 So.2d 126 (Fla. 1st DCA 1986); *Brevard County v. Jacks*, 238 So.2d 156 (Fla. 4th DCA 1970); *Walt Disney World Co. v. Goode*, 501 So.2d 622 (Fla. 5th DCA 1986), *review dismissed*, 520 So.2d 270 (Fla. 1988).[3/]

[3/] The decision also recognizes an exception to the rule of non-liability for the drowning of a child-licensee, where "there is some unusual danger not generally existing in similar bodies of water or the water contains a dangerous condition constituting a trap." 513 So.2d at 693. Surely the demolition debris which caused Juan Jr.'s quadriplegia would fall within this exception, even if Juan Jr. were considered a licensee, rather than an invitee. *See Whitaker v. City of Belle Glade*, 638 So.2d 186 (Fla. 4th DCA 1994).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Most respectfully, the nature of the duty owed depends upon the status of the plaintiff upon the property, not upon whether the injury occurred on land or in water:

> Visitors upon the private property of others fall within one of three classifications: they are either trespassers, licensees, or invitees. The classification is important because it determines the duty of care owed the visitor by the property owner or occupier. . . .

Post v. Lunney, 261 So.2d 146, 147 (Fla. 1972). *Accord Wood v. Camp*, 284 So.2d 691 (Fla. 1973). And, of course, that governmental entities owning and operating public swimming areas at public beaches owe a duty of reasonable care for the safety of their invitees is settled in any event by this Court's decisions in *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986), and *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986) -- so the State's reliance upon *Saga Bay* is clearly misplaced, and its first potshot at the district court's decision is just as clearly without merit.

2. The State next contends that it can owe no duty of care to Juan Jr. because it never formally "designated" South Beach as a public swimming area. Actually, there are two arguments being made here. The first is that, in the absence of a formal "designation" of an area as a public swimming area, *no* governmental entity (which would include the City in this case) can owe anyone a duty of care. The second is an alternative argument -- that even if open, notorious, and undeniable use as a public swimming area constitutes a "designation," because the City rather than the State "designated" South Beach as a swimming area, only the City owed Juan Jr. a duty of care. Neither of these arguments is defensible. We

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

will respond to each of them in turn.

For its first argument, the State isolates and seizes upon a single word in a single sentence in *Butler v. Sarasota County*, 501 So.2d 579, 579 (Fla. 1986) -- "In this instance, the public owner did not create the specific dangerous condition but did create a *designated* swimming area where the dangerous condition existed" (emphasis supplied) -- and it argues that no operational level duty arose in this case because South Beach was never formally "designated" as a public swimming area. In our judgment, this is a semantic ploy of no substance at all. The sentence simply states a fact -- that Sarasota County had designated the beach as a swimming area; it does not purport to make "designation" a condition precedent to the operational level duty of care which arises from ownership and operation of what is, as a matter of undeniable fact, a public swimming area.

In addition, *Butler* derives squarely from *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986), which announces the same holding without using the word "designated" -- so inclusion of the word in *Butler* was most certainly not intended to be given the dispositive significance which the State has attached to it. And even if the word were purposefully inserted to create some type of limiting principle, the fact of the matter is that there is no statute providing any process or procedure whereby swimming areas at ocean beaches can be formally "designated" as swimming areas by the governmental entities which own them. Neither has the State explained to this Court where any such process or procedure can be found.[4/] We respectfully submit that no such

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[4/] The State has identified a set of administrative regulations, enacted pursuant to the authority of Ch. 258, Fla. Stat. (State Parks and Preserves), which deals

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

process or procedure exists, and that the State has attached a meaning to the word "designated" which it simply will not support.

When a public beach is in open and notorious daily use as a public swimming area by people from all over the world, and is openly held out to the public as available for that very purpose -- as South Beach indisputably is -- it is a certainty that it is a "designated" swimming area within the meaning of *Butler*, whether formally "designated" as such in some way by its owner or not. No other reading of *Butler* makes any sense. To read *Butler* otherwise would mean that, by the simple expedient of not doing something which the law does not even require it to do, a governmental entity can relieve itself of an obligation which the law otherwise squarely imposes upon it. Surely this Court is not prepared to endorse such a peculiar reading of *Butler* in this case.

The Second District declined to endorse such a peculiar reading of *Butler* in *Andrews v. Department of Natural Resources, State of Florida*, 557 So.2d 85 (Fla. 2d DCA), *review denied*, 567 So.2d 434 (Fla. 1990). In that case, a young boy drowned at Dog Beach, which was located in a park owned and operated by the State. As it has here, the State sought to avoid liability by arguing that Dog Beach was not a "designated" swimming area. It contended that the only "designated" swimming area was elsewhere in the park. However, "[t]he designation was not reduced to rule or regulation, and the state could not produce any document

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exclusively with state parks, and which provides for designation of swimming areas within state parks. These regulations prove nothing of any relevance here, because South Beach is not a state park. There are no statutory or regulatory provisions in existence providing for the formal "designation" of South Beach or any of the similar public swimming areas in the State operated outside the state park system.

evidencing that designation." 557 So.2d at 88.

The evidence also reflected that, upon assuming control of the park from the municipality, the State had removed signs prohibiting swimming at Dog Beach, and that Dog Beach was in open and notorious use as a swimming area by the park's visitors, with the knowledge of the State. Given all this evidence, the Court concluded, the lack of a formal "designation" of Dog Beach as a swimming area would not preclude a finding that Dog Beach was in fact a public swimming area, and if a jury were to so find, then the State plainly owed the plaintiffs' decedent an actionable, operational level duty of care. *See also Brown v. Florida State Board of Regents*, 513 So.2d 184 (Fla. 1st DCA 1987) (where Board of Regents operated recreational facility at Lake Wausberg, it owed an operational level duty of reasonable care to invitee/drowning victim).

In the instant case, the district court reached the same 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. Not reluctant to deny the nose on its face, however, the State insists that a formal "designation" *is* required; that *Warren v. Palm Beach County*, 528 So.2d 413 (Fla. 4th DCA), *cause dismissed*, 537 So.2d 570 (Fla. 1988), requires a formal "designation"; and that the district court's decision is therefore in "express and direct conflict" with *Warren*. 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

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

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 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 and diving 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

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

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.

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.

In short, neither the State nor the City can avoid the operational level duty of care which arises from the operation of a public swimming area by the simple expedient of failing to formally "designate" as a swimming area what is in undeniable fact a public swimming area of world renown. Whatever this Court may have intended by the word "designated" in *Butler*, if it intended anything at all beyond merely "established" or "recognized," it most certainly did not intend that the State, as owner of South Beach, and the City, as operator of South Beach, could avoid the operational level duty of care which each owed to its invitees by the simple expedient of not formally "designating" it to be what it undeniably is. Given *Avallone* and *Butler*, the district court's conclusion to that effect was plainly correct.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

There is also no merit to the State's alternative contention that, because the City rather than the State "designated" South Beach as a public swimming area, only the City could owe Juan Jr. a duty of care. To begin with, we doubt that the State can claim ignorance of or innocence in the "designation." Undersigned counsel was born in Miami 55 years ago and has spent the better part of his life in Miami, and for as long as he can remember South Beach has been a public swimming area. It was a public swimming area long before 1982 -- and it was certainly a public swimming area in 1982, when the State delegated "management responsibilities" for it to the City (in exchange for a 25% cut of all revenues collected from private concessionaires). The State certainly knew then that it was a public swimming area, and it would therefore seem that the State "designated" it as such long before it turned over responsibility for its management to the City. At the very least, the "designation" was joint.

And even if it were not, we remind the Court that the City is the State's delegate, and that the State's duty of care is non-delegable. The very essence of the doctrine of non-delegability is that the delegating landowner remains liable to third parties for torts committed by its delegate -- so any tort arising out of the City's "designation" of South Beach as a public swimming area must be actionable against the State as well, whether the State itself formally "designated" the beach as such or not. Most respectfully, the doctrine of non-delegability is not a set of shells under which to hide the various peas which, when cumulated, establish tort liability; it is one shell which covers all the peas -- and it plainly requires that the State be held liable for its delegate's breach of its non-delegable duty of care. The State's second miscellaneous argument is therefore without merit as well.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

3. The State also quarrels with the district court's observation that it can protect itself against financial losses by including indemnification clauses in its beach management agreements, as it did in the instant case. Of course, this observation was merely an aside, offered in response to the State's rather generalized complaint that a refusal to recognize its defense of sovereign immunity would impose an "intolerable financial burden" on it. It had nothing to do with the holding of the decision itself -- that the State, as owner of South Beach, owed Juan Jr. a non-delegable, operational level duty of care. Right or wrong, the observation can therefore provide no basis for a quashal of the holding of the decision.

The argument is also not properly before the Court. Although we made the point about the existence and the significance of the indemnity clause in our initial brief below (State's appendix, 1, p. 10), the State did not quarrel with our position on the point in is answer brief (State's appendix, 2). The State's contrary position was raised for the first time in its post-decision motion for rehearing (R. 5551-58). This was plainly too late, and the district court therefore properly declined to consider it.[5/] An issue not properly raised below cannot properly be raised here, of course. We will address the State's quarrel briefly nevertheless, because it is also meritless.

There was a time when it was generally accepted that, although governmental

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[5/] *See, e. g., Green Companies, Inc. v. Kendall Racquetball Investment, Ltd.*, 658 So.2d 1119 (Fla. 3d DCA 1995); *Eastern Airlines, Inc. v. King*, 561 So.2d 1220 (Fla. 3d DCA 1990), *review denied*, 576 So.2d 288 (Fla.), *cert. denied*, 500 U.S. 943, 111 S. Ct. 2238, 114 L. Ed.2d 480 (1991); *Devon-Aire Villas Homeowner's Ass'n No. IV, Inc. v. Americable Associates, Ltd.*, 490 So.2d 60 (Fla. 3d DCA 1985); *Calderon v. Torres*, 445 So.2d 1040 (Fla. 3d DCA 1984).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

entities could enter into contracts, they possessed sovereign immunity from any action to enforce those contracts. The law was changed in 1984, however. The change came in *Pan-Am Tobacco Corp. v. Department of Corrections,* 471 So.2d 4, 5 (Fla. 1984), in which this Court held as follows:

> Where the legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into contract, the legislature has clearly intended that such contracts be valid and binding on both parties. As a matter of law, the state must be obligated to the private citizen or the legislative authorization for such action is void and meaningless. We therefore hold that where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract.

That, of course, is still the law today. *See, e.g., County of Brevard v. Miorelli Engineering, Inc.,* 703 So.2d 1049 (Fla. 1997); *Broward County v. Finlayson,* 555 So.2d 1211 (Fla. 1990); *Public Health Trust of Dade County v. State, Department of Management Services,* 629 So.2d 189 (Fla. 3d DCA 1993); *Dade County v. American Re-Insurance Co.,* 467 So.2d 414 (Fla. 3d DCA 1985).

The beach management agreement at issue here was entered into in February, 1982 (R. 983). It was fully authorized by general law at that time. (Indeed, page 4 of the agreement contains the signature of the State's attorney, noting that the agreement was "Approved as to Form & Legality" -- a declaration which ought to render the State's 25th-hour 1998 declaration of "illegality" highly suspect here.) Section 166.021(1), Fla. Stat. (1981), provided municipalities with all "governmental, corporate, and proprietary powers to enable them to conduct municipal

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

government, perform municipal functions, and render municipal services" -- a grant which certainly included the power to enter into a contract.

Section 375.031(1), Fla. Stat. (1981), placed title to all state-owned lands in the Board of Trustees of the Internal Improvement Trust Fund, but placed all beneficial use, control, and management of state-owned lands in the Department of Natural Resources -- and subsection (7) of the same statute authorized the department to contract with any state agency for the management of state-owned lands for authorized purposes. Section 375.021(3), Fla. Stat. (1981), also provided the Department of Natural Resources with the power to contract with any governmental entity, including a municipality, for the "development of outdoor recreation."

Section 253.023, Fla. Stat. (1981), also provided the Board of Trustees with the power to "enter into any contract necessary to accomplish the purposes of" the Conservation and Recreation Land Trust Fund; provided for delegation of the management of public lands to other governmental agencies; and required those agencies to develop individual management plans for public lands to be used for recreation. Sections 253.03 and 253.034, Fla. Stat. (1981), also authorized the Board of Trustees to enter into beach management agreements and required each agency managing lands owned by the Board of Trustees to submit management plans. And §253.784, Fla. Stat. (1981), provided the Department of Natural Resources with both "the power and authority to enter into any and all contracts necessary or convenient to the exercise of any of the powers granted" to it in connection with state-owned lands.

Section 161.101(3), Fla. Stat. (1981), also rather explicitly authorized the

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Department of Natural Resources 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, or any agencies or representatives thereof, 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).) And the beach management agreement in issue here recites on its face that it was entered into under the authority of Chapter 161, Fla. Stat. (1981), in connection with the State's beach and shore preservation program. The beach management agreement also expressly delegates to the City the responsibility for preparing the beach management plan required by §253.034, which is attached as an exhibit to the contract. Most respectfully, both the management agreement in issue here, and the very indemnification clause which the State now declares "illegal," were fully authorized by general law -- and because of *Pan-Am Tobacco*, the indemnification provision is plainly enforceable.

The State argues nevertheless that the indemnification clause is illegal and unenforceable because §768.28(18), Fla. Stat., says so. Section 768.28(18) says no such thing, however. What it says is that contracts between governmental entities "must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence." In other words, §768.28(18) prohibits one governmental entity from agreeing to indemnify, insure, or assume the liability of a second governmental entity for the *second governmental entity's* negligence. On the facts in this case,

for example, §768.28(18) would prohibit the State from agreeing to indemnify the City from a judgment against the *City* arising out of the City's negligence.[6/] However, it does not prevent the City from agreeing to indemnify the State for a judgment against the *State* arising out of the City's negligence, so it does not prohibit the indemnification agreement in issue here.

In fact, the State would be entitled to indemnity from the City here whether its beach management agreement contained an indemnity provision or not, under thoroughly settled principles of the common law. Because the State's liability arises only passively from the non-delegability of the duty of care actively breached by its delegate, its liability is merely "vicarious, constructive, derivative, or technical"; it is therefore a passive tortfeasor, and it is entitled to indemnity from the active tortfeasor, the City, as a matter of law:

> "Moreover, it has been established that a defendant who has been held liable, without personal fault, to a business invitee for breach of a nondelegable duty to maintain his premises in a reasonably safe condition may recover [common law] indemnity against his negligent independent contractor hired to discharge the nondelegable duty." Wetherington, *Tort Indemnity in Florida*, 8 Fla. State U. L. Rev. 383, 408 (1980), *citing* [five decisions] . . .

Mortgage Guarantee Insurance Corp. v. Stewart, 427 So.2d 776, 779 (Fla. 3d DCA), *review denied*, 436 So.2d 101 (Fla. 1983).

That is undeniably the law of Florida. *See Houdaille Industries, Inc. v. Edwards*, 374 So.2d 490 (Fla. 1979); *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla.

[6/] For the type of indemnity agreement prohibited by §768.28(18), see *University Plaza Shopping Center, Inc. v. Stewart*, 272 So.2d 507 (Fla. 1973), and its progeny.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

1977). *See generally* 12 Fla. Jur.2d, *Contribution, Indemnity, and Subrogation*, §35 (and decisions cited therein). Absent clear and unequivocal language in §768.-28(18) to the contrary -- and no such language appears there that would prevent a passive tortfeasor from obtaining indemnity from an active tortfeasor -- it would make little sense for this Court to read the provision otherwise. Indeed, because of the well-settled rule that statutes will not be construed to overturn the common law unless they explicitly do so in clear and unequivocal terms, it would appear that the Court could not accept the State's suggested reading of the provision even if it were inclined to do so. *See Carlile v. Game & Fresh Water Fish Commission*, 354 So.2d 362 (Fla. 1977); *Kitchen v. K-Mart Corp.*, 697 So.2d 1200 (Fla. 1997).

Finally, even if §768.28(18) could be read in the topsy-turvy manner in which the State suggests it should be read, it was not enacted until 1993 -- long after execution of the beach management agreement in issue here, and long after Juan Jr.'s injury -- so it plainly can have no applicability here. *See* Ch. 93-89, §1, Laws of Florida. In addition, of course, as we have demonstrated, the agreement in issue here was fully authorized by general law at the time it was executed. (And frankly, we think the State has not thought the problem through very well; surely it should not be asking this Court to declare all of its no doubt numerous indemnity agreements illegal simply to bolster its pursuit of non-liability in this one case.) Most respectfully, the State's contention that the indemnification agreement in issue here is "illegal" comes far too late in this proceeding; it has no bearing whatsoever on the correctness of the holding of the district court's decision in any event; and it is plainly without merit.

4. The State's remaining arguments are a generalized plea for resurrection

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

of the now statutorily-repealed doctrine of "the King can do no wrong." The State asserts, for example, that because it owns all of Florida's beaches, the district court's decision will impose an "intolerable financial burden" on it. In our judgment, this argument is neither relevant nor true.

The argument is irrelevant because it is directed to the wrong institution. It cannot legitimately be directed to this Court because the legislature has already determined that "[t]he State and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances . . . . " Section 768.28(5), Fla. Stat. And this Court has also declared, in both *Avallone* and *Butler*, that once a governmental entity "decides to operate the swimming facility, it assumes the common law duty to operate the facility safely, just as a private individual is obligated under like circumstances . . . ." *Avallone, supra* at 1005; *Butler, supra* at 579. This Court is therefore in no position to relieve the State from the non-delegable duty it owes as landowner to its invitees, simply because it owns all the beaches. The legislature has spoken otherwise.

Moreover, to the extent that the argument suggests that the expansive nature of the State's exposure ought to be addressed by a reduction in its legal duties, it is plainly wrong. The State owns thousands of motor vehicles, but the sheer size of its fleet is hardly a reason for relieving it of the settled operational level duty to operate those vehicles non-negligently. The State also owns thousands of miles of highways and thousands of traffic control devices, yet it plainly owes an operational level duty of care to maintain them in a reasonably safe condition. *See Bailey Drainage District v. Stark*, 526 So.2d 678 (Fla. 1988); *Department of Transporta-*

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tion v. Webb, 438 So.2d 780 (Fla. 1983); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979).

The State also owns a considerable number of government buildings, yet it plainly owes an operational level duty of care to maintain them in a reasonably safe condition. *See City of Jacksonville v. Mills*, 544 So.2d 190 (Fla. 1989). And the State has thousands upon thousands of law enforcement personnel, educators, professionals, and other employees, yet it is settled that they owe an operational level duty to exercise reasonable care in performing their daily duties. *See City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992); *Kaisner v. Kolb*, 543 So.2d 732 (Fla. 1989); *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So.2d 912 (Fla. 1985); *Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982). We could go on and on, but the point is simple: the State's exposure is large because the State is a large enterprise -- but the sheer size of the exposure, by itself, provides no reason for reimposition of the doctrine of sovereign immunity now that the legislature has spoken otherwise.

It is also not true that the district court's decision will impose an "intolerable financial burden" on the State. First, "as [the district court's] 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 or actually used as public swimming beaches" -- a point upon which we will elaborate in a moment (slip opinion, p. 6). Next, the State's liability is not unlimited; it is capped at a rather meager amount by §768.28 itself, and any judgment in excess of that cap must be obtained from the legislature through the claims bill process -- a process which was available to victims of governmental torts even before enactment of §768.28. *See generally*

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Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981).

In addition, as we have demonstrated, the State may protect itself from financial loss (but at the expense of its delegate rather than at the expense of the invitees to whom it owes a non-delegable duty of care) by including an indemnification provision in its beach management agreements, as it did in the instant case -- or, as a passive tortfeasor, it can obtain indemnification from its actively negligent delegates under settled principles of the common law. And finally, of course, the State could exercise a little more supervision over the governmental entities to which it delegates its duty of care, which would greatly reduce its exposure and be of considerable benefit to the public as well -- which is, after all, the principal rationale for imposing tort liability in the first place. Perhaps the district court's decision in this case will have that salutary effect.

5. All of which brings us to the State's extended reliance upon the Public Trust Doctrine. That doctrine is generally that the State holds title to the tidal navigable waters and the foreshore thereof; that its title is held in trust for the people for purposes of navigation, fishing, bathing and similar uses; and that its title cannot be conveyed or alienated for purely private purposes. Nothing in the doctrine speaks to the subject of governmental torts and sovereign immunity. Neither do any of the decisions upon which the State relies speak to that subject, and all were decided long before the legislature waived the State's immunity from tort suits in §768.28.

Of course, the fact that private persons cannot own any of the State's ocean beaches provides no reason for holding the State immune from suit. This argument -- that §768.28 does not waive immunity for governmental functions which private

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persons do not perform -- was squarely rejected by this Court in its very first construction of §768.28. *See Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979). The argument is also squarely refuted by this Court's decisions in *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986), and *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986).

The State suggests nevertheless that the Public Trust Doctrine has been badly subverted by the district court's decision, and that it has essentially been made an insurer of the safety of all persons utilizing its shoreline for any purpose. As did the district court, we disagree. We remind the State that §768.28(5) makes it "liable for tort claims *in the same manner and to the same extent* as a private individual under like circumstances . . . . " The 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. *Post v. Lunney*, 261 So.2d 146 (Fla. 1972); *Wood v. Camp*, 284 So.2d 691 (Fla. 1973).

By virtue of the plain language of §768.28(5), the *same* three-tiered classification system exists where governmental landowners are concerned. *See Barrio v. City of Miami*, 698 So.2d 1241 (Fla. 3d DCA 1997), *review denied*, 705 So.2d 569 (Fla. 1998); *Lukancich v. City of Tampa*, 583 So.2d 1070 (Fla. 2d DCA 1991); *Dougherty v. Hernando County*, 419 So.2d 679 (Fla. 5th DCA 1982), *review denied*, 429 So.2d 5 (Fla. 1983). *See also City of Boca Raton v. Mattef*, 91 So.2d 644 (Fla. 1956) (before enactment of §768.28, at a time when municipalities were subject to suit, three-tiered classification system applied to premises liability suit against governmental landowner).

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And not every plaintiff injured on a governmental landowner's property is an invitee, owed the duty of reasonable care under the circumstances; if his presence is merely permitted there because it is public property, he is merely a licensee -- owed the considerably lesser duty of avoiding willful and wanton harm, and warning of a dangerous condition known by the landowner and not open to ordinary observation. *See City of Boca Raton v. Mattef, supra*; *Barrio v. City of Miami Beach, supra*; *Mueller v. South Florida Water Management District*, 620 So.2d 789 (Fla. 4th DCA), *review denied*, 629 So.2d 135 (Fla. 1993); *Davis v. City of Miami*, 568 So.2d 1301 (Fla. 3d DCA 1990); *Dougherty v. Hernando County, supra*; *Savignac v. Department of Transportation*, 406 So.2d 1143 (Fla. 2d DCA 1981), *review denied*, 413 So.2d 875 (Fla. 1982); *Wilkinson v. Duval County School Board*, 377 So.2d 245 (Fla. 1st DCA 1979).

Because the State holds title to the beaches under the Public Trust Doctrine, in trust for its citizens, the public cannot be denied their use; but this permission to use the beaches makes most beachgoers mere licensees, not invitees -- and the State's duty of care is thus ordinarily a limited one, to avoid willful and wanton harm and to warn of known dangerous conditions not open to ordinary observation.[7/] That is not a particularly onerous burden; the Public Trust Doctrine is

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[7/] It is even conceivable that the State could convert a swimmer into a trespasser for purposes of premises liability law, by posting signs prohibiting swimming in known dangerous areas incapable of being made safe. *Cf. Dougherty v. Hernando County, supra*; *Palumbo v. State of Florida Game & Fresh Water Fish Commission*, 487 So.2d 352 (Fla. 1st DCA 1986). Like the Second District in *Savignac v. Department of Transportation, supra*, however, we are inclined to think that a plaintiff injured on property "open to the public" is more appropriately classified as a licensee, rather than a trespasser.

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hardly subverted by it; and the State's concern that it has been made an insurer of the safety of all persons using its beaches is therefore hyperbolic in the extreme, and thoroughly unjustified.

As the district court was careful to explain in its decision, "the only beaches for which the State could possibly face liability for a breach of the duty of [reasonable] care are those beaches held out or actually used as public swimming beaches." And with respect to those types of beaches, this Court has already squarely spoken in *Avallone* and *Butler*: notwithstanding that the State owns all the beaches and holds them in trust for its citizens, where a governmental entity owns and operates a public swimming facility like South Beach, its patrons are clearly invitees and they are plainly owed a duty of reasonable care under the circumstances. Most respectfully, the State's professed concern about its exposure should be directed to the legislature; after the enactment of §768.28, its plea for resurrection of the doctrine of sovereign immunity is simply inappropriate in this Court. And we respectfully submit that this miscellaneous potshot at the district court's decision, like all the others, is without merit.

V.
CONCLUSION

It is respectfully submitted that the district court's decision is not in "express and direct conflict" with any of the decisions upon which the State has relied to support this Court's discretionary review jurisdiction; that review was improvidently granted; and that the case should be dismissed for lack of jurisdiction. Alternatively, the district court's decision is correct, and it should be approved.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 30th day of November, 1998, to: Bruce G. Hermelee, Esq., and Sarah Helene Sharp, Esq., Hermelee and Sharp, 25 S.E. 2nd Ave., #1135, Miami, Fla. 33131, Attorneys for State of Fla., Dept. of Nat. Resources; Jennifer G. Altman, Esq., Zack, Sparber, et al., 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 .

Respectfully submitted,

NEEDLE, GALLAGHER, ARECES
& ELLENBERG, P.A.
1401 Brickell Avenue, Suite 900
Miami, Florida 33131
-and-
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN,
P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

Attorneys for Respondents

By: Joel D. Eaton
JOEL D. EATON