

## NOTE

### A LEASE BY ANY OTHER NAME IS STILL A LEASE: A CRITICAL ANALYSIS OF *FLORIDA DEPARTMENT OF NATURAL RESOURCES v. GARCIA*

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#### I. INTRODUCTION

The State of Florida holds title to thousands of miles of real property in public trust for the people of Florida. Miami's South Beach, a well-known tourist and recreational hot-spot, is included in this property. "In 1982, the State [of Florida] entered into a management agreement with the City [of Miami (the City)] allowing the City to manage South Beach."<sup>1</sup> The management agreement

- (1) provided that the State "holds title" to the beach property;
- (2) granted the City "management responsibilities" of the beach for twenty-five years;
- (3) 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
- (4) required the City to pay the

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1. *Fla. Dept. of Nat. Resources v. Garcia*, 753 S.2d 72, 74 (Fla. 2000).

State twenty-five percent of revenues collected from private concessionaires.<sup>2</sup>

On February 1, 1989, seven years after the commencement of this agreement, Juan Garcia, Jr. was having fun in the water at Miami's South Beach when he was seriously injured. Garcia dove into the Atlantic Ocean and hit his head on debris allegedly left on the ocean floor after the destruction of Miami's old South Beach pier.<sup>3</sup> Garcia's injury rendered him paralyzed, and he and his parents sued a long line of defendants, including the City and the Florida Department of Natural Resources (the State) for negligence in failing to remove the debris and failing to take measures to prevent the accident.<sup>4</sup>

The trial court granted the State's motion for summary judgment on the grounds that (1) the State had no duty of care to swimmers because it never formally designated South Beach as a public swimming area, and (2) even if the State owed a duty of care to swimmers, it properly delegated that duty to the City when it entered into the management agreement.<sup>5</sup> On appeal, the Third District Court of Appeal reversed, concluding that a formal designation of property as a public swimming area is not required to create a duty of care to swimmers and that the State ultimately remained responsible as the titleholder of the beach because a landowner's duty is nondelegable.<sup>6</sup>

The Third District posited that a duty of care arises whenever a body of water is represented to the public as a public swimming area or commonly is used by the public as a swimming area despite the lack of a formal designation.<sup>7</sup> Although the Third District agreed

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2. *Id.* (emphasis in original). The State is able to enter into management agreements for the operation of State lands. See Fla. Stat. § 253.034(1) (2000) (contemplating that entities other than the State may operate State lands). The validity of the management agreement, therefore, is not an issue addressed in *Florida Department of Natural Resources v. Garcia*. See 753 S.2d at 75 (addressing "whether a formal designation as a public swimming" facility was a prerequisite to the imposition of a common-law duty of care to keep the area safe).

3. *Garcia*, 753 S.2d at 73-74.

4. *Id.* at 74. The Author also will use "the State" to refer to the State of Florida in general terms throughout this Note.

5. *Id.*

6. *Id.* The Third District stated that the issue on appeal was "whether the State has a duty of care towards swimmers at a public beach, where the beach is state-owned, but is controlled and operated by a municipality in accordance with a management agreement between the State and the municipality." *Garcia v. State Dept. of Nat. Resources*, 707 S.2d 1158, 1159 (Fla. Dist. App. 3d 1998).

7. *Garcia*, 707 S.2d at 1159.

that the decision to delegate operation of the beach was a planning-level decision, it concluded that the duty of care to invitees implied in property ownership is a common-law operational duty, which effectively waives sovereign immunity.<sup>8</sup> The district court concluded that, because this duty to swimmers is a nondelegable duty, the management agreement between the City and the State did not operate to shift the duty of care from the State to the City.<sup>9</sup>

On application to the Florida Supreme Court, a five justice majority HELD: When an area such as South Beach is well recognized as a public swimming area, the State cannot claim sovereign immunity based on the argument that it never formally classified the beach as a swimming area. Furthermore, the court noted that the State was not precluded from entering into an indemnification agreement under which the City would reimburse the State if the State were found vicariously liable for the City's negligence.<sup>10</sup>

The Florida Supreme Court's decision in *Florida Department of Natural Resources v. Garcia*<sup>11</sup> is based on a failure to address the critical issues, weak reasoning, and inapplicable law. It also violates the separation of powers doctrine. Additionally, the court's decision results in further dissolution of the sovereign immunity doctrine and leads to unsound public policy. Theoretically, the *Garcia* decision implies that, no matter what the State (or local government) does to delegate the administration of government lands, it will remain liable to people who are injured on State lands merely because it holds title to the lands. Thus, although the State has the statutory authority to delegate operational responsibility to a local government to operate State-owned land, the State will remain liable to every swimmer, boater, diver, fisherman, water-skier, and windsurfer who enters State-owned property or waters.

Part II of this Note reviews the history of sovereign immunity and introduces Florida's sovereign immunity statutes. Part III describes the *Garcia* court's analysis of the issues and facts before it. Part IV analyzes the *Garcia* decision critically, focusing on the court's failure to address the correct issues. Part V proposes that the

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8. *Id.* at 1160.

9. *Id.* at 1159. The Third District stated that while the duty of care was nondelegable, the performance of a duty may be delegated. *Id.* at 1160. The Third District noted that its decision would not impose a financial burden on the State, because the management agreement contained an indemnification clause requiring the City to reimburse the State if the State was found liable merely because it was the owner of the beach. *Id.*

10. *Garcia*, 753 S.2d at 77-78.

11. 753 S.2d 72 (Fla. 2000).

management agreement is equivalent to a lease and that the case ultimately should have been examined under premises liability law. The conclusion identifies the unsound public policy the *Garcia* decision leaves us with and hypothesizes about the grim future of the State's public land use policies in light of *Garcia*.

## II. SOVEREIGN IMMUNITY: THE BACKDROP TO GARCIA

### A. Sovereign Immunity

Federal and state governments and their agencies are deemed immune from tort liability unless a statute or constitutional amendment operates to waive that immunity, thus subjecting the government entity to the same liability as a private individual.<sup>12</sup> Commentators have set forth public policy reasons for the doctrine of sovereign immunity, which include protecting the public treasury, efficient government operation, the need for discretion and flexibility in government decisionmaking, and protecting the separation of powers doctrine.<sup>13</sup> Florida's reluctance to apply the doctrine of sovereign immunity has taken courts down a tumultuous path.

#### 1. Sovereign Immunity in Florida

Florida Statutes, Section 768.28 provides that the State's sovereign immunity is limited only in the specific situations detailed

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12. Gerald T. Wetherington & Donald I. Pollock, *Tort Suits against Governmental Entities in Florida*, 44 Fla. L. Rev. 1, 7 (1992). The authors argue that the sovereign immunity doctrine prevents the judiciary from interfering with the discretionary powers of the legislative and executive branches of government absent a violation of a constitutional right. *Id.* at 8. The sovereign immunity doctrine effectively deprives the courts of subject-matter jurisdiction according to certain authorities. *Id.* at 7. Therefore, a plaintiff seeking to find a government entity liable must establish that sovereign immunity has been waived. *Id.*

13. *Id.* at 8. Elizabeth Kunder Hocking discusses three of these public policy reasons for sovereign immunity. However, Hocking criticizes these public-policy concerns and argues that the doctrine diminishes the incentive for governments to comply with the law, that minimal judicial interference encourages the continuity of inappropriate or harmful government action, and that governments have larger treasuries now than they have had in the past, which makes the protection of the public treasury a weak policy concern. Elizabeth Kunder Hocking, *Federal Facility Violations of the Resource Conservation and Recovery Act and the Questionable Role of Sovereign Immunity*, 5 Admin. L.J. 203, 208–211 (1991). Hocking adds that an equally valid public-policy argument is that innocent individuals should be able to recover from abusive governments. *Id.* at 212.

in that Section.<sup>14</sup> Under these circumstances, Section 768.28 provides 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, but liability shall not include punitive damages or interest for the period before judgment.”<sup>15</sup> Essentially, this Section provides that when the State waives sovereign immunity it is liable in the same way that any other person would be for similar conduct.<sup>16</sup> This statute allows plaintiffs to sue the State as if it were a private person under certain circumstances and limits only the recoverable damages.<sup>17</sup> Although the words “only to the extent specified in this act” seem clear and unambiguous on their face, Florida courts struggle with determining which government actions are immune versus those that are considered to waive sovereign immunity.<sup>18</sup> A look at Florida’s decisions with regard to tort claims against government entities reveals the ambiguity and inconsistency that infects the case law.

## *2. Operational- Versus Planning-level Decisionmaking and Determining the Scope of the Section 768.28 Waiver*

One of the most challenging tasks for Florida courts has been determining the scope of the sovereign immunity waiver provided in Section 768.28.<sup>19</sup> The problem arises in discerning which government actions are purely governmental and immune, such as enacting legislation, and which are analogous to the actions of

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14. Fla. Stat. § 768.28 (2000). Section 768.28(1) provides as follows: “In accordance with s. 13, Art. X, of the State Constitution, the 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.”

15. *Id.* § 768.28(5). The statute also provides that recovery shall not exceed \$100,000 per person and any claim or portion of any claim shall not exceed \$200,000 when totaled with all other judgments or claims paid by the State or its agencies. *Id.*

16. *Id.*

17. *Id.*; Wetherington & Pollock, *supra* n. 12, at 26–27. Sovereign immunity traditionally barred suits against the government; Florida’s statute seems to further erode the application of the doctrine. *See id.* (discussing how sovereign immunity is waived under certain circumstances). The only minimal protection enjoyed by the State today is immunity against judgments that exceed \$100,000 for any individual. Fla. Stat. § 768.28(5).

18. *E.g. Avallone v. Bd. of County Commrs. of Citrus County*, 493 S.2d 1002, 1005 (Fla. 1986) (explaining that Section 768.28 did not create a new cause of action, but waived sovereign immunity for common-law torts); *Com. Carrier Corp. v. Indian River County*, 371 S.2d 1010, 1012 (Fla. 1979) (stating that the court’s task in that case was to determine the scope of the sovereign immunity waiver).

19. *Infra* nn. 20–42 and accompanying text.

private individuals. The Florida Supreme Court struggled with the scope of waiver contemplated by Section 768.28 in the seminal case of *Commercial Carrier Corporation v. Indian River County*.<sup>20</sup> In *Commercial Carrier*, the plaintiffs brought a wrongful-death action against Indian River County for an accident that occurred at an intersection in the county at which there allegedly was no stop sign or street markings.<sup>21</sup> While Section 768.28 provides that, in the case of a waiver of immunity, the State will be treated as a private individual under like circumstances, there are activities in which the State participates that are different from those in which private individuals engage.<sup>22</sup> Therefore, the *Commercial Carrier* court concluded that Section 768.28 does not contemplate a waiver for activities that are purely governmental and hence not analogous to tortious conduct of private individuals.<sup>23</sup>

To identify those government functions that do not fall within the scope of the Section 768.28 waiver, the court adopted the distinction proposed in *Johnson v. State*<sup>24</sup> between “planning” and “operational” levels of decisionmaking by the government and its agencies.<sup>25</sup> *Commercial Carrier* suggested that this case-by-case analysis would begin with the preliminary test set forth by the Washington Supreme Court in *Evangelical United Brethren Church of Adna v. State*<sup>26</sup> and adopted by *Johnson*.<sup>27</sup>

To distinguish between operational- and planning-level decisionmaking by a state and its agencies, the *Evangelical Brethren* court developed a four-inquiry method of analysis.<sup>28</sup> The first inquiry asks whether “the challenged act, omission, or decision necessarily involve[s] a basic governmental policy, program, or objective.”<sup>29</sup> The second inquiry asks whether “the questioned act, omission, or decision [is] essential to the realization or accomplish-

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20. 371 S.2d 1010, 1016 (Fla. 1979).

21. *Id.* at 1013. There allegedly had been a stop sign and street markings at that intersection at some time before the accident. *Id.*

22. *Id.* at 1022.

23. *Id.* The court held that “although Section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain ‘discretionary’ governmental functions remain immune from tort liability.” *Id.* Additionally, the court recognized the need for flexibility and discretion for governments in making decisions. *Id.*

24. 447 P.2d 352 (Cal. 1968).

25. *Com. Carrier*, 371 S.2d at 1022.

26. 407 P.2d 440 (Wash. 1965).

27. 371 S.2d at 1022.

28. 407 P.2d at 445.

29. *Id.*

ment of that policy, program, or objective.”<sup>30</sup> The third inquiry is whether “the act, omission, or decision require[s] the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved.”<sup>31</sup> The final inquiry is whether “the governmental agency involved possess[es] the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision.”<sup>32</sup> If all four questions are answered affirmatively, then the government conduct is discretionary and remains immune from tort liability.<sup>33</sup> If one or more question is answered negatively, then further inquiry may become necessary to determine whether the conduct is “discretionary” or “operational.”<sup>34</sup>

Although the line of demarcation for determining when government conduct remains immune from tort liability seems brighter after *Commercial Carrier*, the Florida Supreme Court failed to categorize certain functions or to determine whether a delegation of a function constitutes a waiver of sovereign immunity.<sup>35</sup>

In *Trianon Park Condominium Association v. City of Hialeah*,<sup>36</sup> the court adopted the distinction between planning- and operational-level decisionmaking proposed by *Johnson*; it also used the criteria set forth by the *Evangelical Brethren* court.<sup>37</sup> The Florida Supreme Court stated that, if government activities are considered operational, there first must exist an underlying statutory or common-law duty of care in the absence of sovereign immunity to subject a government to tort liability.<sup>38</sup> Consequently, when no common-law or statutory duty exists, the *Evangelical Brethren* test need not be applied, because there clearly is no governmental liability in those situations.<sup>39</sup>

The *Trianon Park* court added to the analysis by suggesting that government functions can be divided into the following four categories:

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *See Com. Carrier*, 371 S.2d at 1022 (following the *Evangelical Brethren* analysis generally, but failing to address whether the delegation of government functions is a planning or operational decision).

36. 468 S.2d 912 (Fla. 1985).

37. *Id.* at 918.

38. *Id.* at 919.

39. *Id.*

(I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational, and general services for the health and welfare of the citizens.<sup>40</sup>

The first two categories are inherent in the act of governing and thus are not subject to judicial intervention unless they violate constitutional or statutory rights.<sup>41</sup>

Both the *Commercial Carrier* and *Trianon Park* courts considered that the distinction between operational- and planning-level decisionmaking was necessary to guard against judicial intervention into discretionary government acts. The courts feared that judicial intervention would cause courts to call into question the political and police powers of other branches of government, which would violate the separation of powers doctrine.<sup>42</sup>

### 3. Government-owned Public Facilities

The difficulty in distinguishing between operational- and planning-level decisions is further compounded when the government entity owns the land on which the alleged tortious conduct occurs. Federal, state, and local governments, much like private individuals, own land and facilities that are open to the public. However, not all government decisions made with respect to government-owned property are inherently governmental.

In *Avallone v. Board of County Commissioners of Citrus County*,<sup>43</sup> the plaintiff sued a county for negligence in operating a county-owned park and swimming facility.<sup>44</sup> The Florida Supreme Court held that a government unit has the discretionary authority to choose whether to operate swimming facilities, and is immune from tort liability on that discretionary question.<sup>45</sup> The court added that once a government entity “decides to operate the swimming facility, it assumes the common-law duty to operate the facility

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40. *Id.*

41. *Id.*

42. *Id.*; *Com. Carrier*, 371 S.2d at 1022.

43. 493 S.2d 1002 (Fla. 1986).

44. *Id.* at 1003.

45. *Id.* at 1005.



safely, just as a private individual is obligated under like circumstances.”<sup>46</sup>

In a subsequent case, the Florida Supreme Court reversed the decision of the Second District Court of Appeal, concluding that a county had the benefit of sovereign immunity in deciding to operate a public swimming facility.<sup>47</sup> Following its decision in *Avallone*, the court in *Butler v. Sarasota County*<sup>48</sup> reiterated that while governments are immune from liability on the discretionary question of whether to operate a facility, once a government decides to operate a facility, “[t]he duty of care is no different for a public owner than a private owner.”<sup>49</sup>

More recently, the Fourth District decided a negligence action brought against Palm Beach County arising out of a diving accident in a lake at a county-owned park.<sup>50</sup> In *Warren v. Palm Beach County*,<sup>51</sup> the court distinguished *Avallone* and *Butler*, concluding that because the county specifically did not designate the swimming area, the county could not be held liable.<sup>52</sup> Despite the absence of signs prohibiting swimming and diving, the court concluded that the county was not liable because it did not contribute to the condition of the water or the lake bottom.<sup>53</sup>

In a similar case, the Second District recognized that the State could be held liable for dangerous conditions despite the lack of a formal designation as a public swimming facility.<sup>54</sup> In *Andrews v. Department of Natural Resources, State of Florida*,<sup>55</sup> the parents of a child who drowned at a State recreational area sued the State, alleging negligent failure to post signs of dangerous currents and to provide lifeguards.<sup>56</sup> The court distinguished *Warren*, claiming that,

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46. *Id.* In a concurring opinion, Justice Leander J. Shaw, Jr. recommended holding that there is no immunity for either operational- or planning-level decisionmaking, and that the government should be treated as a private individual would in a tort action, making only the following inquiries: Was there a duty? Was the duty breached? Did the breach cause injury to the plaintiff? *Id.* at 1006 (Shaw, J., concurring).

47. *Butler v. Sarasota County*, 501 S.2d 579 (Fla. 1986).

48. 501 S.2d 579 (Fla. 1986).

49. *Id.* at 579–580.

50. *Warren v. Palm Beach County*, 528 S.2d 413, 415 (Fla. Dist. App. 4th 1988).

51. 528 S.2d 413 (Fla. Dist. App. 4th 1988).

52. *Id.* at 415.

53. *Id.* In this case, the plaintiff became paralyzed after diving into a shallow lake. *Id.* at 414. The lake’s murky condition created the illusion that it was deep in that area. *Id.*

54. *Andrews v. Dept. of Nat. Resources, State of Fla.*, 557 S.2d 85, 89 (Fla. Dist. App. 2d 1990).

55. 557 S.2d 85 (Fla. Dist. App. 2d 1990).

56. *Id.* at 86.

whereas in *Warren* the State specifically had not designated the swimming area, in *Andrews* there existed an issue of material fact concerning whether the State led the public to believe that the beach was a designated swimming area.<sup>57</sup> The preceding body of law serves as a backdrop for the *Garcia* court's analysis.

### III. THE GARCIA COURT'S ANALYSIS

The Florida Supreme Court's legal and factual analysis in *Garcia* fails to provide convincing precedent for courts to follow in tort actions against the State. The court described the issues before it as follows:

(1) whether a formal designation as a public swimming area is necessary before a common law duty to maintain the swimming area in a reasonably safe condition arises, and (2) whether the district court in this case incorrectly concluded that the State could insulate itself from liability through indemnification agreements with the local government entities operating the public swimming area.<sup>58</sup>

The court purported to follow *Avallone*, citing the rule that a government entity that operates a swimming facility assumes the common-law duty to operate the facility safely, just as a private individual is obligated under like circumstances.<sup>59</sup> Adding to this assertion, the court maintained that this duty owed by the government is the same operational-level duty that is owed by a private landowner to keep the premises reasonably safe and to warn the public of any dangers about which the landowner knows or should know.<sup>60</sup>

In resolving the issue of whether a formal designation was required, the *Garcia* court turned to *Warren* and *Andrews*, which focus on the totality of circumstances in determining whether a government entity made a formal designation or led the public to believe that a particular swimming area was open to the public.<sup>61</sup> Under the circumstances, the court conceded that the State itself had not formally designated or operated South Beach as a swim-

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57. *Id.* at 89.

58. *Garcia*, 753 S.2d at 75.

59. *Id.*

60. *Id.*

61. *Id.* at 76.

ming area.<sup>62</sup> However, by focusing on the totality of the circumstances, the court determined that there was no dispute that South Beach was in fact held out to the public as a swimming area by the City,<sup>63</sup> a conclusion that appears to have no bearing on the State's liability.

In an attempt to connect the City's operation of South Beach to the State, the court cited *Andrews*, and stated that the public's "common use" is only one factor to consider in determining whether the area was "held out" to the public as a public swimming area.<sup>64</sup> The court also looked at the fact that the State received twenty-five percent of the revenues from concessionaires to reach its conclusion that the State held South Beach out as a public swimming area.<sup>65</sup> Furthermore, the court determined that by allowing the City to operate the beach as a swimming area via the management agreement and requiring the City to submit a management plan, the State was aware that the beach would be operated as a public swimming area.<sup>66</sup> After evaluating the foregoing facts, the court concluded that

[t]he actual operation of South Beach by the City pursuant to the management agreement between the City and the State establishes that the basis for the State's liability in this case is the State's permission to grant the City the right to operate South Beach as a swimming area open to the public.<sup>67</sup>

This apparent connection is tenuous at best.<sup>68</sup>

The court proceeded to respond to the State's financial concerns regarding the posting of "no swimming" signs up and down its hundreds of miles of beach property by agreeing that requiring such signs would be an intolerable burden on the State.<sup>69</sup> However, it determined that when a swimming area is well known, the State cannot claim immunity merely because the beach formally was not

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62. *Id.* at 76.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The court goes on to rationalize its decision by stating, "Not only did the State agree to the operation of the public swimming area, . . . it put limitations on the terms of the operation and demanded twenty-five percent of the revenues." *Id.*

68. See *infra* pt. IV(2)(B), at 149–151 (discussing the illogical connection between the requirement of a management plan and the State's approval of the City's negligent conduct).

69. *Garcia*, 753 S.2d at 77.

designated as a State park.<sup>70</sup> Accordingly, the Third District's reversal of summary judgment in favor of the State on this issue was affirmed; however, the court disapproved of the Third District's dicta suggesting that the public's mere common use of the property as a swimming area creates an operational-level duty requiring the State to maintain the swimming area.<sup>71</sup> The court's conclusion of liability on the part of the State appears to be based on intuition rather than facts and precedent. This illogical leap will be addressed in Part IV of this Note.<sup>72</sup>

In addressing the second issue of whether the Third District incorrectly concluded that the State could insulate itself from liability through indemnification agreements with the local governments, the *Garcia* court interpreted Section 768.28(18) as consistent with the common-law right of indemnification.<sup>73</sup> Accordingly, the court concluded that "the State would have been able to seek indemnity from the City if the State was without fault and held vicariously liable for the City's failure to keep South Beach reasonably safe."<sup>74</sup> Finally, the majority declined to address the Third District's determination that the duty owed by the State was nondelegable, because a landowner's duty to invitees to keep the premises reasonably safe is nondelegable.<sup>75</sup>

#### IV. A CRITICAL ANALYSIS OF FLORIDA DEPARTMENT OF NATURAL RESOURCES v. GARCIA

##### A. The State's Decision to Enter into a Management Agreement with the City Was a Planning-level Discretionary Decision for Which the State Retained Its Sovereign Immunity Protection

The *Garcia* court's analysis overlooked fundamental issues and instead based the State's liability on irrelevant facts and faulty analogies. In examining the issue of the State's liability for injuries in bodies of water, the court should have addressed whether the State's decision to enter into the management agreement was an

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70. *Id.*

71. *Id.*

72. *Infra* pt. IV.

73. 753 S.2d at 77.

74. *Id.* at 78.

75. *Id.* The court did not address this issue, because neither party briefed the issue or argued it on review. *Id.*

operational- or planning-level decision, and applied the *Evangelical Brethren* test it adopted in *Commercial Carrier*.<sup>76</sup> Instead, the court incorrectly went directly into an analysis of the totality of the circumstances advocated by *Warren* and *Andrews* to determine whether the State held the beach out as a public swimming area and was therefore liable to Garcia.<sup>77</sup> This totality of the circumstances analysis was incorrect, because it assumed that the basic issue in the case was whether the State's formal designation of South Beach as a swimming area was a prerequisite to the State's liability for injury to Garcia. Whether South Beach was designated as a swimming area should not have been the central issue in this case.

It is common knowledge that, despite the fact that the area formally was not designated as a public swimming area, Miami's South Beach is a recreational hot-spot where tourists and residents swim, sunbathe, eat, and shop; therefore, South Beach obviously was held out to the public as a public swimming area. However, the sovereign remains immune from liability unless it waives immunity, thus requiring it to be treated as a private individual.<sup>78</sup> Instead of starting with the presumption that the State was immune and then determining whether a waiver occurred under *Evangelical Brethren* and *Trianon Park*, the majority ignored this fundamental analysis. Such an inquiry would have yielded the conclusion that the State's decision to enter into the management agreement with the City was a planning-level decision that was within the State's discretionary authority and for which the sovereign retained the protection of immunity. Accordingly, two similar lines of inquiry should have been included in *Garcia* when the justices began their analysis.

### 1. *The Evangelical Brethren Analysis*

The court logically could have raised the *Evangelical Brethren* test by beginning with the first two inquiries of that test, which go hand-in-hand. The first two questions are as follows:

- (1) [d]oes the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
- [and] (2) [i]s the questioned act, omission, or decision essential

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76. See *Com. Carrier*, 371 S.2d at 1019 (adopting the *Evangelical Brethren* analysis to distinguish between operational- and planning-level decisions).

77. *Garcia*, 753 S.2d at 75.

78. Fla. Stat. § 768.28(5).

to the realization or accomplishment of that policy, program, or objective?<sup>79</sup>

The State's decision to enter into a management agreement with the City involved a basic government policy. The management agreement between the City and the State "granted the City 'management responsibilities' of the beach for twenty-five years."<sup>80</sup> Such management contracts are contemplated by the Florida Statutes.<sup>81</sup> Because the State is controlled by statute on such matters, a plain reading of the statute will answer the inquiry of whether the State's decision to enter the management agreement involved a basic government policy.

Section 253.034 states that all State-owned lands "shall be managed to serve the public interest by protecting and conserving land, air, water, and the state's natural resources, which contribute to the public health, welfare, and economy of the state."<sup>82</sup> According to Section 253.034, the State's land "shall be managed using a stewardship ethic that assures these resources will be available for the benefit and enjoyment of all people of the state, both present and future."<sup>83</sup> Additionally, Section 253.034 appears to contemplate management agreements in that, with respect to State-owned lands, it provides that

[a]ll multiple-use land management strategies shall address public access and enjoyment . . . and the degree to which public-private partnerships or endowments may allow the *entity with management responsibility* to enhance its ability to manage these lands.<sup>84</sup>

A plain reading of this statute reflects that an entity other than the State itself may exercise management responsibilities to carry out the government policy set forth in Section 253.034.<sup>85</sup> This statute also indicates the intent of the legislature to make State lands that are held in public trust for the people of the State accessible to the

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79. *Evangelical Brethren*, 407 P.2d at 445.

80. *Garcia*, 753 S.2d at 74.

81. *Infra* nn. 84–87 and accompanying text (discussing how the Florida Statutes provide for entities with management responsibilities).

82. Fla. Stat. § 253.034(1).

83. *Id.*

84. *Id.* (emphasis added).

85. *See id.* (referring to the duties of "the entity with management responsibility").

public for the safe enjoyment of the citizens of the State.<sup>86</sup> This public policy, apparent throughout Section 253.034, supports the argument that, in *Garcia*, the challenged act of entering into the management agreement necessarily involved the government policy of providing access and enjoyment to the public. Therefore, entering into management agreements with other agencies is appropriate to realize the accomplishment of this policy.<sup>87</sup>

The State owns hundreds of miles of coastline. Consequently, if the State itself were expected to manage every inch of that coastline, it would be impractical and would impose an unreasonable financial burden. City officials are local and familiar with South Beach, whereas the State is far removed from the day-to-day operation of the beach. Financially, such an expectation would be impossible. The contemplation of management agreements in Section 253.034 shows the ineffectiveness of expecting the sovereign titleholder to respond to every dangerous condition on its lands.<sup>88</sup> Local governments are more familiar than the State with the local needs and dangers present on State lands within their local limits and are therefore better equipped to manage State lands within their boundaries quickly and efficiently. Allowing the entity with the most knowledge and in the best position to respond to problems and to manage the area insures that the Beach will “be managed to serve the public interest.”<sup>89</sup>

For example, if there were an outbreak of red tide or the water were polluted at South Beach, the City would probably have issued warnings and closed the appropriate sections of the beach. Because the City officials and employees would be the first to know of such an incident and City authorities are local, the City would respond quickly to the problem. It would be inefficient and take considerably longer for the City to notify the State of the red tide and for the State to designate employees to travel to South Beach to issue a warning and block off the beach. Thus, the beach is more effectively operated to serve the public interest by allowing the City to respond to such concerns. Accordingly, if the court had examined the first two inquiries of the *Evangelical Brethren* test, it would have concluded, based on the policy set forth in Section 253.034, that the

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86. *Id.*

87. *See id.* (suggesting that an agency other than the State may have management responsibility over State lands).

88. *See id.* (stating that State lands shall be managed using a stewardship ethic to serve the public interest).

89. *Id.*

State's decision in *Garcia* necessarily involved the basic government policy of making efficient use of State lands for public enjoyment. Furthermore, it would have determined that the State's decision to enter into a management agreement with the City was essential to the realization of the public policy behind Section 253.034, because the State cannot monitor and manage such extensive amounts of State-owned land efficiently.<sup>90</sup> Even after answering the first two *Evangelical Brethren* inquiries affirmatively, the court would have had to examine the facts of the case under the final two inquiries of the test.

The third inquiry of the *Evangelical Brethren* test is whether "the act, omission, or decision require[s] the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved."<sup>91</sup> As noted above, the policy is to provide access and enjoyment of public lands to the people of the State.<sup>92</sup> Because the State holds title to sovereign lands in trust for the benefit of the people of the State, it is logical that the State, acting in a fiduciary capacity, evaluated its policy in order to make the most efficient use of State lands for the benefit of the public. Pursuant to its management agreement with the City, it is clear that the State had its policy in mind.<sup>93</sup> The management agreement in *Garcia* required the City to submit a management plan for the control of water and beach-related activities and the sale of goods and services to the public to be approved by the State.<sup>94</sup> This provision in the management agreement indicated that the State wanted the City's management plan to be consistent with the policy of the State to ensure the public safe access to and enjoyment of State lands.<sup>95</sup> However, the foregoing provision in the management agreement was not, as the court suggested, evidence that the State held South Beach out as a public swimming area.<sup>96</sup> After examining the third *Evangelical*

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90. *But see Garcia*, 707 S.2d at 1160 (rejecting the State's assertion that monitoring South Beach would be a financial burden, reasoning that the duty to operate beaches safely applies only to the State beaches "held out" to the public as swimming areas, and finding that the State could enter indemnification agreements to alleviate this financial burden).

91. 407 P.2d at 445.

92. Fla. Stat. § 253.034(1).

93. *See Garcia*, 753 S.2d at 74 (noting that the State required a detailed management plan providing for the control of numerous beach activities).

94. *Id.*

95. *See id.* (stating that the management plan required regulation of bathing and other water-related activities).

96. *See id.* at 76 (concluding that by entering into the management agreement, the State conceded that South Beach would be held out to the public as a swimming area by the City).



*Brethren* inquiry and answering it affirmatively, the *Garcia* court should have proceeded to the final inquiry of the *Evangelical Brethren* test.

The final inquiry is whether “the governmental agency involved possess[es] the required constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision.”<sup>97</sup> The sovereign has the authority to enter into management agreements with other entities and agencies of the State. Not only does Section 253.034 expressly mention management agreements between the State and other entities,<sup>98</sup> in its most basic form, a management agreement also essentially establishes a contractual relationship, and the State has the authority to enter into contractual agreements.<sup>99</sup> Additionally, pursuant to Section 373.046, “[t]he department may enter into interagency agreements with or among any other state agencies conducting programs or exercising powers related to or affecting the water resources of the state.”<sup>100</sup> Based on the foregoing, the State had the lawful statutory authority to make the decision to enter into an agreement with the City for the management of South Beach.<sup>101</sup>

After conducting these preliminary inquiries, it is obvious that the State’s decision to enter into the management agreement involved a basic policy, was essential in realizing that policy, involved the exercise of the State’s judgment, and was a lawful exercise of State authority. After answering all of the *Evangelical Brethren* questions affirmatively, the *Garcia* court should have concluded that the State’s decision to enter into the management agreement with the City was a discretionary, planning-level decision and was therefore protected by sovereign immunity. Unfortunately, the majority failed grievously to conduct the type of convincing factual inquiry required by *Commercial Carrier*. The court would have appeared more credible if it had at least attempted the preliminary analysis suggested by *Trianon Park*.

## 2. *The Trianon Park Analysis*

In line with the *Evangelical Brethren* analysis, the court logically could have used the preliminary categorization of govern-

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97. *Evangelical Brethren*, 407 P.2d at 445.

98. Fla. Stat. § 253.034(4).

99. Fla. Stat. § 373.046(1) (2000).

100. *Id.*

101. *Id.* § 253.034(4); *id.* § 373.046(1).

ment conduct recommended by *Trianon Park* as a precursor to *Evangelical Brethren*.<sup>102</sup> According to *Trianon Park*, government conduct can be separated into four categories to distinguish between operational- and planning-level decisions.<sup>103</sup> Since the *Garcia* court based the State's liability on the fact that it entered into a management agreement with the City, the State's decision to enter into the management agreement with the City is the challenged conduct for purposes of the *Trianon Park* analysis.

The first category proposed in *Trianon Park* includes "legislative, permitting, licensing, and executive officer functions."<sup>104</sup> Government conduct that falls into this category does not operate to waive sovereign immunity, because these functions are inherent in the act of governing and hence not subject to judicial scrutiny because of separation of powers concerns.<sup>105</sup> The State's decision to enter into a management agreement with the City was not inherent in the act of governing, because when governments enter into management agreements, they are not acting according to a basic government function performed by the legislative or executive branch. The act of entering into a management agreement goes beyond the government acts of enacting laws and issuing permits, licenses, or directives and therefore is not properly attributed to this category.<sup>106</sup>

The second category submitted by the *Trianon Park* court includes "enforcement of laws and the protection of the public safety."<sup>107</sup> The State's ability to exercise its police powers to enforce laws and promote the public safety has been recognized as a discretionary function that has never given rise to a common-law duty of care; hence, it is not subject to judicial review.<sup>108</sup> In *Garcia*, the State's decision to enter into the management agreement may have fallen into this category because, although it is not a means of enforcing the law, the State's decision to enter into the management agreement promoted the public safety by requiring the City to

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102. 468 S.2d at 918.

103. *Id.* at 919.

104. *Id.*

105. *Id.*

106. *See id.* (concluding that a government has discretionary authority to enact laws, issue permits, and implement directives of a similar nature; therefore, this conduct is protected by sovereign immunity).

107. *Id.*

108. *Id.* at 919–920.

submit a management plan for the State's approval.<sup>109</sup> Because there has never been a common-law duty of care for the first and second categories proposed in *Trianon Park*, government decisions that fall into these categories are considered discretionary, and as a result, the statutory waiver of sovereign immunity does not create a new duty of care under Section 768.28.<sup>110</sup>

The third category of government conduct proposed by the *Trianon Park* court includes "capital improvements and property control operations."<sup>111</sup> According to the *Trianon Park* court, a government entity's decision not to build or modernize a particular improvement is a discretionary function, which is not subject to judicial review.<sup>112</sup> Alternatively, once a government "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."<sup>113</sup> In *Garcia*, the State did not have control of the South Beach property when Garcia was injured.<sup>114</sup> While the State continued to hold title to the South Beach property throughout the duration of the management agreement, the provisions of the management agreement clearly indicated that the State was making a decision *not* to take control of the management of South Beach.<sup>115</sup> In fact, the management agreement clearly indicated that the City took control of the property, and thus the City had the same common-law duty as a private individual to maintain and operate the premises properly.<sup>116</sup> Furthermore, the destruction of the old pier was part of the City's redevelopment plan, and it was the City that contracted for the destruction of the pier.<sup>117</sup> Therefore, it was the City's conduct

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109. *See id.* (concluding that State powers to enforce and promote public safety are discretionary with no common-law duty of care).

110. *Id.* at 919.

111. *Id.*

112. *Id.* at 920.

113. *Id.* at 921.

114. 753 S.2d at 74 (noting that the management agreement granted the City management responsibilities and required the City to submit a plan detailing how it would control specific beach activities).

115. *Id.*; *see Trianon Park*, 468 S.2d at 918 (holding that a government entity has the discretionary authority to decide to operate a swimming area, and remains immune on that question).

116. *Garcia*, 753 S.2d at 74; *see Avallone*, 493 S.2d at 1005 (concluding that once a government entity decides to operate a swimming area, it assumes the same common-law duty as a private person).

117. UPI, *Old South Beach Pier to Be Razed* (July 26, 1984) (available in LEXIS, News library, UPI file).

— not the State's — that would have fallen into the third *Trianon Park* category.<sup>118</sup>

The final category proposed by the *Trianon Park* court includes “providing professional, educational, and general services.”<sup>119</sup> These services, such as providing medical and educational services, are analogous to similar services provided to the public by private individuals and give rise to common-law duties of care.<sup>120</sup> The State's decision in *Garcia* would not fall into this category of decisionmaking proposed by *Trianon Park*, because the management agreement did not contemplate the State providing medical, educational, or any other services to the public.

The third and fourth categories implicate the possibility of government liability, because there is a common-law duty of care regarding the maintenance of property and the provision of general services. It is when government conduct appears to fall into the third and fourth categories that the *Trianon Park* court suggests that the *Evangelical Brethren* test most appropriately is utilized to distinguish between conduct that is discretionary, and remains immune, from that which is operational, and for which a government may be liable.<sup>121</sup>

Even supposing that the State's decision to enter into a management agreement fell into the third *Trianon Park* category, moving into the *Evangelical Brethren* analysis, as *Trianon Park* suggests, would result in the conclusion that the State's decision to enter into a management agreement with the City was discretionary.<sup>122</sup> Because the decision to enter into the management agreement necessarily involved a basic government policy, was essential to the realization of the policy, required the exercise of basic policy evaluation, and the government possessed the statutory ability to make the agreement, the State's decision did not subject it to liability.<sup>123</sup>

Regrettably, the foregoing analysis, which the court used in *Commercial Carrier* and *Trianon Park*, is missing from the *Garcia*

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118. *Trianon Park*, 468 S.2d at 920 (concluding that control of government property and redevelopment falls into the third category).

119. *Id.*

120. *Id.* at 921. However, a government decision regarding the number of doctors or teachers that will be provided at a particular medical or educational facility may be a discretionary decision for which there would be no tort liability. *Id.*

121. *Id.* at 919.

122. *Supra* nn. 79–101 and accompanying text.

123. *Supra* nn. 80–101 and accompanying text.

opinion. Although the *Garcia* court concluded that the State had an operation-level duty of care to those individuals enjoying the South Beach property, it made this conclusion without following its own method of analysis as set forth in *Commercial Carrier* and *Trianon Park*. This faulty legal and factual analysis renders the majority's opinion unpersuasive. This shortcoming is further compounded by the majority's misapplication of the holding in *Avallone* to the present case.

#### B. The *Garcia* Court Misapplied the Holding in *Avallone*

One can only speculate why the court mischaracterized the holding in *Avallone* by failing to distinguish the facts of that case from the facts before it. Indeed, the important precedent from *Avallone* should have been applied to the facts of *Garcia*; however, that case is not on all fours with *Garcia*, which is an important point the majority failed to consider.

The court cited the rule in *Avallone* that a government entity that operates a swimming facility assumes the common-law duty to operate the facility safely.<sup>124</sup> However, the facts in *Avallone* are distinguishable from the present facts. In *Avallone*, the plaintiff sued the county for negligence in operating a county-owned and operated park and swimming facility.<sup>125</sup> Hence, in *Avallone* the owner of the facility actually was operating the facility where the injury occurred.<sup>126</sup> In the present case, however, the State was not operating the swimming area where *Garcia* was injured,<sup>127</sup> making the State in *Garcia* once removed from the county in *Avallone*. Furthermore, the agreement clearly granted "management" duties to the City and required the City to submit a management plan to the State for approval.<sup>128</sup> The salient facts the court failed to consider in applying *Avallone* were precisely those activities contemplated by the proposed management plan.

The management plan provided "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

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124. *Garcia*, 753 S.2d at 75.

125. 493 S.2d at 1003.

126. *Id.*

127. 753 S.2d at 74. The court noted that the State had never managed South Beach as a swimming area. Additionally, when *Garcia* was injured, the twenty-five-year period provided for in the management agreement already had commenced. UPI, *supra* n. 117.

128. *Garcia*, 753 S.2d at 74.

the public.”<sup>129</sup> This request is not ambiguous. On the contrary, the plan required specific day-to-day management activities. For example, the City had to create a plan that clearly set forth, among other things, how it would monitor and regulate swimming and water sports and how it would provide adequate and safe bathroom and changing facilities, parking, and other services to the visitors of South Beach, like *Garcia*.<sup>130</sup> The existence of such a detailed management plan in *Garcia* makes this case twice removed from the facts in *Avallone*. It was the court’s failure to consider the factors above, which distinguish this case from *Avallone*, that render the court’s analogy grossly inadequate.

This miscomprehension is exacerbated further by the court’s failure to consider the language in *Avallone* that a government has the discretionary authority to decide whether to operate a swimming area.<sup>131</sup> This language should have become the most critical factor in *Garcia*, because there clearly was an issue of whether the State decided to operate South Beach.<sup>132</sup> Instead, the *Garcia* court assumed that the State made the decision to operate a swimming area by approving the City’s management plan, therefore assuming the common-law duty to operate it safely.<sup>133</sup> However, based on the fact that the State entered into a management agreement with the City, it is clear that the State made an express and definite decision *not* to operate a swimming facility.<sup>134</sup> In fact, by delegating “management responsibilities,” the State was clearly telling the City that the State was deciding not to operate South Beach itself, but the City could regulate swimming, sports, bathroom facilities, parking, rental equipment, and other services in accordance with the approved plan. Although the very nature of the agreement was evidence that the State made the discretionary decision not to operate South Beach itself, thus retaining sovereign immunity under *Avallone*, the court circumvented this obvious conclusion by mischaracterizing the State’s approval of the plan.

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129. *Id.* (emphasis in original).

130. *Id.*

131. 493 S.2d at 1005.

132. *Contra Garcia*, 753 S.2d at 75 (stating that the issues before the court were whether a designation of a swimming area was required for liability and whether the State could protect itself by entering into an indemnification agreement).

133. *Id.* at 76 (contending that the “management agreement demonstrates more than just an acquiescence by the State to allow the City to operate South Beach”).

134. *But see id.* (concluding that the State’s decision to enter into the agreement evidenced its approval that South Beach would be operated as a public swimming area).

The court misconstrued the State's approval of the management plan as approval of and participation in the City's allegedly negligent conduct. However, approval of the plan bears no rational connection to approval of how the City actually carried out that plan. While the management agreement certainly required the City to submit a plan "for the limitation and control of land and water-related activities,"<sup>135</sup> the court's tenuous connection of facts was not persuasive. By entering into the management agreement, the State subscribed to the specific plan the City indicated it would implement in its management of the beach. While it is obvious that the State approved of the specific management plan, to conclude that approval of a plan is equal to approval of the allegedly negligent execution of that plan is unsound.

For example, when the Department of Motor Vehicles issues a license to an individual, it approves of the individual driving in accordance with the "plan" exemplified by the traffic laws of that state. Just because the Department approves a driver and issues a license does not mean that the Department approves of that driver's negligent deviation from the traffic laws. This example highlights the court's misapplication of *Avallone*, an unfortunate conclusion that could have been avoided by a straightforward application of that case.

Under *Avallone*, the State's decision not to operate a swimming facility by entering into the management agreement would have been a discretionary one.<sup>136</sup> Because the decision was discretionary, the State never assumed the common-law duty of a private individual under *Avallone*.<sup>137</sup>

*V. PREMISES LIABILITY ANALYSIS: IF THE SOVEREIGN  
WAIVES IMMUNITY, IT IS TREATED AS A PRIVATE  
INDIVIDUAL UNDER LIKE CIRCUMSTANCES*

Although the court found that the State did not benefit from the protection of sovereign immunity,<sup>138</sup> it could have salvaged its opinion by following Section 768.28 and treating the State as a

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135. *Id.* at 74.

136. *Avallone*, 493 S.2d at 1005 (holding that a government remains immune until it decides it will operate a swimming facility).

137. *Id.* (stating that a government unit has discretionary authority regarding whether to operate swimming facilities and only assumes a common-law duty after deciding to operate a swimming facility).

138. *Garcia*, 753 S.2d at 77.

private individual under the same circumstances. By properly characterizing the management agreement as a lease and treating the State as a landlord, the court could have avoided the severe public-policy concerns its decision implicates.<sup>139</sup>

#### A. The Management Agreement between the State and the City Was Actually an Enforceable Lease

“If it looks like a duck and quacks like a duck, it is a duck.” This familiar phrase illustrates the upcoming characterization of the management agreement as an enforceable lease. In other words, the reference to the term of years entered into by the City and the State as a management agreement is a misnomer. While the majority characterized the agreement as a management agreement, an examination of the provisions of the agreement and an application of the elements of a lease will help to characterize the agreement in the law.

“An ‘estate for years’ is a property interest limited to a fixed period”<sup>140</sup> and a type of leasehold estate that creates an interest in property in the tenant that is less than a fee simple absolute.<sup>141</sup> Most jurisdictions recognize that the elements of an enforceable lease include the designation of the parties, a description of the premises to be leased, a statement of the duration of the lease, and the amount of rent.<sup>142</sup> Once these elements are established and a lease is determined to exist, the landlord and tenant are deemed to have certain rights and responsibilities with respect to the leased premises.<sup>143</sup>

The first two provisions of the management agreement cited by the *Garcia* court established the identity of the parties. The first provision of the management agreement provided that the State “holds title” to the beach, and the second granted the City “management responsibilities” of the beach for twenty-five years.<sup>144</sup> These

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139. *Infra* pt. VI (discussing the public policy ramifications of *Garcia*).

140. Ralph E. Boyer, *Florida Real Estate Transactions* vol. 4, § 50.03[2], 50-7 (LEXIS L. Publg. 2000).

141. *Id.* “A ‘lease’ is a contract or agreement by which the owner of an estate conveys to another person a present interest in part of the estate for a term that is less than that held by the owner.” *Id.* at § 50.04[1], 50-13 (citations omitted).

142. *Id.* at 50-36 to 50-37; Roger A. Cunningham, William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 6.13, 262 (2d ed., West 1993).

143. Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.10, 258.

144. *Garcia*, 753 S.2d at 74.



provisions established that the State and the City were parties to this agreement.

A lease also must include a description of the premises.<sup>145</sup> This description need not be an exact legal description, which is usually required for the sale of land.<sup>146</sup> If a court can identify the leased property with the use of extrinsic evidence, the description of the property will be sufficient to establish a lease agreement with respect to that property.<sup>147</sup> The lease between the City and the State in *Garcia* adequately described the property that was the subject of the agreement. There was no dispute that the property to be controlled by the City was the area of land in Miami, Florida commonly known as “South Beach.”<sup>148</sup> Therefore, a sufficient description of the premises was contained in the management agreement between the City and the State.<sup>149</sup>

The third element of a lease is a statement of the duration of the lease.<sup>150</sup> In an estate for years, the duration of the lease must be certain.<sup>151</sup> This element of a lease refers to how long the tenant will have a possessory interest before the right to possession reverts to the landlord.<sup>152</sup> The duration of the lease in *Garcia* was established clearly by the twenty-five-year limitation on the City’s management responsibilities.<sup>153</sup> In fact, the twenty-five-year term probably was the most salient evidence that the management agreement between the City and the State was a lease. Because the most distinctive

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145. Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.13, 262. “The term ‘premises’ refers to the property interest that is the subject of a lease and that may be used by the tenant.” Boyer, *supra* n. 140, at § 50.05, 50-19.

146. Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.13, 262.

147. *Id.*

148. See *Garcia*, 753 S.2d at 74 (referring to the premises generally as South Beach). Neither the court nor the parties disputed the area of land that encompasses the premises governed by the management agreement.

149. See Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.13, 262 (stating that a completely informal description is sufficient “if it gives a clue that, with extrinsic evidence, identifies the intended premises”).

150. Boyer, *supra* n. 140, at § 50.30[1], 50-36 to 50-37; Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.13, 262.

151. Boyer, *supra* n. 140, at § 50.03[2], 50-7. The duration of a term of years can be less than one year, provided the term is certain. *Id.* “The requirement of definiteness of duration is satisfied if the estate has a certain ending even though its commencement in possession is stated to depend on the happening of a specified event.” Cornelius J. Moynihan, *Introduction to the Law of Real Property: An Historical Background of the Common Law of Real Property and its Modern Application* § 2, 58 (2d ed., West 1988).

152. Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.12, 260–261.

153. See *Garcia*, 753 S.2d at 74 (noting that the State retained title to South Beach and the agreement would terminate in twenty-five years).

element of a lease for years is the right to possession by the tenant for a specified term,<sup>154</sup> this provision in the management agreement was persuasive evidence that this agreement was a lease.

Finally, the fourth element of a lease is the amount of rent to be paid by the tenant for the right to possess the land.<sup>155</sup> More specifically, “[r]ent’ is the return accorded an owner of realty for the use and occupation of the premises by a tenant.”<sup>156</sup> Rent can be paid in “money, services, chattels, labor, or a share of crops or proceeds.”<sup>157</sup> Although rent usually is an element of a lease agreement, rent is not a material element of a lease; thus, a lease can be rent-free if that is the intention of the parties.<sup>158</sup> In *Garcia*, the amount of rent was not specifically enumerated; however, the lease “required the City to pay the State twenty-five percent of revenues collected from private concessionaires.”<sup>159</sup> This provision in the lease specified the return the State would receive for the use and occupation of South Beach by the City; therefore, the final requisite of a lease was provided for in the management agreement.

Reviewing the general elements of a lease and comparing them to the management agreement between the City and State, it can be easily reasoned that this management agreement was in fact a lease. A determination that the management agreement in *Garcia* was a lease leads to the next issue: What were the landlord’s and the tenant’s duties with respect to the leased premises, and who was liable for injury to the tenant or third parties on the premises with the tenant’s permission?

#### B. The State Did Not Have a Duty to *Garcia* under the Law Because the Landlord’s Presumption of Non-liability Could Not Be Rebutted by the Traditional Exceptions to Caveat Emptor

Once the management agreement is characterized properly in the law as a lease, the question of liability on the part of the State in *Garcia* can be resolved under premises-liability law by examining the rights and duties that attach to the landlord and tenant. At common law, the State, as landlord, would have no liability to the City or third persons on the leased premises with the City’s

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154. Moynihan, *supra* n. 151, at § 2, 63.

155. Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.13, 262.

156. Boyer, *supra* n. 140, at § 50.06, 50-19.

157. *Id.*

158. Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.13, 262.

159. 753 S.2d at 74.

permission for injury resulting from dangerous conditions on the leased premises.<sup>160</sup> There are exceptions to the old rule of caveat emptor embodied in the traditional view of landlord liability, which is espoused by a majority of jurisdictions.<sup>161</sup>

The traditional view begins with the presumption that the landlord is not liable and then provides five exceptions for landlord liability in specific situations.<sup>162</sup> These exceptions include the “common areas” exception, the “latent defects” exception, the “landlord covenants to repair” exception, the “landlord undertakes to repair” exception, and the “public use” exception.<sup>163</sup>

An analysis of the State’s liability in *Garcia* should have begun with the presumption that the State, as landlord, was not liable to Garcia for injuries merely because the State held title to the premises where Garcia’s injuries occurred.<sup>164</sup> After establishing this presumption of non-liability for the State, the facts of the case should have been analyzed to determine whether one of the exceptions invalidated the presumption.<sup>165</sup>

Under the first exception, a landlord has a duty to maintain and repair defects that exist in the “common areas” of leased premises.<sup>166</sup> “Common areas” normally are defined as areas that are not part of the leased premises, but are used in connection with the use of the leased premises.<sup>167</sup> The term “common areas” usually is used with respect to residential leases, because it refers to areas such as stairs, hallways, driveways, etc.<sup>168</sup> For example, when a lessee rents an apartment in an apartment complex, he or she rents the actual

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160. Ralph E. Boyer, Herbert Hovenkamp & Sheldon F. Kurtz, *The Law of Property: An Introductory Survey* 277 (4th ed., West 1991). In modern times, legal complexities accompanying the landlord-tenant relationship have caused courts to reject caveat emptor in exchange for an implied warranty of habitability. *Id.*; Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.36, 292–293.

161. Cunningham, Stoebuck & Whitman, *supra* n. 142, at §§ 6.36, 292–293, 6.46, 348–351. Until recently, the common law of premises liability imposed no liability on a landlord for injuries to persons resulting from dangerous conditions on the leased premises. *Id.* at § 6.36, 290. Additionally, the common law did not impose a duty on the landlord to repair dangerous conditions on the leased premises. *Id.* at 291. Over the course of the nineteenth century, the law with respect to landlord and tenant rights has expanded, developing broader rights for tenants and recognizing exceptions to the doctrine of caveat emptor. *Id.* at 291–293.

162. *Id.* at § 6.46, 347–350.

163. *Id.* at 348–351.

164. *Id.* at 348.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

apartment he or she will occupy for the term of the lease. The lessee does not, however, rent the stairs to his or her second-floor apartment. Because a tenant has the right to exclude others from the leased premises, the stairs to the second floor obviously are not leased premises but “common areas,” because one tenant does not have the right to exclude any other second-floor tenant from using these stairs to reach his or her apartment.

In *Garcia*, the lease of the South Beach property to the City was not a residential lease; therefore, the “common areas” exception would not apply. This conclusion is logical in light of the description of the premises to be leased. The second provision of the lease “granted the City ‘management responsibilities’ of the beach for twenty-five years.”<sup>169</sup> This is an extremely general grant of use to the City. The State did not limit the grant by providing, for example, that the City had management responsibilities for the water and shoreline, excluding parking areas and sidewalks. Such a general grant suggested that there were no common areas contemplated in this lease. The City would manage the entire property — boardwalks, sidewalks, parking lots, bathroom facilities, and the areas where private concessionaires sold goods to the public. For example, if one of the public restrooms at South Beach had a leaky faucet that created a slippery condition on the restroom floor, a City employee probably would come out and fix it. Likewise, the beach clean-up crew that picks up trash and debris left by tourists and visitors probably is composed of City, not State, employees. Accordingly, the State’s presumption of non-liability under the traditional view could not be rebutted by the “common areas” exception,<sup>170</sup> because the City managed the entire South Beach property.

The second exception to the landlord’s presumption of non-liability under the traditional view is that the landlord may be liable to third parties for “latent defects” that exist on the leased premises when the lease begins.<sup>171</sup> In the present case, the pier was destroyed in 1984 after the lease agreement between the City and the State began.<sup>172</sup> The City, as tenant, was already in possession of the leased premises when the dangerous condition caused by the destruction

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169. *Garcia*, 753 S.2d at 74.

170. See Cunningham, Stoebeck & Whitman, *supra* n. 142, at § 6.46, 348 (maintaining that common areas remaining in the landlord’s control are not considered part of the leasehold).

171. *Id.* at 349.

172. *Garcia*, 753 S.2d at 74; UPI, *supra* n. 117 (confirming that the City Commission decided to tear down the old pier because the City considered it an insurance risk).

of the pier arose.<sup>173</sup> Because the defect did not exist when the lease commenced in 1982, the allegedly dangerous condition was not a “latent defect,” and this exception would not rebut the presumption that the State, as landlord, was not liable.<sup>174</sup>

The third exception that may rebut the presumption of non-liability of a landlord arises when a landlord covenants to repair all or part of the leased premises.<sup>175</sup> Under this exception, a landlord must promise to make certain repairs, and his or her failure to make repairs after receiving notice of the need for them creates an unreasonable risk of harm and injury to the person on the premises.<sup>176</sup>

In *Garcia*, the management agreement did not establish who would make needed repairs to the leased premises.<sup>177</sup> Absent such a covenant, it can be assumed that the landlord (the State) did not agree to make repairs to the premises.<sup>178</sup> The majority opinion is devoid of facts to resolve the issue regarding whether the State was responsible for cleaning up the debris left by the demolition of the pier. However, it was the City Commission that passed a resolution to destroy the pier, because it was not compatible with the City’s redevelopment plan for South Beach and was considered an insurance risk.<sup>179</sup> Additionally, it was the City that let bids for the demolition of the pier<sup>180</sup> and sent out an invitation to bid on a contract to remove the debris in 1988.<sup>181</sup> These facts, which are absent from the majority opinion, indicate that the parties understood that it was the City’s responsibility to keep the premises safe. Therefore, no facts indicate that the State made a covenant to

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173. *Garcia*, 753 S.2d at 74 (noting that the management agreement commenced in 1982); UPI, *supra* n. 117.

174. See Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.46, 349 (stating that a landlord is liable for a latent defect that existed on the leased premises when the lease began).

175. *Id.*

176. *Id.* at 349–350.

177. 753 S.2d at 74. There were no covenants for repair between the City and the State contained in the material portions of the management agreement cited by the court. *Id.*

178. Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.46, 349–350 (stating that courts are divided as to whether a landlord is liable for conditions on premises he or she has covenanted to repair).

179. UPI, *supra* n. 117.

180. *Id.*

181. *City of Miami Beach v. Dickerman Overseas Contracting Co.*, 659 S.2d 1106, 1107 (Fla. Dist. App. 3d 1995) (affirming summary judgment in favor of the contractor because a contract to clean up underwater debris was not finalized until after *Garcia*’s injury).

repair, and the “covenants to repair” exception would not rebut the presumption that the State was not liable.

The fourth exception that may rebut a landlord’s presumption of non-liability arises when a landlord undertakes to make repairs that he or she has not promised to make and performs those repairs negligently.<sup>182</sup> Not only did the State in *Garcia* not have a duty to make repairs pursuant to the management agreement, it did not undertake to repair the allegedly dangerous condition caused by the pier’s remains. Because the State did not undertake to make repairs, this exception would not operate to rebut the presumption that the State, as landlord, was not liable.

The final exception to a landlord’s presumption of non-liability is the “public use” exception, which provides that a landlord who leases his or her land for admission of the public may be liable to the members of the public who are injured by a dangerous or defective condition that existed on the premises at the commencement of the lease.<sup>183</sup> This exception, like the others, does not rebut the presumption that the State, as landlord, was not liable, for the simple reason that the underwater debris that created the dangerous condition did not exist in 1982 when the lease began because the pier was not destroyed until 1984.<sup>184</sup> For the State to be liable under this exception, it would have had to destroy the pier itself before it entered into the management agreement with the City.

Most Florida courts have adopted one or more of the foregoing exceptions to caveat emptor embodied in the traditional view of landlord liability.<sup>185</sup>

### C. The State, as a Landowner, Was Not Liable to Garcia under Florida Law, Which Espouses the Traditional View of Landlord Liability

Florida case law helps to solidify the analysis above by ruling consistently with the traditional view of landlord liability.<sup>186</sup> The

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182. Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.46, 350.

183. *Id.*

184. *Garcia*, 753 S.2d at 74; UPI, *supra* n. 117.

185. *Bovis v. 7-Eleven, Inc.*, 505 S.2d 661 (Fla. Dist. App. 5th 1987).

186. *See id.* at 664 (concluding that a landlord owes a duty to warn invitees of latent defects that are not readily apparent to invitees, but are known or should be known to the landlord); *Miller v. Sinclair Oil Refining Co.*, 268 F.2d 114, 117 (5th Cir. 1959) (holding that a landlord is not liable to third persons on the premises with permission of the tenant unless “the negligent condition which causes the injury is a violation of law, is a pre-existing defect in construction or is inherently dangerous, or unless the lessor undertakes to keep the

Fifth Circuit's conclusion in *Miller v. Sinclair Oil Refining Company*<sup>187</sup> shows that Florida, like a majority of jurisdictions, embraces the exceptions to the traditional view of landlord liability.<sup>188</sup> *Miller* maintains that a landlord is not liable for negligence to third persons on the premises in the tenant's right unless the negligent condition is illegal, "is a pre-existing defect in construction," or the landlord "undertakes to keep the premises in repair."<sup>189</sup> Therefore, the State in *Garcia* would not have been held liable to Garcia for his injuries at South Beach because Garcia's injuries did not result from an illegal condition, a pre-existing defect, or the State's failure to perform a covenant to keep the premises in repair.<sup>190</sup>

A Fifth District decision defines two specific duties that an owner or occupier of land may owe to invitees.<sup>191</sup> The first is the duty to exercise ordinary care in keeping the property reasonably safe.<sup>192</sup> The second is to give timely notice of latent defects that are known or should be known to the owner or occupier, but are not known to the invitee.<sup>193</sup> In *Hylazewski v. Wet 'N Wild, Incorporated*,<sup>194</sup> the court specifically determined that "the owner/occupier" of land owes a duty to the invitee.<sup>195</sup> This language suggests that either the owner or the occupier will owe the duty, not both the owner and the occupier.<sup>196</sup> This language in *Hylazewski* is consistent with the well-established principle in landlord-tenant law that a tenant has all of the rights and duties of a true owner unless the parties to a lease agree that the landlord maintains certain rights

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premises in repair"); *Hylazewski v. Wet 'N Wild, Inc.*, 432 S.2d 1371, 1372–1373 (Fla. Dist. App. 5th 1983) (holding that an invitee is owed a duty of ordinary care and timely notice of defects by a landlord).

187. 268 F.2d 114 (5th Cir. 1959).

188. *Id.* at 117.

189. *Id.*

190. *Id.* (concluding that there is no unilateral liability to third persons unless the injury results in a violation of law, there is a pre-existing defect, or there is a failure to perform a contract to keep the premises in repair).

191. *Hylazewski*, 432 S.2d at 1372 (citing *Zambito v. Southland Recreation Enters., Inc.*, 383 S.2d 989, 990 (Fla. Dist. App. 2d 1980)).

192. *Id.*

193. *Id.*

194. 432 S.2d 1371 (Fla. Dist. App. 5th 1983).

195. *Id.* (emphasis added).

196. *See id.* (suggesting that either the owner or the occupier of the premises will owe a duty, but not asserting that both may owe a duty).

or the landlord undertakes certain duties to repair the premises.<sup>197</sup> *Hylazewski* supports the conclusion that, if the premises are not leased, the titleholder will owe a duty to invitees, while if the premises are leased, the tenant will have a duty to the persons he or she permits to be on the premises because a tenant has the right to exclude others from use, including the landlord.<sup>198</sup> According to *Hylazewski*, because the court in *Garcia* concluded that the City owed a duty to Garcia because it was in possession of the land, the State, as landlord, was not liable to Garcia merely because it held title to South Beach.<sup>199</sup>

Another Fifth District opinion shows that Florida follows the traditional view of landlord liability.<sup>200</sup> In *Bovis v. 7-Eleven, Incorporated*,<sup>201</sup> the court stated that the issue of liability with respect to leased premises must be approached from the perspective that a titleholder of real property is not an insurer of the safety of persons on his or her property, nor is he or she subject to liability per se or strict liability for injury caused by unsafe conditions on the property.<sup>202</sup> According to *Bovis*, the real issue in a case involving leased premises is the failure of the tenant in possession to use due care in allowing invitees to come, unwarned, to a dangerous area where injury is foreseeable by the tenant, but is not readily apparent to the invitee.<sup>203</sup> The tenant's duty is a continuing legal duty to inspect the premises and take action according to the dangerous conditions present, either by warning invitees or repairing the danger, unless the condition is a latent defect.<sup>204</sup>

The majority in *Garcia* would not have been able to find the State liable for Garcia's injuries under *Bovis*. First, the State, as owner, would have been presumed not liable for Garcia's injuries.<sup>205</sup> Second, the City, as the party in possession, would have owed

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197. *See id.* at 1372 (suggesting that an individual with the right to occupy the land will owe a duty of care to persons on the premises).

198. Cunningham, Stoebuck & Whitman, *supra* n. 142, at § 6.22, 274.

199. 432 S.2d at 1372 (concluding that an owner/occupier of land owes a duty to invitees to keep the premises safe and to give timely notice of latent or concealed defects).

200. *Bovis*, 505 S.2d at 663–664.

201. 505 S.2d 661 (Fla. Dist. App. 5th 1987).

202. *Id.* at 662–663.

203. *Id.* at 663 (determining that the crux of a case of premises liability lies in the possessor's failure to use due care in warning invitees of dangerous conditions).

204. *Id.* at 663–664.

205. *See id.* at 663 (concluding that ownership is not the crux for a premises liability cause of action; the issue is the failure to use due care in permitting invitees to come unwarned to an area where it is foreseeable that injury may result).



Garcia, as its invitee at South Beach, a duty either to warn him that there was underwater debris near the site of the old pier or to make the area safe by removing the debris before allowing Garcia to swim near the debris unwarned.<sup>206</sup> Finally, the State would be liable to Garcia under the latent defects exception in *Bovis* if the debris was present when the lease commenced.<sup>207</sup> If this were the case, then the State either would have had to warn Garcia of the dangerous condition or repair the dangerous condition before allowing Garcia to swim at South Beach without a warning. However, because the pier had not been destroyed when the lease began in 1982, the dangerous condition left by the pier's destruction was not a latent defect.<sup>208</sup>

The *Garcia* court's use of cases that deal with governmental tort liability when the government entity in control of the premises also is the owner of the premises is ineffective in this case. In *Garcia*, unlike in *Andrews*, *Warren*, and *Avallone*, the titleholder was not in control of the premises pursuant to a written, legally-binding management agreement that contained all of the elements of an enforceable lease.<sup>209</sup> The *Garcia* court's failure to recognize the distinction between these cases, as well as its failure to follow its own precedents as set forth in *Commercial Carrier* and *Trianon Park*, led to a poor public-policy decision.

## VI. CONCLUSION

In light of the Florida Supreme Court's decision, one can only wonder what the aftermath of this explosion will leave us with after the smoke clears. The Florida Supreme Court's decision in *Garcia* violates Florida's public policy regarding the use and management of State lands. Regrettably, this fateful result further confuses and erodes the doctrine of sovereign immunity in Florida by rendering its application so narrow that anyone injured on State lands can sue the State merely because it "holds title." *Garcia* also calls into question all of the public-policy concerns commentators have cited in support of sovereign immunity. First, this decision will have an adverse impact on the public treasury because it will subject the

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206. *Id.*

207. *Id.* (concluding that an owner may be liable to third persons for latent dangerous conditions which the owner knew existed when he or she delivered the premises to the lessee).

208. *Id.*

209. 753 S.2d at 74.

State to enormous judgments, ultimately discouraging the State from using its lands for public purposes due to the impossible financial burden, not only on the State, but on its citizens and visitors who will bear the cost. Second, it will hinder efficient government operation by allowing the State to be sued at the whim of every citizen or visitor who so much as cuts his or her foot on a soda can left behind on a State-owned beach. Third, it robs the State of the flexibility and discretion required for government decisionmaking by forcing the State to err on the side of caution out of fear of litigation. Finally, it violates the separation of powers doctrine, because it allows the judiciary to interfere with the discretionary powers of the legislative branch by refusing to treat the State as a private individual, as required by Section 768.28 in the case of a waiver of immunity.<sup>210</sup>

In light of these results, the problems are self-evident. By refusing to treat the State as a private individual and failing to characterize the management agreement as a lease, the majority created the unreasonable expectation that the sovereign, an “absentee landlord,” must identify and alleviate every dangerous condition on its land or suffer the consequences. Agreements between the State and local governments delegate management responsibilities to government entities that are more familiar with the area where the property is and that are often better able to identify and respond to dangerous conditions. These leases promote Florida’s public policies. Instead of construing the management agreement as a lease, the court went round-about, violating public policy and the separation of powers doctrine by failing to treat the State as a private individual under a lease. The result only serves to perpetuate the ambiguity and inconsistency that mars the case law.

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210. Fla. Stat. § 768.28(5); Wetherington & Pollock, *supra* n. 12, at 8.