IN THE SUPREME COURT OF FLORIDA

CONSOLIDATED CASE NOS. SC02-1568 & SC02-1569

FREDERICA E. BREAUX, as
administratrix of the Estate of ZACHARY
CHARLES BREAUX, deceased,

Petitioner,
vs.
THE CITY OF MIAMI BEACH,

Respondent.
_____/
RABBI ISRAEL POLEYEFF, as
personal representative of the Estate
of EUGENIE POLEYEFF, deceased,

Petitioner,
vs.
THE CITY OF MIAMI BEACH,

Respondent.
_____/

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

BRIEF ON THE MERITS OF PETITIONER POLEYEFF

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I.
STATEMENT OF THE CASE AND FACTS

The decision sought to be reviewed contains an appropriate thumbnail sketch of the consolidated cases:

> These are wrongful death actions brought against the City of Miami Beach on account of two drownings. Ms. Eugenie Poleyeff, a tourist staying at a nearby hotel, went to the public beach at 29th Street. She rented a beach chair and umbrella from Hurricane Beach Rentals ("Hurricane Rentals"), which is located there. Hurricane Rentals operates under a concession from the City of Miami Beach, for which the City receives revenue.
>
> Ms. Poleyeff went swimming. She was caught in a rip tide and called for help.
>
> Zachary Breaux, also a vacationing tourist, had likewise rented a beach chair from Hurricane Rentals and was on the beach at that time. He heard Ms. Poleyeff's cries for help. While his wife and daughter tried to find a lifeguard, Mr. Breaux went into the water to try to rescue Ms. Poleyeff. Both Ms. Poleyeff and Mr. Breaux were overcome by the rip currents and drowned.
>
> When lifeguards arrived from the closest lifeguard station (21st Street), five other swimmers had to be rescued from the same rip currents. The lifeguards recovered Ms. Poleyeff's body from sixty yards offshore. Mr. Breaux was brought in by other swimmers.
>
> On the day of this tragedy, the lifeguard stand at 21st Street had posted warnings regarding rip tides. There was no lifeguard stand at 29th Street, and no warnings about rip tides were posted at that location.
>
> The estates of Ms. Poleyeff and Mr. Breaux brought separate wrongful death actions against multiple defendants. They sued the City of Miami Beach because the City

> controls the beach under a lease from the State of Florida. The estates alleged that the City was negligent in failing to warn swimmers of the danger of rip tides, or take other steps to safeguard those who used the beach.
>
> The city moved for summary judgment on the theory that it was entitled to sovereign immunity. The trial court granted the City's motion, and the estates have appealed.
>
> On appeal, the city concedes that it is not entitled to sovereign immunity. However, the City argues that the summary judgment should be affirmed on the alternative theory that it owed no legal duty to the decedents to warn them, or otherwise take measures to protect them, from naturally occurring conditions in the water.

Poleyeff v. City of Miami Beach, 818 So.2d 672, 673-74 (Fla. 3d DCA 2002) (J. Cope, dissenting, acknowledged by the majority to be "accurate" at 818 So.2d 673, n. 1; footnote omitted).

Judge Cope's dissenting opinion contains some additional facts (which will be supported by record references in the Brief on the Merits filed by Petitioner Breaux in the consolidated case):

> It is undisputed that the City controls this part of the beach. As the Florida Supreme Court has explained:
>
> > In 1982, the State entered into a management agreement with the City [of Miami Beach] allowing the City to manage South Beach. The management agreement: (1) provided that the State "holds title" to the beach property; (2) granted the city "management responsibilities" of the beach for twenty-five years; (3) required the City to submit a "management plan" providing for "the limitation and control

> of land and water related activities such as boating, *bathing*, surfing, rental of beach equipment, and sale of goods and services to the public;" and (4) required the City to pay the State twenty-five percent of revenues collected from private concessionaires.

Florida Dept. of Natural Resources v. Garcia, 753 So.2d 72, 74 (Fla. 2000) (emphasis in original).

The City entered into a concession agreement with Hurricane Rentals which allowed Hurricane Rentals to operate a rental stand at 29th Street. Hurricane Rentals had a Tiki hut from which it rented beach lounges, umbrellas, water craft, and beach equipment. The City receives revenue from Hurricane Rentals' operations. *See id.* at 76.

The City built facilities at the 29th Street location for the use of swimmers and other beachgoers. The facilities included public showers, restrooms, drinking fountains, and parking. The City provided access to the beach from its boardwalk.

The City was well aware that beachgoers swam at this and other concession stand locations. The City has promulgated rules and regulations for beachfront concession operations. Where, as here, the concessionaire is renting watercraft, the regulations require a separation of the swimming area from the access channel used by the water craft.[4]

. . . .

As stated in the *Garcia* opinion, this is a well known public swimming area. Under the agreement with the State, the City was required to do a management plan for land and water related activities, including swimming. *Id.*

As relates to the 29th Street location, the City entered into a concession agreement with Hurricane Rentals to provide

beach and water equipment. The City obtained income from that rental activity. The City contemplated that there would be swimmers congregating at the concession stand locations, because the City's rules require the concessionaire to provide an access channel for water craft which is clearly separated by a line of buoys from the swimming area. The City provided showers, restrooms, and parking in the vicinity.

Plainly the City is operating a swimming facility within the meaning of *Garcia.* Indeed, after *Garcia* there is no room left for the City to make a contrary argument. . . .

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4. The rules and regulations state, in part:

17. The following are particular regulations which apply to Concessionaires offering Water Recreational Equipment:

. . . .

B. All rental operations of water craft must have a "chase boat" available. . . .

C. The operation of all water sport activity should be outside the 300 foot swimming area ("guarded area") and no closer than 400 feet to the nearest lifeguard stand(s). The location of beachfront operations shall be subject to the approval of appropriate City Departments. The Concessionaire must instruct renters in safety precautions to avoid contact with swimmers beachfront.

. . . .

E. Concessionaires are responsible for instructing clients on safe operation of equipment including advisement to stay away from "guarded area."

F. The "guarded area" is to include 300' east of the shoreline or 100' from the nearest bather.

> G. The Concessionaire must identify, through a channel marked by removable buoys, an access route through which renters of water recreational equipment may leave the beachfront and enter open water. The marked channel shall extend 300 ft. perpendicular to the shore line and must be marked with orange buoys, a minimum of 18 inches in diameter, four (4) on each side of the channel, equally spaced.
>
> . . . .
>
> Q. All water sports concessions must be approved by the City's Marine Authority *and* by the City Manager or his designee.
>
> . . . .
>
> 23. The City also reserves the right to revoke a Concessionaire's license(s) due to noncompliance with the Rules and Regulations herein specified.
>
> Rules and Regulations for Beachfront Concession Operations (R. 262-64).

818 So.2d at 674-75, 677. These regulations also required Hurricane Rentals to procure liability insurance for itself, the City (which, together with the state, shared in its revenues), and the hotel behind which Hurricane Rentals conducted its business (Rule 21, Poleyeff R2 262-64).

For those members of the Court who may be unfamiliar with rip currents, a brief explanation may help. Rip currents are created only when several factors exist in unusual confluence. Generally, they are formed when strong onshore winds cause water to pile up on the shoreline and become trapped inside a sandbar. When this

collection of water becomes sufficient, it will seek the path of least resistance to return to seaward. If a natural depression in the sea floor exists, the water will rush seaward through the depression, eroding a deeper channel as it moves and thereby creating a strong seaward current which can carry even the strongest swimmer out to sea. Rip currents are fairly narrow and they dissipate readily beyond the channel they have carved. Drownings occur when people attempt to swim directly against the current in an effort to reach the shore. Rip currents can be escaped by riding them out until they dissipate and then swimming shoreward at an angle away from the current, or by swimming parallel to the shoreline until free of the current and then toward the shore.

Additional facts will be supplied and supported in Petitioner Breaux's brief. For our purposes here, we summarize only the obvious ones --proven, we think, by the two drownings in issue here. Although lifeguards are trained in the recognition of rip currents and how to avoid them and escape from them, most people are not familiar with them at all. They are unable to recognize them; they are unaware of the danger they pose; and they are uneducated in the techniques required for escaping them. Warnings of the danger are therefore a sensible precaution, which is why the City placed lifeguards at some places on its beach, and which is why its beach patrols were required by their own rules to warn swimmers and to place red danger flags on the shoreline whenever rip currents were detected.

Although the City itself deemed these precautions both necessary and sensible, a majority of the district court concluded that, at least with respect to dangerous conditions in its swimming area, the City owed its swimmers no duty of care at all. It

would appear that the majority accepted the City's argument that, although it may have exercised some control and responsibility over the dry part of its beach, it had no responsibility for the wet part -- because it justified this "swim at your own risk" policy as follows:

> On the authority of this Court's en banc decision in *Poleyeff v. Seville Beach Hotel Corp.*, 782 So.2d 422 (Fla. 3d DCA 2001), *review denied*, . . . 817 So.2d 849 (Fla. March 22, 2002), 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." . . .

818 So.2d at 673. Concluding that "[t]he majority opinion is contrary to controlling decisions of the Florida Supreme Court . . . ," Judge Cope wrote a thoughtful and strongly-worded dissent. *Id.* For the reasons that follow, we agree with Judge Cope.

II.
ISSUE PRESENTED FOR REVIEW

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."

III.
SUMMARY OF THE ARGUMENT

It has been settled for nearly a century that private entities operating swimming areas owe a duty of reasonable care to warn of and to safeguard against dangerous conditions existing in the waters in which their invitees are invited to swim. By virtue of §768.28, Fla. Stat., governmental entities operating swimming areas owe the same duty of care to their invitees. A recent trilogy of this Court's decisions establishes that this duty is an "operational level" duty and therefore actionable if breached, and that this duty includes the duty to warn of and to safeguard against naturally occurring dangerous conditions in the governmental entity's swimming area, like rip currents. *See Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986); *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986); *Florida Dept. of Natural Resources v. Garcia*, 753 So.2d 72 (Fla. 2000).

In the instant case, the majority adopted Justice McDonald's *dissenting* opinion in *Butler* as the law in the Third District, notwithstanding that five members of this Court rejected the dissenters' position in that case. To approve the majority's decision in the instant case will require the Court to change its mind, agree with Justice McDonald's dissent, and overrule *Butler*. Indeed, to approve the majority's decision in this case will require the Court to overrule a long line of its own consistent decisions dating back nearly 100 years. We respectfully urge it not to do so. Judge Cope's dissenting opinion correctly states the law of this state, as it has existed for nearly a century, and the majority's contrary decision should be quashed.

IV.
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."

Judge Cope's dissenting opinion presents our position as well as we could have hoped, and we adopt that opinion as our principal argument here. And because we believe this Court has already resolved the issue presented here adversely to the City in at least three relatively recent decisions, we will try to be brief.

We note first that the majority's apparent conclusion that the City "does not control the area" in which Ms. Poleyeff and Mr. Breaux drowned is simply insupportable. As Judge Cope explained, this language was borrowed from an earlier decision of the court in which it had concluded that beachfront hotels and beachfront concessionaires owed no duty of care to Mrs. Poleyeff and Mr. Breaux because they did not "control the area." Immediately after this phrase appears in the earlier decision, however, the following footnote appears: "Compare *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986); *McKinney v. Adams*, 68 Fla. 208, 66 So. 988 (1914)." *Poleyeff v. Seville Beach Hotel Corp.*, 782 So.2d 422, 424 n. 3 (Fla. 3d DCA 2001) (*Poleyeff* I), *review denied*, 817 So.2d 849 (Fla. 2002). As will become clear as we proceed, this footnote was plainly designed to *except* the instant case from the holding in *Poleyeff* I.

The City's position below (and the position it advanced in its jurisdictional brief here) -- that, although it may have controlled the beach area in which Ms. Poleyeff and Mr. Breaux entered the adjoining water in which they were invited to swim, it did not "control" the ocean itself -- is also simply insupportable. As will also become clear as we proceed, whether an entity that operates a *swimming* area owes a duty of care to its invitees has *always* been analyzed with respect to the area in which the *swimming* takes place -- which would include the ocean in the instant case -- and at least until the majority appears to have drawn the line between wet and dry in the instant case, no court has ever drawn the line at the water's edge and excluded the *swimming* area beyond.[1/]

The issue is not a new one. It was resolved adversely to the City nearly a century ago in *McKinney v. Adams*, 68 Fla. 208, 66 So. 988 (1914). In that case, the defendant operated a bathhouse adjacent to a public beach, in which he rented bathing suits and provided dressing rooms for his patrons. One of his patrons drowned while swimming in the ocean in the vicinity of the bathhouse. A wrongful death action was brought against him in four prolix counts, only one of which alleged violation of a statute (absence of statutorily required "life lines and life rafts"); the remaining counts alleged three factually specific (and somewhat redundant) violations of the common

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[1/] The majority was at least correct in its implicit conclusion that the city owed a duty of reasonable care to beachgoers on the dry area of its beach. *See Ralph v. City of Daytona Beach*, 471 So.2d 1 (Fla. 1983). There is nothing in *Ralph*, however, to suggest that a city's duty of care extends no further than where the water meets the sand.

law duty to exercise reasonable care (negligent failure to provide lifeguards, negligent failure to provide persons and appliances to facilitate rescue, and negligent failure to provide persons to search for and recover persons in distress). The trial court sustained the demurrer to all four counts of the plaintiff's declaration, concluding that none of them stated a cognizable cause of action.

This Court reversed, holding that *all four counts* of the declaration stated causes of action, notwithstanding that the plaintiff's decedent drowned in the ocean at a public beach. It explained the nature of the duty owed by the defendant to the plaintiff as follows:

> When one assumes to offer the use of public waters for purposes of profit by establishing bathhouses or dressing rooms on the shore and furnishing bathing suits for hire to persons who are expressly or impliedly invited to use the bathing suits by bathing or swimming in the public waters, and a patron uses the waters in the usual and ordinary way consistent with the express or implied invitation, and without his fault is injured because of the unsafe condition of the premises on which patrons are invited to bathe or swim, or because of the negligence of the proprietor in performing his duties to patrons, the one so offering the use of the waters for profit may be liable in damages for such injury.
>
> The liability proceeds from the duty imposed by law upon one who thus assumes to offer the use of public waters for profit to exercise due care to prevent injury to patrons who without fault use the waters in the customary way. One will not be permitted to establish for profit a business of furnishing facilities and inviting persons to use public waters for bathing or swimming and to escape liability for injuries caused by the unsafe condition of the premises so used, of

> which unsafe condition the patron may not know or have due appreciation, but of which the proprietor of the business should know. The patron has a right to rely upon the due performance of the implied legal duty of the one furnishing the facilities and extending the implied invitation to use the premises to keep the same in a reasonably safe condition or to give due warning as to and protection against dangers. Though the waters are public and no governmental authority be expressly given to so offer them for use, one who assumes to so offer the use of the waters also assumes the legal duties and liabilities that are commensurate with such offer of the use. The nature of the use fixes the duty and correlative liabilities. An invitation may be implied from a continued and general custom in using the premises by the patrons of the business. The nature of the use and the extent of the premises covered by an implied invitation to use may be determined by the continued and general custom of the patrons of the place.
>
> . . . .
>
> If a negligent failure to perform a statutory or a common-law duty with reference to the safe condition of the premises customarily used by the patrons of a particular business enterprise is a proximate cause of an injury to a patron who is not guilty of contributory negligence, the proprietor of the business may be liable in damages for such negligent injury.

66 So. at 992.[2/]

McKinney was decided at a time when governmental entities were immune from suit, but it plainly established that private entities operating swimming areas at public

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[2/] After *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), of course, contributory negligence no longer bars a plaintiff's recovery; principles of comparative negligence apply.

beaches owe a common law duty of reasonable care to their invitees. And in the years that followed, the existence of this duty was reiterated and reinforced by a number of this Court's decisions involving private entities and municipalities (which did not enjoy sovereign immunity at the time). *See, e. g., Turlington v. Tampa Electric Co.*, 62 Fla. 398, 56 So. 696 (1911); *Pickett v. City of Jacksonville*, 155 Fla. 439, 20 So.2d 484 (1945); *Payne v. City of Clearwater*, 155 Fla. 9, 19 So.2d 406 (1944).

A good example of this genre is *Ide v. City of St. Cloud*, 150 Fla. 806, 8 So.2d 924 (1942). In that case, the plaintiff's husband and son drowned while swimming in a privately-owned lake that was located outside the city limits of the defendant-city, but at which the city maintained a bathing beach. The cause of the drowning was a hidden and unguarded hole in the lake bottom of which the city was aware, but of which it failed to warn. The trial court dismissed the action. This Court reversed.

Following *McKinney*, the Court held that the fact that the city did not own the lake was immaterial. It also held that the city owed the same duty of care as a private person would have owed, and that *McKinney* established a common law duty of care which, on the allegations of the declaration, the city had breached:

> If the city had charter power to maintain a park outside the corporate limits, then the city is answerable for a tort committed while exercising the corporate franchise even though it has no title to the property where the park is located. For the purpose of determining the city's liability in tort in maintaining the park, the ownership of the land where the park is located is immaterial. . . . It is the use of the premises rather than title which is material in determining liability. McKinney v. Adams, . . .

> . . . Those who maintain the latter [a bathing beach] are under a duty to exercise due care for the safety of those invited there. McKinney v. Adams, supra. It is true that there was a statutory liability in the McKinney case; nevertheless, the court recognized the common law liability.

8 So.2d at 925.

Indeed, that a common law duty of care exists on facts like those in the instant case was recognized by the Third District itself more than 25 years ago:

> The law is clear that the proprietor of a bathing beach, including a governmental entity not otherwise immune from liability, has a duty to exercise due care for the safety of those invited there and to warn such people of hidden dangerous conditions of which the proprietor has knowledge or of which, through the exercise of reasonable care, he should have knowledge. Such a proprietor, however, is not the insurer of the safety of the beach and must only exercise a duty of reasonable care to those people using the beach. *Payne v. City of Clearwater*, 155 Fla. 9, 19 So.2d 406 (1946); *Ide v. City of St. Cloud*, 150 Fla. 806, 8 So.2d 924 (1942).

Bucher v. Dade County, 354 So.2d 89, 91 (Fla. 3d DCA 1977) (recognizing the general duty of reasonable care, but concluding -- on the undeniably frivolous claim asserted by the plaintiff -- that the county did not breach the duty), *cert. denied*, 361 So.2d 830 (Fla. 1978).

Some additional historical background is pertinent here. Prior to 1973, the City would not have enjoyed the protection of the state's sovereign immunity for the operation of its swimming area. *See Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981). With the enactment of §768.28, Fla. Stat., in 1973, however, the

legislature partially "waived" the sovereign immunity of the state and its political subdivisions, and by including municipalities within the definition of political subdivisions, it actually *created* partial sovereign immunity for municipalities. In 1979, this Court concluded that the partial "waiver" of §768.28 extended only to "operational level" activities, and that governmental entities remained immune from suit for "planning level" activities. *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979). And in 1981, this Court held that the legislature's *creation* of sovereign immunity for municipalities was constitutional. *Cauley v. City of Jacksonville, supra*. From this point forward, the law governing the tort liability of all governmental entities -- the state, counties, and municipalities alike -- has been uniform (although not without difficulty in application).

The issue presented in the instant case -- whether a governmental entity that operates a swimming area owes an actionable duty of care to warn of or safeguard others from naturally occurring dangerous conditions in the waters in which they are found -- was then presented to the Second District in *Sarasota County v. Butler*, 476 So.2d 216 (Fla. 2d DCA 1985), *quashed*, 501 So.2d 579 (Fla. 1986). In that case, a nine-year old boy drowned in a rip current at the county's beach, and the jury found the county negligent for failing to provide warnings of the dangerous conditions, failing to provide lifeguards, and failing to provide safety or rescue equipment. The district court reversed the plaintiff's judgment, concluding that the county could not be held liable for the naturally occurring danger because it did not create it, and that the

county's failure to warn its invitees of the danger or take precautions for their safety were "planning level" acts for which the county was immune from suit.

In the same time frame, the Fifth District was presented with the question of whether a county could be found liable for a negligent failure to provide supervisory personnel at a county-operated swimming facility. Although the question was not resolved by that court, it reached this Court in *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986). In that case, the plaintiff contended that "once the [county] made the discretionary decision to operate a swimming facility it assumed a common law duty to operate the facility safely." 493 So.2d at 1005. Relying in part on the Second District's decision in *Sarasota County v. Butler, supra*, the county contended in turn that "the decision not to supervise the swimming facility was a planning level or discretionary decision for which there is immunity." *Id.*

This Court resolved the conflicting positions as follows:

> We agree [with plaintiff] on this point. Section 768.28 and *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981), abolished the distinction which once existed between municipalities and counties. The common law duty which *Pickett* and *Ide* recognized was also applicable to counties even though the counties were sovereignly immune from suit at the time *Pickett* and *Ide* issued. . . . A government unit has the discretionary authority to operate or not operate swimming facilities and is immune from suit on that discretionary question. However, once the unit decides to operate the swimming facility, it assumes the common law duty to operate the facility safely, just as a private individual is obligated under like circumstances. We disapprove

> *Sarasota County* [and two additional decisions] to the extent they conflict with the decision here.

493 So.2d at 1005.

With that handwriting on the wall, this Court then granted review of the Second District's decision in *Butler*; quashed the decision; and ordered "reinstatement of the trial court's judgment." *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986). By ordering reinstatement of the plaintiff's judgment, this Court necessarily concluded that the duty of care owed to the drowning victim included the duty to warn of and to safeguard against the danger presented to swimmers by rip currents.

Justice McDonald dissented in *Butler*. He wrote:

> . . . Henry Sanders' drowning resulted from strong currents and a drop-off in the body of water adjacent to South Lido Beach. Merely by owning this beach, Sarasota County did not create the hazardous conditions that led to the death of Henry Sanders. Rather, these conditions were the result of natural forces for which the county should not be held responsible.
>
> . . . .
>
> Governmental entities should not be liable for naturally occurring dangerous conditions in bodies of water adjacent to public beaches. The mere establishment of a beach or park should not render a governmental entity responsible for conditions naturally existing in the water. A governmental entity's responsibility is limited to those conditions of the water that result from improvements or changes it has made to the body of water. It should not be held responsible for waters which may be dangerous, depending on variable circumstances, which are not under the control of the governmental entity involved. To hold otherwise is to

> make the governmental entity an insurer of the public at large against naturally occurring conditions. Here, the strong currents and drop-offs, which were natural conditions, were in themselves hazardous to swimmers.
>
> Sarasota County should not be held liable for providing access to the Gulf of Mexico without also providing lifeguards. The majority opinion holds that it is. . . .

501 So.2d at 580.

A five-member majority of this Court squarely rejected Justice McDonald's position. It responded simply:

> The duty of care is no different for a public owner than a private owner. In this instance, the public owner did not create the specific dangerous condition but did create a designated swimming area where the dangerous condition existed.

501 So.2d at 579.[3/]

In the decision sought to be reviewed, the majority held, just as Justice McDonald had urged in *dissent* in *Butler*, that the governmental defendant owed no duty of care to its invitees for naturally occurring dangerous conditions in the water at its public beach. It thereby squarely rejected this Court's holding in *Butler* (without even a passing reference to it, and with red flags flying in Judge Cope's dissent) that a governmental entity operating a public beach most certainly *does* owe a duty of

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[3/] For a similar decision from a state with another large shoreline and a substantial tourist industry, *see Kaczmarczyk v. City and County of Honolulu*, 65 Haw. 612, 656 P.2d 89 (1982).

reasonable care to warn of and safeguard against naturally occurring dangerous conditions existing in the water.

And if there were any question that the duty of care recognized in *Butler* extended to protection against naturally occurring conditions, that question was put to rest by this Court in *Bailey Drainage District v. Stark*, 526 So.2d 678, 681 (Fla. 1988):

> We reject the contention that the petitioners cannot be liable because the brush and weeds [obscuring the line of sight across an uncontrolled intersection] were a naturally occurring condition, not planted by the petitioners. In *Sarasota County v. Butler*, 476 So.2d 216 (Fla. 2d DCA 1985), a nine-year-old child drowned at South Lido Beach. The complaint alleged that Sarasota County was negligent because it failed to post warning signs or devices alerting beach-goers to the strong tides and currents and to the fact that the underlying lands contained drop-offs, conditions which rendered the swimming area dangerous. The district court directed that judgment be entered for Sarasota County because it was neither the beach nor the operation of it which caused the child's death, but the water and drop-offs, which were naturally occurring conditions not created by the county. This Court quashed the district court's opinion, stating that "the public owner did not create the specific dangerous condition but did create a designated swimming area where the dangerous condition existed," *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986), and that once it decided to operate a swimming facility, it assumed the common law duty to operate the facility safely. Likewise, although brush and weeds may be a naturally occurring condition not specifically created by a governmental entity, an entity responsible for maintaining an intersection has a duty to warn of or to make safe naturally occurring conditions which render an intersection danger-

> ous when the conditions create a danger which is not readily apparent to motorists.

(It is worth noting that, having lost the point in *Butler*, Justice McDonald joined in the opinion containing the above-quoted statement.) *Accord Whitt v. Silverman*, 788 So.2d 210, 221 (Fla. 2001) (rejecting a private defendant's contention that it could not be held liable for failing to warn of or safeguard against a danger presented by a "naturally occurring condition"). Most respectfully, if *Avallone* and *Butler* are still the law in this Court, the district court's decision is clearly erroneous.[4/]

Unlike the Third District, the Second District understood the message delivered in *Avallone* and *Butler*. In *Andrews v. Dept. of Natural Resources, State of Florida*, 557 So.2d 85 (Fla. 2d DCA), *review denied*, 567 So.2d 434 (Fla. 1990), a child drowned when he was "swept away by a strong current from the gulf as he was wading in the water." 557 So.2d at 87. His mother brought a wrongful death action against the Department of Natural Resources "alleging a breach of duty for failure to post signs warning of the known dangers of the currents and for failing to post lifeguards close enough to the area of the accident to warn of the dangers of swimming." 557 So.2d at 86.

[4/] Neither *Avallone* nor *Butler* contain any mention of the concept of "control." The majority borrowed that concept from its decision in *Poleyeff* I. However, as noted previously, *Poleyeff* I dealt with the liability of beachfront hotels and beachfront concessionaires -- not with the liability of the operator of a public swimming area -- so it provided no basis for the majority to ignore the holding of *Butler* in favor of Justice McDonald's dissent.

The trial court entered a summary final judgment in favor of the state, concluding that it was immune from suit. The district court reversed. Following *Butler*, it observed that the state owed a duty of reasonable care to warn of and to safeguard against the danger presented to swimmers by rip currents, *if* the area in which the child drowned was being operated as a swimming area; and because it concluded that a fact question existed as to whether the area was a swimming area, it reversed the state's judgment.

Andrews was thereafter cited with approval by this Court in the third recent decision of this Court that is controlling here, *Florida Dept. of Natural Resources v. Garcia*, 753 So.2d 72 (Fla. 2000). And if *Avallone* and *Butler* were not enough to demonstrate the error of the majority's disposition of the instant case, this Court's decision in *Garcia* should nail the point down. In that case -- which involved the same public beach in issue here, and to which the state had granted the City "management responsibilities" and required it to provide for "the limitation and control of land and water related activities such as boating, *bathing*, surfing, rental of beach equipment, and sale of goods and services to the public" (753 So.2d at 74) -- this Court reiterated its holdings in *Avallone* and *Butler*, in no uncertain terms:

> A governmental entity that operates a swimming facility "assumes the common law duty to operate the facility safely, just as a private individual is obligated under like circumstances." *Avallone v. Board of County Comm'rs*, 493 So.2d 1002, 1005 (Fla. 1986); *see Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986). Thus, a government entity operating a public swimming area will have the same operational-level duty to invitees as a private landowner --

> the duty to keep the premises in a reasonably safe condition and to warn the public of any dangerous conditions of which it knew or should have known. *See, e. g., Avallone*, 493 So.2d at 1005; *Brightwell v. Beem*, 90 So.2d 320, 322 (Fla. 1956); *Hylazewski v. Wet'N Wild, Inc.*, 432 So.2d 1371, 1372 (Fla. 5th DCA 1983).

753 So.2d at 75. Most respectfully, if *Avallone, Butler,* and *Garcia* are still the law in this Court, Judge Cope's dissenting opinion represents the only permissible disposition of these consolidated cases.

Because the duty of care owed by private entities in circumstances like those presented here has been settled for nearly a century by *McKinney* and its extensive progeny, and because the duty of care owed to Ms. Poleyeff and Mr. Breaux by the City on the facts in this case is settled by *Avallone, Butler,* and *Garcia,* we will resist the temptation to argue alternatively for recognition of a duty of care under the Court's current paradigm for resolving questions of this sort: "[T]he trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant." *McCain v. Florida Power Corp.*, 593 So.2d 500, 503 (Fla. 1992). Rather, we will await the City's response, and expand on the point if necessary in reply. All of which brings us to a more philosophical resting place.

It is undeniable that the economy of the City of Miami Beach depends in substantial measure upon the lure of its world-renowned beaches. And it is not merely foreseeable that the tourists invited to partake of the pleasures of its beaches will go swimming at those beaches; it is undeniable that they will. Because the "foreseeable zone of risk" created by the invitation plainly includes the risks associated with

swimming at the City's beaches, its duty of care ought to include a duty to at least warn its invitees of potential fatal hazards of which it is aware, but of which its invitees may be ignorant. That, we submit, is not an awful lot to ask. A simple warning, a red flag flying, or the availability of some simple, inexpensive rescue equipment might very well have saved two human lives in this case -- and, in our judgment at least, it would be socially irresponsible for the Court to conclude, as the City will urge, that the City may ignore with impunity the known risks to which its invitees are foreseeably exposed by the operation of its beaches and swimming areas.

Most respectfully, our tourists, who pay substantial bed taxes and who support a sizeable chunk of the State's economy, deserve better protection than what they received from the majority below. They deserve the far more sensible protection from known dangers extended to them by this Court in *Avallone, Butler,* and *Garcia.* We therefore respectfully submit that the district court erred in concluding that the City owed no duty of care whatsoever to petitioners' decedents.

V.
CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the district court's decision should be quashed, and that the cause should be remanded with directions to reverse the summary final judgments entered in the City's favor below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 20th day of May, 2003, to: Judith L. Weinstein, Esq., City of Miami Beach, 1700 Convention Center Drive, Miami Beach, FL 33139, Counsel for City of Miami Beach; Howard Pomerantz, Esq., 7800 W. Oakland Park Blvd., Suite 101A - Belle Terre Tower, Sunrise, FL 33351, Counsel for Breaux; Daniel S. Pearson, Esq., Holland & Knight LLP, 701 Brickell Avenue, Suite 3000, Miami, FL 33131, Counsel for City of Miami Beach; and to Nancy Little Hoffman, Esq., 440 E. Sample Road, Suite 200, Pompano Beach, FL 33064, Counsel for Breaux.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

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