



TABLE OF CONTENTS

	<u>PAGE</u>
Citations of Authority . . . . .	ii
Question Presented . . . . .	iii
Statement of the Facts and Statement of the Case . . . . .	1
Argument	
THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN <u>RALPH V. CITY OF DAYTONA BEACH</u> , 471 SO.2D 1 (FLA. 1983) AND <u>TRIANON PARK CONDOMINIUM ASSOCIATION V. CITY OF HIALEAH</u> , 468 SO.2D 912 (FLA. 1985) OR THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN <u>BUCHER V. DADE COUNTY</u> , 354 SO.2D 89 (FLA. 3D DCA 1977). . . .	3
Conclusion . . . . .	6
Certificate of Service . . . . .	7
Appendix	

CITATIONS OF AUTHORITY

	<u>PAGE</u>
<u>Barrera v. State of Florida Department of Transportation,</u> Case No. 84-1490 (Fla. 3d DCA May 28, 1985) [10 F.L.W. 1337]. . . . .	3
<u>Bucher v. Dade County,</u> 354 So.2d 89 (Fla. 3d DCA 1977) . . . . .	iii, 3,5
<u>City of St. Petersburg v. Collom,</u> 419 So.2d 1082 (Fla. 1982). . . . .	3,4
<u>Commercial Carrier Corp. v. Indian River County,</u> 371 So.2d 1010 (Fla. 1979). . . . .	3,4
<u>Department of Transportation v. Neilson,</u> 419 So. 2d 1071 (Fla. 1982) . . . . .	3,4
<u>Hill v. City of Lakeland,</u> 466 So.2d 1231 (Fla. 2d DCA 1985) . . . . .	4
<u>Ralph v. City of Daytona Beach,</u> 471 So.2d 1 (Fla. 1983) (rehearing decided June 27, 1985) . . . . .	iii, 3,4,5
<u>Sarasota County, Florida v. Butler,</u> 10 FLW 1819 (Fla. 2d DCA July 26, 1985) . . . . .	1
<u>Trianon Park Condominium Association v. City of Hialeah,</u> 468 So.2d 912 (Fla. 1985) . . . . .	iii, 3,4

**QUESTION PRESENTED**

WHETHER OR NOT THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN RALPH V. CITY OF DAYTONA BEACH, 471 SO.2D 1 (FLA. 1983) AND TRIANON PARK CONDOMINIUM ASSOCIATION 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.2D 89 (FLA. 3D DCA 1977).

**STATEMENT OF THE FACTS AND STATEMENT OF THE CASE**

The facts in this case are clearly set forth in SARASOTA COUNTY, FLORIDA v. BUTLER, 10 FLW 1819 (Fla. 2d DCA July 26, 1985), which is attached as an Appendix.

## SUMMARY OF ARGUMENT

The cases with which Petitioner alleges direct and express conflict deal with different factual and legal issues and therefore are totally distinguishable. Therefore the Opinion rendered by the Second District Court of Appeal in the instant case does not directly and expressly conflict with these cases and this Court should decline to invoke its discretionary jurisdiction in this cause.

## ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THE INSTANT CASE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN RALPH V. CITY OF DAYTONA BEACH, 471 SO.2D 1 (FLA. 1983) AND TRIANON PARK CONDOMINIUM ASSOCIATION V. CITY OF HIALEAH, 468 SO.2D 912 (FLA. 1985) OR THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN BUCHER V. DADE COUNTY, 354 SO.2D 89 (FLA. 3D DCA 1977).

The Second District reversed the trial court in the instant case because the record disclosed that SARASOTA is insulated from liability under the doctrine of sovereign immunity. The Court's reasoning was set forth in the following language:

"The test, composed of three conjoined parts, to be followed in a matter of this kind is whether the governmental entity created the dangerous condition, knew it to be dangerous, and that such danger was not readily apparent to those persons who might sustain injury as a result of it. City of St. Petersburg v. Collom, 419 So.2d 1082 (Fla. 1982); Barrera v. State of Florida Department of Transportation, Case No. 84-1490 (Fla. 3d DCA May 28, 1985) [10 F.L.W. 1337]. One of the elements critical to stripping away the shield of sovereign immunity is missing in the matter at hand, i.e. the creation by Sarasota County of the dangerous condition. The hazardous nature of the waters which might exist at the South Lido Beach cannot be attributed to Sarasota County. ... The presence or non-presence of warning signs or other devices, lifeguards or other type of protection, or rescue or safety equipment falls wholly within the concept of a "judgmental, planning-level function," immune from consequential liability, in contrast to an "operational-level" activity which can result in the loss of such immunity. Department of Transportation v. Neilson, 419 So. 2d 1071 (Fla. 1982); Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979). ... It was neither the beach nor the operation of it, but the

water, which caused the child's death. Cf. Hill v. City of Lakeland, 466 So.2d 1231 (Fla. 2d DCA 1985) ..."

Petitioner alleges conflict with this Court's decision in Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985). The certified question in Trianon was stated as follows:

"Whether a governmental entity may be liable in tort to individual property owners for the negligent actions of its building inspectors in enforcing provisions of a building code enacted pursuant to the police powers vested in that governmental entity." Id. at 914.

In answering the certified question in the negative the Court in Trianon, like the Second District in the instant case based its analysis in part on Commercial Carrier; Collom; and Neilson, supra. The case is totally distinguishable in terms of both the facts and applicable legal issues. The few words quoted from Trianon in Petitioner's Brief are clearly dicta. There is no express and direct conflict with Trianon.

Petitioner alleges conflict with this Court's recent decision in Ralph v. City of Daytona Beach, 471 So.2d 1 (Fla. 1983) (rehearing decided June 27, 1985). In Ralph the limited issue was whether a complaint that alleged that the city allowed a known dangerous condition to exist on the beach without warning the public invited to use the beach for recreational purposes of that known hazardous condition stated a cause of action able to withstand a motion to dismiss. Id. at 1. In Ralph the dangerous condition was the permitting of motor vehicles on the beach without



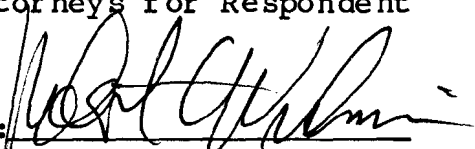
supervision. This was a condition created by the City; therefore the case is clearly distinguishable from the instant case. It should be noted that the Court in Ralph, like the Second District in the instant case, relied on Neilson and Collom, supra. There is no express and direct conflict with Ralph.

Petitioner alleges conflict with the decision of the Third District Court of Appeal in Bucher v. Dade County, 354 So.2d 89 (Fla. 3d DCA 1977). Dade County did not defend that case on the theory of sovereign immunity, Id. at 90. Therefore the case is totally inapplicable. There is no express and direct conflict with Bucher.

**CONCLUSION**

The decision of the Second District Court of Appeal that the Petitioner seeks to have reviewed is not 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 in Bucher v. Dade County, 354 So.2d 8 (Fla. 3d DCA 1977). Respondent therefore requests that this Court decline to extend its discretionary jurisdiction to this cause.


NELSON HESSE CYRIL SMITH  
WIDMAN & HERB  
2070 Ringling Boulevard  
Sarasota, Florida 33577  
813/366-7550  
Attorneys for Respondent

By:   
ROBERT C. WIDMAN

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by U. S. Mail to Robert Jackson McGill, Esquire, Post Office Box 1725, Venice, Florida 34284.

NELSON HESSE CYRIL SMITH  
WIDMAN & HERB  
2070 Ringling Boulevard  
Sarasota, Florida 33577  
813/366-7550  
Attorneys for Respondent

By:   
ROBERT C. WIDMAN

NOV 22 1985