O/a

IN THE SUPREME COURT OF FLORIDA

MARGARET E. BUTLER, as personal representative of the estate of HENRY LEE SANDERS,

Appellant,

vs.

SARASOTA COUNTY, FLORIDA, a corporate body politic,

Appellee.

Case No. 67,869

On Appeal From The Second District Court of Appeal

BRIEF AMICUS CURIAE OF THE CITY OF CLEARWATER

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STATEMENT OF THE CASE AND FACTS

The amicus curiae, City of Clearwater, accepts the statement of the case and facts filed by Appellee, Sarasota County. The amicus curiae will only address the issue concerning whether the cause of action filed by the Plaintiff is barred by the doctrine of sovereign immunity.

SUMMARY OF ARGUMENT

Under the test announced in Collom v. City of St. Petersburg, 419 So.2d 1082 (Fla. 1982), a governmental entity has a duty to warn or correct dangerous conditions that the entity created, and knew to be dangerous, and which were not readily apparent to those persons who might sustain injury as a result of it. Henry Sanders' drowning resulted from strong currents and a drop-off in the body of water adjacent to South Lido Beach. Merely by owning this beach, Sarasota County did not create the hazardous conditions that led to the death of Henry Sanders. Rather, these conditions were the result of natural forces for which the County should not be held responsible.

Holding the County liable for naturally occurring conditions in a body of water is unreasonable because the County has no control of the conditions. Such a burden would require a constant monitoring of the body of water to ensure that the County is able to warn the public of such dangers. The unreasonableness of this burden is even more apparent because conditions such as strong currents are inherent in bodies of water and are a matter of common knowledge. Placement of responsibility for warning of naturally occurring dangerous conditions on public bodies will render those bodies virtual insurers of these conditions. Therefore, public policy demands that the County not be held liable for failing to warn of naturally occurring conditions it did nothing to create, nor had the ability to control.

ARGUMENT

I. PUBLIC POLICY DEMANDS THAT GOVERNMENTAL ENTITIES NOT BE HELD LIABLE FOR NATURALLY OCCURRING CONDITIONS THEY DO NOT CREATE.

As recently as 1982 this Court established the test applicable to determine whether a governmental entity has immunity from suit for failure to warn of or correct known dangerous conditions. Collom v. City of St. Petersburg, 419 So.2d 1082 (Fla. 1982). Under Collom, an operational duty to warn of or correct a dangerous condition exists when (1) the governmental entity creates the dangerous condition, (2) knows it to be dangerous, and (3) the dangerous condition is not readily apparent to those persons who might sustain injury as a result of it. Id. at 1086.

Sarasota County received title to South Lido Beach in 1974 and made a few improvements to that beach. The County did not interfere with or create the strong current and underlying lands in the ocean which contained drop-offs and which allegedly contributed to the drowning of Henry Sanders. These were in this case, and are generally, conditions that naturally occur in bodies of water. Thus, the initial question presented is whether Sarasota County by owning a beach can be held responsible for failing to warn of naturally occurring conditions in the body of water adjacent to that beach.

A governmental entity does not create a dangerous condition merely by establishing a beach near a body of water that presents naturally occurring dangerous conditions. In Collom, the city created the dangerous condition when it constructed an unprotected sewer drainage ditch. The unprotected drainage ditch itself was the dangerous condition. Likewise, in Ralph v. City of Daytona Beach, 471 So.2d 1 (Fla. 1983), the dangerous condition was the operation of a

public highway by the city on a public beach. Thus, the beach itself was rendered dangerous by the city in allowing a mixed use of the beach area. Unlike the city's control of the drainage ditch in Collom and the beach/highway in Ralph, here Sarasota County did not control the strong tides and drop-offs which the jury found contributed to the drowning of Henry Sanders. Collom and Ralph reveal that "create" connotes more than merely establishing a beach near a body of water that may contain naturally occurring dangers. South Lido Beach itself was not dangerous. Rather, the adjacent body of water presented the dangers.

Bodies of water, whether natural or man-made, impose many dangers that governments cannot reasonably control. Besides strong currents and drop-offs that frequently exist, creatures such as Portuguese man-of-war and sharks that make oceans their home present dangers to people. These dangers predated statehood and must have been known by the earliest inhabitants and Spanish explorers. To require the government to warn the public of these dangers is unreasonable. If the present case is found to fall within the Collom test, governmental bodies will be responsible to warn of naturally occurring conditions of which they have actual or constructive knowledge. Thus, they will be required to protect the public from naturally occurring conditions which are found to have existed long enough to impose notice on the governmental entity. In order to meet this burden and make such warnings effective, governmental entities would have to monitor all bodies of water where swimming is permitted so as to ascertain whether nature has created a danger. This would require constant inspections of all bodies of water to discover if the currents have strengthened, if the depth increased or decreased resulting in a danger, or if a dangerous creature is present.

Such a burden is even more unreasonable since such naturally occurring conditions are readily apparent to swimmers. For instance, it is well-known that strong currents and drop-offs in ocean floors present dangerous situations and have resulted in drownings. A governmental entity has no greater knowledge of such conditions than those who swim in natural bodies of water. At least one court has recognized that "drowning because of currents is a natural and inevitable risk to swimmers in such waters." Hall v. Lemieux, 378 So.2d 130, 132 (La. 4th Cir. 1979).

The placement of the responsibility of warning of naturally occurring dangerous conditions on governmental bodies will render these bodies virtual insurers of these conditions. Governmental entities will be responsible to warn the public of natural conditions of which they may not have actual notice, even though they have no control or superior knowledge of these conditions. In Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985), this Court stated that political subdivisions and their taxpayers should not be made virtual insurers of all buildings constructed by third parties. Id. at 915, 922. A governmental entity should also not be held as an insurer of conditions caused by neither that entity nor a third person but by natural forces. Reversal of the Second District's decision below will have just that effect.

Property owners are not held liable for dangerous conditions which exist in bodies of water unless they are so constructed as to constitute a trap or there is some unusual danger. Savignac v. Department of Transportation, 406 So.2d 1143, 1146 (Fla. 2d DCA 1981) (citing 65 C.J.S. Negligence § 63(100) (1966)). In Savignac, the Second District stated that shallow water, insufficient for diving, does not constitute a trap. Id. at 1146. Similarly, the existence of strong currents and drop-offs in bodies of water is a matter of common knowledge and

does not constitute a trap. In Savignac, shoaling performed at the behest of DOT rendered the water unsafe for diving. Here, no like actions were taken by Sarasota County that rendered the Pass unsafe for swimming.

Other states, through judicial decisions as well as statutes, have recognized that public policy demands that governmental bodies not be held responsible to warn the public of naturally occurring conditions in bodies of water adjoining public property. In Hall, supra, the plaintiff alleged that the public body caused the death of a swimmer by failing to warn of known hazards that existed in a body of water adjacent to park grounds owned and operated by the governmental entity. The court recognized that dangers of drowning are inherent in every body of water and the facility itself serves as a warning. 378 So.2d at 132. It held that since drowning because of currents is an inherent danger to swimmers, a public entity that maintains an adjacent recreational area is under no duty to warn of that danger.

The Supreme Court of Nebraska came to a similar conclusion in Cortes v. State, 218 N.W.2d 214 (Neb. 1974). There the plaintiff alleged that the State was negligent for failing to warn of a rapid increase in the depth of a lake. The applicable tort claims act, like § 768.28, Fla. Stat., provided that governmental entities were liable under the same circumstances in which private persons would be liable. The court held that the State did not have a duty to provide warning signs at the beach. In so holding, the court stated that a body of water is generally held not to constitute a concealed dangerous condition. The reason for this general rule is that the possible hazards of bodies of water are appreciated even by children. Id. at 216. The court went on to state that

> [m]ere depth of water as such is not a hazard to a person of adequate swimming ability. The depth of a body of water may be unknown to the user, but the general nature of the potential hazard is not. It can be stated as a matter of fact that the public recognizes that bodies of water vary in depth and that sharp changes in the bottom may be expected.

Id. at 216-217.

California also has recognized that public bodies should not be held responsible for naturally occurring conditions in bodies of water adjacent to public beaches and parks. In Osgood v. County of Shasta, et al., 50 Cal.App.3d 586, 123 Cal.Rptr. 442 (3d Dist.Ct.App. 1975), an individual was killed when he was struck by a motorboat while waterskiing on a public lake. The plaintiff alleged that the defendants encouraged members of the public to use the lake for recreational purposes, but failed to warn the public of the dangers resulting from the configuration of the lake. Pursuant to a statute that stated that a public body is not liable for a natural condition of any lake, stream, bay, river or beach, the court held that the county was immune from suit. The court stated that the lake's shoreline was a natural condition.

The statute cited in Osgood, however, does not immunize public bodies from liability where the condition is not natural, but is the result of changes to the body of water caused by the government's actions. Buchanan v. City of Newport Beach, 50 Cal.App.3d 221, 123 Cal.Rptr. 338 (4th Dist.Ct.App. 1975). In Buchanan, improvements made by the governmental entity altered the flow of the ocean, the wave action and the slope of the beach. Id. at 341. The plaintiff alleged that these changes caused a hazardous condition that resulted in the plaintiff's injuries. Thus, the court reversed the lower court's decision dismissing the action.

Finally, the situation presented in Ufnal v. Cattaraugus County, 93 App.Div.2d 521, 463 N.Y.S.2d 342 (App.Div. 1983), is analogous to this case. There, the plaintiff attempted to hold a county liable for the death of a motorcyclist who died from injuries sustained when he collided with a deer on a county road. The alleged act of negligence was the failure to post a deer crossing sign in the area of the accident. The court stated that deer in their natural state were wild animals which the county could not control. Id. at 345. Thus, the court held that the county was not under a legal duty to protect or warn users of its highway of the potential of a collision with wild deer that populated areas adjacent to the county's highway. Ibid.[1/]

These cases reveal that other states have recognized that public policy demands that governmental entities not be held liable for naturally occurring conditions that exist in land or water lying adjacent to public beaches, parks or roads. The courts in Louisiana and Nebraska have recognized that strong currents and similar naturally occurring conditions are inherently dangerous and such dangers are readily apparent to swimmers. Further, by statute and judicial interpretation of that statute, California follows the rule that amicus urges the Court to adopt; that is that political bodies are not liable for naturally occurring dangerous conditions in bodies of water adjacent to public beaches. The mere establishment of a beach or park does not render the public body responsible for conditions naturally existing in the water. The government's responsibility is limited to those conditions of the water that result from improvements or

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1/ In so holding, the court relied on Weiss v. Fote, 7 N.Y.2d 579, 200 N.Y.2d 409, 167 N.E.2d 63 (1960). Weiss is a case cited by this Court in Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010, 1018 (Fla. 1979).

changes the government has made to the body of water. The government should not be held responsible for waters which may be dangerous, depending on variable circumstances, which are not under the control of the governmental entity involved. To hold otherwise is to make the governmental entity an insurer of the public at large against naturally occuring conditions. Here, the strong currents and drop-offs, which were natural conditions, were in themselves hazardous to swimmers. Thus, the county merely by establishing a beach did not create a dangerous condition for which it can be held liable under Collom.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

Alan S. Zimmet
Assistant City Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U. S. mail to Robert C. Widman, Esq., P. O. Box 2524, Sarasota, Florida 33578, and to Robert Jackson McGill, Esq., P. O. Box 1725, Venice, Florida 34284, this 11th day of April, 1986.

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