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 E. BREAUX, as
Administratrix of the Estate of
ZACHARY CHARLES BREAUX, deceased,

Petitioners,

v.

THE CITY OF MIAMI BEACH,

Respondent.

BRIEF OF AMICI CITY OF NORTH MIAMI AND TOWN OF SURFSIDE IN SUPPORT OF RESPONDENT, CITY OF MIAMI BEACH

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

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SUMMARY OF ARGUMENT

The City of North Miami and the Town of Surfside ("Amici") recognize the well articulated amicus brief submitted by the Village of Key Biscayne and Bal Harbour Village and adopt the argument that government entities should not be held liable for failing to warn about or safeguard against naturally occurring conditions.

The purpose of this brief is to join with other coastal communities to discuss the possible effects that a finding of liability against the City of Miami Beach will have on all Florida municipalities for dangerous conditions which they neither created nor broadened. A ruling in favor of the petitioners in the present case could result in an extensive expansion of municipal tort liability for dangers created by forces entirely outside of a municipality's control. As two of the Florida coastal municipalities which join the other coastal communities who have filed briefs in support of the Appellee, the amici wish to highlight a few lines of Florida case law which could be called into question by a reversal of the Third District Court of Appeal's Summary Judgment.

The amici believe that Miami Beach had no duty to warn Eugenie Poleyeff and Zachary Charles Breaux (decedents) of the naturally occurring dangers of the ocean. Florida case law has long established that a duty to warn is premised on the

defendant's creation of the dangerous condition that resulted in injury.[1] In situations where the danger was not created by the municipality charged with a duty to warn, Florida courts have found liability only where municipalities have failed to exercise due care after having taken control over a situation. This has often been so, for example, where foliage has been allowed to obscure traffic signals and signs maintained by a municipality.

The danger in this case is a spontaneous, unpredictable naturally occurring event for which no one should be held liable. The amici are concerned that a finding of liability in the present case could expand municipal liability for acts or omissions by governmental entities to other, non-natural dangers created by people over whom the municipality lacks control.

The amici believe that there should be no municipal liability for spontaneously occurring events which could neither be accurately predicted nor prevented by a government entity.

[1] *See generally: City of St. Petersburg v. Collum*, 419 So.2d 1082, 1086-1087 (Fla. 1982).

ARGUMENT

I. MUNICIPAL DUTY TO WARN OF A DANGEROUS CONDITION IS PREDICATED ON A MUNICIPALITY CREATING THAT DANGEROUS CONDITION.

Florida courts have long recognized that a municipal duty to warn is found when the "government entity *creates* a known dangerous condition." *Hyde v. Florida Department of Transportation*, 452 So.2d 1109, 1111 (Fla. 2nd DCA 1984) (no municipal liability for failure to install a guardrail on road which resulted in child's death when a car plunged into a roadside canal) citing *City of St. Petersburg v. Collum*, 419 So.2d 1082, 1086-1087 (Fla. 1982) (municipal liability for hazards created by storm sewer the city constructed). *See also Allen v. Port Everglades Authority*, 553 So.2d 1341, 1342 (Fla. 4th DCA 1989)(jury question of whether placement of a light pole was a dangerous condition constituting a trap); *Leonard v. Wakulla County*, 688 So.2d 440, 443 (Fla. 1st DCA 1997) (no municipal liability for faulty wheelchair ramp at courthouse if danger is readily apparent); *Polk County v. Sofka*, 803 So.2d 751, 754 (Fla. 2nd DCA 2001)(jury question whether design of intersecting streets constituted a dangerous trap). In the instant case, the City of Miami Beach did not, and in fact could not have, created the dangerous rip tides which led to the unfortunate deaths of the decedents any

more than a city could create a random lightning strike or any other naturally occurring danger.

The petitioners point to language in *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986), providing that the municipality "did not create the specific dangerous condition but did create a designated swimming area where the dangerous condition existed." *Id.* at 579. The petitioners' reliance on *Butler* is misplaced because, although the dangerous condition in that case was naturally occurring and not created by the governmental entity, the drop-offs[2] in the beachside waters were a permanent feature of that beach area and were not spontaneously created by forces of nature. *Sarasota County v. Butler*, 476 So.2d 216, 217 (Fla. 2nd DCA 1985). Rip tides, on the other hand, cannot be said to exist in any given area because they are formed spontaneously by forces of nature.

II. NO DUTY TO WARN EXISTS FOR A DANGEROUS CONDITION CREATED BY A NATURALLY OCCURRING PHENOMENON, WHERE THE MUNICIPALITY DID NOT ENGAGE IN OPERATIONAL ACTIVITY OR EXERCISE CONTROL OVER THE SITUATION THAT CREATED THE DANGER.

[2] A drop off is an area where the ocean floor suddenly becomes much deeper or "drops off."

Florida courts have found municipalities liable for injuries resulting from traffic signs and signals that have become obscured by the growth of nearby foliage. *See Armas v. Metropolitan Dade County*, 429 So.2d 59, 61 (Fla. 3rd DCA 1983) (municipal liability for failure to trim foliage obscuring traffic sign resulting in accident); *Cahill v. City of Daytona Beach*, 577 So.2d 715 (Fla. 5th DCA 1991)(same). Similar to *Butler*, the above mentioned cases involve situations in which a naturally occurring phenomenon created a dangerous situation which the defendant municipality failed to protect against. However, these cases differ from the present case in two important ways: 1) the defendant municipality in the aforementioned cases assumed liability and engaged in operational activity by maintaining the traffic signs involved and erecting traffic signs initially, and 2) the natural process which created the dangerous obstruction was not spontaneous, as are rip tides, but instead occurred slowly over time, giving the city sufficient time during which to have corrected the dangerous condition.

III. NO DUTY OF CARE ARISES WHERE A MUNICIPALITY TAKES NO ACTION.

In prior decisions of this Court, municipalities were found free from liability for the manner in which they responded, or failed to respond, to street riots.

See Ellmer v. City of St Petersburg, 378 So.2d 825 (Fla. 1979) (City had no duty to warn citizens or take action to cordon off a riot area); *Wong v. City of Miami*, 237 So.2d 132 (Fla. 1970) (City was not liable for damage that occurred after police forces were withdrawn from a rally which resulted in a riot, even though nearby store owners had requested police presence prior to rally). In those cases, the Court found that the determination of whether, or the exact manner in which municipal resources are used to respond to a riot was an aspect of the exercise of the police power for which a city should not have to worry about "possible allegations of negligence." *Ellmer* at 827, citing *Wong* at 134.

Riots are analogous to rip tides in that they can spontaneously and unpredictably break out, giving a municipality little chance to prevent or correct the situation before damages occur. In *Ellmer*, this Court distinguished between such spontaneously occurring conditions and more static ones, such as road conditions, stating "[t]he obligation to make an appropriate response to the fluid and volatile conditions of a riot is far different from the duty to warn of a static condition which may constitute a hazard." *Ellmer* at 827. If a municipality is free from liability for failing to respond to a riot for nearly two hours, *Ellmer*

826, surely the matter of minutes within which a rip tide can form and claim the life of an unsuspecting swimmer cannot be viewed as sufficient time in which to warn or correct a hazard. Similarly, as municipalities have the discretion to distribute their police resources, they are also allowed to use their limited resources to set up guarded swimming areas in places where they think guards are most needed. Surely, the City's answer to the Supreme Court finding liability in this drowning case should not be to stop providing lifeguards at all. Yet, the City would have no liability if it did so, as that decision would be beyond judicial review.

CONCLUSION

The City of Miami Beach had neither a duty to warn of the spontaneously occurring rip tides nor a duty to station lifeguards at every accessible ocean area within the City. The amici are concerned that a judgment for the petitioners in this case would expand municipal liability to situations where dangers spontaneously and unpredictably arise. This would create a great financial and logistical burden on Florida municipalities. The amici urge the Court to consider this in making their decision in the present case to affirm the decision of the Third District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the attorneys on the attached service list on July 16, 2003.

_____

John C. Dellagloria
Florida Bar No. 283721

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.

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