IN THE SUPREME COURT OF FLORIDA

Case Nos. SC02-1568, SC02-1569
(Consolidated)

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

and

FREDERICA BREAUX, as
Administratrix of the Estate of
ZACHARY CHARLES BREAUX, deceased,

Petitioners,
vs.

CITY OF MIAMI BEACH,

Respondent.

BRIEF OF AMICI, VILLAGE OF KEY BISCAYNE AND BAL HARBOUR VILLAGE IN SUPPORT OF RESPONDENT, CITY OF MIAMI BEACH

ON REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

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> Roll on, thou deep and dark blue ocean, roll!
> Ten thousand fleets sweep over thee in vain;
> Man marks the earth with ruin, – his control
> Stops with the shore.
>
> Lord Byron, *Childe Harold's Pilgrimage*,
> Canto iv. Stanza 179.

In somewhat less poetic fashion, this Court and the District Courts of Appeal have recognized that the duty to warn about and protect against conditions in the ocean arises under very limited circumstances. Underlying this proposition of law is the basic assumption that no individual or entity, whether public or private, can control or even accurately predict the ocean in its natural state. This is especially true in situations where a local governmental entity may have jurisdiction over miles of shoreline that are freely accessible to the public.

Imposing a legal duty on local governments to warn about or safeguard against variable, naturally occurring conditions in the ocean risks making those local governments the insurers of the safety of millions of beachgoers.[1] It creates as well a strong incentive for local governments not to maintain and oversee the State's shorelines to the detriment not only of residents and visitors, but also the natural resources of the State of Florida. Amici, Village of Key Biscayne and Bal Harbour Village, both rely extensively on free and open public access to their beaches to enhance their value as residential communities and tourist destinations.

Regardless of the liability paradigm used to analyze the present case, the City of Miami Beach

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[1] / From 1996 to 2000, beach attendance in the United States ranged from an annual low of 233 million visitors to a high of just over 290 million. United States Life Saving Association. (2001). National lifesaving statistics retrieved on June 29, 2003 from USLA website at http://www.usla.org.

("City") should not be held liable for failing to warn about or safeguard against naturally occurring conditions such as rip tides[2] at any particular location along its beaches. Where the City (a) did not exercise direct control over the area of the ocean where the deaths occurred, and (b) did not create a foreseeable zone of risk or broaden the risk, no duty of care should arise.

[2] / For purposes of this brief, the terms "rip tides" and "rip currents" are used interchangeably.

ARGUMENT

I. THERE IS NO DUTY TO WARN ABOUT OR SAFEGUARD AGAINST NATURALLY OCCURRING, TRANSITORY CONDITIONS IN THE OCEAN.

The record in this case demonstrates the rip tides which resulted in the untimely deaths of Eugenie Poleyeff and Zachary Breaux (occasionally referred to as the decedents) were neither created by the City nor permanent in nature. As such, this case falls squarely within that line of cases which have repeatedly held that there is no duty to warn about naturally occurring, transitory conditions commonly found in bodies of water. *Lomas v. West Palm Beach Water Co.*, 57 So.2d 881, 882 (Fla. 1952) (there is no duty to warn about conditions that are common to the body of water in which they are found); *Poleyeff v. Seville Beach Hotel Corp.*, 782 So.2d 422, 425 (Fla. 3d DCA 2001), *rev. denied*, 817 So.2d 849 (Fla. 2002) ("*Poleyeff* I") (no duty to warn about conditions that are "common to the waters in which they are found."); *Kaweblum v. Thornhill Estates Homeowners Ass'n, Inc.*, 801 So.2d 1015, 1017-18 (Fla. 4th DCA 2001) (local government with control over canal has no duty to warn of natural condition that is common to such a canal); *Adicka v. Beekman Towers, Inc.*, 633 So.2d 1170, 1170-71 (Fla. 3d DCA), *rev. denied*, 640 So.2d 1106 (Fla. 1994) (there is no duty to warn of naturally occurring conditions in ocean off a public beach); *Sperka v. Little Sabine Bay, Inc.*, 642 So.2d 654, 654-56 (Fla. 1st DCA 1994) (no duty to warn about "temporary changing conditions" in the water); *Bucher v. Dade County*, 354 So.2d 89, 91 (Fla. 3d DCA 1977), *cert. denied*, 361 So.2d 830 (Fla. 1978) (there is no duty to warn of "a natural condition of the shoreline which is constantly changing due to the tides."); *Hughes v. Roarin' 20's, Inc.*, 455 So.2d 422, 423-24 (Fla. 2d DCA 1984) (campground operator that allows swimming and diving has no duty to safeguard against shallow water common to similar bodies of water).

Florida's courts are not alone in their appreciation of the uncontrollable and unpredictable nature of the ocean. *See Jacome v. Commonwealth*, 778 N.E.2d 976, 980-81 (Mass. App. Ct. 2002) (entity controlling beach has no duty to warn of rip currents); *Lupash v. City of Seal Beach*, 89 Cal. Rptr. 2d 920, 922 (Cal. Ct. App. 1999) (there is no duty to protect against dangers such as "high points, low points, rip tides, rip currents, swirls, splashing waves, drowning water…[and] all kinds of dangers" commonly found in oceans); *Saland v. Village of Southampton*, 662 N.Y.S.2d 322, 323 (N.Y. App. Div. 1997), *leave to appeal den.*, 668 N.Y.S.2d 558 (N.Y. Ct. App. 1997) (no duty to safeguard against natural transitory conditions in ocean); *Princess Hotels Int'l, Inc. v. Superior Ct.*, 39 Cal. Rptr. 2d 457, 460-61 (Cal. Ct. App. 1995) (the oceans are created by no one and are "beyond the control of humankind."); *Swann v. Olivier*, 28 Cal. Rptr. 2d 23, 24-30 (Cal. Ct. App. 1994) (private beach owner has no duty to warn about ocean's natural conditions, such as rip currents);[3] *Darden v. Pebble Beach Realty, Inc.*, 860 F. Supp. 1101, 1106-09 (E.D.N.C. 1993) (not reasonable to require that a landowner must warn about natural, but constantly changing conditions in the ocean such as "tides, currents, winds, gravitational pull, and temperature fluctuations"); *Herman v. State*, 463 N.Y.S. 2d 501, 502 (N.Y. App. Div. 1983), *affirmed*, 482 N.Y.S.2d 248 (N.Y. Ct. App. 1984) (there is no duty to warn about transitory conditions such as sandbars "which may change location within hours and thus are impossible to monitor").

This case raises the question of what it means to warn about or safeguard against conditions the occurrence, location and intensity of which are highly speculative and the prediction of which is, at best, imprecise.[4] It is one thing to warn about the presence of a man-made or naturally occurring *permanent*

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[3] / In a trip-and-fall case involving a broken water meter box, the California Supreme Court disapproved *Princess Hotels* and *Swann* with respect to their conclusion that a commercial benefit is required in order to establish liability for a condition on adjacent land. *Alcaraz v. Vece*, 929 P.2d 1239, 1249-50 (Cal. 1997). The holding in *Alcaraz* did not relate to warnings for naturally occurring conditions in the ocean.

[4] / If liability is to attach for the failure to warn about the existence of rip currents at a particular location along the beach, then it would be equally reasonable to assign liability for the failure of meteorologists to predict accurately the path of a storm or the

condition; it is entirely another to, in essence, guess as to the existence of a condition like rip tides based on factors as variable as the wind, waves and an obscured ocean floor. If liability cannot be premised upon the constantly changing condition of the ocean's floor – *Bucher*, 354 So.2d at 91 – then what does it mean to impose liability based on rip currents that rely for their formation and existence, in large part, on the condition of the ocean floor?[5] How long would the City have to maintain a warning about *possible* rip currents in any given location, and could liability be premised on the premature removal of such a warning? Would the posted warning disclose how far in either direction potential rip currents might occur? These questions, among many others, demonstrate the impossibility of providing "adequate" or "sufficient" notice of potentially dangerous transitory conditions.

Had the City posted warnings of possible rip currents at the location where Mrs. Poleyeff and Mr. Breaux drowned, and had they safely ignored those warnings and returned to the shore without incident (as other swimmers apparently did), would that have made the warnings any more or less effective? Regrettably, the proof of the sufficiency of any warning involving transitory ocean conditions is found, as they say, "in the pudding." It is only when someone is actually caught in a rip current that the sufficiency of the warning can be determined.

Requiring warnings of unpredictable, transitory conditions also creates an intractable situation for courts trying to determine the legal sufficiency of particular warnings in specific situations involving unique individuals. Would a warning require some indication of the strength of the rip current and its geographical scope? Should the warning be based on the skills of a hypothetical average swimmer, or someone with

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location of a possible lighting strike. *See Seelbinder v. County of Volusia*, 821 So.2d 1095, 1097 (Fla. 5th DCA 2002), *rev. denied*, 842 So.2d 846 (Fla. 2003) (county, in its capacity as owner of beach, did not have duty to warn invitees, including beach goers, that there was a risk of being struck by lighting).

[5] / A rip current is defined as "a current of water disturbed by an opposing current, especially in tidal waters, or by passage over an irregular bottom." *Poleyeff* I, 782 So.2d at 423 n. 1, citing THE AMERICAN HERITAGE DICTIONARY 1120 (New College Ed. 1979).

few or no swimming skills?[6] Should the warning include even more basic information as to what a rip current is and how to survive it?[7]

For these reasons, the cases on which petitioners principally rely are readily distinguishable. In *Florida Dept. of Nat. Resources v. Garcia*, 753 So.2d 72 (Fla. 2000), this Court recognized a duty of care where the dangerous condition was a man-made one (construction debris), easily ascertainable and fixed in location. *Id.* at 73-74. As the Court observed, "if a government entity *creates* a hazardous condition that would not be readily apparent to the public and has knowledge of the presence of people likely to be injured by the dangerous condition, the government has a duty to either correct the condition or warn the public." *Id.* at 77 n. 4, citing *Ralph v. City of Daytona Beach*, 471 So.2d 1, 3 (Fla. 1983) and *City of St. Petersburg v. Collom*, 419 So.2d 1082 (Fla. 1982).

This Court's decision in *Avallone v. Bd. of County Comm'rs of Citrus County*, 493 So.2d 1002 (Fla.), *on remand*, 497 So.2d 934 (Fla. 5th DCA 1986) is similarly distinguishable. In *Avallone*, the injury resulted from "rowdyism and roughhousing" of which the county was allegedly aware and which took place on a regular basis at a particular dock. 497 So.2d at 935-36. The injury in question did *not* occur as a result of a naturally occurring and transitory condition in the ocean.

Both *Ide v. City of St. Cloud*, 8 So.2d 924 (Fla. 1942) and *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986) are also inapposite by virtue of the conditions which caused the injuries and the conduct of the respective local governments vis-à-vis the environments in which the

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[6] / For a person with limited swimming skills, any given wave is potentially dangerous, without regard to the existence of rip currents.

[7] / "If you are caught in a rip current, don't fight it by trying to swim directly to shore. Instead, swim parallel to shore until you feel the current relax, then swim to shore. Most rip currents are narrow and a short swim parallel to shore will bring you to safety." USLA (2001), quotation retrieved June 29, 2003 from USLA website at http://www.usla.org.

conditions occurred. In *Ide*, the drownings occurred because "for some time the city had knowingly *allowed* a deep hole out in the lake to remain hidden and unguarded…." 8 So.2d at 925. Unlike the rip currents in this case, the hole in *Ide* had existed "for some time" and was fixed in nature. Moreover, the Court's use of the term "allowed" suggests that the city was able to exercise control over the situation. Nothing in *Ide* suggests that the danger was transitory or hints at how a local government may protect against constantly changing conditions.

In *Butler*, the county directed swimmers to a particular, marked area *in the water* containing a significant drop-off and currents, both fixed and unique to that area and which ultimately resulted in the death of a young boy.[8] *Butler*, 501 So.2d at 579 (the county "create[d] a designated swimming area where the dangerous condition existed."). In contrast, Mrs. Poleyeff and Mr. Breaux were not required to swim in any particular area of the ocean. In fact, they chose an area that was conspicuous in its lack of supervision. The record reflects that lifeguard stands were prominently located six and eight blocks to the north and south, respectively. Moreover, the condition which resulted in their drowning was naturally occurring in all areas of the ocean yet unpredictable in its specific spontaneous generation.

Finally, the Second District's ruling in *Andrews v. Dept. of Nat. Resources, State of Florida*, 557 So.2d 85 (Fla. 2d DCA), *rev. denied*, 567 So.2d 434 (Fla. 1990) is distinguishable because the State, in that case, through the use of signs which suggested that swimming was permitted, directed people to a particular swimming area that had a *long-established current*. *Id.* at 88. Moreover, prior to the State's having assumed responsibility for the beach area in question, the City of Dunedin, which had exercised control over the area, had posted signs warning bathers of the strong current and prohibiting swimming in that area. *Id.* at 87-88. When the State assumed control of the beach, it *removed the signs* because,

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[8] / As the City has indicated in its brief on the merits, the facts underlying the ruling in *Butler* are obtained from the briefs filed in that case. *See Gorham v. State*, 494 So.2d 211, 211-12 (Fla. 1986) (Court takes judicial notice of briefs filed in case said to be controlling). The *Butler* briefs were presented, without objection, to the district court below.

according to park officials, "the signs were not necessary." *Id.* at 88.

We respectfully urge the Court to reaffirm the generally accepted principles that there are dangers inherent in the act of swimming in the ocean and that a governmental entity does not owe a duty of care to warn about and safeguard against naturally occurring transitory conditions in the ocean.

II. THE CITY NEITHER CREATED NOR BROADENED A FORESEEABLE ZONE OF RISK FOR BEACHGOERS SO AS TO GIVE RISE TO A DUTY OF CARE WITH RESPECT TO THE RIP CURRENTS AT THE LOCATION WHERE THE DECEDENTS DROWNED.

Absent an indication that the City took action which created or broadened a foreseeable zone of risk for Mrs. Poleyeff or Mr. Breaux, there can be no liability for failure to warn about or safeguard against the existence of rip currents. *McCain* v. Florida Power Corp., 593 So.2d 500 (Fla. 1992). In *McCain*, this Court concluded that "[t]he duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." *Id.* at 502, citing *Kaisner v. Kolb,* 543 So.2d 732, 735 (Fla.1989). The Court in *McCain* found a duty of care because a foreseeable zone of risk was created by the inherent dangers of the electrical equipment the defendant had installed. *McCain*, 593 So.2d at 504. The same cannot be said about the City in this case.

The City did nothing to create or enhance the dangerousness of the rip currents which caused the deaths of Mrs. Poleyeff and Mr. Breaux. The risks of drowning by rip currents on that day were the same at any given location along the beach and were equally unpredictable. If the risk of drowning at one location was not demonstrably greater than at any other, then under *McCain*, the City can be held liable only if it was responsible for urging the decedents to swim, when they otherwise would not have. Certainly, that cannot be the case; for as this Court has observed, "[t]here is probably no custom more universal or more ancient…than that of bathing in the salt waters of the ocean…." *White v. Hughes*, 190 So. 446, 448-49 (Fla. 1939).

In fact, on at least one occasion, the Court has recognized the impossibility of safeguarding against the general public choosing to swim at any given location along the shore. *Garcia*, 753 So.2d at 77 ("[I]t would be an intolerable and unnecessary burden to expect the State to post 'No Swimming' signs up and down its expansive coastline on the chance residents of the State may, on their own, select a particular area to enjoy the ocean….").

The argument that the City should be held liable simply because it licensed a concessionaire to operate on the beach near the location where the decedents drowned must fail. First, it makes little sense to insist that the City should be held liable for licensing a concessionaire, when the concessionaire, itself, cannot be held liable for failing to warn its patrons of conditions in the ocean. *Butler*, 501 So.2d at 579 (duty of care imposed on public entity is no greater than that imposed on private actor); *Poleyeff* I, *supra* (finding concessionaire, Hurricane Rentals, had no duty to warn decedents of naturally occurring ocean conditions). Second, if a governmental entity is going to be held liable for conditions beyond its control solely as a result of its having licensed or permitted certain activities by others, there is no end to the liability which will be foisted upon local government.[9] If the granting of a license to a concessionaire to rent beach lounges[10] is sufficient to impose upon the City a duty to warn about conditions in the ocean, then the permitting of construction of a beach resort should impose the same liability with respect to the stretch of shoreline adjacent to the resort. For that matter, an airport authority must then have a duty to warn

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[9] / In stark contrast, where the City had an "official" presence on the beach and "designated" a swimming area, warnings of possible rip currents *were* posted and lifeguard stands were present and manned. There is no allegation in this case that the City negligently performed its duty with respect to these sanctioned areas.

[10] / The petitioning estates have made particular mention of the fact that the concessionaire at issue – Hurricane Rentals – also rented watercraft. While the record does not specifically indicate that anyone actually rented watercraft on the day Mrs. Poleyeff and Mr. Breaux drowned, what is certain is that neither decedent rented watercraft or otherwise received goods or services from the concessionaire that facilitated or encouraged their swimming in the ocean. As a result, the rental of watercraft is immaterial to the allocation of risk in the deaths of Mrs. Poleyeff and Mr. Breaux.

travelers about and protect them from the hazards of air travel simply because it permits an airline to operate from its airport.

The notion that local governments can be held liable in connection with the exercise of its licensing or permitting authority was rejected by this Court in *Trianon* Park Condominum Ass'n, Inc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985). In determining whether certain types of governmental action give rise to a duty of care, the Court observed:

> Clearly,…commissions, boards, [and] city councils,…by their issuance of, or refusal to issue, licenses, permits, variances, or directives, are acting pursuant to basic governmental functions performed by the legislative or executive branches of government. The judicial branch has no authority to interfere with the conduct of those functions unless they violate a constitutional or statutory provision. *There has never been a common law duty establishing a duty of care with regard to how these various governmental bodies or officials should carry out these functions*.

Id. at 919 (emphasis supplied). Thus, without regard to the application of sovereign immunity, no duty of care arises with respect to licensing or permitting functions.

Since *Trianon*, this Court has continued to uphold its prior ruling that "category I" activities such as licensing and permitting cannot form the basis for imposing a duty of care, and the District Courts have followed suit. *See Department of Health and Rehabilitative Services v. B.J.M.*, 656 So.2d 906, 912 (Fla. 1995) (reaffirming *Trianon* holding that category I functions such as licensing and permitting do not give rise to a duty of care); *Harris v. Kearney*, 786 So.2d 1222, 1226 (Fla. 4th DCA 2001) (no duty of care or liability for *Trianon* category I conduct); *Thompson v. Dept. of Highway Safety & Motor Vehicles*, 692 So.2d 272, 273 (Fla. 5th DCA 1997) (no category I duty of care); *Collazos v. City of West Miami*, 683 So.2d 1161, 1163 (Fla. 3d DCA 1996), *rev. denied*, 695 So.2d 698 (Fla. 1997) (same holding); *State, Dept. of Corrections v. Vann*, 650 So.2d 658, 660 (Fla. 1st DCA), *decision approved*, 662 So.2d 339 (Fla. 1995) (same holding); *Dennis v. City of Tampa*, 581 So.2d 1345, 1347-48 (Fla. 2d DCA), *rev. denied*, 591 So.2d 181 (Fla. 1991) (same holding).

There is no evidence in the record which demonstrates that the City took any actions to create or

enhance a foreseeable zone of risk in the ocean where the decedents drowned. In fact, as the petitioning estates have acknowledged, the City undertook *no* duty of care in the area where the incident occurred. Since the City did not undertake to exercise control over the decedents' use of the ocean and did not create or worsen in any way the naturally occurring condition which resulted in the deaths of Mrs. Poleyeff and Mr. Breaux, no legal duty of care can be imposed on the City from the mere licensing of a concessionaire who rented beach lounges to the decedents.

III. IMPOSING A DUTY OF CARE ON THE CITY IN THIS CASE WILL CREATE A STRONG INCENTIVE FOR LOCAL GOVERNMENTS EVERYWHERE IN THE STATE NOT TO MAINTAIN AND OVERSEE PUBLIC BEACHES.

There is a strong public policy in favor of allowing the public free and unfettered access to beaches and the ocean. So much so, that the right of access has been recognized as "universal" and an "American common law right." *White*, 190 So. at 448. At present, many local governmental entities like the City take it upon themselves to provide some level of service on public beaches, whether that service consists of providing lifeguards or warnings *at particular locations*, or simply maintaining the beaches free of debris or providing basic services such as refreshments and restroom facilities. However, the exercise of this limited function should not, as a matter of public policy, devolve into a generalized obligation to insure the safety of everyone at all possible locations where the public may enjoy the beach. As this Court has, itself, recognized, such an overarching duty would pose an "intolerable and unnecessary burden" on government. *Garcia*, 753 So.2d at 77.[11]

Courts in other jurisdictions have explicitly recognized the public policy perils of imposing a duty of care to warn about or safeguard against transitory conditions in public bodies of water. The Illinois Supreme Court in *Bucheleres v. Chicago Park Dist.*, 665 N.E.2d 826 (Ill. 1996) concluded that a duty

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[11] / In fact, requiring governmental entities to provide warnings simply because they are aware that rip currents *may* form in near shore waters would require the posting of signs along the entire coastline of Florida, a requirement this Court has already rejected.

to warn about the risks associated with shifting currents, sand and water levels would "create a practical and financial burden of considerable magnitude" which could result in "curtailment of the public's access to…beaches, to the detriment of the public at large." *Id.* at 836-37. In similar fashion, the Pennsylvania Supreme Court in *Stone v. York Haven Power Co.*, 749 A.2d 452 (Pa. 2000) found that the duty to guard against risks inherent in bodies of water was "too weighty," and would discourage the opening of those bodies of water to the public. *Id.* at 457. *See also Banks v. Bowen's Landing Corp.*, 522 A.2d 1222, 1225-26 (R.I. 1987) (Rhode Island Supreme Court finding that imposing a duty to warn and safeguard against diving into shallow water "might require the construction of unsightly and burdensome barriers along the shore and restrict access to beaches, docks, and other recreational spots along the water.")

This case does not present a situation where the City undertook a duty which it performed negligently. Neither does it involve a situation where the City created a particular hazard in the ocean and failed to warn the public about its presence. Instead, this case involves a situation where the City, otherwise taking measures to warn and safeguard swimmers in areas clearly designated by the presence of lifeguard stands, did not provide similar safeguards at another location along the beach where the decedents chose to swim. The only conceivable connection between public ocean access at this other location and the City is that the City exercised some degree of generalized regulation (through licensing) over the use of the beach by commercial enterprises in the vicinity of where the drownings occurred.

Imposing a duty of care on the basis of mere licensing of businesses, aside from being a deviation from established precedents, would also likely lead local

governments either to prohibit all commercial activities on public lands (a legally dubious proposition) or to engage in no regulation whatsoever of such activities, which would result in the deterioration of natural resources available to the public. The consequences of unregulated commercial access to public beaches are almost self-evident: disruption of use of beaches by residents and tourists, significant litter, overcrowding, competition for "turf" and potential deterioration of protected environments such as dunes and shorelines. The consequence of responsible government oversight of these activities should not be the expansion of potential liability through the imposition of additional duties of care for naturally occurring, transitory conditions beyond the control of government.

CONCLUSION

Courts responsible for defining broad public policy are often reluctant to draw bright lines over which the tread of tort liability will not cross, perhaps because there may be no truly universal and immutable principles in the law. However, there are obvious dangers in carving out exceptions to fairly well-established doctrines the parameters of which, while not drawn in bright lines, are nonetheless known and function to provide stability in societal relationships. Insofar as naturally occurring, transitory conditions of the ocean are concerned, nature itself is willing to aid the Court in drawing the line at the shore. There is no pressing societal need to explore, Cousteau-like, the murky regions of the ocean to find new tort law principles.

Chief Judge Schwartz explained it best for the *en banc* Third District in his opinion in *Poleyeff* I:

> It is enough to say that drowning because of a natural characteristic of the very waters in which it occurs is simply one of the perhaps rapidly diminishing set of circumstances for which, without more, no human being or entity should be considered "to blame," deemed "at fault" or, therefore, held civilly liable. While the law of torts may properly serve to distribute risks among those whom society, speaking through the courts, holds responsible for a particular unwelcome event, it should not be employed to assign fault – with the result that the transfer of money is required – when none can be fairly said to exist.

Poleyeff I, 782 So.2d at 425. The City should not and cannot be held accountable for the ocean in its natural state: "this same placid ocean, as civil now as a city's harbor, a place for ships and commerce, will ere long be lashed into sudden fury, and all its caves and cliffs will resound with

tumult."[12]

Since the City could not control and did not create or contribute to the worsening of the rip currents that claimed the lives of Mrs. Poleyeff and Mr. Breaux, it cannot be held to have had a duty of care to warn about those transitory and largely unpredictable conditions common to the ocean everywhere. There are perils in the air, in the ocean and on the land that are as intrinsic to the human experience as living and dying. Tort law should not allocate amongst members of society the risks associated with those conditions.

Respectfully submitted,

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[12] / HENRY DAVID THOREAU, THE WRITINGS OF HENRY DAVID THOREAU, Vol. 4, 124-126 (Houghton Mifflin 1906) Cape Cod (1855-65).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this __ day of July, 2003, upon Joel D. Eaton, Esq., 25 West Flagler Street, Suite 800, Miami, Florida 33130 (counsel for petitioner Poleyeff); Grossman & Roth, P.A., 327 Plaza Real, Suite 215, Boca Raton, Florida 33432 (counsel for petitioner Poleyeff); Nancy Little Hoffman, Esq., Nancy Little Hoffman, P.A., 440 E. Sample Road, Suite 200, Pompano Beach, Florida 33064 (counsel for petitioner Breaux); Howard L. Pomerantz, Esq., 7800 W. Oakland Park Blvd., Suite 101, Sunrise, Florida 33351 (counsel for petitioner Breaux); Murray L. Dubbin, Esq., City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139 (counsel for respondent City of Miami Beach); Daniel S. Pearson, Esq. and Christopher N. Bellows, Esq., Holland & Knight, LLP, 701 Brickell Avenue, Suite 3000, Miami, Florida 33131 (counsel for respondent, City of Miami Beach); John C. Dellagloria, Esq. City of North Miami, 776 N.E. 125th Street, North Miami, Florida 33161-5654 (counsel for amici, City of North Miami and Town of Surfside).

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EDWARD G. GUEDES

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief was prepared using Times New Roman, 14-point font as required by the Florida Rules of Appellate Procedure.

_____
EDWARD G. GUEDES