IN THE SUPREME COURT OF FLORIDA

CASE NOS.: SC02-1568 & SC02-1569
(Consolidated)

FREDERICA E. BREAUX, as Administratrix of the estate of ZACHARY CHARLES BREAUX, deceased,

Petitioner,

v.

THE CITY OF MIAMI BEACH,

Respondent.

RABBI ISRAEL POLEYEFF, as personal representative of the Estate of EUGENIE POLEYEFF, deceased,

Petitioner,

v.

THE CITY OF MIAMI BEACH,

Respondent.

Discretionary Proceedings to Review a Decision by the
Third District Court of Appeal, State of Florida

INITIAL BRIEF OF PETITIONER BREAUX ON THE MERITS

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WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT A GOVERNMENTAL ENTITY THAT OPERATES A SWIMMING AREA OWES "NO COMMON LAW DUTY TO WARN, CORRECT, OR SAFEGUARD OTHERS FROM NATURALLY OCCURRING, EVEN IF HIDDEN, DANGERS COMMON TO THE WATERS IN WHICH THEY ARE FOUND."

PREFACE

This brief is submitted on behalf of the Plaintiff/Petitioner, FREDERICA E. BREAUX, as Administratrix of the Estate of ZACHARY CHARLES BREAUX, deceased. Mrs. Breaux has sought review of a decision of the Third District Court of Appeal affirming a summary judgment in favor of the Defendant/Respondent, CITY OF MIAMI BEACH.

Plaintiff's husband, Zachary Charles Breaux, while vacationing with his family in Miami Beach, drowned when he attempted to rescue Eugenie Poleyeff, another tourist who had been caught in a rip tide while swimming off Miami Beach. Mrs. Breaux filed a wrongful death action against the City of Miami Beach and other defendants, as did Rabbi Israel Poleyeff, the personal representative of Mrs. Poleyeff's estate. The trial court entered summary judgment in favor of the City in both cases based on sovereign immunity grounds, and appeals from those judgments were consolidated before the Third District. Although the City conceded on appeal that it was not entitled to sovereign immunity, the Third District in a split opinion affirmed both judgments on the basis that the City owed no duty to the

Plaintiffs as a matter of law. Poleyeff v. City of Miami Beach, 818 So. 2d 672 (Fla. 3rd DCA 2002).[1]

Both Mrs. Breaux and Rabbi Poleyeff have sought this Court's review of Poleyeff II, based on its express and direct conflict with this Court's prior decisions. This Court accepted jurisdiction of the consolidated review proceedings on April 25, 2003.

In this brief, we will refer to the record in Mrs. Breaux's case (No. 3D00-3405) by the clerk's volume number followed by the initials "BR" and the page number. Because the same documents appear in the record in both the Poleyeff and Breaux appeals but at different pages, it may be convenient for this Court to consult the Breaux record for both cases.

STATEMENT OF THE CASE AND FACTS

The Drownings

Zachary Breaux, while vacationing with his wife and three young daughters, was a paying guest with his family at the Seville Hotel at 2901 Collins Avenue in

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[1] That decision will be referred to as "Poleyeff II" to distinguish it from the Third District's earlier affirmance of an order dismissing the complaint as to the other defendants, Poleyeff v. Seville Hotel Corporation, 782 So. 2d 422 (Fla. 3rd DCA 2001) [*en banc*], rev. denied, 817 So. 2d 849 (Fla. 2002) [hereinafter "Poleyeff I"].

Miami Beach on February 20, 1997 (1.BR.5). At the same time, Eugenie Poleyeff and her husband were also vacationing in Miami Beach and were paying guests at the Saxony Hotel at 3201 Collins Avenue (1.BR.5). The Breaux family chose the Seville because it was on the beach, and they wanted to use the beach and ocean (4.BR.625). On the beach behind the Seville, the City provided public restrooms, showers, and water fountains for beachgoers to use (3.BR.379-380). The City also licensed a concessionaire, Hurricane Beach Rentals, to rent lounges, umbrellas, water craft and other beach equipment at that location (3.BR.380).

On that date, Mrs. Poleyeff and her husband walked from the beach behind the Saxony approximately three blocks to the beach behind the Seville in order to rent a beach lounge and umbrella from Hurricane, and to swim in the ocean in the area of their rented beach lounge (1.BR9, 16). The Poleyeffs saw other people swimming and wading in the ocean, and they believed that the area was a swimming area (4.BR.628). They saw no warning signs between 32nd Street and 29th Street to indicate that it was not a swimming area or that there were no lifeguards in the area. There were no signs advising where any guarded swimming areas existed (4.BR.6-8).

The Breaux family had also rented a lounge from Hurricane and believed the beach behind their hotel was a swimming area, having seen many people swimming there on that day and the previous day (4.BR.625).

Unknown to either Mr. Breaux or Mrs. Poleyeff, dangerous rip current conditions existed in the ocean on that day (1.BR.8). Upon entering the water, Mrs. Poleyeff was swept out by rip currents. Mr. Breaux, who had been at the edge of the water playing with one of his daughters, heard Mrs. Poleyeff's cries for help and entered the water to help her. Trying to find a lifeguard, Mrs. Breaux ran to the boardwalk area where she thought a lifeguard would be, but there was none (4.BR.625). The nearest lifeguard towers were at 21st Street (eight blocks to the south) and 35th Street (six blocks to the north).

No lifeguards came in time. Mr. Breaux was overcome by the rip currents, and both people drowned (1.BR.9).

William Morrison, a lifeguard at the 21st Street tower, testified that on the day of this tragedy, he had rip current warning flags set up at his tower (2.BR.218). However, there were no warnings posted at 29th Street because there was no lifeguard tower at that beach (3.BR.421).[2]

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[2] A tower was placed at 29th Street after Mr. Breaux and Mrs. Poleyeff (continued...)

The City's Operation and Control of the Beach

In 1982, the City entered into a 25-year management agreement with the State of Florida, which owns the entire beach (2.BR.262, 277, 319-324). Under the terms of that agreement, the City was granted the right to manage the beach property for recreational and other related activities (2.BR.319). Among other things, the agreement called for the City to provide a plan to limit and control activities on the beach such as bathing and surfing, as well as boating, rental of beach equipment, and sale of goods and services to the public. The City was to remit to the State 25% of the revenues which it collected from these activities (2.BR.320).[3] The City also agreed to hold the State harmless for any liability for injury to persons or property arising out of the use of the property (2.BR.321).

Pursuant to that agreement, the City granted a license to Hurricane Beach Rentals, Inc., permitting the company to rent beach equipment and water craft on the beach where Mr. Breaux and Mrs. Poleyeff drowned (4.BR.562). Pursuant to the rules and regulations established by the City for operation of such beachfront concessions (4.BR.563-568), all concessionaires and their employees were required

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[2](...continued)
drowned (3.BR.386).

[3] For further discussion of the 1982 management agreement, see Florida Department of Natural Resources v. Garcia, 753 So. 2d 72, 74, 76 (Fla. 2000).

to wear City of Miami Beach approved identification badges (4.BR.565). Vincent Andreano, captain of the Miami Beach Patrol, testified that Hurricane Beach Rentals rented jet skis as well as beach lounges and umbrellas (4.BR.443), and that it had a tiki hut about 75 to 90 feet from the edge of the water (3.BR.444). He was aware of at least one instance where a swimmer thought a concessionaire was a lifeguard (3.BR.446).

Contrary to the City's representations in its jurisdictional brief before this Court at pages five and six, the City did receive revenue from the rental of water craft at the 29th Street beach (3.BR.443). It also regulated the swimming area by requiring the concessionaire to separate that area from the access channel used by the water craft.[4] Moreover, the City monitored the concessionaire to make sure it had the required number of buoys in the water and to make sure that it was enforcing the idle speed of the jet skis which it rented to the beachgoers at the 29th Street beach (3.BR.439, 443).

Kevin Smith, the Director of Parks and Recreation for the City of Miami Beach (2.BR.256), testified that he was aware that the public was using the beach

[4] The City's rules and regulations are contained in the record at 4.BR.563-568; and those most pertinent to the regulation of "water recreational equipment" are quoted in Judge Cope's dissent in Poleyeff II, 818 So. 2d 675, *fn*. 4.

at 29th Street for swimming, and that the 14-block stretch of beach in that area was the longest unguarded area in the City of Miami Beach (2.BR.294-295). According to Smith, the City's policy was to establish guarded areas in "public parks" or "City parks" only (2.BR.286). Although 29th Street was not designated a City park, Smith did not know what criteria had been used to decide which areas should be called City parks. He admitted that the 29th Street area was the only beach in the City that had the amenities of a park (public restrooms, showers, drinking fountains, a beach rental concession, and accessibility from the boardwalk) yet did not have a lifeguard tower in February of 1997 (2.BR.287-288, 291). Moreover, he recognized that the City had placed a lifeguard tower at the 17th Street beach, which was not a City park, because many people used that beach, and there had been serious injuries there (2.BR.293). Under the City's agreement with the State, the City had the responsibility to manage the entire beach and not just those portions it chose to designate as City parks (2.BR.282).

Despite the City's knowledge that the public had been using the 29th Street beach for swimming, its Director of Parks and Recreation had rejected the idea of putting "unguarded beach" signs up in that area to warn swimmers, because he didn't want to "send a negative message (2.BR.297-298)." The City had rejected

a previous request by the beach patrol captain that "unguarded beach" warning signs be erected (3.BR.405-406).

Danger of Rip Currents

Most of the actual rescues by the beach patrol in guarded areas resulted from swimmers being caught up in rip currents (2.BR.306; 3.BR.415; 4.BR.602). According to testimony by the lifeguards themselves, most people have no idea of the danger of rip currents and do not know how to identify them (2.BR.207; 3.BR.413, 418; 4.BR.603-605). The appearance of rip currents is "very deceiving"; people tend to go in the water where the rip current exists, because it looks calmer than the surrounding waters (4.BR.603). Captain Andreano testified that rip tide conditions are not obvious to an untrained observer, and that not enough people know about them (3.BR.413, 418). William Morrison, a lifeguard with 26 years' experience, testified that although he could identify a rip current, most people have a real problem doing so (2.BR.207-208).

The City's parks and recreation director testified that he did not think it was necessary to post signs to advise the public how to recognize rip currents (2.BR.307), claiming that the media did a very good job of educating the public on this subject (2.BR.307). However, he also conceded that although he had read those articles, he still did not know how to recognize rip currents (2.BR.306).

The lifeguards, who were aware in February of 1997 that people were swimming in unguarded areas, including 29th Street (3.BR.379; 4.BR.598), tried to patrol and assist in those areas. Beach patrol lieutenants driving along the beach were supposed to stop and warn swimmers in areas where they observed a rip current, and to tell the swimmer to move to an area where there was a lifeguard tower (3.BR.427-428, 431). The beach patrol's rules (3.BR.495-498) specifically required lifeguards to warn bathers of hazardous areas and conditions, and to inform them of areas safe to bathe (Rule 10).

According to Captain Andreano, the duty to warn bathers applied in both guarded and unguarded areas (3.BR.435). When rip currents were present, yellow caution flags were to be placed near the lifeguard tower, and a red danger flag placed on the shoreline in front of the rip current in the guarded area (3.BR.500). However, no flags or warnings were in existence at 29th Street on the day Mr. Breaux and Mrs. Poleyeff drowned (3.BR.420-421).

The Litigation

In their wrongful death actions, Plaintiffs alleged that it was reasonably foreseeable to the City that Mr. Breaux and Mrs. Poleyeff, as well as others, would make use of the beach and ocean in the 29th Street area because it provided public facilities such as restrooms, showers, drinking fountains and parking in that area and

licensed Hurricane Beach Rentals to rent beach chairs, towels, and water craft there (1.BR.10, 15-16). Plaintiffs also alleged that it was reasonably foreseeable to the City that dangerous rip currents would be present in the ocean in the 29th Street area from time to time, and that tourists such as Mr. Breaux and Mrs. Poleyeff would be unfamiliar with the identification of rip currents, the dangers of rip currents, and of the procedures for escaping danger in the presence of rip currents (1.BR.10, 16).

It was further alleged that the City owed a duty to protect users of the beach and ocean in the area where it had invited the public and attracted it to use the beach and ocean by virtue of the facilities and amenities provided. The complaints also alleged that the City had a duty to provide a lifeguard stand; to have a warning system for rip currents and other dangerous surf conditions by using signs, flags, condition boards or other warning means; to have safety equipment such as throw bags with attached lines, life preservers and/or a dedicated emergency telephone available; and in areas where no lifeguard stations were provided, to have their roving lifeguards adequately protect users of the beach and ocean (1.BR.11). Alternatively, it was alleged that the City should post warnings that the beach was unguarded and that swimmers should proceed eight blocks south to 21st Street or six blocks north to 35th Street where lifeguards were present before entering the

ocean (1.BR.12). Because the City breached each of those duties, Zachary Breaux and Eugenie Poleyeff died on February 20, 1997 (1.BR.13).

The City moved for summary judgment on the basis that it had not designated the area where Mr. Breaux and Mrs. Poleyeff drowned as a "city park" (4.BR.513); that the area was never held out as a designated swimming area (4.BR.513); and that it was not practical to guard the entire waterfront (4.BR.514). Accordingly, it claimed that it was entitled to the protection of sovereign immunity (4.BR.515-522). At the hearing on the summary judgment motion (transcript at 4.BR.639-682), the City argued that it was entitled to sovereign immunity for incidents occurring at all its beaches except for "designated city parks" (2.BR.651) where there are lifeguard stands (R.II/654). The court granted the City's motion (R.IV/739-740) and entered final summary judgment for the City based on sovereign immunity (4.BR.741).

On appeal, the City abandoned its sovereign immunity argument and urged affirmance based on the alternative theory that it owed no legal duty to the decedents to warn them or to take any other measures to protect them from naturally occurring conditions in the water. Poleyeff II, 818 So. 2d at 674 (J. Cope, dissenting). The majority of the Third District panel accepted the City's argument and affirmed the summary judgment based on Poleyeff I, which had found no duty on the part of the private defendants.

SUMMARY OF ARGUMENT

For more than sixty years it has been the law in this State that a governmental entity which operates a public swimming facility owes a duty to swimmers to warn them of, and protect them against, dangerous (albeit naturally occurring) conditions in the adjacent waters. The decision of the Third District Court of Appeal in this case is directly contrary to that line of cases from this Court.

The record in this case amply demonstrates that the City of Miami Beach operated the entire beach under a management agreement with the State. It held out the 29th Street beach as a place for people to swim, by providing amenities such as showers, access from its boardwalk and the like, and by licensing a concessionaire to rent beach towels, chairs, water craft and other such items. The City derived revenue from that business and also regulated it by requiring certain safety precautions be taken such as separating swimmers from boaters and marking a separate swimming area in the water with buoys.

The record also demonstrates, unfortunately, that although the City knew people were swimming at 29th Street, and although it profited financially from their patronage of the concession there, it left the entire 14-block stretch of beach unguarded – the longest unguarded beach in the City. Although the City was aware of the danger of rip currents and knew that most tourists (and residents) had no

knowledge of how to detect them or escape from them, and although it required its lifeguards at other parts of the beach to post warning flags, it did nothing at the 29th Street beach. No lifeguards, no warning flags, no life rings, no telephone to the beach patrol – nothing to help the swimmers who tried to rescue first Mrs. Poleyeff, and then Mr. Breaux, from the rip currents.

The Third District's conclusion that the City had no duty to do anything at all to prevent such a foreseeable and unnecessary tragedy flies in the face of this Court's prior decisions. As the Court observed in Butler v. Sarasota County, 501 So. 2d 579 (Fla. 1987), the duty to take reasonable precautions applied even where the governmental entity "...did not create the specific dangerous condition [the strong tides and currents which caused a child to drown]."

There was indeed a duty here, and the Third District erred in holding to the contrary.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT A GOVERNMENTAL ENTITY THAT OPERATES A SWIMMING AREA OWES "NO COMMON LAW DUTY TO WARN, CORRECT, OR SAFEGUARD OTHERS FROM NATURALLY OCCURRING, EVEN IF HIDDEN, DANGERS COMMON TO THE WATERS IN WHICH THEY ARE FOUND."

In affirming summary judgment for the City, the majority wrote:

> On the authority of [Poleyeff I], we hold that 'an entity which does not control the area or undertake a particular responsibility to do so has no common law duty to warn, correct, or safeguard others from naturally occurring, even if hidden, dangers common to the waters in which they are found.'

Poleyeff II, 818 So. 2d at 673. Because, as Judge Cope's dissent[5] demonstrates, the City did "control the area" and did "undertake a particular responsibility... to warn, correct or safeguard others" from rip tides, the majority clearly erred in finding no duty in this case. There was ample evidence in the record from which a jury could conclude that the City was operating the beach at 29th street and undertook the same duty to beachgoers at that location as it did at the other locations controlled by its management agreement with the State of Florida. It assumed the duty to warn swimmers of dangerous conditions such as rip currents, and it assumed the duty to protect them by providing lifeguards and rescue equipment.

The majority's citation of Poleyeff I reveals the error in its decision in the present case, since Poleyeff I pertained only to the liability of hotels and the beach concessionaire, and it could not be dispositive of the duties owed by the City. Those duties are controlled by this Court's decisions on the subject, all of which

[5] As did Rabbi Poleyeff, we also adopt Judge Cope's well-reasoned dissent.

mandate that such a duty does indeed exist. See Florida Department of Natural Resources v. Garcia, 753 So. 2d 72, 76-77 (Fla. 2000); Butler v. Sarasota County, 501 So. 2d 579 (Fla. 1987); Avallone v. Board of County Commissioners of Citrus County, 493 So. 2d 1002, 1005 (Fla. 1986); and Ide v. City of St. Cloud, 150 Fla. 806, 8 So. 2d 924, 925 (1942).

Before going further, a brief review of the cases establishing the parameters of governmental liability for water-related injuries is in order. Over sixty years ago, this Court held in Ide that a city which maintained a bathing beach, even though it had no title to the beach, was liable in tort to a father and son who drowned as a result of its negligence in allowing a deep hole in the lake to remain hidden and unguarded. The Court announced the proposition, which is still true today,[6] that the city would be held to the same degree of care as private persons in maintaining the beach. Ide, 8 So. 2d at 925.

In 1985, a jury held Sarasota County liable for the death of a child who drowned in the strong tides and currents off Lido Beach, which was improved and maintained by the county for the use of the public, because the county failed to post warning signs or other devices to warn of the dangerous conditions and failed to

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[6] See Fla. Dept. of Natural Resources v. Garcia, 753 So. 2d at 75.

provide lifeguards or rescue equipment. The Second District Court of Appeal reversed with directions that judgment be entered for the county, holding that its decision to provide lifeguards, warnings or rescue equipment was a "judgmental, planning-level function" which entitled the county to immunity. Sarasota County v. Butler, 476 So. 2d 216, 217 (Fla. 2nd DCA 1985), quashed, 501 So. 2d 579 (Fla. 1987). The court also held that even if the county had an operational-level duty, it would not be liable because "[i]t was neither the beach nor the operation of it, but the water, which caused the child's death." Id. at 217.

Within a matter of months, this Court disapproved that decision. In Avallone v. Board of County Commissioners of Citrus County, 493 So. 2d at 1005, the Court squarely rejected the argument that a governmental entity's decision not to supervise a swimming facility which it operated was an immune, planning-level decision. Citing Ide, among other decisions, for the proposition that the county had assumed a common law duty to operate the facility safely, it specifically disapproved Sarasota County v. Butler. Avallone, 493 So. 2d at 1005. Then, when the Butler decision itself reached this Court for review, it directly quashed the Second District's decision and directed that the judgment against the county be reinstated. This Court held that even though the county "...did not create the specific dangerous condition [which caused the child to drown, it]... did create a

designated swimming area where the dangerous condition existed." Butler v. Sarasota County, 501 So. 2d at 579.

Further clarifying the law in Florida Department of Natural Resources v. Garcia, 753 So. 2d at 75-76, this Court held that the government's liability did not turn on whether it had formally "designated" a public swimming area. In that case, although the State of Florida owned the entire beach, it disclaimed liability for a swimmer's injuries in the waters off South Beach because it had not "designated" the area for swimming. This Court held that the focus of the inquiry should not be whether a formal designation occurred, but rather

> ...the actions of the government entity must be examined to determine whether, based on all the circumstances, the government entity held the area out to the public as a swimming area or led the public to believe the area was a designated swimming area.

Garcia, 753 So. 2d at 76. Since the City of Miami Beach was operating South Beach pursuant to its written agreement with the State (the same agreement under which the City operates the entire beach, including the beach where Mr. Breaux and Mrs. Poleyeff drowned), the State could be held liable because of its agreement and because it shared in the City's revenues from the concessions established on the beach. Id. at 77. This Court has made it quite clear that although a governmental unit has the discretionary authority to decide whether to operate a beach as a public

swimming area, once it decides to do so, it assumes the common law duty to operate the facility safely. Garcia, 753 So. 2d at 75; Avallone, 493 So. 2d at 1005; Butler, 501 So. 2d at 579; and Ide, 8 So. 2d at 925. It includes the duty to warn of and protect against dangerous, naturally-occurring conditions in the adjacent waters, even though not created by the governmental entity. Butler, 501 So. 2d at 579; Avallone, 493 So. 2d at 1005.

As this Court recently held in Garcia, if sufficient facts exist to demonstrate that the area was held out to the public as a public swimming area, or that the City had led the public to believe that the area was suitable for swimming, then it matters not whether the City formally "designated" it as such. Id. at 76. At the very least, this would be an issue of material fact, based on the totality of the circumstances. See Andrews v. Department of Natural Resources, 557 So. 2d 85, 89 (Fla. 2nd DCA 1990) [reversing summary judgment for the State, to resolve that factual issue]. In the present case, the facts virtually compel the conclusion that the City has done so. Indeed, this Court has already determined that the 1982 agreement between the State of Florida and the City of Miami Beach (2.BR.319-324) "unquestionably demonstrates" the City's operation of the beach area owned by the State and covered by that agreement as a public swimming area. Garcia, 753 So. 2d at 76. This Court noted that not only did the State agree to the operation of the

swimming area, it put limitations on the terms of the operation and demanded 25% of the revenues collected from private concessionaires. Id. at 76.

The management agreement referred to in Garcia is, of course, the very same agreement which is of record in the present case (2.BR.319- 324) and which grants the City the right to operate the entire state-owned beach within city limits, including the granting of licenses to private concessionaires. It is in accordance with that agreement that the City granted a license to Hurricane Beach Rentals at the 29th Street beach. There is nothing in that agreement which restricts it to the South Beach area. The map attached to the agreement makes it quite clear that the entire beach area is the subject of that agreement, and that the City assumed the responsibility for managing and regulating the entire beach, including the area where Mr. Breaux and Mrs. Poleyeff drowned (2.BR.323-324).

In reviewing all of the facts and circumstances to determine whether the City held out this area as a public swimming area, it must be remembered that the public was allowed to use all of the beaches in the city (4.BR.596), and the 29th Street beach was being used routinely by swimmers (3.BR.379). There were no areas that were specifically "designated" or "not designated" for swimmers (3.BR.401). The public tended to go where facilities existed on the beach (3.BR.381).

Aside from the facilities which the City provided directly, such as the public showers, drinking fountains, restrooms and the like, the City actively assumed control over the beach at the precise location where Mr. Breaux and Mrs. Poleyeff drowned, by licensing Hurricane Beach Rentals to operate its concession there and deriving revenue therefrom. By so doing, the City actively participated in attracting beach goers and swimmers to that area, with the obvious knowledge and intention that they would enter the water. The City thus cannot legitimately argue that it had no obligation to exercise even a modicum of care for their safety. The record in the present case is compelling in that regard, since, as Rabbi Poleyeff has sworn in his affidavit, he and Mrs. Poleyeff came to that area of the beach to swim precisely because Hurricane Beach Rentals was located there (4.BR.627-628). Moreover, both Rabbi Poleyeff and Mrs. Breaux have sworn that they believed this area was a swimming area, since there were no warning signs, and other people were swimming and bathing there (4.BR.624-625, 627-628).

It must also be remembered that although the City justified its failure to place a lifeguard tower at 29th Street by relying on the fact that the beach there was not "designated" as a City Park, its Director of Parks and Recreation acknowledged that the City had a duty to protect people all along its beach (2.BR.283). Moreover, the beach patrol required its supervisory lifeguard personnel, who roved up and down

the beach, to warn swimmers in unguarded areas and to help them when possible (3.BR.427-428, 431; 4.BR.581, 599; 2.BR.210, 266). A jury could properly conclude from these facts that the City indeed recognized the need for lifeguard protection in all areas where swimmers congregated, particularly those where the City provided amenities to attract them there, and had undertaken (to some extent) to provide it. However, its efforts fell far short of any reasonable standard of care.

In attempting to persuade this Court not to accept jurisdiction in the present case, the City argued:

> Thus in *Butler*, unlike *Poleyeff I* and *II*, a duty was undertaken in the water *because* the defendant created a designated swimming area in the water, 'where the dangerous condition existed.' *Butler*, 501 So. 2d at 579.

(City's jurisdictional brief, pp.4-5, emphasis by the City).

> In the present case, the City did not create a designated swimming area in the area of water, 'where the dangerous condition existed.' *Butler*, 501 So. 2d at 579. The City was not operating in this area of water or deriving revenue from its use or engaging in any activity that led people into the water.

(City's jurisdictional brief, pp.5-6). Having thus overstated its case (since the facts are to the contrary), the City then made the following significant concession:

> As it now stands, swimmers in Miami-Dade and Monroe counties, and every County in the state, *will* be owed a duty in the water *if* the entity controls the area or undertakes a particular responsibility to do so.

(City's jurisdictional brief, p.7, emphasis by the City). Thus, the City has agreed that the decisions of this Court would impose a duty toward swimmers had it undertaken a duty "in the water" by regulating swimming in that area and deriving revenue therefrom.

Although in our view this Court's decisions do not so narrowly circumscribe conditions under which a duty arises, nor do they require that the City have caused buoys or flags to be placed in the water before such a duty arises – nonetheless, in the present case even under the City's criteria, such a duty would exist. As set forth earlier in this brief at page six, the City required that buoys be placed to designate the specific swimming area, and it monitored the concessionaire to ensure that those regulations were obeyed.[7] There is simply no room under the facts of this case for the City to argue the absence of any duty on its part to safeguard swimmers at the 29th Street beach, nor was there any basis for the Third District majority to so hold.

A jury could – and we predict it will, if given the chance – find that the City breached its operational-level duty of care in this case. Not only was the City well aware that the public was swimming at 29th Street, but it also knew that riptides

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[7] The City erroneously insisted in its jurisdictional brief that the only equipment rented at 29th Street from which the City derived revenue "...was beach chairs and umbrellas, for use on the *land* (City's jurisdictional brief, p.6, *fn*.6; emphasis by the City).

occurred from time to time, and that most swimmers had no idea how dangerous they were or how to recognize them. Nonetheless, the City took no action; indeed, it refused to put up warning signs in unguarded areas because of concerns that it might "send a negative message," as its Director of Parks put it (2.BR.297-298). The City's total failure to provide any lifeguards or safety equipment at the 29th Street beach represented a breach of its common-law duty to exercise reasonable care for the safety of swimmers at its beach, which proximately caused the deaths of two people. The Third District erred in holding that the City of Miami Beach had no duty to take such reasonable steps to prevent this tragedy.

CONCLUSION

For the reasons set forth above, the decision of the Third District should be quashed and the case remanded with directions that the summary judgments in both cases be reversed.

Respectfully submitted,

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Fla. Bar #181238

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by mail this 20th day of May, 2003, to: **JUDITH L. WEINSTEIN, ESQUIRE**, City of Miami Beach, 1700 Convention Center Drive, 4th Floor - Legal Department, Miami Beach, Florida 33139, Co-Counsel for Respondent Miami Beach; **HOWARD L. POMERANTZ, ESQUIRE**, Abramowitz & Pomerantz, P.A., 7800 West Oakland Park Boulevard, Suite 101, Sunrise, Florida 33351, Co-Counsel for Petitioner Breaux; **ANDREW B. YAFFA, ESQUIRE**, Grossman and Roth, P.A., 327 Plaza Real, Suite 215 Boca Raton, Florida 33432, Co-Counsel for Petitioner Poleyeff; **JOEL D. EATON, ESQUIRE**, Podhurst, Orseck, Josefsberg, Eaton, et al., 25 West Flagler Street, Suite 800, Miami, Florida 33130, Co-Counsel for Petitioner Poleyeff; and **DANIEL S. PEARSON, ESQUIRE**, Holland & Knight, LLP, Post Office Box 015441, Miami, Florida 33101-5441, Co-Counsel for Respondent City of Miami Beach.

By_____
Nancy Little Hoffmann
Fla. Bar #181238

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing appellate brief was prepared using Times New Roman 14, in compliance with the font requirements set forth in rule 9.210(a)(2).

By_____
Nancy Little Hoffmann
Fla. Bar #181238