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Torts: Exposing the Government to a Riptide of Negligence Liability for Injuries to Swimmers Florida Dept. of Natural Resources v. Garcia, 753 So. 2d 72 (Fla. 2000)

Keith Myers

CASE COMMENT

TORTS: EXPOSING THE GOVERNMENT TO A RIPTIDE OF NEGLIGENCE LIABILITY FOR INJURIES TO SWIMMERS

Florida Department of Natural Resources v. Garcia, 753 So. 2d 72 (Fla. 2000)

*Keith Myers**

In *Florida Department of Natural Resources v. Garcia*, the Respondent became a quadriplegic when he dove into the ocean at Miami Beach and hit his head on submerged debris.[1] The Respondent claimed that the City of Miami (the City), Dade County, and Petitioner (the State) were negligent in their failure to remove the underwater debris or take necessary preventative measures to protect swimmers.[2] The trial court found the State had not designated, and therefore not operated, the beach as a public swimming area.[3] Accordingly, the trial court found that if there was a duty of care owed to the Respondent, the City owed the duty and not the State, and granted summary judgment for the State.[4] The Third District Court of Appeals reversed and remanded for trial, holding that the State had a nondelegable duty to operate the beach safely, even though the State did not formally designate the area as a public swimming area.[5] The Supreme Court of Florida affirmed the judgment,[6] and HELD that the State owed a duty of care to the Respondent because the State expressly permitted the City to operate the beach as a public swimming area according to the terms

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* To my family, Drue and Devon, and ol' King Neptune.

1. *See* Florida Dep't of Natural Res. v. Garcia, 753 So. 2d 72, 73-74 (Fla. 2000) (5-2 decision). Respondent was injured at the "South Beach" section of Miami Beach, where the City had planned to contract work for underwater debris removal at the site of a demolished pier. *See id.* n.1. The State and City had a 1982 management agreement which provided: that the State "'holds title'" to the beach property; granted the City "'management responsibilities'" of the beach for twenty-five years; required the city to submit a "'management plan'" providing for "'the limitation and control of land and water related activities such as boating, bathing, surfing, rental of beach equipment, and sale of goods and services to the public;'" and required the City to pay the State twenty-five percent of revenues collected from private concessionaires. *See id.* at 74 (emphasis omitted).

2. *See id.*

3. *See id.* at 76-77.

4. *See id.* at 74.

5. *See* Garcia v. State Dep't of Natural Res., 707 So. 2d 1158, 1159-60 (Fla. 3d DCA 1998).

6. Florida Dep't of Natural Res., 753 So. 2d at 78. Certiorari was granted to resolve direct conflict between *Garcia*, 707 So. 2d 1158 (Fla. 3d DCA 1998), and *Warren v. Palm Beach County*, 528 So. 2d 413 (Fla. 4th DCA 1988). *See Florida Dep't of Natural Res.*, 753 So. 2d at 73.

of the management agreement between the City and the State.[7] At common law, a possessor of land had a duty to inspect the premises and warn an invitee[8] of dangerous conditions that were not open and obvious.[9] The possessor owed this duty of care to members of the public whom entered land that was held open to them.[10] Historically, under the public policy doctrine of sovereign immunity, government entities were shielded from having a similar duty of care.[11]

The Supreme Court of Florida was the first state court to judicially abolish sovereign immunity in 1957.[12] The Court declared that sovereign immunity was an anachronism in light of the "business institution" character of modern municipalities.[13] In 1975, the Florida legislature enacted a waiver statute that further restricted sovereign immunity.[14] Subsequently, in *Commercial Carrier Corp. v. Indian River County,*[15] the Florida Supreme Court interpreted the waiver statute in the context of Florida common law and drew a distinction between the government's "planning" function and the government's "operational function."[16] Sovereign immunity was held to still apply when the government exercised its "planning" function, such as when the government engaged in policy making and other discretionary acts.[17] However, the Court held

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7. *See id.* at 76. The instant Court also held that the management agreement, which provided for the City to indemnify the State for the City's negligence, was not prohibited by statute. *See id.* at 77 (citing FLA. STAT. § 726.28(18) (1999)). The City's negligence was not an issue in this appeal. *See id.*

8. An invitee is a "person who has an express or implied invitation to enter or use another's premises, such as a business visitor or a member of the public to whom the premises are held open." BLACK'S LAW DICTIONARY 832 (7th Ed. 1999).

9. *See* FOWLER, HARPER, et al., THE LAW OF TORTS 234, 242-44 (1986).

10. *See* PROSSER AND KEETON ON THE LAW OF TORTS 425-26 (W. Page Keeton, ed. 1984).

11. *See* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957) (en banc). The doctrine of sovereign immunity is commonly viewed as having evolved from the English case Russel v. Men of Devon, 2 T.R. 667, 100 Eng. Rep.R. 359 (1788), where a county was held immune from liability for a defective bridge. The policy basis for this reasoning was that imposing liability on the sovereign translated into an unfair burden on the citizenry. *See Hargrove*, 96 So. 2d at 132.

12. *See id.* at 133; *see also* David W. Case, *From* Pruett *to* Presley*: The Long and Winding Road to Abrogation of Common Law Sovereign Immunity in Mississippi*, 63 MISS. L.J. 537, 542 & n.28 (1994) (comparing Florida to Mississippi's approach to sovereign immunity).

13. *See Hargrove*, 96 So. 2d at 133. The *Hargrove* Court also pointed out that Florida had distinguished its cases from the *Men of Devon* case since 1850. *See id.* at 132 (citing Tallahassee v. Fortune, 3 Fla. 19 (1850) (imposing liability on an incorporated community not the same as directly imposing such a burden on each individual citizen)).

14. *See* FLA. STAT. § 762.28 (1975). The statute specifies the extent of the waiver, including liability "for tort claims in the same manner . . . as a private individual. . . ." *See id.* § 762.28(5).

15. 371 So. 2d 1010, 1015-17 (Fla. 1979).

16. *See id.* at 1010, 1017-22.

17. *See id.* at 1022.

that sovereign immunity did not apply when the government exercised its "operational functions," such as when the government maintained a traffic light or a facility held open to the public.[18] Thus, once a government entity chose to exercise its "operational" function, it was liable for negligence in the same manner as a private individual or business.[19]

In subsequent decisions relating to swimming areas, Florida courts have attempted to determine when an "operational" duty of care arises.[20] In *Andrews v. Department of Natural Resources*,[21] the appellant's minor child drowned in an area where there were no lifeguards stationed or signs posted to prohibit swimming.[22] At trial, the issue was whether the State had designated the area in question as a public swimming area.[23] In reversing summary judgment for the State, the *Andrews* court suggested that the State could be found liable if, under the totality of the circumstances, it had assumed a duty of care by operating the beach as a public swimming area, even if it had not formally designated the area as such.[24]

The *Andrews* decision[25] directly conflicted with the Fourth District's prior ruling in *Warren v. Palm Beach County*.[26] In *Warren*, the appellant

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18. *See id.* (citing Johnson v. State, 447 P.2d 352 (Cal. 1968) and Evangelical Brethren Church v. State, 407 P.2d 440 (Wash. 1965) (developing and applying "planning" and "operational" analysis)). The Florida statute made no such express distinction. *See id.* at 1022.

19. *See id.* at 1018, 1020, 1022 (drawing line at this point adhered to separation of powers doctrine). However, the waiver statute did cap damages at $100,000 and precluded punative damages against the state. *See* FLA. STAT. § 768.28(5) (1975). Damage awards in excess of this limit may be granted by special claims act of the legislature. *See id.* In the instant case, Respondent received a $1.25 million award against the City. *See* Carol Miller, *Justices Say State Can be Sued Over Accidents at Public Beaches*, BROWARD COUNTY DAILY BUS. REV., Feb. 17, 2000, at A1.

20. *See* Avallone v. Board of County Comm'rs, 493 So. 2d 1002, 1005 (Fla. 1986) (holding that Respondent's decision to operate an unsupervised swimming facility was not a discretionary decision for which sovereign immunity applied).

21. 557 So. 2d 85 (Fla. 2d DCA 1990).

22. *See id.* at 86. The State of Florida acquired portions of Honeymoon Island from the City of Dunedin after 1974, and opened a state recreation area. *See id.* The state *removed* signs which warned of the strong current and prohibited swimming in the area of Dog Beach, where appellee's son drowned. *See id.* at 87-88. The State placed signs which stated "'No lifeguard on duty. Swim at own risk.,'" but these signs were not visible along the path appellant took to the beach. *See id.* at 88. Also, the state produced brochures, given to visitors upon entering the park, which proclaimed "'The clear Gulf waters are enjoyed for swimming and sun bathing.'" *See id.*

23. *See id.* There were at least two brochures published; only one showed a specifically designated swimming area. *See id.* It was disputed which brochure appellant received on the day her son drowned. *See id.*

24. *See id.* at 88-89. Testimony from park officials and lifeguards indicated that the State was aware of the area's regular use by fisherman and swimmers. *See id.* at 88.

25. *See id.*

26. 528 So. 2d 413, 415 (Fla. 4th DCA 1988).

became a quadriplegic after he dove into a shallow lake.[27] The court concluded that Palm Beach County was immune from liability because it did not post signs designating the site as a public swimming area.[28] Thus, because Palm Beach County did not post signs, it was conclusively not "operating" a swimming area, and evidence of the area's common use for swimming was not considered relevant by the Court.[29] However, to incur liability under *Andrews*, the government entity need not overtly designate an area as a public swimming area.[30]

Because the Fourth District's rigid approach to establishing government liability in *Warren* conflicted with the Second and Third Districts' more flexible approaches in *Andrews*[31] and the instant case,[32] respectively, the Supreme Court of Florida granted certiorari in the instant case.[33] In the instant case, the Supreme Court of Florida found that the State had waived its sovereign immunity because it had acted in its operational capacity.[34] The instant Court reasoned that the proper test to determine whether the petitioner possessed an operational duty of care was the totality of the circumstances and not whether the State had formally designated the area as a public swimming area.[35] Specifically, the Court's analysis of the totality of the circumstances focused on whether the State either held out South Beach as a public swimming area or caused the public to reasonably believe South Beach was a designated a public swimming area.[36] In the instant case, the State had signed a management agreement which allowed the City to operate South Beach as a public swimming area; therefore, the State was clearly aware of such intended use.[37] And since the State retained profits and managerial interests, it incurred an operational-level duty of care.[38]

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27. *See id.* at 414.

28. *See id.* at 415. A county ordinance stated that "Areas where [public] swimming is permitted will be designated by official signs and markings." *See id.* (citing Ordinance No. 76-9). Absent such actual designation, the ordinance prohibited swimming in "waters or waterways in or adjacent to any park . . . ." *See id.*

29. *See id.* The park rangers were instructed to discourage or prevent swimming, but there were no signs *prohibiting* swimming, and the lake was commonly used for boating and water-skiing despite the ordinance. *See id.* The county's decision not to operate a swimming facility was a discretionary government function, where sovereign immunity applied. *See id.*

30. *See* Andrews v. Dept. of Natural Res., 557 So. 2d 85, 87-89 (Fla. 2d DCA 1990).

31. *See id.* at 86-88.

32. *See* Garcia v. State Dep't of Natural Res., 707 So. 2d 1158, 1159 (Fla. 3d DCA 1998).

33. *See* Florida Dep't of Natural Res. v. Garcia, 753 So. 2d 72, 73 (Fla. 2000).

34. See id. at 76-77.

35. *See id.* at 76.

36. *See id.*

37. *See id.* at 74, 76.

38. *See id* at 75 (citing Avallone v. Board of County Comm'rs, 493 So. 2d 1002, 1005 (Fla. 1986)) (stating that when government entity *operates* a swimming facility it assumes a common

The instant Court explained that the State actions fell between two ends of a spectrum.[39] At one end of the spectrum was a formal designation by the State of an area as a public swimming area.[40] At the other end of the spectrum was an active prohibition by the State of swimming in a specific area or lack of knowledge by the State that persons commonly swim in a specific area.[41] In the instant case, the State was aware that persons commonly swam at South Beach. Furthermore, the petitioner retained financial and managerial interests in the City's operation of South Beach as a public swimming area.[42]

While the instant Court affirmed the Third District's ruling for the Respondent, the majority rejected the Third District's dicta which suggested that "common use" by persons alone could establish that the State was acting in its operational capacity, and therefore, was liable.[43] Instead, the instant Court, like the *Andrews* court[44] found that common use was only one factor to be considered under the totality of the circumstances test.[45] In the instant case, the State's knowledge that South Beach was commonly used for swimming, and the State's desire to profit from or limit this activity, created a sufficient basis for the Respondent to defeat summary judgment.[46]

The instant Court majority emphasized that its decision would not create an excessive burden on the State.[47] The instant Court stated that its rejection of the Third District's "common use" test in favor of the *Andrews* approach would limit the areas where the State had a duty of care to swimmers to those areas where the State should reasonably have known that public swimming was a common use or those areas where the petitioner promoted swimming.[48] Thus, the majority concluded that the State would not be forced to post "No Swimming" signs along its entire coastline as a result of the ruling.[49]

In the dissent, Justice Wells agreed that an area did not have to be formally designated as a public swimming area for a duty of care to exist.[50] However, he criticized the majority for not following the Court's

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law duty of care identical to private individual) (emphasis added).

39. *See id.* at 76-77.
40. *See id.*
41. *See id.* at 77.
42. *See id.* at 76.
43. *See id.* at 77.
44. *See* Andrews v. Dep't of Natural Res., 557 So. 2d 85, 87-88 (Fla. 2d DCA 1990).
45. *See Florida Dep't of Natural Res.*, 753 So. 2d at 76.
46. *See id.* at 77.
47. *See id.*
48. *See id.* at 76.
49. *See id.* at 77.
50. *See id.* at 78 (Wells, J., dissenting).

precedent, which held that a government entity was immune from liability unless it decided to directly operate a swimming facility.[51] Justice Wells argued that in the instant case, the State gave the City operational control of the swimming area.[52] Thus, the State's knowledge of, or profit from, the City's operation was immaterial with respect to the State's liability.[53] Because it did not operate the swimming facility, the petitioner did not waive sovereign immunity.[54] Justice Wells also expressed concern that the majority's decision would harm the public policy goal of sovereign immunity by exposing the State to liability along Florida's entire coastline.[55]

Despite Justice Well's concerns, the instant Court's analysis[56] adheres to the modern rationale for imposing tort liability upon government entities.[57] Sovereign immunity has been waived by statute or judicially abolished in the vast majority of states.[58] Innocent tort victims can seek redress, while the burden on the citizenry has been lessened by the sovereign's "business institution" character and its use of insurance and indemnification.[59] Further, liability is only triggered where the sovereign chooses to accept it by affirmatively acting in an operational capacity.[60]

The instant Court's approval of the *Andrews* totality of the circumstances test is also consistent with standard negligence theory, which would apply once a court determines that a waiver of sovereign

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51. *See id.* (Wells, J., dissenting) (citing Avallone v. County Bd. of Comm'rs, 493 So. 2d 1002, 1005 (Fla. 1986)).

52. *See id.* (Wells, J., dissenting).

53. *See id.* (Wells, J., dissenting).

54. *See id.* (Wells, J., dissenting).

55. *See id.* (Wells, J., dissenting). Justice Wells also criticized the Third District's nondelegable duty analysis. *See id.* However, the petitioner did not challenge the Third District's nondelegable duty ruling, and thus the instant Court did not address this issue of vicarious liability. *See id.* at 78-79.

56. *See id.* at 75.

57. *See generally* Case, *supra* note 12 (describing Mississippi's law in evolution as it became the forty-fifth state to abolish or limit sovereign immunity); William R. Hartl, Note, *Sovereign Immunity: An Outdated Doctrine Faces Demise in a Changing Judicial Arena,* 69 N.D. L. REV. 401 (1993) (explaining sovereign immunity history, judicial misapplications, and policy reasons for its abolition).

58. *See id.*

59. *See* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957) (en banc). The management agreement also provided for the City to indemnify the State for losses arising from the *City's* negligence. *See* Florida Dep't of Natural Res., 753 So. 2d at 77. The instant Court concluded that the indemnification agreement did not violate state law. *See id.* (citing FLA. STAT. § 768.28(18) (1999)); *see also* Hartl, *supra* note 57, at 415-21 (discussing policy reasons to abolish sovereign immunity in North Dakota).

60. *See* Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1017 (Fla. 1979).

immunity is present.[61] Thus, a possessor of land, including a government entity, cannot escape a duty of ordinary care to invitees by claiming that the *absence* of an express invitation or posted sign obviates such duty.[62] Instead, the possessor's duty is based upon whether, under the circumstances, a danger to invitees was known or foreseeable.[63] Thus, as in the instant case, when the State chose to "operate" a public swimming area, it assumed a duty of ordinary care to swimmers like the Respondent.[64]

Despite assurances that its decision will not result in an increased risk of liability for the State along Florida's vast coastline, the instant Court does not use any expressly limiting language to forestall such a risk.[65] For example, the Court particularly emphasizes the Petitioner's willingness to share its revenue with the City as part of the South Beach management agreement.[66] Is the Court suggesting that merely sharing profits is an automatic liability trigger, or must further control be exerted, such as in the instant case where the State retained the option to perform some management duties?[67] Also, the instant Court suggests that the State cannot claim immunity from suit where the area is "well known" for public swimming and the State derives a profit.[68] However, it is not clear whether the State *must* derive a profit, or whether an area's description as "well known" is an independent determinant of liability.[69] The term "well known" is one of art, and does not describe which party, the State or the public, must have the required knowledge.[70]

The instant Court concludes that the "basis for the State's liability" is that the State granted the City the right to operate South Beach as a public

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61. *See Florida Dep't of Natural Res.*, 753 So. 2d at 75-76 (citing Andrews v. Dep't of Natural Res., 557 So. 2d 85, 89 (Fla. 2d DCA 1990)). *Cf. Commercial Carrier Corp.*, 371 So. 2d at 1021-22 (distinguishing between "discretionary" government functions and "operational" functions, and finding sovereign immunity not applicable to the latter). *See also supra* note 18 and accompanying text.

62. *See supra* note 26 and accompanying text. *But cf.* Warren v. Palm Beach County, 528 So. 2d 413, 415 (Fla. 4th DCA 1988) (requiring express designation as swimming area for imposition of liability).

63. *See* PROSSER & KEETON, *supra* note 10, at 426. Reasonable care is an *implied* representation to all invitees. *See id.* (emphasis added).

64. *See Florida Dep't of Natural Res.*, 753 So. 2d at 75.

65. *See id.* at 77.

66. *See id.* at 76.

67. *See id.* at 76 & n.3.

68. *See id.* at 77. The instant Court rejected the "common use" standard of the *Andrews* court in favor of the "well known" standard, apparently emphasizing a knowledge requirement. *See supra* notes 42-46 and accompanying text.

69. *See id.*

70. *See id.* Also, no reasonableness or actual knowledge standard is described. *See id.*

swimming area.[71] The Court actually requires more though and places emphasis on the State's ability to limit the City's operation and to share in the City's profits.[72] These sequential statements in the opinion are potentially confusing and, arguably, contradictory.[73] The first statement suggests a nondelegable duty, while the subsequent qualifying statements are consistent with the totality of the circumstances approach used in *Andrews*[74] and endorsed by the instant court.[75] Thus the court left unclear when the State can effectively delegate an operational duty of care to the City short of maintaining a completely hands-off posture.[76]

Justice Wells sets forth a slightly clearer guiding rationale in his dissent, arguing that premises liability is based upon who possesses the land and not who owns the land.[77] He argues that the State-owner is not liable when it delegates operational control to the City-possessor.[78] However, he does not explain where the line of liability is drawn in instances where the State-owner profits from or maintains some control over a City-possessor's use of the owner's premises.[79]

Ultimately, neither the majority nor the dissent establishes clear guidelines for determining when a government entity is operating a public swimming area. A useful set of specific factors to consider could have been outlined, such as whether the State still maintained control, and to what extent, or whether the State shared in the profits of the operation.[80] In the absence of further judicial or legislative clarification, Florida's lower courts are likely to continue to struggle with deciding when a government entity has assumed an operational duty of care in factually similar scenarios.[81] Specifically, guidance is needed with respect to what defines a "well known" swimming area, whether sharing profits is by itself

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71. *See id.* 76.

72. *See id.* at 76 (stating "[n]ot only did the State agree to the operation . . . , but it put limitations on the terms of the operation and demanded twenty-five percent of the revenues").

73. *See infra* notes 74-76 and accompanying text.

74. *See* Andrews v. Dep't of Natural Res., 557 So. 2d 85, 86-88 (Fla. 2d DCA 1990).

75. *See Florida Dep't of Natural Res.*, 753 So. 2d at 75-76.

76. *See id.* at 75-78.

77. *See id.* at 79-80 (Wells, J., dissenting).

78. *See id.* at 80 (Wells, J., dissenting).

79. *See id.* (Wells, J., dissenting).

80. The instant court does not describe the State-City relationship as analogous to parent-subsidiary interactions in the corporate context. However, such an analogy might be useful, since the parent is expected to share in profits with the subsidiary, but parent liability is limited by the extent of control and participation it exerts on the subsidiary. *Cf.* United States v. Best Foods, 524 U.S. 51, 67-69 (1998). (applying parent-subsidiary concepts in the corporate context). Given the modern "business institution" character of local government entities, this would seem to be a relevant analogy. *See supra* note 13 and accompanying text.

81. *See supra* notes 24-29 and accompanying text.

a liability trigger, and to what extent operational control may be delegated.[82]

While it is important to allow innocent tort victims to seek redress, government entities, as public lands trustees, need some foreseeable limit to their liability, short of building a fence around every potentially hazardous shoreline.[83] In the meantime, Florida's expansive shorelines will continue to present hazards for both unwary swimmers and the government.[84]

82. *See supra* notes 65-70 and accompanying text.
83. *See supra* notes 49, 59 and accompanying text.
84. *See supra* notes 48-49, 55 and accompanying text.