

67,869

IN THE SUPREME COURT  
STATE OF FLORIDA

**FILED**

SID J. WHITE

NOV 13 1985

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

MARGARET E. BUTLER, as )  
Personal Representative )  
of the Estate of HENRY )  
LEE SANDERS, a minor, )

Petitioner, )

vs. )

SARASOTA COUNTY, FLORIDA, )  
a corporate body politic, )

Respondent. )

SECOND DISTRICT COURT OF APPEAL  
CASE NO. 84-2532

---

APPLICATION FOR CONSTITUTIONAL  
CERTIORARI TO THE DISTRICT COURT  
OF APPEAL, SECOND DISTRICT OF FLORIDA

---

---

PETITIONER'S BRIEF ON JURISDICTION

---

LAW OFFICES OF  
ROBERT JACKSON MCGILL, P.A.  
P.O. Box 1725  
Venice, Florida 34284  
(813) ~~484-0418~~ 497-1160  
Attorney for Petitioner.

TABLE OF CONTENTS

Citations of Authority . . . . . iii

Question Presented . . . . . iv

Statement of the Facts and Statement  
of the Case. . . . . 1

Summary of Argument . . . . . 4

Argument  
The decision in the instant case is in express and  
direct conflict with decisions of this court and  
another district court which require that when a  
government is in possession and control of real  
property open to the public it must warn of all  
hidden hazards and dangers . . . . . 5

Conclusion . . . . . 7

Certificate of Service . . . . . 8

Appendix  
App. 1 - Copy of opinion of District Court of  
Appeal, Second District  
App. 2 - Copy of Order denying rehearing  
App. 3 - Copy of Notice to Invoke Discretionary  
Jurisdiction

CITATIONS OF AUTHORITY

<u>CASES</u>	<u>PAGE</u>
<u>Bucher v. Dade County</u> , 354 So. 2d 89 (FLA. 3d D.C.A. 1977) . . . . .	.5,6,7
<u>Ralph v. City of Daytona Beach</u> , 471 So. 2d 1 (FLA. 1983). . . . .	.5,6,7
<u>Trianon Park Condominium Association Inc.</u> <u>v. City of Hialeah</u> , 468 So. 2d 912 (FLA. 1985). . . . .	.5,6,7

QUESTION PRESENTED

WHETHER OR NOT THE DECISION IN THE INSTANT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND ANOTHER DISTRICT COURT WHICH REQUIRE THAT WHEN A GOVERNMENT IS IN POSSESSION AND CONTROL OF REAL PROPERTY OPEN TO THE PUBLIC IT MUST WARN OF ALL HIDDEN HAZARDS AND DANGERS?

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

WHEN THE LETTER "R" IS USED IN THIS BRIEF  
IT SHALL REFER TO THE RECORD ON APPEAL.

This Petition stems from the wrongful drowning death of Henry Lee Sanders, a minor, which occurred on June 10, 1981, at a public beach facility operated by the Respondent, Sarasota County, Florida.

During the year 1974, the Respondent County received title to an area of beach known as South Lido Beach. (R-214). Shortly after acquiring the title to the property, the County began operating it as a public beach facility. (R-214). In operating the beach facility, the County made improvements on the land and also marked out a swimming area in the water through the use of buoys. (R-214-215).

After the County began operating the beach facility, and before the death of Henry Lee Sanders, the County, through its agents, was aware that the waters of the beach had strong tides, varying currents and contained dropoffs. (R-218). Robert Hall, Respondent's Manager of the Beach Patrol, was of the opinion that swimming should never have been permitted at this beach. (R-219). Additionally, Walter Rothenback, the Respondent's Director of Parks and Recreation, was also aware of the hazards presented to swimmers at this park facility by the currents and tides. (R-285-286). Mr. Rothenback felt that the body of water off of the beach facility was unsafe and he was also aware that children of tender years and other persons who were unable to swim would be using the park facility. (R-285).

During the time that the Respondent operated the park facility prior to Henry Lee Sanders' death, the County failed to post any warnings to swimmers using the waters in the park facility warning them of the known hazards present at the premises. (R-214).

On June 10, 1981, Henry Lee Sanders went to the Respondent's beach facility with his aunt and seven other young people. (R-277). Approximately thirty minutes after arriving at the park, Henry was swimming between the buoys set out in the water by the Respondent. (R-275-276). As he was swimming and playing, the water began pulling him back and also was pulling him under the water. (R-269-270). The child tried to swim back to the other children but the current pulled him away causing him to drown. (R-270).

On March 14, 1983, a Complaint for wrongful death was filed against the Respondent in the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida. (R-1-6). The Complaint alleged that the Respondent was negligent and careless in the operation of its park facility in failing to warn of dangerous conditions, failing to provide lifeguards or other types of protection, and failing to provide safety or rescue type equipment to be used in emergencies. (R-2).

The Respondent subsequently answered the Complaint, (R-11-12, 66-68), and a trial was held on August 15 and 16 and 1984. (R-107-485). At the conclusion of the trial, a jury verdict was returned in favor of the Petitioner and against the Respondent in the amount of \$87,500.00, (R-556-557), which resulted in the entry of a Final Judgment in

favor of Petitioner and against the Respondent. (R-562).

On November 16, 1984, the Respondent filed a Notice of Appeal to the Second District Court of Appeal challenging the Final Judgment. (R-563). On July 26, 1985, the Second District Court issued an opinion reversing the Final Judgment entered by the lower Court basing its reversal on a finding that the Respondent did not create the hazard causing Henry Lee Sanders' death. (See Appendix 1 of this Brief.) After the issuing of the opinion, a Motion for Rehearing was filed by Petitioner and was subsequently denied on October 8, 1985, (see Appendix 2 of this Brief), and the Petitioner timely served a Petition to invoke this Court's jurisdiction on October 31, 1985. (See Appendix 3 of this brief.)

## SUMMARY OF ARGUMENT

Prior opinions of this Court and of the Third District Court of Appeal require that when a government is in possession and control of property to which the public is invited, the government has a duty to warn of all known hidden hazards. The opinion rendered by the Second District Court of Appeal in the instant case expressly and directly conflicts with these opinions by holding that the government only has a duty to warn in these instances when the government itself creates the known hidden hazard.

ARGUMENT

THE DECISION IN THE INSTANT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND ANOTHER DISTRICT COURT WHICH REQUIRE THAT WHEN A GOVERNMENT IS IN POSSESSION AND CONTROL OF REAL PROPERTY OPEN TO THE PUBLIC IT MUST WARN OF ALL HIDDEN HAZARDS AND DANGERS.

The decision of the Second District Court of Appeal in this case expressly and directly conflicts with this Court's decision in Ralph v. City of Daytona Beach, 471 (FLA. 1983), and Trianon Park Condominium Association v. City of Hialeah 468 So. 2d 912 (FLA. 1985); and the Third District Court of Appeals' decision in Bucher v. Dade County, 354 So. 2d 89 (FLA. 3d D.C.A. 1977).

In Trianon, this Court recently categorized governmental functions and activities and discussed the government's liability as to each category. In discussing what the Court termed as "Capital Improvement and Property Control Functions" it has stated:

"...once a governmental entity builds or takes control of property or an improvement, it has the same common law duty as a private person to properly maintain and operate the property."  
Trianon Park Condominium Association, Inc., v. City of Hialeah, 468 So. 2d 912 (FLA. 1985) at p. 921.

Subsequent to the Trianon opinion this Court issued a revised opinion in Ralph v. City of Daytona Beach, supra. In this case the City of Daytona Beach had supervision and control of the beach which was being used as a highway and for sunbathing. In deciding the case this Court held that the city had the same duty of care as private persons and corporations; i.e. to keep the beach in a reasonably safe condition and to warn of known dangerous conditions.

In reference to the duty owed by the operator of a bathing

beach such as Sarasota County operated at South Lido Beach, the Third District Court of Appeal in the Bucher case stated:

"...the proprietor of a bathing beach, including a governmental entity not otherwise immune from liability, has a duty to exercise due care for the safety of those invited there and to warn such people of hidden dangerous conditions of which the proprietor has knowledge..."  
Bucher v. Dade County, 354 So. 2d 89 (FLA. 3d D.C.A. 1977) at p. 91.

In the instant case the evidence clearly established that the Respondent was operating and controlling a public beach with clear knowledge of the hidden hazards and unsafe conditions faced by the swimmers invited to use its park facility. In spite of its possession and control and personal knowledge of the dangers, the County did not warn the users of the beach of the dangerous hidden and hazardous conditions.

In the present case, the Second District Court of Appeal erroneously held, in spite of this Court's opinions in Trianon and Ralph, and the Third District Court's opinion in Bucher, that under these facts the County did not have a duty to warn of the known hidden hazards because it did not create the hazards.

This decision clearly and expressly conflicts with Trianon, Ralph, and Bucher, because the evidence was undisputed that the Respondent had possession, control, and operation of the public beach park with actual knowledge of the hidden hazards present. Under the decisions of this Court and the Third District Court of Appeal, the County had a duty to warn of all known hidden hazards, and not just the known hidden hazards it created itself.

CONCLUSION

The decision of the District Court of Appeal for the Second District that the Petitioner seeks to have reviewed is in direct and express conflict with this Court's opinions in Ralph v. City of Daytona Beach, 471 So. 2d 1 (FLA. 1983), and Trianon Park Condominium Association Inc., v. City of Hialeah, 468 So. 2d 912 (FLA. 1985), and the Third District Court of Appeal decision in Bucher v. Dade County, 354 So. 89 (FLA. 3d D.C.A. 1977). Because of the reasons and authority set forth in this brief, it is submitted that the decision in the present case is erroneous in that the decisions of this Court in Ralph v. City of Daytona Beach, and Trianon Park Condominium Association Inc. v. City of Hialeah, and the opinion of the Third District Court of Appeal in Bucher v. Dade County are correct and should be reaffirmed and approved by this Court as the controlling law of the State.

The Petitioner, therefore, requests this Court to extend its discretionary jurisdiction to this cause and to enter its Order quashing the decision sought to be reviewed, and the granting of such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,


LAW OFFICES OF  
ROBERT JACKSON MCGILL, P.A.



ROBERT JACKSON MCGILL, ESQUIRE  
P.O. Box 1725  
Venice, Florida 34284  
(813) 484-0418  
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand/~~mail~~ to ROBERT C. WIDMAN, ESQUIRE, 2070 Ringling Blvd., Sarasota, Florida 33577 on this 8<sup>th</sup> day of November, 1985.

  
\_\_\_\_\_  
ROBERT JACKSON MCGILL