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

REPLY BRIEF ON THE MERITS OF PETITIONER POLEYEFF

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I.
ARGUMENT

The City's 25 pages of argument notwithstanding, we remain convinced that the issue presented here is a simple one which is squarely controlled by the Court's recent decisions in *Butler v. Sarasota County*, 501 So.2d 579 (Fla. 1986); *Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986); and *Florida Dept. of Natural Resources v. Garcia*, 753 So.2d 72 (Fla. 2000). And make no mistake about it, for the Court to adopt the City's "no duty: swim at your own risk" position, it must recede from all three decisions -- and concede as well that it has been wrong on the point in a substantial number of prior decisions dating back nearly a century. Frankly, given that lengthy history (and the restraining hand of *stare decisis*), the likelihood of such a drastic reversal in policy seems so remote to us that we think little more needs to be said. Nevertheless, it is worth reminding the Court of a few things that the City and its amici hope it might overlook.

First, we remind the Court that issue presented here has arrived in this Court on a summary final judgment. As a result, the plaintiffs are entitled to have the evidence viewed in a light most favorable to their position here. *See Moore v. Morris*, 475 So.2d 666 (Fla. 1985). And on that favorable view of the evidence, there can be no question that the City was operating a "swimming area" within the meaning of *Butler*, *Avallone*, and *Garcia*. Indeed, the City was undeniably operating a "swimming area" along the entire length of its beach from its city limit to the south to its city limit on the north. And even if the City could legitimately argue that some isolated portions of its beachfront (with its wall-to-wall hotels) were not really "swimming areas," it cannot

make that argument with respect to the 29th Street location where Mrs. Poleyeff and Mr. Breaux drowned.

It cannot legitimately make that argument because it provided parking, restrooms, showers, water fountains, and boardwalk access at that location -- and, for a cut of the revenue, it permitted a concessionaire to rent beach chairs, umbrellas, and watercraft at that location under "rules and regulations" that explicitly required it to protect a "300 foot swimming area" in front of its business for the safety of the City's invitee-swimmers. Most respectfully, for the City to suggest that it was not operating a "swimming area" at the 29th Street location simply because it had chosen to erect no lifeguard stand there should seriously strain the credulity of the Court.

The City's contention that its management agreement with the state "limited the property being managed to the dry area landward, away from the ocean, and excluded the ocean property beyond" (respondent's brief, p. 22) should also strain the credulity of the Court. This Court *quoted* from the agreement in *Garcia*, noting that it required the City 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; emphasis in original). Most respectfully, if the city owed a duty of care to Mrs. Poleyeff and Mr. Breaux, that duty clearly extended to the "swimming area" in which they lost their lives.

We must also take issue with the City's suggestion that rip currents are such ordinary and "typical" phenomena that occur so regularly in the oceans of the world that everyone should be so familiar with them that no warning of their presence at a

given time and place should ever be necessary. The City knows better than this. In fact, rip currents of the severity that took the lives of Mrs. Poleyeff and Mr. Breaux require a relatively rare confluence of certain wind speeds, wind directions, tides, and bottom conditions. And the evidence in this case, viewed in the favorable light to which the plaintiffs are entitled, is that they are insidious and highly deceptive; that the public is generally unaware of them; that most persons are unable to recognize them when they occur; and that few persons know how to escape when caught in them.[1/] In contrast, the City's professional lifeguards are experts in their recognition and regularly post warning flags when they are detected -- which brings us to another point that ought to be telling here.

Although the City has urged the Court to hold that it owes no duty of care whatsoever to its invitee-swimmers with respect to "naturally occurring conditions" in the ocean, it has actually adopted an entirely different policy itself. Recognizing that the safety of its invitee-swimmers is worthy of protection as a matter of social policy, it has enacted stringent safety rules and regulations to govern the conduct of its

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[1/] For what it may be worth, undersigned counsel has been swimming at the beaches in Miami-Dade County off and on for over 50 years, and he has never encountered a rip current of the type that took the lives of Mrs. Poleyeff and Mr. Breaux. The Court's experiences are likely to have been the same. The phenomenon is sufficiently rare and deceptive enough that even knowledgeable and intelligent persons can be trapped by it. Indeed, in 1978, one of the founding partners of undersigned counsel's law firm (who appeared frequently in this Court), Robert Orseck, was caught in a rip current in the Mediterranean, and drowned while attempting to rescue a child carried out to sea by the phenomenon. Surely, the City's contention that rip currents are ordinary phenomena presenting no unusual dangers to swimmers at Miami Beach is a makeweight which cannot be defended when put to the test of ordinary experience.

concessionaires; it has located lifeguard stands at a number of places up and down the length of its beach; it has provided its beach with professional lifeguards, life-saving equipment, and beach patrols; and it has itself assumed the socially responsible duty of providing warnings of dangerous rip currents when they are detected by its professional staff.

As a result, even if this Court had never decided *Butler*, *Avallone*, and *Garcia*, it would be compelled to recognize the existence of a duty of care here under the doctrine of "assumed duty":

> It is clearly established that one who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care. . . .
>
> Voluntarily undertaking to do an act that if not accomplished with due care might increase the risk of harm to others or might result in harm to others due to their reliance upon the undertaking confers a duty of reasonable care, because it thereby "creates a foreseeable zone of risk." *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992); . . .

Union Park Memorial Chapel v. Hutt, 670 So.2d 64, 66-67 (Fla. 1996). And, of course, since the City itself deemed such a social policy to be a necessary and perfectly reasonable one, the Court should have no difficulty in simply agreeing with it on that point.

Most respectfully, the City is drawing the line of contention at the wrong place in this case. Given *Butler*, *Avallone*, *Garcia*, and its own long-established policy, the City should recognize that it *did* owe a duty of reasonable care to Mrs. Poleyeff and Mr. Breaux, and it should engage them on the different *factual* issue of whether it

breached that duty on the facts in this case. On that issue, it will be free to argue to a jury what it has suggested here -- that, given the volume of swimmers at the 29th Street location of its beach, it was reasonable not to place a lifeguard stand or any lifesaving equipment there; that, given the "universal" (its word, not ours) phenomena of the "naturally occurring conditions" known as rip currents, it was reasonable not to provide any warning of the particular rip current that took their lives; that it neither knew nor should have known of that particular rip current; that it could not have anticipated that Mrs. Poleyeff and Mr. Breaux would go in the ocean since they only rented beach chairs and umbrellas; or anything else by which it thinks it might convince a jury that it exercised reasonable care under all the circumstances in this case.

But the City goes too far when it asks this Court to hold that it owes no duty of care to its invitee-swimmers at all. Such a holding would simply give the City (and every other governmental entity in the state) a green flag to remove its lifeguard stands and lifesaving equipment; to pack up its lifeguards and beach patrols and send them off to different careers; and to leave its invitee-swimmers at the mercy of the sea. While that might be beneficial to the City's budget, it would be a disaster for the tourist industry which generates the bulk of its revenue.

It is also worth reminding the Court that the "naturally occurring conditions" in issue here are relatively rare, deceptively dangerous rip currents that are capable of taking (and which do take) human lives -- and of which the City's lifeguards are generally aware and capable of detecting, and of which the beachgoing public is generally ignorant. The City's (and its amici's) reliance upon cases involving "open

and obvious" dangers -- like shallow water, sand bars, strong surf, wave action, flotsam and jetsam, indigenous animals, storms, lightning, and the like -- are therefore completely off point.

So too are the numerous California decisions with which the City has peppered its brief. California has two statutes that immunize governmental entities from liability for injuries caused by "naturally occurring conditions" at public beaches: *West's Ann. Cal. Gov. Code* §§831.2 and 831.21.[2/] The City has failed to disclose the existence of these statutes to the Court; it has identified no comparable statute in this state; and there is no comparable statute in this state. Indeed, as we explained in our initial brief, the City did not share the sovereign immunity of the state prior to 1973; it gained no

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[2/] Section 831.2 reads as follows: "Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." Section 831.21 reads in pertinent part as follows:

> Public beaches shall be deemed to be in a natural condition and unimproved notwithstanding the provision or absence of public safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, beach cleanup services, or signs. . . .

Despite the existence of §831.2, and prior to the enactment of §831.21, a California municipality *could* be found liable for failing to warn a swimmer of the naturally occurring condition of a rip current at a public beach. *See Gonzales v. City of San Diego*, 130 Cal. App.3d 882, 183 Cal. Rptr. 73 (1982). *See also Buchanan v. City of Newport Beach*, 50 Cal. App.3d 221, 123 Cal. Rptr. 338 (1975) (immunity not available where injury caused by combination of "naturally occurring condition" and improvements on property). These decisions were expressly abrogated by the California legislature with the enactment of §831.21 in 1988. *See Knight v. City of Capitola*, 4 Cal. App.4th 918, 6 Cal. Rptr.2d 874 (1992).

immunity from "operational level" activities when the legislature *waived* the state's sovereign immunity in that year; and according to *Butler*, the type of statutory immunity available to governmental entities in California is simply not available in Florida on the facts in this case. The California decisions upon which the City has staked its case here -- as well as the Pennsylvania, Massachusetts and Texas decisions upon which it relies, which also turn on the existence of sovereign immunity or a statutory immunity from suit -- are therefore quite beside the point.

Neither, as the City and its amici suggest, will recognizing a duty of care in this case create an "intolerable burden" or make governmental entities "insurers" of the safety of their invitee-swimmers. All that it will require is that governmental entities operating swimming areas exercise reasonable care under the circumstances for the safety of their invitees. "If reasonable care is exercised, there can be no liability. The alternative, the exercise of no care or unreasonable lack of care, subjects the facility to liability." *Nova University, Inc. v. Wagner*, 491 So.2d 1116, 1118 (Fla. 1986). And recognition of that universal proposition of the law of premises liability, we submit, is not an awful lot to ask.

Indeed, we should not have to ask for that at all, because this Court has already imposed that duty on the City with respect to the swimming areas it operates along its beachfront. It summarized that duty less than three years ago as follows:

> 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).

Garcia, supra, 753 So.2d at 75. This pronouncement draws no distinction between man-made conditions and "naturally occurring conditions"; it applies to "*any* dangerous conditions of which [the governmental entity] knew or should have known" -- and the "knew or should have known" limitation effectively eliminates the City's professed fear that it will be held liable for the "ever-changing conditions" of the sea of which it cannot be aware.

In effect, *Butler* (which undeniably involved the "naturally occurring condition" of a rip current), *Avallone*, and *Garcia* simply apply to governmental entities operating swimming areas the long-settled rule of premises liability recognized by §343 of the *Restatement (Second) of Torts*, which was explicitly adopted by this Court as the law in Florida in *Hall v. Holland*, 47 So.2d 889 (Fla. 1950):

> Dangerous Conditions Known to or Discoverable by Possessor.
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

As Comment *d* to §343 explains: "An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein." And that is the extent of the duty the plaintiffs seek here -- nothing more, nothing less.

While we are on the subject of §343 of the *Restatement*, we should note that the several New York decisions that the City has mustered in its brief involve "open and obvious" dangers *exempted* from liability by the *next* section of the *Restatement (Second) of Torts*, §343A.[3/] That is clear enough from the subsequent history of

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[3/] The exemption is not absolute, however. Section 343A contains an important qualification which would be applicable here even if the danger of rip currents were "open and obvious":

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Herman v. State, 463 N.Y.S.2d 501 (App. Div. 1983) (no liability for failure to warn of sand bar), which the City has failed to disclose to the Court. In affirming this decision for a different reason than the reasons announced by the lower court, the Court of Appeals explained:

> . . . The Appellate Division reversed and dismissed the complaint, refusing to impose a duty to warn, both because of the natural, highly transitory character of the sand bars, making any warning impractical and of little value, and because plaintiff himself knew or should have known of any danger posed by the sand bars.
>
> To be liable in damages for failure to warn of a dangerous condition, a property owner must have notice of the condition itself as well as the unreasonable risk it creates. Here, defendant could not anticipate a danger to swimmers simply from the existence of the natural, shifting condition of sand bars in the ocean . . . And, on a beach visited by millions of bathers, defendant was not placed on notice of the danger by virtue of three similar incidents over the preceding 24 years. Since defendant did not in these circumstances have a duty to warn, we do not reach the issue of causation.

Herman v. State, 63 N.Y.2d 822, 823, 472 N.E.2d 24, 482 N.Y.S.2d 248 (1984). Of course, the same can hardly be said of the quite different, latent and concealed, and far more insidious and dangerous "condition" involved here -- as this Court has already determined in *Butler*.[4/]

[4/] The City has also failed to disclose either the issue or the lengthy subsequent history of *Darby v. Societe des Hotels Meridien*, 1999 WL 459816 (S.D.N.Y. 1999), *aff'd*, 13 Fed. Appx. 37 (2d Cir. 2001). The issue in that case was whether a beachfront *hotel* owed its guests a duty to warn of rip currents at a public beach operated by the government of Brazil. On a certified question from the Second Circuit, the New York

Finally, because this Court's decision in *Butler* is the closest case on point -- indeed, because it squarely rejects the City's position here -- we should briefly address the City's desperate attempt to "distinguish" it on its facts. The City can find no facts on the face of the Court's decision to "distinguish" it from this case, so it has collected all the briefs filed in this Court in the *Butler* case, and filed them in the record. It then asks the Court to note a single fact contained in those briefs -- that the swimming area in *Butler* was marked off with buoys. And it argues that, because the swimming area in this case was not marked off with buoys, *Butler* can safely be ignored here. Most respectfully, this argument *is* a desperate one, for at least three reasons that come readily to mind.

First, if the *Butler* decision was meant to turn upon the existence or non-existence of buoys in the water, the decision would certainly have said so. The fact that the buoys were not mentioned in the decision is proof enough, we think, that their existence was not deemed significant to the decision. What was deemed significant was that Sarasota County was operating a swimming area containing dangerous rip currents -- just as the City was in this case -- and on that point, the two cases are plainly indistinguishable.

Second, the obvious purpose of the buoys in the *Butler* case was to delineate the

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Court of Appeals held that the hotel owed no such duty -- that the duty to warn was owed by the Brazilian government. *Darby v. Compagnie National Air France*, 96 N.Y.2d 343, 753 N.E.2d 160, 728 N.Y.S.2d 731 (2001). All things considered, the New York decisions upon which the City relies provide no support whatsoever for its position here.

swimming area from the areas that were *not* to be utilized as swimming areas. In this case, however, the *entire* beach within the city limits of the City of Miami Beach is open to the public as a swimming area, so there is neither need nor reason to place buoys anywhere to mark off *non*-swimming areas, as Sarasota County did in the *Butler* case. Once again, *Butler* turns upon the existence of a swimming area, not on the buoys marking off a non-swimming area -- and this case must turn on the existence of a swimming area as well, whether marked by buoys or not.

Third, the City has overlooked (or more likely, hopes the Court will overlook) the proven fact that the swimming area in which Mrs. Poleyeff and Mr. Breaux drowned was actually *required* to be delineated with a line of buoys marking off a non-swimming area reserved for the passage of watercraft. As we noted in our initial brief, the record contains a lengthy and detailed list of "Rules and Regulations for Beachfront Operations" governing the operation of Hurricane Rentals' watercraft rental business on the beachfront. Included in the list is a regulation establishing a "swimming area" extending from the shoreline in front of the concession to "300' east of shoreline or 100' from the nearest bather," in which recreational watercraft must be prohibited from operating, and a regulation requiring a marked channel clear of swimmers for the ingress and egress of rented watercraft. In short, if the City is correct that *Butler* turns on the existence of devices marking off swimming areas from non-swimming areas, then it still loses on the facts in this case. And with that off our chest, we rest our case.

II.

CONCLUSION

Most respectfully, unless this Court is prepared to overrule its own decisions in *Butler*, *Avallone* and *Garcia* (and a number of other decisions that precede them), the district court's decision should be quashed, and 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 11th day of August, 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; Nancy Little Hoffman, Esq., 440 E. Sample Road, Suite 200, Pompano Beach, FL 33064, Counsel for Breaux; Edward G. Guedes, Esq., Weiss, Serota, et al., 2665 South Bayshore Drive, Suite 420, Miami, FL 33133, Counsel for Amici, Village of Key Biscayne and Bal Harbour Village; Stephen H. Cypen, Esq., 825 Arthur Godfrey Road, Miami Beach, FL 33140, Counsel for Amicus, Town of Surfside; Lynn M. Dannheisser, Esq., 17070 Collins Ave., Suite 250, Sunny Isles Beach, FL 33160, Counsel for Amicus, City of Sunny Isles Beach; and to John C. Dellagloria, Esq., 776 NE 125 Street, North Miami, FL 33161, Counsel for Amicus, City of North Miami.

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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JOEL D. EATON