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 Administratix of the Estate of
Zachary Charles Breaux, deceased,

Petitioners,

v.

CITY OF MIAMI BEACH,

Respondent.

RESPONDENT CITY OF MIAMI BEACH'S BRIEF ON THE MERITS

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES (continued)

CASES Page

TABLE OF AUTHORITIES (continued)

CASES Page

TABLE OF AUTHORITIES (continued)

CASES Page

TABLE OF AUTHORITIES (continued)

CASES Page

TABLE OF AUTHORITIES (continued)

CASES Page

TABLE OF AUTHORITIES (continued)

CASES Page

STATUTES

RULES

STATEMENT OF THE CASE AND FACTS[1]

Eugenie Poleyeff and Zachary Breaux were guests at separate beachfront hotels in the City of Miami Beach. From their separate quarters, they walked onto the public beach at 29th Street and rented chairs and umbrellas, nearly a mile from the well-known South Beach area (3.BR.369; 4.BR.625, 628).[2] They rented no equipment for use in the ocean.

Unlike South Beach, some fifteen blocks away, the beach at 29th Street was "quiet" and "narrow," with only a "small crowd" of people, just a "few stragglers here and there" (2.BR.211; 3.BR.369, 382; 4.BR.612, 645-46). The City did not have lifeguards or lifeguard stations near this stretch of beach; its closest guard stations were six to eight blocks away (2.BR.211, 295; 3.BR.374-75, 393-94, 402).[3]

As with all of the shore in Miami Beach, this area was owned by the State of Florida and the City was responsible for managing it (2.BR.319-24). The City's responsibilities were set out in a management agreement which defined the beach

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[1] The decisions presented for review, consolidated under *Poleyeff v. City of Miami Beach*, 818 So. 2d 672 (Fla. 3d DCA 2002), adopt the facts set forth in *Poleyeff v. Seville Beach Hotel Corp.*, 782 So. 2d 422 (Fla. 3d DCA 2001). We have included these decisions in the appendix to this brief.

[2] BR is the record in the appeal brought by Mr. Breaux's estate. As for the separate estates, we will refer to them collectively as "the estates."

[3] The dissent in the present case observed that the beach in the present case was the same as the beach found in *Florida Department of Natural Resources v. Garcia*, 753 So. 2d 72 (Fla. 2000). That is not correct (3.BR.369). The beach in the present case, unlike the heavily-populated well-known South Beach area of *Garcia*, is narrow (2.BR.211), heavily eroded (4.BR.612) and sparsely populated (2.BR.211).

property as the dry area, stopping at the high-water mark and excluding the Atlantic Ocean (2.BR.319, 323-24). *See* §§ 161.141-161.211, Fla. Stat. (1981) (beach is property *upland* of the mean high-water mark [the erosion control line]); § 161.191(1), Fla. Stat. (1981) ("all lands seaward" of mean high-water mark "shall be deemed to be vested in the state"). The City's only authority in the ocean was to use its police powers (2.BR.320 ¶ 2(d); *see also* 2.BR.263).

Some time after Mrs. Poleyeff rented the beach chair, she went into the ocean and was caught in a rip current "of the kind which occurs periodically in the Atlantic, as in every ocean in the world" (A.9). These seaward currents are not a permanent or fixed condition but are of a kind that happen suddenly in no particular place, in a matter of seconds, spawned by natural confluences of wind and water (2.BR.186, 207-08, 307; 3.BR.411, 414-15, 429; 4.BR.518-20, 535, 544). The currents are not unique to this area of water but are common to ocean waters everywhere and there is no greater risk of their developing here, as opposed to some other place (3.BR.414-15; 4.BR.518-20, 535). They might form someplace one year and another place the next year. It always varies (2.BR.207; 3.BR.411, 429).

Mr. Breaux, hearing Mrs. Poleyeff's cries for help, went into the water to save her, and was himself caught in a current that caused both of them to drown (A.2, 9). Their estates brought separate suits for wrongful death against the beachfront hotels,

the company that rented the beach chairs, and the City of Miami Beach alleging that the defendants owed a duty to warn or protect the decedents from dangers brought about by the natural characteristics of the Atlantic Ocean (A.2, 9). The trial court dismissed the complaints against the hotels and the rental company; it also entered summary judgment in favor of the City (A.2, 9).

The estates appealed from the orders and judgments. The district court of appeal affirmed, ruling that neither the City nor the private defendants owed a duty to protect others against natural and changing conditions common to oceans everywhere, and that the defendants did not undertake a particular responsibility to do so. *Poleyeff v. City of Miami Beach*, 818 So. 2d 672, 673 (Fla. 3d DCA 2002) (*Poleyeff II*) (affirming judgment for the City); *Poleyeff v. Seville Beach Hotel Corp.*, 782 So. 2d 422, 424 (Fla. 3d DCA 2001) (*Poleyeff I*) (affirming dismissal of suit against private defendants), *review denied*, 817 So. 2d 849 (Fla. 2002). The estates have now asked this Court to quash the district court's ruling as to the City of Miami Beach, arguing it is contrary to prior decisions of this Court.[4]

SUMMARY OF ARGUMENT

The district court's ruling fully accords with authorities in Florida and elsewhere which uniformly hold that the ever-changing characteristics of the natural ocean do not

[4] Earlier, the estates asked this Court to review the ruling as to the private defendants, and review was denied. *Poleyeff v. Seville Beach Hotel*, 817 So. 2d 849 (Fla. 2002).

have to be warned about. Though the law may require someone to safeguard against man-made, peculiar and permanent conditions in the water, the law does not require protection against those natural conditions that are always in flux, that perpetually move and change, and that exist wherever the ocean is found. No one creates a broader risk of harm from the sudden forces of the sea. Thus, no one has a duty to protect others against those instantaneous conditions which are common to ocean waters everywhere and are part of the landscape to which all beachgoers are exposed.

Contrary to the estates' claim, the district court's decision does not conflict with *Butler v. Sarasota County*, 501 So. 2d 579 (Fla. 1986); *Ide v. City of St. Cloud*, 8 So. 2d 924 (Fla. 1942); *Florida Department of Natural Resources v. Garcia*, 753 So. 2d 72 (Fla. 2000); *Avallone v. Board of County Commissioners of Citrus County*, 493 So. 2d 1002 (Fla. 1986); or *Andrews v. Department of Natural Resources, State of Florida*, 557 So. 2d 85, 89 (Fla. 2d DCA 1990). In those cases — unlike this case — the defendants created a broader risk of harm from a danger in the ocean by maintaining an area with a peculiar and permanent condition that was *not* common to those waters generally. Thus a duty was owed in a county-created area with permanent dropoffs (*Butler*); an irregular hole (*Ide*); a long-standing undertow (*Andrews*), construction debris (*Garcia*) and a dock (*Avallone*) — conditions that were fixed, permanent and not common to the waters generally.

In the present case, there was no broader risk created by the City or anyone else. The ocean was in its natural in-flux state, with no man-made or irregular conditions. And under Florida law that natural ocean with its universal and ever-changing characteristics is not something anyone can or must protect others against. This has always been the law in Florida and does not conflict with the law announced by this Court or any other court in the state.

Nor does the district court's ruling conflict with *McKinney v. Adams*, 66 So. 988 (Fla. 1914). The duty in *McKinney* was bottomed on a now-repealed statute for places "where bathing suits are furnished for hire" and where the water is rented for a fee. Thus *McKinney* has no bearing on this case where no bathing suits or swimming equipment were rented to Mrs. Poleyeff or Mr. Breaux and where the water was open and accessible as a matter of right.

As it is, the district court's ruling does not conflict with the decisions of this Court or any other court in the state. Jurisdiction, then, was improvidently granted and the petition should be dismissed. Alternatively, the Court should affirm the decision of the district court because it is entirely correct and consistent with the settled law of the state.

ARGUMENT

THE CITY CREATED NO BROADER RISK OF HARM IN THE EVER-CHANGING OCEAN AND THUS OWED NO DUTY TO SAFEGUARD OTHERS AGAINST NATURAL AND CHANGING CONDITIONS COMMON TO OCEANS EVERYWHERE

The currents that overcame Mrs. Poleyeff and Mr. Breaux were typical and common to every ocean and could have occurred at any time and in any area where the ocean is found. It cannot be said the City created an increased risk to anyone swimming in this particular area of the ocean water — the risk was common to ocean waters everywhere. Thus, according to the rule announced by this Court in *McCain v. Florida Power Corporation*, 593 So. 2d 500 (Fla. 1992), the City had no duty to protect swimmers against the natural and transitory conditions of this ocean.[5]

Though the district court did not cite *McCain*, its reasoning was consistent with *McCain*'s admonition that a duty requires one to create a broader risk of harm. Here, no broader risk was created by the City — the ocean was in its typical constantly-changing condition and was no different from the ocean anyplace else (2.BR.207-08; 3.BR.414-15; 4.BR.518-20, 535). The invitation to swim in the ocean could not be

[5] The question of duty — whether the City of Miami Beach had a duty to warn about transitory conditions of the natural ocean — presents an issue of law for the Court. *McCain*, 593 So. 2d at 502.

blamed on the City either. There is no custom more universal or more ancient than ocean swimming, and the invitation to swim in these waters existed from time immemorial, as a common-law right. *White v. Hughes*, 190 So. 446, 448-49 (Fla. 1939) ("[t]here is probably no custom more universal, more natural or more ancient . . . than that of bathing in the salt waters of the ocean . . . . The constant enjoyment of this privilege of thus using the ocean . . . [has been] establish[ed] . . . as an American common law right"); *City of Miami Beach v. Hogan*, 63 So. 2d 493, 495 (Fla. 1953) (people have right to use the ocean "for the purposes universally recognized"); *Merrill-Stevens Co. v. Durkee*, 57 So. 428, 431 (Fla. 1912) (navigable waters are held "for the benefit of the whole people"); *Bass v. Ramos*, 50 So. 945, 947-48 (Fla. 1909) (recognizing public's superior right to use navigable waters).

The City, then, created no broader risk by leaving the public free to do what it had a right to do, and owed no duty to protect others against the ever-shifting conditions of the sea — conditions that are "common to the waters in which they are found." *Poleyeff I*, 782 So. 2d at 424 (footnote omitted); *Sperka v. Little Sabine Bay, Inc.*, 642 So. 2d 654, 656 (Fla. 1st DCA 1994) (no duty to warn of "temporary changing conditions of the water and sand"); *Bucher v. Dade County*, 354 So. 2d 89, 91 (Fla. 3d DCA 1977) (county had no duty to warn beachgoer of "a natural condition

of the shoreline which is constantly changing due to the tides").[6]

The law recognizes that the dangers of the ocean are created by no one and are beyond the "control of humankind."[7] The impulsive character of the ocean is a condition everyone must anticipate, is common to the ocean generally, and is something for which no human being or entity will be held liable. This has always been so in Florida and elsewhere. *Poleyeff I*, 782 So. 2d at 424-25; *Adika v. Beekman Towers, Inc.*, 633 So. 2d 1170, 1170-71 (Fla. 3d DCA 1994) (no duty to warn of naturally occurring surf conditions off a public beach); *Sperka*, 642 So. 2d at 654-56 (same); *Bucher*, 354 So. 2d at 91 (danger presented by natural condition of the ocean's constantly-changing shoreline should be taken as obvious and there is no duty

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[6] *See also Carter v. Capri Ventures, Inc.*, 845 So. 2d 942, 943-45 (Fla. 5th DCA 2003) (hotel had no duty to warn guest of dangerous condition on public roadway separating its hotel properties because hotel did not create a broader risk relating to its guests and the roadway); *Hialeah Hotel, Inc. v. Talley*, 790 So. 2d 466, 467 (Fla. 3d DCA 2001) (defendant hotel created no broader risk and thus owed no duty where plaintiffs were themselves engaged in an obviously dangerous act); *Thompson v. Baniqued*, 741 So. 2d 629, 631 (Fla. 1st DCA 1999) (defendant "did nothing that created a risk of harm to [plaintiff who] placed himself in a zone of risk"); *Cecil v. D'Marlin, Inc.*, 680 So. 2d 1138, 1138-39 (Fla. 3d DCA 1996) (bus driver who allowed passenger to disembark from bus adjacent to busy street, did not create broader risk and thus owed no duty to passenger); *Kmart Corp. v. Lentini*, 650 So. 2d 1031, 1032 (Fla. 2d DCA 1995) (store owner, in apprehending and detaining shoplifter, did not create a broader zone of risk to others in store and thus breached no duty).

[7] See *Princess Hotels Int'l, Inc. v. Superior Ct.*, 39 Cal. Rptr. 2d 457, 461 (Cal. Ct. App. 1995), cited in *Poleyeff I*, 782 So. 2d at 424-25.

to protect anyone against it); *see also Lomas v. West Palm Beach Water Co.*, 57 So. 2d 881, 882 (Fla. 1952) (no duty to warn about danger that exists generally in similar bodies of water); *Kaweblum v. Thornhill Estates Homeowners Ass'n, Inc.*, 801 So. 2d 1015, 1017-18 (Fla. 4th DCA 2001) (governmental entity that operates canal has no duty to warn against natural condition that exists generally in canals and similar bodies of water); *Hughes v. Roarin' 20's, Inc.*, 455 So. 2d 422, 423-24 (Fla. 2d DCA 1984) (operator of campground with swimming and diving area has no duty to protect against shallow water because it is a condition that exists generally in similar bodies of water); *Dankenbring v. Fitzhugh*, 467 So. 2d 828, 828 (Fla. 2d DCA 1985) (landowner has no duty to protect others against void in soil underneath a lawn).

The ruling in this case accords with the rule of this Court in *McCain*.[8] It is also a sensible rule. Public policy and the law require that all people have access to the ocean despite its universal dangers; and no human being or entity, by respecting that right of access, creates a broader risk of harm. The law also recognizes it would be impossible to effectively protect everyone from the natural and always-changing features of the sea — a task that is all the more formidable in Florida where there are

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[8] Keeping with the law of this Court, the district court's decision imposed on the City "no different" duty than the one owed by private defendants under similar circumstances. *Butler*, 501 So. 2d at 579. Thus because private persons on the beach owed no duty to warn of transitory conditions in the ocean, *Poleyeff I*, the City owed no duty either.

more than 2,000 miles of shoreline. Not only do the currents, tides and waves move, vary and fluctuate suddenly, without warning or pattern, but there are "various forms of life . . . to keep track of, man-of-war, jellyfish, sea lice, sharks, barracuda, stingrays, ***on and on it goes***" (3.BR.336; emphasis added). *Wamser v. City of St. Petersburg*, 339 So. 2d 244, 245-46 (Fla. 2d DCA 1976) (city operating beach facility had no duty to warn of sharks in adjacent waters, observing general rule that the "law does not require [one to] . . . guard an invitee against harm from animals . . . indigenous to the locality"); *Palumbo v. State of Fla. Game & Fresh Water Fish Comm'n*, 487 So. 2d 352, 353 (Fla. 1st DCA 1986) (operator of lake had no duty to protect invitee against danger of alligators which were indigenous to the area); *see also Seelbinder v. County of Volusia,* 821 So. 2d 1095, 1097 (Fla. 5th DCA 2002) (county had no duty to warn "beachgoers that there was a risk of being struck by lightning"); *Grace v. City of Ok.*, 953 P.2d 69, 70-71 (Okla. Ct. App. 1997) (no duty to protect invitee against lightning "[w]here there is no act on the part of the owner or occupant of the premises creating a greater hazard than that brought about by natural causes").

The variables and phenomena in the ocean are dynamic (2.BR.207-08), always different (4.BR.535), "don't [ever] show up in the same spot" (2.BR.307), are controlled by uncontrollable confluences of weather,[9] wind, waves and ocean bottom,

[9] *See Dykema v. Gus Macker Enters., Inc.*, 492 N.W.2d 472, 475 (Mich. Ct. App. 1992) ("it is one's own responsibility to protect himself from the weather").

and are constantly on the move (2.BR.307; 3.BR.411, 414; *see also* 2.BR.186; 4.BR.518-20, 535, 544). No person or entity creates a greater risk of these conditions; instead, they are part of the ocean's universal landscape, and something for which no human being or entity can be held responsible. *See Lupash v. City of Seal Beach*, 89 Cal. Rptr. 2d 920, 926 (Cal. Ct. App. 1999) ("[a]s the [trial] court rightly concluded . . . '[the ocean] can have high points, low points, riptides, rip currents, swirls splashing waves, drowning water, sand crabs, driftwood, broken glass, seashells, all kinds of dangers,'" and there is no duty to protect anyone against those dangers).

Courts in other jurisdictions have long recognized that a duty to protect against the highly transitory nature of the ocean would be both impractical and impossible for anyone to meet. Thus the law does not expect anyone to protect others against it.

> [T]he highly transitory nature of sandbars leads us to conclude that the imposition of a duty to warn upon the State would be both impractical and of little value in preventing injury. It is true that the courts of New York have often imposed liability upon a defendant for failure to warn of a naturally occurring dangerous condition of which the defendant has prior notice (see, e.g., . . . *Piche v. State of New York*, 202 Misc. 84, 106 N.Y.S.2d 437 [fixed dropoff in lake bottom]). However, ***each of the cited cases involved a hazardous condition which was in a fixed location*** and which was therefore susceptible to remedy by the defendant or isolation from the public. Conversely, the present case concerns the formation of sandbars, ***structures which may change location within hours*** and thus are impossible to monitor.

Herman v. State, 463 N.Y.S. 2d 501, 502 (N.Y. App. Div. 1983) (emphasis added); *accord Darby v. Societe Des Hotels Meridien*, No. 88 Civ. 7604(RWS), 1999 WL

459816, *8 (S.D.N.Y. June 29, 1999) ("a rip current, like a sandbar," is of a transitory nature "'which may change location within hours'" and defendant had no duty to protect others against it); *see also Bucheleres v. Chicago Park Dist.*, 665 N.E.2d 826, 836-37 (Ill. 1996) (duty to warn of risks associated with shifting currents, sands and water levels in a body of water would "create a practical and financial burden of considerable magnitude" and might result in "curtailment of the public's access to the . . . beaches, to the detriment of the public at large"); *Stone v. York Haven Power Co.*, 749 A.2d 452, 457 (Pa. 2000) (if there were a responsibility to guard against risks inherent in the water, entities would be discouraged from opening bodies of water to the public; the burden of such a duty would be "too weighty" and impossible to meet); *cf. Florida Department of Nat'l Res. v. Garcia*, 753 So. 2d 72, 77 (Fla. 2000) ("it 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 that residents of the State may, on their own, select a particular area to enjoy the ocean or other waterways").

The imposition of liability for failure to do the impossible — safeguard all beachgoers against the sudden and passing conditions of the sea — would ultimately eliminate all those government and private entities that furnish essential services to the beach itself and the beachgoing public. This, and the inability to determine the

particular warnings and safeguards[10] required to protect beachgoers from conditions that vary with the wind, are never in the same form, and may not be in the same place in the same way for years, has led courts to announce a rule for the ocean in its natural, ever-transforming state that applies regardless of a defendant's proximity to the ocean or the user's status, *Poleyeff I*, 782 So. 2d at 425 n.7, and discharges those occupying the adjoining land from any duty to protect against the natural characteristics of the ocean — conditions that are guaranteed to exist wherever the ocean is found. *See generally Poleyeff I*, 782 So. 2d at 424-25, citing the decisions in *Lupash*, 89 Cal. Rptr. 2d at 924 (though city may provide lifeguard and other services on the dry beach it does not owe a duty to warn against natural conditions of the ocean); *Swann v. Olivier*, 28 Cal. Rptr. 2d 23, 24-30 & n.1 (Cal. Ct. App. 1994) (private beach owner has no duty to warn of ocean's natural conditions, including rip currents); and *Sun v. The Governmental Auths. on Taiwan*, No. C94-2769 SI, 2001 WL 114443, **9-10 (N.D. Cal. Jan. 24, 2001) (entity operating beach as a swimming venue, with designated swimming areas, has no duty to disclose to user the presence of extreme water forces). *See also Darden v. Pebble Beach Realty, Inc.*, 860 F. Supp. 1101, 1106-09 (E.D.N.C. 1993) (landowner has no duty to protect swimmers in the ocean; unreasonable to say that landowner must warn of natural, but constantly-changing

[10] *See* 2.BR.307; 3.BR.403; 4.BR.590-91, 593, 595.

conditions in the ocean — including "tides, currents, winds, gravitational pull, and temperature fluctuations"); *Jacome v. Commonwealth*, 778 N.E.2d 976, 980-81 (Mass. App. Ct. 2002) (entity controlling beach has no duty to maintain or warn against rip currents in the ocean); *Saland v. Village of Southampton*, 662 N.Y.S. 2d 322, 323 (N.Y. App. Div. 1997) (no duty to guard against natural transitory conditions of the ocean); *Smyth v. County of Suffolk*, 569 N.Y.S. 2d 128, 129 (N.Y. App. Div. 1991) (same); *Perez v. Town of East Hampton*, 561 N.Y.S. 2d 69, 69-70 (N.Y. App. Div. 1990) (same).

There is then no conflict between the rule announced in this case and *Butler v. Sarasota County*, 501 So. 2d 579 (Fla. 1986). As the *Butler* briefs explain,[11] the defendant there physically created a swimming area in the water where there were sudden dropoffs — a peculiar and fixed condition — and where it knew people should not swim (A.20-21, 26-28, 37-39).[12] By putting swimmers in a fixed location

[11] We obtained the briefs in *Butler* from this Court and it can take notice of them. *Gorham v. State*, 494 So. 2d 211, 211-12 (Fla. 1986) (Court takes notice of file and briefs in previous case said to be controlling); *Foxworth v. Wainwright*, 167 So. 2d 868, 870 (Fla. 1964) (Court can take notice of its own records); *Arnold Lumber Co. v. Harris*, 503 So. 2d 925, 927 & n.1 (Fla. 1st DCA 1987) (court refers to briefs in different case as an aid to interpreting decision in that prior case). The *Butler* briefs were also furnished to the district court by way of an unopposed motion (A.12-15, 40).

[12] In *Butler*, Sarasota County marked out a swimming area *in the water*, using buoys (A.20-21, 26-28, 37-39). According to the petitioner, the county "*created* a scope of danger . . . [because] it had marked out and defined a swimming area . . . [where there were] varying currents, strong tides [and] dropoffs [knowing] that swimming should

(continued...)

with a permanent danger — a danger that did not exist in the ocean water generally — the county created a broader zone of risk and thus was held to owe a duty. Indeed, as the Court observed: the county "create[d] a designated swimming area [in the water] where the dangerous condition existed." *Butler*, 501 So. 2d at 579. Similarly, a duty was owed in *Ide v. City of St. Cloud*, 8 So. 2d 924 (Fla. 1942), because the defendant maintained a lake with a peculiar and fixed condition, a deep hole. *Ide*, 8 So. 2d at 925. And a duty was owed in *Andrews v. Department of Natural Resources, State of Florida*, 557 So. 2d 85 (Fla. 2d DCA 1990) because the defendant, through swimming signs, drew people to a location of water with dangerous undercurrents from a long-standing undertow. *Andrews*, 557 So. 2d at 87-89.[13]

Trying to make their cases more like *Butler* (with its marked-off swimming area in the water), the estates say there were watercraft markers in the water near this beach. But the only reference to markers in the record was to markers two years ***after*** the

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(...continued)
not have been permitted in this area . . ." (A.38-39; emphasis added). The Court agreed, observing that while the county did not create the water and dropoffs, it "did create a designated swimming area [in the water] where the dangerous condition existed." *Butler*, 501 So. 2d at 579.

[13] The issue presented in *Andrews* concerned sovereign immunity only, and the cause was remanded for further proceedings. The *Andrews* court did not address whether there was a common-law duty to protect others against the Gulf of Mexico's constantly-changing currents and conditions. If *Andrews* can be read to impose such a duty, it is wrong and the Court should say so.

drownings occurred (3.BR.443).[14] There was no evidence of markers at the time of the drownings (1.BR.128-29; 4.BR.676). Just as importantly, markers would have been for watercraft — not swimmers — and would have been controlled by the State and Coast Guard, ***not*** the City. Fla. Admin. Code R. 68D23.101-68D-23.112 (formerly Fla. Admin. Code R. 16N-23.03, 16N-23.003 and 68D-23.003); *see also* § 327.40 Fla. Stat. (1997). And according to the City's own rules — on which the estates rely — the City's fixed swimming area was *not* alongside watercraft markers, but in the guarded area six blocks away (2.BR.295; 3.BR.394; 4.BR.564 ¶ 17(C) [defining swimming area as the "guarded area"]).

As we have said, the marked-off area in *Butler* contained a peculiar and permanent condition with sudden dropoffs and Sarasota County set it up as the place where a nine-year old boy was directed to swim, despite knowing he should not swim there (A.37-39). In our case, swimmers could go wherever they wanted and there was no permanent and irregular condition anywhere. *See Schoen v. Gilbert*, 436 So. 2d 75, 76 (Fla. 1983) (no duty to warn of difference in floor levels because the condition is common to the construction of buildings generally). As it stood, the Atlantic Ocean was in its natural, always-shifting state, controlled by forces of wind and water with

[14] Vincent Andreano, head of the City's beach patrol, was testifying about the beach as it stood in June 1999, two years *after* the drownings occurred, when the beach was a guarded area (3.BR.442-444).

nothing atypical about its features. The City did not control the ocean water (1.BR.117, 137), did not create a greater risk in the ocean water and thus had no duty to protect others against transitory characteristics of the ocean water. *See and compare Whitt v. Silverman*, 788 So. 2d 210, 222 (Fla. 2001) (landowner controlled foliage on the premises); *Bailey Drainage Dist. v. Stark*, 526 So. 2d 678, 679-82 (Fla. 1988) (entity controlled dangerous intersection, and trimmed and maintained plant growth causing the danger); *with Sullivan v. Silver Palm Props., Inc.*, 558 So. 2d 409, 410-11 (Fla. 1990) (landowner owed no duty to safeguard others against natural roots from adjacent property because landowner did not create or cause the defect); *and Britz v. LeBase*, 258 So. 2d 811, 813-14 (Fla. 1971) (landowner had no duty because it did not control bayonet tree on adjacent property; constructive control over area was insufficient). And see *Poleyeff I*, 782 So. 2d at 424-25, citing the decisions in *Swann*, 28 Cal. Rptr. 2d at 28-30 (not possible for anyone to control the sea; control over *dry beach* does not mean there is control over the *wet surf* and thus there is no duty to protect against natural dangers forming in the surf) and *Princess Hotels Int'l, Inc. v. Superior Ct.*, 39 Cal. Rptr. 2d 457, 460 (Cal. Ct. App. 1995) (wrong to say that "control over a beach is the same as control over the raging surf"; not possible to control the ocean and thus no duty to warn against ocean's natural and transitory conditions). *See also Darden*, 860 F. Supp. at 1106 (control of ocean water

is not possible); *Vela v. Cameron County*, 703 S.W.2d 721, 723-24 (Tex. App. 1985) (county's control and duty over beach cannot be extended to include natural conditions in the ocean); *Cameron County v. Velasquez*, 668 S.W.2d 776, 780 (Tex. App. 1984) (same; no duty to warn of condition existing on sandbar).

This case is also unlike *Florida Department of Natural Resources v. Garcia*, 753 So. 2d 72 (Fla. 2000), and *Avallone v. Board of County Commissioners of Citrus County*, 493 So. 2d 1002 (Fla.), *on remand*, 497 So. 2d 934 (Fla. 5th DCA 1986), where the defendants actually created the dangerous conditions in the water. In *Garcia* the defendant (through its delegate) created and was responsible for construction debris in the water (4.BR.648).[15] *Garcia*, 753 So. 2d at 73-74 & n.1. In *Avallone* the defendant operated and controlled a dangerous dock, thus creating a dangerous and peculiar condition in the water. *Avallone*, 497 So. 2d at 935-36. Because the defendants created the peculiar condition and the increased risk of harm,

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[15] As we explained earlier, the beach area in this case is different from the South Beach area in *Florida Department of Natural Resources v. Garcia*, 753 So. 2d 72 (Fla. 2000). The beach in the present case was fifteen blocks away from South Beach, and was eroded, narrow, sparsely populated and unguarded (2.BR.211, 299; 3.BR.369, 382; 4.BR.612, 645-46). It is thus wrong to say this case and *Garcia* involve the "exact" same area of beach. They don't. It is also wrong to say watercraft were rented in this area (1.BR.128-29; 4.BR.676). Mrs. Poleyeff and Mr. Breaux rented beach chairs for the land only and there is no evidence they rented water or swimming equipment or that water equipment was being rented by anyone else on the day of the drownings (4.BR.625, 628).

a duty arose to warn or protect others against it. *Compare Poleyeff I*, 782 So. 2d at 424-26 & n.6 (no duty to protect against natural characteristics of the ocean, in contrast to the duty to warn of peculiar defects), *with Whitaker v. City of Belle Glade*, 638 So. 2d 186, 187-88 (Fla. 4th DCA 1994) (duty to warn of submerged construction debris peculiar to particular area of water); *Blankenship v. Davis*, 251 So. 2d 141, 143-44 (Fla. 1st DCA 1971) (duty to warn of danger presented by pier and slide extending over shallow water); *Brightwell v. Beem*, 90 So. 2d 320, 321-23 (Fla. 1956) (duty to warn of danger presented by wooden platform extending into the water); *Turlington v. Tampa Elec. Co.*, 56 So. 696, 697-99 (Fla. 1911) (duty to warn of danger presented by springboard extending over shallow water).

Nor does the district court's ruling conflict with *McKinney v. Adams*, 66 So. 988 (Fla. 1914). *McKinney* was premised on a now-repealed statute for places "'where bathing suits are furnished for hire or rent.'" *McKinney*, 66 So. at 992 (citation omitted); *Pickett v. City of Jacksonville*, 20 So. 2d 484, 486 (Fla. 1945) (observing that *McKinney* was premised largely on a statute).[16] Unlike the defendant

[16] *McKinney* belongs to those cases where the water is furnished for rent or hire — for a fee — so that a particular responsibility is undertaken in the water. Unlike the rented area in *McKinney*, the area in the present case was open and accessible at no charge, as a matter of right (3.BR.379). *Compare Poleyeff I*, 782 So. 2d at 424 n.4 (decedents rented beach chairs, which were only tangentially related to use of the ocean, and thus rental company undertook no particular responsibility to decedents in the ocean) *with McKinney*, 66 So. at 988-94 (duty arises where one offers the water for profit); *Pickett v. City of Jacksonville*, 20 So. 2d 484, 484-87 (Fla. 1945) (same; (continued...)

in *McKinney*, the City did not furnish bathing equipment to Mrs. Poleyeff or Mr. Breaux — for "hire" or otherwise — nor did it rent them equipment expressly intended for swimming in the ocean. *Poleyeff I*, 782 So. 2d at 424 n.4.[17] Mrs. Poleyeff and Mr. Breaux rented beach chairs and umbrellas only (4.BR.625, 628) which were *not* for the ocean, were *not* intrinsic to the ocean, and did *not* give rise to a particular undertaking in the ocean. *See Huff v. Goldcoast Jet Ski Rentals, Inc.*, 515 So. 2d 1349, 1349-51 (Fla. 4th DCA 1987) (city, which granted concession company license to rent jet skis, did not itself create a risk in the waterway and did not have a duty to protect others using the waterway).

And unlike the private rented area in *McKinney*, these ocean waters were open and offered to all people as a matter of common-law right (3.BR.379). The offer was in being long before the City and no greater risk was created by the City by virtue of the public's exercising its right to swim anywhere the ocean is found.

(...continued)
fee or consideration paid specifically for use of water); *Turlington v. Tampa Elec. Co.*, 56 So. 696, 697-99 (Fla. 1911) (same); *Smith v. Jung*, 241 So. 2d 874, 876 (Fla. 3d DCA 1970) (same); *Collazos v. City of West Miami*, 683 So. 2d 1161, 1162-64 & n.4 (Fla. 3d DCA 1996) (fee paid specifically for supervision at park, and county otherwise assumed duty to supervise; otherwise, no common-law duty to do so).

[17] *Compare with Brown v. Florida State Bd. of Regents*, 513 So. 2d 184, 185-86 (Fla. 1st DCA 1987) (entity distributed canoe and life vest to student specifically for use in water); *and Galati v. Town of Longboat Key*, 562 So. 2d 780, 782-83 (Fla. 2d DCA 1990) (city provided swing (instrumentality) for diving into water).

This Court put it nicely, years ago:

> There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean . . . . The lure of the ocean is universal . . . . Appearing constantly to change, it remains ever essentially the same. This primeval quality appeals to us . . . . The people of Florida — a State blessed with probably the finest bathing beaches in the world — are no exception to the rule. Skill in the art of swimming is common amongst us. We love the oceans which surround our state. We, and our visitors too, enjoy bathing in their refreshing waters. ***The constant enjoyment of this privilege of thus using the ocean and its fore-shore for ages without dispute should prove sufficient to establish it as an American common law right . . . .***

White v. Hughes, 190 So. 446, 448-49 (Fla. 1939) (emphasis added); *see also Cameron County v. Velasquez*, 668 S.W.2d at 780 (public's right to use waters of Gulf of Mexico has existed since time immemorial; those waters are held for the use of all people).

Recognizing the public's superior right to use the ocean, the State's management agreement limited the property being managed to the dry area landward, away from the ocean, and excluded the ocean property beyond (2.BR.319, 323-24). *See* §§ 161.141-161.211, Fla. Stat. (1981) (beach is property *upland* of the mean high-water mark); § 161.191(1), Fla. Stat. (1981) ("all lands seaward" of mean high-water mark "shall be deemed to be vested in the state"); *see also* § 161.54(3), Fla. Stat. (2002) (beach "extends landward from the mean low-water line"). Indeed, the City's ***only*** authority in the ocean was through police power the State authorized it to use (2.BR.320 ¶ 2(d);

2.BR.263). The existence of this police power creates no common-law duty. *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912, 917-21 (Fla. 1985) (there has never been a common-law duty of care with respect to police-power functions); *City of Daytona Beach v. Palmer*, 469 So. 2d 121, 122-23 (Fla. 1985) (same); *Delgado v. City of Miami Beach*, 518 So. 2d 968, 969 (Fla. 3d DCA 1988) (same).[18]

With no facts on which to construct a *McCain*-like duty, the estates do not — and cannot — argue that the City voluntarily undertook a duty to protect Mrs. Poleyeff or Mr. Breaux in the ocean. *Union Park Mem'l Chapel v. Hutt*, 670 So. 2d 64, 67 (Fla. 1996) ("[v]oluntarily undertaking to do an act" may increase the risk of harm and if so, a duty will arise). Their claim is just the opposite: they say the City took no responsibility for the swimmers' well-being and did not supervise or control them. The City did not require beachgoers to swim in the ocean and did not assign them to a particular location. *See Nova Southeastern Univ., Inc. v. Gross*, 758 So. 2d 86, 88-90 (Fla. 2000) (defendant undertook a duty by requiring student to do an internship and assigning student to a particular location which the defendant knew was unsafe). The City did not mark out a "safe" area for these swimmers to use, *McCain*, 593 So. 2d

[18] Just as with the police power, the City's activity in granting a business license for beach-chair rentals creates no common-law duty of care (it is a purely governmental activity and thus there is no corresponding private duty). *Huff v. Goldcoast Jet Ski Rentals, Inc.*, 515 So. 2d 1349, 1350-51 (Fla. 4th DCA 1987).

at 501, 505, and did not undertake to provide warnings or safeguards for them. *Poleyeff II*, 818 So. 2d at 673-74; *Poleyeff I*, 782 So. 2d at 424 & n.4.

As it was, Mrs. Poleyeff and Mr. Breaux could go wherever they wanted to go on the beach and in the ocean (not at the City's invitation or offering, but as a matter of right), *Adika*, 633 So. 2d at 1171, and the City undertook no responsibility to control them. They went to an area of the ocean that was no different from the ocean anyplace else, and no duty was owed by anyone to prevent them from doing that or to protect them against the natural characteristics of the sea. This universally recognized proposition obeys the rule in *McCain*, conflicts with no other decision of the Court and is consistent with "the host of cases in Florida and elsewhere which without exception support" it. See *Poleyeff I*, 782 So. 2d at 424-25, citing the decisions in *Lupash*, 89 Cal. Rptr. 2d at 926 (rip currents are part of the ocean's landscape and something that everyone must anticipate); *Princess Hotels Int'l, Inc.*, 39 Cal. Rptr. 2d at 459-61 (ocean swimming is dangerous and there is no legal duty to warn others of that danger); *Swann*, 28 Cal. Rptr. 2d at 24-30 (owner of beach has no responsibility for injuries occurring in the adjacent ocean); *Sun v. The Governmental Auths. on Taiwan*, 2001 WL 114443, at *10 (extreme water forces pose an obvious danger and can occur in almost any ocean area; beach operator has no duty to warn of these general dangers); *Lerma v. Rockford Blacktop Constr. Co.*,

617 N.E. 2d 531, 538-39 (Ill. Ct. App. 1993) ("it is a body of water *per se* that presents an obvious [danger]"; possessor of land has no duty to protect against dangerous undercurrents or undertows in river); and *Dewick v. Village of Penn Yan*, 713 N.Y.S. 2d 592, 593-94 (N.Y. App. Div. 2000) (proprietor of beach has no duty to warn of sandbar, currents or other natural transitory conditions in the water). *See also Hall v. Lemieux*, 378 So. 2d 130, 131-32 (La. Ct. App. 1979) (no duty to safeguard swimmer against dangers inherent to body of water, including the currents that are a "natural and inevitable risk" to any swimmer); *Casper v. Charles F. Smith & Son, Inc.*, 560 A.2d 1130, 1133-37 (Md. 1989) (natural body of water "constitutes an open, obvious, and patent danger" and landowner is under no duty to warn of that danger); *Waters v. United States Fid. & Guar. Co.*, 369 N.W.2d 755, 757-59 (Wis. Ct. App. 1985) (natural body of water presents open and obvious danger).[19]

[19] The City has not conceded the issue of sovereign immunity altogether. Instead, it has observed that because there was no duty, the court "need not consider whether an immunity might also exist" (A42). If it is determined, however, that a duty *is* owed to safeguard others against the transitory conditions of the ocean, there would remain an issue of fact on the issue of sovereign immunity based on whether the City "held the area out to the public as a swimming area." *Garcia*, 753 So. 2d at 76.

CONCLUSION

For the reasons stated and upon the authorities cited, the district court's ruling does not conflict with the decision of this Court or any other district court. Jurisdiction, then, was improvidently granted and the petition should be dismissed. Alternatively, the district court's ruling is entirely sensible and correct, and should stand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure because it has been prepared in Times New Roman 14-point font.

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