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John A. Cardegna v. Buckeye Check Cashing, Inc.

CHIEF JUSTICE: GOOD MORNING EVERYONE AND WELCOME TO THE FLORIDA SUPREME COURT. WE APPRECIATE COUNSEL BEING READY TO GO ON THE FIRST CASE. THESE ARE CONSOLIDATED CASES. WHERE -- BREAUX VERSUS CITY OF MIAMI BEACH AND POLEYEFF VERSUS CITY OF MIAMI BEACH. YOU MAY PROCEED.

GOOD MORNING. I REPRESENT RABBI ISRAEL POLEYEFF, WHO REPRESENTS ROBBY ISRAEL POLEYEFF AGAINST THE CITY OF MIAMI BEACH AND THIS IS NANCY LITTLE HOFFMANN, WHO REPRESENTS FREDERICA BREAUX VERSUS CITY OF MIAMI BEACH. ON THE GROUND THAT THE CITY'S WORDS THAT IT OWED, QUOTE, NO COMMON LAW DUTY TO WARRANT SAFETY TO OTHERS FROM OCCURRING, EVEN IF HIDDEN IN DANGEROUS WATERS IN WHICH THEY ARE FOUND. IT IS OUR POSITION THAT THAT HOLDING IS CONTRARY TO A UNIVERSAL PROPOSITION OF THE LAW OF PREMISE LIABILITY RECOGNIZED IN SECTION 343 OF THE RESTATED SECOND OF TORTS.

IS ONE OF THE FIRST ISSUES HERE, WHETHER OR NOT THE CITY ACTUALLY CONTROLLED THIS AND DESIGNATED THIS AS A BEACH AREA?

I DON'T BELIEVE THAT IS AN ISSUE HERE AT ALL, YOUR HONOR.

BUT IN THE THIRD DISTRICT'S OPINION, IT SAYS THAT WE HOLD THAT AN ENTITY WHICH DOES NOT CONTROL THE AREA, SO IF WE, RATHER THAN THE BIGGER, FIRST BIGGER QUESTION OF WHETHER, IF THEY OPERATE THE BEACH, WHETHER THEY HAVE A DUTY TO WARN OF THESE CONDITIONS. CAN YOU ADDRESS THE ISSUE ABOUT WHAT YOU SAID THE PUBLIC BEACH WAS OPERATED BY THE CITY. IS THAT A DISPUTED ISSUE? IS THAT SOMETHING THAT SUMMARY JUDGMENT, THAT WAS THE BASIS OF SUMMARY JUDGMENT?

IT IS NOT THE BASIS OF SUMMARY JUDGMENT, YOUR HONOR. THE WORD CONTROL DOES NOT APPEAR IN ANY OF THIS COURT'S CONTROLLING DECISIONS ON THE POINT. THIS WAS SOMETHING THAT WAS ADOPTED FROM AN EARLIER DECISION IN WHICH WE ARGUED WHETHER OR NOT THE HOTELS AND THE CONCESSION OWNERS HAD A DUTY OF CARE TO MR. BREAUX AND MISS POLEYEFF.

IF WE USE THE WORD AND SUBSTITUTE "OPERATE" FOR "CONTROL", IF THEY ARE A PUBLIC ENTITY WHICH OPERATES A PUBLIC BEACH, YOU WOULD AGREE WITH THAT OVERALL PROPOSITION?

YES, YOUR HONOR. ACTUALLY WE HAD AGREED TO ARGUE OUR TIME. I WAS GOING TO ARGUE THE LAW AND MS. HOFFMANN ARGUE THE FACTS, AND WE WERE GOING TO PROVE THAT IT WAS THE RESPONSIBILITY OF THE BEACH. WE ARE GETTING AHEAD OF OUR ARGUMENT. BUT THE FACT IS THAT THERE WERE DRINKING FOUNTAINS, PARKING LOT, ACCESS BY, VIA BOARDWALK, AND THAT THEY HAD LICENSED A CONCESSIONAIRE AT THE VERY SPOT WHERE THESE DROWNINGS OCCURRED, TO RENT BEACH CHAIRS AND UMBRELLAS.

LET ME ASK YOU FROM THAT POINT, AS I UNDERSTAND WHAT WAS GOING ON IN MIAMI BEACH AT THIS TIME, WAS THAT THERE WAS A LIFEGUARD STATION AT 21st STREET, CORRECT?

CORRECT, YOUR HONOR.

THERE WAS A LIFEGUARD STATION AT 35th STREET, CORRECT?

SOMEWHERE IN THAT NEIGHBORHOOD, YES.

OKAY. THERE WAS NOT A LIFEGUARD STATION AT 29th STREET.

THERE WAS NOT, ALTHOUGH THERE WAS CONSIDERABLE AMOUNT OF SWIMMING AND THERE WAS A CONCESSIONAIRE.

SO IS IT YOUR POSITION, WITHIN THIS DUTY ARGUMENT, THAT THE CITY HAD A DUTY TO POST A LIFEGUARD AT 29th STREET?

OUR POSITION IS BROADER THAN THAT, YOUR HONOR. OUR POSITION IS THAT THE DUTY, THAT THE CITY OWED A DUTY OF REASONABLE CARE, BASED ON SECTION 343 OF THE RESTATEMENT, AND NEARLY A CENTURY'S WORTH OF CASES FROM THIS COURT, A DUTY OF REASONABLE CARE, WHICH MIGHT INCLUDE, MIGHT INCLUDE, AS A MATTER OF FACT, THE REASONABLENESS OF PUTTING A LIFEGUARD AT THIS PARTICULAR AREA, BUT IT WOULD ALSO INCLUDE THE DUTY TO WARN OF A DANGER KNOWN TO OR WHICH SHOULD HAVE BEEN KNOWN BY THE CITY WHICH WAS NOT READILY APPARENT TO THE SWIMMERS.

WHAT I AM TRYING TO GRAPPLE WITH, IS THAT I UNDERSTAND THE McCAIN ARGUMENT HERE AND THE ZONE OF REASONABLENESS OR THE ZONE OF DANGER, BUT WHAT I AM CONCERNED ABOUT, IS HOW, UNDER THE CIRCUMSTANCES OF A RIPTIDE OR SOMETHING THAT IS SUDDEN IN THE OCEAN, HOW IS THAT DUTY PERFORMED BY A, THE ENTITY, THE STATE OR THE CITY, THAT CONTROLS THE BEACH? DO THEY HAVE TO POST LIFEGUARDS, OR DO THEY HAVE TO POST A SIGN, AND HOW, WHAT IS THE DISTANCE OF THE SIGNS? HOW DO WE FIGURE THAT OUT?

WELL, YOUR HONOR, THE FACTS WILL SHOW, AND MS. HOFFMANN WAS DESIGNATED TO DEMONSTRATE THIS, THAT THESE RIP CURRENTS ARE VERY INSIDIOUS AND DECEPTIVE TO THE LAY PUBLIC, BUT THE PROFESSIONAL LIFEGUARDS AND THE BEACH PATROLS ON THIS BEACH ARE TRAINED HOW TO RECOGNIZE THEM. THEY ALREADY KNOW HOW TO RECOGNIZE THEM. THEY ALREADY ASSUMED THE DUTY OF PUTTING RED FLAGS FLYING ON THE BEACH, WHENEVER THERE ARE RIPTIDES. NOW, THERE WILL BE A FACT QUESTION AS TO WHETHER THIS RIPTIDE WAS SUCH THAT AND SUDDEN THAT THE CITY COULDN'T HAVE DISCOVERED IT, BUT WE WILL SHOW THAT THE BEACH PATROL, WHO HAD THE DUTY IN THIS CASE AND ASSUME IT, WHETHER THE LAW APPLIED IT OR NOT, TO POST RED WARNING FLAGS ON THE BEACH WHENEVER THEY WERE RIPTIDES AND TO PATROL THE BEACH, THEN WE OUGHT TO BE --

SO IF WE TAKE THAT, THEN THE SAME WOULD BE TRUE FOR HIGH SURF, SHARKS, JELLYFISH AND ANY OTHER NATURALLY-OCCURRING TRANSIENT CONDITIONS OF OCEAN SWIMMING?

I THINK THE LEGAL QUESTION WOULD HAVE TO BE CERTAINLY THAT IS A FACT QUESTION. CERTAINLY IF THERE ARE SHARKS IN THE AREA AND IF THEY DON'T WARN SWIMMERS, THERE OUGHT TO BE A LIABILITY. NOW, AS TO JELLYFISH OR HIGH SURF, NOW WE ARE DEALING WITH A QUESTION OF FACT HERE, BUT WE ARE DEALING WITH WHAT I THINK IS A BROADER QUESTION OF WHETHER THE CITY OWES DUTY TO EXERCISE REASONABLE CARE UNDER THE CIRCUMSTANCES, TO EITHER PROTECT ITS SWIMMERS OR WARN ITS SWIMMERS OF DANGEROUS CONDITIONS ON ITS PREMISES, OF WHICH IT KNOWS OR SHOULD HAVE KNOWN AND WHICH ARE NOT READILY APPARENT TO THE SWIMMERS.

I GUESS -- READILY APPARENT TO THE SWIMMERS.

I GUESS MY QUESTION OF TRANSIENT CONDITIONS TO PERMANENT CONDITIONS, AND IT APPEARS THAT IT WAS DECIDED THAT IT APPEARED TO BE A DROP OFF IN THAT SWIMMING AREA OR A DESIGNATED WHERE THEY PUT BUOYS IN THAT AREA WHERE THIS IS WHERE YOU ARE SUPPOSED TO SWIM AND THERE IS A DEEP DROP OFF, AS OPPOSED TO RIPTIDES, THAT WILL MOVE UP AND

DOWN THE BEACH, DEPENDING ON THE LOCATION ON THE SAND BARS, ET CETERA.

AGAIN, I THINK WE ARE INTO A FACTUAL QUESTION BUT THE BUTLER CASE INVOLVED A RIPTIDE. IT INVOLVED A RIPTIDE, AND THEIR ARGUMENT ISN'T --

WAIT. WAS IT A CURRENT TIED OR A RIPTIDE? THERE IS A BIG DIFFERENCE, I THINK, BETWEEN A CURRENT TIED, WHEN THE TIDES ARE GOING HIGH AND LOW TIDE THAT ARE CONSISTENT AT THE EDGE OF A PATH, AS OPPOSED TO A RIPTIDE THAT WOULD DRIFT UP AND DOWN THE COAST, DEPENDING ON THE VARIATIONS OF SAND BARS, ET CETERA.

THE WAY I READ THE BUTLER DECISION, THERE WAS A RIP CURRENT INVOLVED. THERE WAS A RIP CURRENT INVOLVED IN THE SECOND DISTRICT'S DECISION IN ANDREWS. RIP CURRENTS ARE NOT SO TRANSIENT. THEY EXIST. THEY DON'T COME AND GO IN AN INSTANT, WHEN THE WIND IS COMING SHORT WARD AND CERTAIN TIED CONDITIONS, CERTAIN BOTTOM CONDITIONS, THEY EXIST FOR LONGER THAN JUST THREE MINUTES. THE BEACH, THE CITY KNOWS THESE THINGS OCCUR, AND IT HAS A PROCEDURE IN PLACE TO WARN PEOPLE ABOUT THEM AT EVERY PLACE ON ITS BEACH, EXCEPT AT 29th STREET, WHERE IT HAS A PARKING LOT, SHOWERS, RESTROOMS, A CONCESSION RENTING BEACH CHAIRS AND UMBRELLAS, WHETHER OR NOT THE DUTY THAT WE SEEK HERE WAS BREACHED ON THE FACTS OF THIS CASE, IS A QUESTION OF FACT.

MR. EATON, YOU AGREE THAT MIAMI BEACH IS A LONG STRETCH OF BEACH, AND THAT ESSENTIALLY PEOPLE SWIM ANYWHERE FROM BEGINNING AT LEAST AT FIFTH STREET, ALL THE WAY UP TO 125th STREET, OVER SEVERAL MILES, CORRECT?

WELL, YOU ARE MAKING AN ARGUMENT ON THE REASONABLENESS OF THEIR CONDUCT.

I AM ASKING YOU A QUESTION NOW, DO YOU AGREE THAT PEOPLE SWIM IN THAT AREA?

TO SOME EXTENT, BUT THE FACTS OF THIS CASE SHOW THAT THEY ROOT THEMSELVES INSERT AREAS WHERE THE CONCESSIONS ARE.

MY QUESTION IS, DO YOU ARGUE THAT THE CITY OF MIAMI BEACH ASSUMED A DUTY TO PROTECT THAT ENTIRE COASTLINE WHERE PEOPLE MAY BE SWIMMING AND CERTAINLY HAVE SWUM IN THE PAST AND CERTAINLY WILL BE SWIMMING IN FUTURE, UP AND DOWN THAT BEACH.

TO THES EXTENT THAT AREA OF -- TO THE EXTENT THAT AREA OF THE BEACH WAS OPEN TO THE SWIMMING PUBLIC, WHICH THIS WAS, WE CONTEND THAT THEY OWE A REASONABLE DUTY OF CARE.

THE ENTIRE STRIP FROM 5th STREET OF MIAMI BEACH ALL THE WAY THROUGH 125th STREET, IS USED BY SWIMMERS AT SOME POINT FOR SWIMMING, SO DOES THE CITY NOW HAVE A DUTY TO POST A LIFEGUARD STATION EVERY 100 FEET, EVERY 100 YARDS, TO PUT A RED WARNING FLAG EVERY 100 FEET OR 100 YARDS? WHAT IS THE EXTENT OF THE DUTY?

YOUR HONOR, THE CITY OWES A DUTY OF REASONABLE CARE WHEN IT OPERATES A SWIMMING AREA. IF IT OPERATES A SWIMMING AREA FROM SOUTH BEACH ALL THE WAY TO THE NORTH END OF ITS CITY LIMITS, THEN IT OWES THAT DUTY. WHETHER OR NOT IT BREACHED THE DUTY BY FAILING TO POST A LIFEGUARD AT A PARTICULAR LOCATION, IS A QUESTION OF FACT, AND THAT WILL DEPEND, TO SOME EXTENT, ON THE NUMBER OF SWIMMERS THAT UTILIZE THE AREA, AND THE FACTS OF THIS CASE AS MS. HOFFMANN WILL DEMONSTRATE, SHOW THAT THIS IS AN AREA IN WHICH THERE WAS AN AWFUL LOT OF SWIMMING, BECAUSE THEY LICENSED A CONCESSIONAIRE TO RENT BEACH CHAIRS AND CONCESSIONAIRES TO RENT UMBRELLAS THERE MR. CHIEF JUSTICE

YOU WERE GOING TO SPLIT YOUR TIME.

I AM STEPPING ON OUR TIME. THIS GOES BACK TO MCKINNEY VERSUS ADAMS AND REPEATED IN IDE VERSUS CITY OF ST. CLOUD AND REPEATED IN THE '80s IN THE AVALLONE CASE AND BUTLER CASE AND TO A SENSE, MAN-MADE OR NATURAL, THE CITY OWES A DUTY, AS IN THE STARK CASE, AND I WILL NOW YIELD TO MS. HOFFMANN. THANK YOU.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM NANCY HOFFMANN, AND AS YOU KNOW, I ALSO REPRESENT MRS. BREAUX IN THIS CASE. I HAVE TO RESPOND NOT ONLY FACTUALLY BUT ALSO, I WOULD LIKE TO RESPOND FURTHER TO SEVERAL OF THE JUSTICES'S QUESTIONS, IF I MAY, BEFORE I GET INTO THE FACTS. AND I WANT TO POINT OUT THAT, WHAT MAKES THIS CASE DIFFERENT, PERHAPS, FROM SOME OF THE OTHER CASES THAT THE COURT HAS DEALT WITH, IS THAT THERE IS IN PLACE, A MANAGEMENT AGREEMENT BETWEEN THE STATE OF FLORIDA AND THE CITY OF MIAMI BEACH. THAT MANAGEMENT AGREEMENT SPECIFICALLY REQUIRES THE CITY TO LIMIT AND CONTROL CERTAIN LAND AND WATER ACTIVITIES, INCLUDING SWIMMING, BATHING AND SO FORTH, SO IF WE ARE GOING TO TALK ABOUT CONTROL, I THINK THAT WE NEED TO LOOK AT THAT MANAGEMENT AGREEMENT.

SO YOUR BASIS, THEN, FOR DUTY, IS BASED UPON CONTRACT, AS OPPOSED TO McCAIN.

WELL, NO, NOT ENTIRELY. IN PART. I AM SAYING THAT BUTT RESIST OUR ARGUMENT THAT -- THAT BUTTRESS HE IS OUR ARGUMENT -- BUTTRESSEZ OUR ARGUMENT, BUT WHETHER A GOVERNMENT ENTITY IS OPERATE AGO PUBLIC SWIMMING AREA, THE COURT HAS TO LOOK AT A NUMBER OF FACTORS, INCLUDING THE NUMBER OF SWIMMERS AND SO FORTH. IT IS NOT A QUESTION THAT THE THIRD DISTRICT SHOULD HAVE DETERMINED AS A MATTER OF LAW HERE. IT IS A FACTUAL ISSUE, EXCEPT THAT IN THIS CASE, IT IS ACTUALLY A, I BELIEVE A LEGAL ISSUE THAT REQUIRES A DECISION IN FAVOR OF OUR POSITION, BECAUSE, AS THIS COURT POINTED OUT IN GARCIA, IT IS THE SAME MANAGEMENT AGREEMENT.

GOING BACK, THEN, TO THE PRELIMINARY QUESTION I HAD, IF WE ASSUME THIS OCCURRED AT 39th STREET, WE ARE GOING TO, I WILL ASK QUESTIONS ABOUT WHETHER IT WOULD BE A DUTY TO WARN OF THE RIPTIDE, BUT WE ARE NOW DEALING WITH AN AREA THAT, AS I UNDERSTAND IT, IS A QUESTION AS TO WHETHER THIS WAS DESIGNATED AS A PUBLIC SWIMMING AREA. NOW, YOU GOT FACTS IN THE RECORD TO SAY THE RESTROOMS AND THE, BUT IS THAT A QUESTION OF, THAT WAS CROSS MOTIONS FOR SUMMARY JUDGMENT, OR IS THAT GOING TO BE A QUESTION OF FACT AS TO WHETHER IT WAS OR WAS NOT A DESIGNATED PUBLIC SWIMMING AREA?

LET ME BACK UP, JUSTICE PARIENTE, AND SAY THAT IT IS NOT NECESSARY THAT THE CITY HAVE, QUOTE, DESIGNATED IT. THAT IS WHAT THIS COURT SAID IN GARCIA. IT SAID IT IS ENOUGH --

I UNDERSTAND, BUT YOU DON'T JUST SAY THAT, BECAUSE THERE IS A MANAGEMENT AGREEMENT, JUST IN COMPARISON FOR 120 BLOCKS OF BEACH, THAT EVERY SINGLE PLACE THAT SOMEONE COULD GET ON IS SOMEPLACE THAT THE CITY IS GOING TO HAVE TO POST A SIGN. I MEAN, YOU DON'T NEED TO TAKE THAT EXTREME POSITION TO THIS CASE, AS I UNDERSTAND IT.

NO. WE DON'T NEED TO. WE CERTAINLY, I THINK WE COULD, BUT WE DON'T NEED TO, BECAUSE IN THIS CASE, FACTUALLY, THE, AS YOU HAVE ALREADY HEARD, THE CITY HAS ERECTED AMENITIES THERE. THE CITY KNEW, AND WE HAVE TESTIMONY FROM THE CITY MANAGER AND THE LIFEGUARDS TO THAT EFFECT, ALL IN THE RECORD, THAT THE CITY KNEW THAT PEOPLE WOULD TEND TO SWIM WHERE THESE AMENITIES WERE PRESENT, AND PERHAPS MOST TELLINGLY IS THE FACT THAT THE CITY DERIVED REVENUE FROM THE OPERATION OF THE BEACH FRONT CONCESSIONAIRE AT THAT LOCATION. THEY LICENSED THEM AND TOOK A CUT OF THE PROFITS, AND THIS ALL DREW PEOPLE. THEY, THE CITY DID, INDEED, EXERT CONTROL. THEY REQUIRED THE CONCESSIONAIRE FOR EXAMPLE, TO OPERATE ITS WATERCRAFT AND SO FORTH, ONLY INSERT

AREAS. THEY DID EXERT CONTROL.

SO DO YOU TAKE THIS CASE AS HAVING SAID THAT, EVEN ASSUMING THEY OPERATED THIS AREA, THERE, GOING BACK, THAT THERE IS NO DUTY TO WARN OF NATURALLY OCCURRING CONDITIONS, OR THAT BECAUSE THEY DIDN'T OPERATE THE AREA, IT WAS NO DUTY TO WARN, BECAUSE TO ME THOSE ARE TWO DIFFERENT THINGS.

THEY ARE, AND FRANKLY I THINK THAT THE THIRD DISTRICT WOULD HAVE BEEN WRONG ON EITHER COUNT AND NEEDS TO BE REVERSED. WHICHEVER WAY YOU INTERPRET THEIR DECISION, BUT THEY, WHAT THEY DID, IN THIS CASE, WAS THEY BORROWED LANGUAGE FROM THEIR PRIOR OPINION IN OUR ACTION AGAINST THE HOTELS AND THE CONCESSIONAIRE, WHICH THEY HAD DETERMINED DID NOT EXERCISE ANY CONTROL.

CHIEF JUSTICE: YOU ALL HAVE RESERVED 5 MINUTES FOR REBUTTAL AND THAT IS WHY THAT ORANGE LIGHT IS ON. IT IS UP TO YOU.

NO. I WANT TO SAVE THE TIME FOR REBUTTAL. THANK YOU VERY MUCH.

GOOD MORNING.

GOOD MORNING.

CHRISTOPHER BELLOWS AND STEPHEN GRIMES, ON BEHALF OF THE RESPONDENT CITY OF MIAMI BEACH.

COULD YOU START OUT BY GIVING US THE LEGAL LANDSCAPE ESCAPE, AND LET ME -- LANDSCAPE, AND LET ME ASK YOU TO DO IT IN THE FORM OF REACTING TO A COUPLE OF HYPOTH'S. THAT IS THAT YOU RECOGNIZE THAT, CERTAINLY IN SOME INSTANCES, A MUNICIPALITY THAT CREATES A PUBLIC BEACH, POSTS HOURS FOR SWIMMING, AND PROVIDES LIFEGUARDS AND OTHER SUCH AMENITIES AT A BEACH, COULD BE RESPONSIBLE, COULD THEY NOT, FOR NOT PROVIDING THOSE SERVICES REASONABLY? I MEAN, THERE ARE INSTANCES, IN WHICH MUNICIPALITIES HAVE BEEN HELD LIABLE. IS THAT CORRECT?

CERTAINLY, YOUR HONOR. FOR EXAMPLE IN THIS CASE --

LET ME TAKE YOU, LET'S POSE THAT ON ONE END OF THE SPECTRUM, WE HAVE A CITY THAT JUST HAS A SMALL LAKE OR A POND. THAT IS NATURALLY OCCURRING. WITHIN THE MUNICIPALITY. AND IT JUST HAS REGULAR GROWTH AROUND IT OR WHATEVER. THE CITY DOESN'T DO ANYTHING WITH IT. PEOPLE GO THERE AND THEY FISH. AND LOOK AT THE PONDS OR WHATEVER, AND MAYBE OCCASIONALLY PEOPLE GO AND SWIM IN IT, MAYBE THEY GO SKINNY DIPPING, FOR ALL I KNOW, BUT THEN AT THE OTHER END OF THE SPECTRUM, WE HAVE A MUNICIPALITY AND LET'S SAY IT IS A LAKE, AND THEY CREATE A PUBLIC BEACH. THEY BRING IN TRUCKLOADS OF WHITE SAND AND THEY PROVIDE BATHROOMS AND LIFEGUARDS, AND THEY PUT UP SIGNS ABOUT THE SWIMMING HOURS, AND THAT KIND OF THING. TRYING TO SORT OF CREATE ONE WHERE IT IS SORT OF OBVIOUS THAT THERE IS SOME RESPONSIBILITY HERE, AND ANOTHER ONE WHERE IT PROBABLY LOOSE QUESTIONABLE ABOUT WHAT THE CITY, WHERE DOES THIS CASE FALL ON THAT SPECTRUM, THAT I HAVE JUST DESCRIBED TO YOU BY MY HYPOTHETICALS?

WELL, I THINK THIS CASE FALSE MORE, THE FIRST LAKE THAT IS LEFT IN ITS NATURAL, UNTOUCHED PRIMITIVE CONDITION, AND THE DIFFICULTY THAT I HAVE WITH THE LAKE, HYPOTHETICAL, IS THAT THE THIS IS THE OCEAN, AND THE OCEAN IS A LITTLE BIT -- IS THAT THIS IS THE OCEAN, AND THE OCEAN IS A LITTLE BIT DIFFERENT IN THE SENSE THAT THE OCEAN BELONGS TO THE PEOPLE. THE PEOPLE HAVE A SUPERIOR RIGHT TO SWIM IN THE OCEAN. IF THEY WANT TO GO OUT AT FIVE O'CLOCK IN THE MORNING AND LOOK FOR SAND DOLLARS OR TO SHELL OR TO FISH OR SWIM, THEY HAVE THAT RIGHT.

WHAT ARE THE FACTORS, WHEN THIS COMES INTO A COURT, AND THERE IS A CLAIM THAT SOMETHING HAPPENED, AND THE CITY, WHICH IS WHERE THE ACCIDENT HAPPENED, IS RESPONSIBLE, WHAT ARE THE FACTORS THAT WE HAVE SAID IN THE CASE LAW, THAT THE COURTS OR A JURY SHOULD LOOK TO IN DETERMINING WHETHER OR NOT THERE IS RESPONSIBILITY FOR PROVIDING REASONABLE CARE AND SAFETY IN SOMEBODY GOING INTO THAT LAKE TO SWIM?

I THINK THE FACTORS WOULD BE HOW DOES THE CITY OR WHOEVER ELSE IS OPERATING ON THE BEACH, HAVE THEY DONE SOMETHING OUT IN THE WATER TO INCREASE OR MAKE THE WATER MORE DANGEROUS TO INCREASE THE RISK OF DANGER TO ANYONE WHO MIGHT BE SWIMMING OUT IN THE WATER.

SO EVEN IF WE ASSUME THAT THIS ACCIDENT HAD TAKEN PLACE ON, SAY, 35th STREET, WHERE THERE IS, THESE KINDS OF AMENITIES, AND WE HAVE A LIFEGUARD, ALL THAT, YOU STILL WOULD MAINTAIN THAT THE CITY WOULD STILL HAVE NO LIABILITY HERE, EVEN THOUGH, IF THAT IS CLEARLY A DESIGNATED SWIMMING AREA?

THE LIABILITY, THE LIFEGUARD SITUATION MAY MAKE IT DIFFERENT UNDER THE JUNION CASE, THE CASE WHERE THE PERSON HAS VOLUNTARILY UNDERTAKEN THE RESPONSIBILITY TO PROTECT AND GUARD ANOTHER PERSON. BY VOLUNTARILY UNDERTAKING THAT RESPONSIBILITY, YOU MAY ASSUME A DUTY AS TO THAT PERSON, SO IF THERE IS A LIFEGUARD OUT THERE WHO IS SAYING OR GIVING THE IMPRESSION THAT THEY ARE WATCHING OVER THE PERSON WHO IS GOING OUT TO SWIM, THAT MAY, IN AND OF ITSELF, THAT SPECIAL RELATIONSHIP THERE MAY GIVE RISE TO A DUTY, SO, YES, YOU MIGHT HAVE A DIFFERENT SITUATION ON 35th STREET IF THERE WAS A LIFEGUARD.

BUT EVEN THEN, ASSUMING THERE IS A LIFEGUARD, WHAT I UNDERSTOOD YOU TO SAY IS THAT BECAUSE THIS OCCURRED IN THE OCEAN AND THE OCEAN BELONGS TO THE PEOPLE, THAT THERE WOULD BE NO DUTY TO WARN OF CONDITIONS THAT THE CITY DIDN'T CREATE. IS THAT YOUR POSITION?

CONDITIONS --

I AM --

A CONDITION THAT THE CITY DID NOT CREATE. ALSO A CONDITION THAT IS CHARACTERISTIC TO THE OCEAN ITSELF.

SEE, BUT THE PROB PROBLEM WITH THAT, IS THAT -- SEE, BUT, THE PROBLEM WITH THAT IS THAT, AND MAYBE WE ARE BASING THIS ON EXPERIENCE WE ALL HAVE SWIMMING IN OCEANS, IS THAT, AND I DON'T KNOW WHAT ALL OF THE TESTIMONY IS, IS THAT GENERALLY, PEOPLE WILL GO TO A PLACE TO SWIM IN THE OCEAN, WHERE IT HAS BEEN DESIGNATED A PUBLIC AREA, EITHER BY PARKING, BY LIFEGUARDS, BY, YOU KNOW, IN THOSE AREAS THAT WILL SAY OF GUARD BEACH", YOU KNOW, SWIM AT YOUR OWN RISK, SO YOU STAY WITHIN IN. THERE ARE SIGNS ROUTINELY AND WARNING SIGNS UP. IT IS NOT SAFE TO SWIM TODAY. WHY IS THAT? THERE IS CURRENTS, AND THAT IS WHAT I WOULD ASSUME, WITHOUT HAVING LOOKED AT THIS WHOLE RECORD IS ONE OF THE BIGGEST HAZARDS FOR DROWNING IS RIP CURRENTS, SO MY PROBLEM WITH IT IS THAT ISN'T THIS MORE OF A FACT-BASED QUESTION ON A CASE-BY-CASE BASIS, AS OPPOSED TO SAYING THERE IS NEVER AN OBLIGATION FOR SOMEONE OPERATING A PUBLIC BEACH, TO WARN ABOUT NATURALLY-OCCURRING CONDITIONS?

IT IS NOT A FACT-BASED QUESTION, BECAUSE TO GET TO THE DUTY, YOU HAVE TO RECOGNIZE. YOU HAVE TO SAY THAT THE ATLANTIC OCEAN, THAT THE OCEAN ITSELF, IS A DANGEROUS HAZARDOUS CONDITION THAT MUST BE GUARDED AND PROTECTED AGAINST.

LET'S SAY WE ARE TALKING ABOUT SHARKS. WOULD YOU, WOULD A DECISION THAT SAID THERE IS, UNDER NO CIRCUMSTANCE WOULD A MUNICIPALITY EVER HAVE THE DUTY TO WARN ABOUT SHARKS, THAT WOULD BE EQUIVALENT TO SAYING THERE IS NEVER A DUTY TO WARN ABOUT RIP CURRENTS. IS THAT WHAT YOUR POSITION WOULD BE? NO MATTER WHAT THE FACTS WERE.

THAT WOULD BE MY POSITION.

ALL RIGHT. NOW, LET'S ASSUME THOUGH, THAT, AT THIS CITY BEACH, THAT THE DAY BEFORE, THERE HAD BEEN FIVE SHARK ATTACKS AND THERE HAD BEEN PEOPLE INJURED, AND THAT THE LIFEGUARD IS THERE AND SEES SHARKS ALL OVER. ARE YOU SAYING THAT, UNDER THOSE FACTS, THAT THERE WOULD BE NO DUTY TO WARN OF A KNOWN DANGEROUS CONDITION?

I THINK, IF YOU HAVE A LIFEGUARD THERE, WHO IS UNDERTAKING THE DUTY, VOLUNTARILY UNDERTAKING THE DUTY AS TO THE PERSON, TO WARN AND PROTECT, THEN THERE IS A DUTY, BASED UPON, BUT IF THERE IS NO LIFEGUARD THERE, IF IT IS JUST OPEN OCEAN, THE ---.

SO THE LIFEGUARD GIVES PEOPLE THE ASSURANCE THAT THERE IS SOME PROTECTION, WHEREAS HERE, WHAT YOU WOULD BE SAYING IS, BECAUSE THERE WAS NO LIFEGUARD STATION ERECTED,, JIDZ -- INDIVIDUALS USING THAT BEACH WOULD NOT ASSUME THAT THERE WAS ANY OBLIGATION TO PROTECT THEM OR WARN?

I DON'T THINK THAT THEY CAN MAKE THAT ASSUMPTION.

BUT ISN'T THAT WHERE THE FACTS COME IN, AS TO THAT THIS, THERE IS PUBLIC RESTROOMS, THERE IS CONCESSIONS THAT NOT ONLY INCLUDE BEACH CHAIRS BUT INCLUDE JET SKIS OR OTHER WATER RENTALS, AND THESE OTHER FACTS THAT MAKE THIS A QUESTION OF FACT AS TO WHETHER THIS WAS BEING OPERATED AS A PUBLIC BEACH, AND THEN, IF IT WERE, WHETHER, WHAT WAS THE DUTY OF REASONABLE CARE, AND IT MAY VERY WELL BE THAT PUTTING LIFEGUARDS UP WOULD NOT BE A PROPER, WOULD NOT BE WITHIN THE DUTY OF REASONABLE CARE. BUT IS THAT REALLY SOMETHING FOR SUMMARY JUDGMENT?

WELL, THIS IS, YOUR HONOR, THIS IS A QUESTION OF SUMMARY JUDGMENT. IT IS A SUMMARY JUDGMENT ISSUE, AS FAR AS THE DUTY IS CONCERNED. THAT IS AN ISSUE OF LAW. DOES SOMEONE HAVE A DUTY TO PROTECT OTHERS AGAINST THE NATURAL OCEANS? THE OCEAN THAT IS IN ITS PRIMITIVE STATE, THE STATE THAT IT HAS ALWAYS BEEN IN.

IS ANDREWS FROM THE THIRD DISTRICT IN CONFLICT?

IT IS NOT IN CONFLICT BECAUSE ANDREWS WAS JUST A SOVEREIGN IMMUNITY CASE. THEY REVERSE ODD SOVEREIGN IMMUNITY ALONE AND SENT IT BACK DOWN TO THE COURT --

I THOUGHT I UNDERSTOOD JUDGE PARIENTE'S QUESTION TO SAY THAT, IF THERE WAS A LIFEGUARD ON DUTY AND THE LIFEGUARD ACKNOWLEDGED THE OCCURRENCE OF A RIPTIDE, OR I THINK SHE USED SHARKS AS HER EXAMPLE, THAT THERE WOULD BE A RESPONSIBILITY, IF THAT IS YOUR ANSWER. I AM HAVING DIFFICULTY. WAS THAT YOUR ANSWER?

IT COULD VERY WELL BEING A DUTY UNDER THE VOLUNTARY UNDERTAKING LINE OF AUTHORITY. IF THERE IS A VOLUNTARY UNDERTAKING BETWEEN THE LIFEGUARD AND THE PERSON WHO IS OUT THERE IN THE WATER, THERE WOULD BE A DUTY. IT IS LIKE A FUNERAL PROCESSION CASE. YOU DON'T HAVE A COMMON LAW DUTY, BUT ONCE YOU UNDERTAKE THE DUTY, IT WOULD BE --

THERE IS A QUESTION HERE AS TO THE CITY HAVING RULES TO PUT UP WARNING FLAGS AND THAT THAT WASN'T DONE IN THIS CASE. IN OTHER WORDS WARNING FLAGS, WHEN THERE IS A RIPTIDE OR RIP CURRENT.

THAT IS ONLY --

EXPLAIN THAT TO ME FACTUALLY. WHAT DOES THE RECORD TELL US ABOUT THAT, IF ANYTHING?

THE RECORD TELLS US IF THE WARNINGS ARE PUT UP ONLY WHERE THERE ARE LIFEGUARDS, WHERE THE LIFEGUARDS HAVE BEEN POSTED, AND THE LIFEGUARDS ARE OUT THERE PURSUANT TO THE MUNICIPALITIES' POLICE POWER. I MEAN, THEY ARE LIKE POLICE ON THE BEACH.

IS THIS IN THE FORM AFTER CITY ORDINANCE OR REGULATION? WHAT IS IT?

THE RULES FOR THE LIFEGUARDS, AS FAR AS IT IS NOT A CITY ORDINANCE. THE RULES FOR THE LIFEGUARD PATROL, WHO ARE OUT THERE. THEY POST WARNING SIGNS. WHEN THERE IS CERTAIN CONDITIONS AT THEIR STATION. BUT THEY HAVE SAID, AND IN THE TESTIMONY, THAT WHERE THERE ARE NO LIFEGUARDS, THERE ARE NO WARNINGS.

COULD YOU EXPLAIN WHY THE THIRD DISTRICT'S DECISION DOES NOT CONFLICT WITH OUR PRECEDENT?

I WILL. BUTLER, WE KNOW IN BUTLER, THAT THE MUNICIPALITY, THE COUNTY ACTUALLY WENT OUT AND BUILT, CONSTRUCTED A SWIMMING AREA WHERE THERE WAS A PERMANENT DROP OFF. BUTLER, AS JUSTICE BELL NOTED, IS NOT A RIPTIDE CASE. THERE WERE NO RIPTIDES IN BUTLER. IT WAS A DROP OFF WITH CURRENTS THAT SWEEPED THROUGH THE DROP-OFFS. THE COUNTY HAD GONE OUT AND INCREASED THE RISK, BY BUILDING A SWIMMING HOLE, A SWIMMING AREA IN THE WORST PLACE POSSIBLE TO SWIM. IT WAS A PERMANENT CONDITION THAT WAS UNIQUE NOT CHARACTERISTIC TO THE WATER GENERALLY, BUT UNIQUE TO THAT PARTICULAR PLACE. AND IN AFTER LONE, WE HAVE A -- IN AVALLONE, WE HAVE AN ARTIFICIAL CONDITION, A MAN-MADE CONDITION. WE HAVE A DOCK AND YOU HAVE ROUGH HOUSING AND DISORDERLY CONDUCT ON THE DOCK. IT IS NOT A COMMON CHARACTERISTIC OF THE OCEAN. IT IS NOT A DANGER THAT EXISTS EVERYWHERE. IT WAS UNIQUE TO THAT PARTICULAR LOCALE. IN GARCIA, IT WAS CONSTRUCTION DEBRIS THAT THE DEFENDANT, THROUGH HIS DELEGATE, LEFT OUT IN THE WATER. I MEAN, YOU HAVE INCREASED THE RISK BY LEAVING THAT FOREIGN SUBSTANCE OUT IN THE WATER, SO THEREFORE THE DUTY ARISES TO PROTECT AGAINST IT.

LET ME ASK YOU A QUESTION. WE SEEM TO BE JUMPING BEYOND THE BASIS FOR A DUTY. THE DUTY DOESN'T ARISE JUST BECAUSE SOMETHING IS OUT THERE THE. THERE HAS TO BE SOME LEGAL THEORY, THE REASON THAT THE DUTY IS CREATED AND WHAT IS THE ALLEGED DUTY HERE? IS IT NOT CONTROL OF A CERTAIN AREA, CONTROL OTHER OPERATION OF A CERTAIN AREA.

CONTROL AND OPERATION IS OF THE DRY BEACH.

OF THE DRY BEACH, AND THEN THERE IS NO OBLIGATION FOR ANY PROPERTY NEXT TO IT. IS THAT YOUR THEORY, THAT BECAUSE WATER TOUCHES THE DRY BEACH, THAT THERE FOR THE DUTY DOES NOT EXTEND TO ANYTHING BEYOND THE DRY BEACH?

THE DUTY COULD EXTEND, ACCORDING TO GARCIA, TO UNUSUALLY NONCHARACTERISTIC CONDITIONS. FOREIGN SUBSTANCES THAT YOU KNOW ABOUT.

I THINK WHAT YOU ARE JUMPING, WE HAVE TO HAVE SOME FRAME OF REFERENCE FOR WHAT IS THE REASON FOR THE DUTY. AND THESE OTHER THINGS WE ARE TALKING ABOUT ARE FACT-BASED AS TO WHETHER IT HAS BEEN BREACHED, BUT WHETHER THERE IS A DUTY IS A LEGAL RELATIONSHIP TO SOMETHING TO A PIECE OF PROPERTY, IS IT NOT BASED ON CONCEPTS OF CONTROL OF REAL ESTATE OR OPERATION OF REAL PROPERTY, THAT THESE THINGS FLOW FROM?

IT IS BASED UPON THE FACT THAT YOU HAVE KNOWLEDGE, THAT YOU DO HAVE CONTROL OF THE

DRY BEACH TO A CERTAIN DEGREE.

IT RELATES TO THAT CONTROL, DOES IT NOT?

YES, IT D.

SO HAVE WE NOT TRADITIONALLY, IN ENGLISH AND COMMON LAW AND FLOWING INTO OUR LAW FOR THE LAST ALMOST 100 YEARS, THAT THE DUTY ITSELF IS A DUTY OF REASONABLE CARE, BUT THEN WE MUST ANALYZE FROM THAT POSTURE, IS WHATEVER HAS HAPPENED FACTUALLY, HAS THAT BREACHED THAT REASONABLE? IT MAY NOT. I MEAN, IN THIS CASE YOU MAY BE ABSOLUTELY NOT. BUT YOU MAY NOT. ISN'T THAT UP TO A JURY QUESTION FOR THAT FACT? WHY IS THAT NOT, YOU SEE THE TROUBLE THAT I AM HAVING IS THAT WE HAVE THE SAME BASIC LEGAL PRINCIPLE THAT APPLIES TO A SHOPPING CENTER ANYWHERE. I MEAN, THAT IS WHERE IT FLOWS FROM, AND IT IS A QUESTION OF WE HAVE TRANSIENT, WE TALKED ABOUT TRANSIENT. WE HAVE TRANSIENT ATTACKS ON REAL PROPERTY THAT YOU DON'T EXPECT, BUT IF YOU HAVE ENOUGH OF THEM, THEN IT IS A QUESTION OF FACT, SHOULD YOU HAVE TAKEN SOME ACTION, AND IS THAT NOT THE QUESTION, WHY IS THAT NOT THE QUESTION HERE, OF WHETHER THEY HAVE SUFFICIENT RECURRENCE OF WHATEVER IT IS THAT THEY SAY YOU SHOULD WARN AGAINST? IT CALLS YOU TO MAKE THAT WARNING. YOU SAY THAT ONLY OCCURS ONCE EVERY THOUSAND YEARS.

IT IS NOT THAT IT ONLY OCCURS ONCE EVERY 1,000 YEARS. IT IS THE FACT THAT IT OCCURS IN THE OCEAN GENERALLY. IT IS COMMON TO THE OCEANS. IT IS THE OCEAN. THE OCEAN COMES IN AND IT GOES BACK OUT. IT IS THE PULL OF THE TIDE. IT IS NOTHING THAT IS EXTRAORDINARY OR UNUSUAL. IT IS PART, IT IS GRAVITY, PULLING THE TIDE BACK. I MEAN, THE EXPLANATION OF RIP CURRENTS THAT YOU HAVE IN THE RECORD IS THAT ALL OF THE RIP CURRENTS ARE, IT IS THE NOLLE PROSES OF THE OCEANGOING BACK TO SEA.

AGAIN THAT GOES -- OF THE OCEAN, GOING BACK TO THE SEA.

THAT IS A FACT QUESTION AGAIN. IT IS NOT A DANGER THAT IS NOT COMMON IN THE AREA, BUT IT ELIMINATES THE DUTY? YOU SEE, WE HAVE A DUTY TO WARN OF CONDITIONS?

THE DUTY AG AS YOU RECOGNIZE IT AS A DANGEROUS, HAZARDOUS CONDITION.

SEE, WHAT I AM HAVING PROBLEMS WITH, AND FOLLOWING UP HERE LOOKING AT THE THIRD DISTRICT'S OPINION. THEY RELY ON THE CASE OF SEVILLE BEACH HOTEL, WHICH THIS COURT DENIED JURISDICTION IN, WHERE THE HOTEL AS WELL AS THOSE INDIVIDUALS THAT OPERATED THE CONCESSION AREA, WERE NOT HELD LIABLE AS A MATTER OF LAW, THAT THEY DIDN'T CONTROL THE AREA. EXCUSE ME. I HAVE GOT A COLD. AND THEN THEY SAY, BASED ON THAT, THAT AN ENTITY WHICH DOES NOT CONTROL THE AREA, OR UNDERTAKE A PARTICULAR RESPONSIBILITY, HAS NO DUTY TO WARN, AND THAT IS WHY I STILL SEEM TO FEEL THAT THE THRESHOLD QUESTION HERE IS NOT THE DUTY QUESTION BUT FIRST, AS JUSTICE WILLIS IS -- AS JUSTICE WELLS IS POINTING OUT, WHETHER THIS WAS OPERATED OR CONTROLLED BY THE CITY, AND IS THAT A, ARE YOU JUST SAYING, WELL, NO, BECAUSE THEY NEVER CAN OPERATOR CONTROL THE OCEAN, THEY ONLY OPERATOR CONTROL THE BEACH? IS THAT THE POSITION?

THE POSITION, BUT THE POSITION IS, AS I STATED FROM THE OUTSET, THAT AS A MATTER OF LAW, POLICY AND THE CONSTITUTION, THIS PROPERTY BELONGS TO THE PEOPLE, AND SO YOU KNOW, IT IS TOUGH TO TALK ABOUT CONTROL, BECAUSE THERE ISN'T CONTROL IN THE SENSE THAT YOU CAN EXCLUDE AND PREVENT PEOPLE FROM YOUR PROPERTY.

LET'S JUST ASSUME THAT THE CITY HAD IMPROVED THE AREA. IT WAS A PARKING LOT, AND THEY CHARGED EVERYONE A FEE, SO THAT IF THERE WAS PUBLIC RESTROOMS AND OTHER AMENITIES, BUT THEN THEY MADE A DECISION, BECAUSE OF THE ECONOMICS, NOT TO PUT UP, HAVE

LIFEGUARDS OR NOT TO HAVE WARNING SIGNS. ARE YOU SAYING THAT, AGAIN, AS A MATTER OF LAW, THAT BECAUSE IT OCCURRED IN THE OCEAN, THAT THERE WAS NOT AN OBLIGATION?

CORRECT.

AND SO THAT EVEN IF THE CITY DESIGNATED TO THE CONCESSION STAND OWNERS, NOT ONLY THAT THEY COULD RENT CHAIRS BUT THAT THEY WOULD DO ANYTHING ELSE TO DO WITH THAT BEACH, THAT, THEN, -- THAT, AGAIN, THEIR OBLIGATION WOULD NEVER GO FARTHER THAN THE BEACH ITSELF.

CORRECT.

NOW, ISN'T THAT THE PRINCIPLE THAT IS IN CONFLICT WITH BUTLER AND ALL OF THE OTHER CASES? BECAUSE THEY ALL END UP TALKING ABOUT WHAT HAPPENS IN THE WATER AND NOT WHAT HAPPENED AT THE BEACH.

WELL, GO BACK TO THE CONCESSION. THE CONCESSION WAS JUST PROCESS OF LICENSING. I LICENSE SOMEONE TO DO SOMETHING, JUST LIKE THE STATE GIVES OUT DRIVERS LICENSES. THAT DOESN'T MEAN I UNDERTAKE A DUTY TO MONITOR WHAT IT IS THEY ARE DOING AND TO TAKE RESPONSIBILITY FOR WHATEVER IT IS THEY DO, SO THAT IS WHY I SAID THERE IS NOT NECESSARILY A DUTY BECAUSE OF THE CONCESSIONAIRE. AND IN BUTLER, THEY WENT OUT INTO THE WATER.

WELL, WAIT A MINUTE. THE GRANTING OF A DRIVERS LICENSE IS NOT THE LICENSE WITH RESPECT TO THE CONTROL OF PROPERTY. ARE WE SUPPOSED TO DO THIS ON THE BASIS OF LICENSING, TO DO SOMETHING, OR LICENSING CONCEPTS FOR REAL PROPERTY?

WHAT I WAS TRYING TO SAY WAS JUST ACT OF LICENSING A CONCESSIONAIRE, DIDN'T GIVE RISE TO A DUTY OUT IN THE WATER.

IT IS DUTY OF LICENSING ON THE PROPERTY, IS IT NOT?

LICENSING ON PROPERTY THAT BELONGS TO EVERYONE.

HOW DO YOU LICENSE ACTIVITY ON PROPERTY THAT BELONGS TO EVERYONE?

IT IS A BUSINESS ENTITY ON PUBLIC PROPERTY.

SOMEONE HAS TO CONTROL THE PROPERTY BEFORE THEY DO IT, IS IT NOT?

THIS PROPERTY BELONGS AND IS OPEN TO EVERYONE, AND SO THE CONTROL IS YES, YOU MAY CONTROL THE LICENSING ASPECT AS A GOVERNMENT. YOU ARE WEARING DIFFERENT HATS HERE. IN SOME RESPECTS YOU ARE OPERATING PURSUANT TO YOUR POLICE POWER, AND YOU SEE IN THE MANAGEMENT AGREEMENT THAT THE ONLY AUTHORITY WE HAD GOING OUT INTO THE WATER WAS PURSUANT TO OUR POLICE POWER, SO CERTAIN THINGS YOU DO, YOU WEAR YOUR POLICE POWER HAT. PRIVATE PEOPLE DON'T DO. THAT THERE IS NO PRIVATE PERSON IN COMMON LAW DUTY THAT ARISES OUT OF THAT POLICE POWER FUNCTION. CERTAIN THINGS WE DO IN THE LICENSING OF ACTIVITIES SYSTEM A GOVERNMENT FUNCTION. NO COMMON LAW DUTY ARISES FROM THAT. WHAT WERE WE DOING OUT THERE THAT PRIVATE PEOPLE DO, THAT WOULD GIVE RISE TO A COMMON LAW DUTY?

I AM JUST ASSUMING THAT THERE IS A BEACH ON THE WEST COAST AND PEOPLE GO TO THAT BEACH BECAUSE IT IS PART OF A HOTEL AND IT IS OCEANFRONT BEACH, AND THE HOTEL ENDS UP PUTTING LIFEGUARDS UP AND WARNING SIGNS, AND YOU ARE SAYING THE PRIVATE OWNER, BECAUSE THEY CAN'T CONTROL, THEY DON'T OWN THE OCEAN, ISN'T GOING TO BE HELD LIABLE,

DEPENDING ON THE, YOU KNOW, WHETHER THEY EXERCISE REASONABLE CARE OR NOT?

NOT FOR THE OCEAN AS IT ALWAYS HAS BEEN, NOT FOR THE OCEAN, THE NATURAL OCEAN, AND IN MY LIMITED TIME, TO GET TO THE DUTY, YOU HAVE TO RECOGNIZE THAT THE OCEAN IS A HAZARDOUS DANGEROUS CONDITION AND THERE IS A DUTY TO PROTECT AGAINST IT, AND IF YOU DO THAT, WE HAVE GOT 2000 MILES OF COASTLINE IN THE STATE. WE ARE SURROUNDED BY THE OCEAN. TO SAY THAT WE ARE SURROUNDED BY A HAZARDOUS CONDITION, A DANGEROUS CONDITION, IT JUST EXPOSES THE STATE, THE CITIES, AND ANYONE ELSE OPERATING ON THE BEACH TO ENORMOUS LIABILITY. WHETHER YOU PUT SIGNS OUT EVERY FIVE FEET, WHETHER YOU HAVE LIFEGUARDS EVERY 200 FEET --

WHAT WAS THE PURPOSE OF PUTTING UP PUBLIC RESTROOMS IN THAT AREA?

THE RESTROOMS HAD BEEN THERE FOR 50 YEARS.

WAS THERE ANY TESTIMONY ABOUT WHY THE RESTROOMS WERE THERE?

NO ONE KNEW WHY THEY WERE THERE. THEY HAD JUST BEEN THERE FOR 50 YEARS, LONG BEFORE THIS MANAGEMENT AGREEMENT, WHICH IS A CONSERVATION AND PRESERVATION AGREEMENT. THE MANAGEMENT AGREEMENT IS ALL ABOUT PRESERVING THE BEACH, PROTECTING IT AGAINST EROSION.

CHIEF JUSTICE: WITH OUR HELP, WE HAVE USED UP ALL OF YOUR TIME. WE THANK YOU VERY MUCH, ESPECIALLY IN RESPONDING TO OUR QUESTIONS. HOW MUCH TIME FOR REBUTTAL, MR. MARSHAL? OKAY.

MAY IT PLEASE THE COURT. I HAVE HEARD TWO ARGUMENTS HERE. ONE IS WE HAVE PUT A LIFEGUARD THERE AND THEN WE OWE A DUTY OF REASONABLE CARE IF THERE IS NO LIFEGUARD THERE, WE DON'T OWE A DUTY OF REASONABLE CARE. IF THE COURT ADOPTS THAT QUESTION TO THE DUTY QUESTIONNAIRE, IT WILL SIMPLY ENCOURAGE MUNICIPALITIES TO WITHDRAW THEIR LIFEGUARDS, THEIR CAREERS.

THAT IS PART OF THE VOLUNTARY UNDERTAKING, ISN'T IT?

IF THERE WERE NO COMMON LAW DUTY AND THIS COURT WERE TO SAY THERE IS NO COMMON LAW DUTY BUT IF YOU PUT A LIFEGUARD THERE, THEN OUR ALTERNATIVE POSITION WOULD BE THAT A VOLUNTARY UNDERTAKING CREATES THE DUTY BUT OUR POSITION HERE IS THAT THIS COURT HAS RECOGNIZED A DUTY OF REASONABLE CARE, WHERE A GOVERNMENT ENTITY OPERATES A PUBLIC SWIMMING AREA, SO PLEASE DON'T ENCOURAGE MUNICIPALITIES TO SEND THEIR LIFEGUARDS OFF TO --

WHAT IS OF EQUAL CONCERN IS THE FACT THAT THIS MUNICIPALITY, IF IT HAS LIABILITY FOR THESE HAZARDS THAT ARE OUT IN THE WATER, THAT THE DEFENSIVE POSITION OF THE CITY OF MIAMI BEACH, USE VERY WELL BE TO -- COULD VERY WELL BE TO SAY NO SWIMMING. CAN IT DO THAT? CAN IT PREVENT SOMEONE FROM GOING SWIMMING AT 124th STREET, IF IT DECIDES IT DOESN'T HAVE THE MONEY TO POST A LIFEGUARD AND SIGNS OR NOT DOING ANY GOOD? DOES IT HAVE THAT POWER?

NO, YOUR HONOR, BUT IT CAN PUT UP A SIGN THAT SAYS UNGUARDED AREA. SWIM AT YOUR OWN RISK, AND THAT WAS SUGGESTED TO THE PEOPLE WHO WERE, TO POST FROM THE CITY, IN THIS CASE, AND THERE WAS A RECOMMENDATION TO PUT UP A SIGN LIKE THAT BUT THE CITY MANAGER DISAPPROVED IT, BECAUSE THEY THOUGHT IT WOULD SEND A NEGATIVE SIGNAL.

WOULD THAT ELIMINATE THE DUTY, IF YOU PUT UP A SIGN TO SWIM AT YOUR OWN RISK?

I DON'T THINK IT WOULD ELIMINATE THE DUTY IF IT WERE AT A PUBLIC SWIMMING AREA SUCH AS 29th STREET HERE, BUT IF IT WAS AN AREA THAT WAS NOT HELD OUT AS A PUBLIC AREA AND YOU PUT UP A SIGN SWIM AT YOUR OWN RISK, THAT MIGHT FACTOR INTO THE FACTUAL QUESTION OF WHETHER OR NOT THE CITY EXERCISED REASONABLE CARE UNDER THE CIRCUMSTANCES.

I THOUGHT THAT THE LAW WAS THAT YOU CANNOT ELIMINATE, IF YOU HAVE A DUTY OF REASONABLE CARE, YOU CANNOT ELIMINATE IT IN THAT WAY.

I BELIEVE THAT IS CORRECT, BUT IT WOULD GO TO THE FACTUAL QUESTION OF WHETHER REASONABLE CARE UNDER ALL OF THE CIRCUMSTANCES WAS EXERCISED BY THE CITY, BECAUSE UNGUARDED AREA, SWIM AT YOUR OWN RISK, IS IN FACT, A WARNING.

BUT THE CITY COULD ELIMINATE THE DUTY UNDER YOUR THEORY, BY SAYING NO SWIMMING: YOU ARE NOT ALLOWED TO SWIM.

I DON'T KNOW THE ANSWER TO THAT QUESTION LEGALLY, YOUR HONOR, BUT IF THEY KNOW THERE IS A DANGER THERE AND THEY PUT UP A SIGN THAT SAYS DANGER, NO SWIMMING, I THINK THEY WIN THE FACTUAL QUESTION OF WHETHER THEY EXERCISED REASONABLE CARE UNDER THE CIRCUMSTANCES. THE OTHER ARGUMENT THAT I HAVE HEARD IS THAT THE COURT SHOULD DRAW SOME LINE BETWEEN THE DRY PART OF THE BEACH AND THE AREA IN WHICH PEOPLE SWIM. BUT THAT, THE COURT HAS NEVER DRAWN A LINE AT THAT POINT, A SWIMMING AREA NATURALLY OCCURS IN THE OCEAN NOT ON THE BEACH, AND ALL OF THIS COURT'S DECISIONS DEAL WITH INJURIES THAT OCCUR IN THE SWIMMING AREA, SO WE COME BACK TO THIS COURT'S TRIL JI OF DECISIONS IN AVALLONE, BUTLER AND GARCIA. CLEARLY IN BUTLER, BY A 5-TO-2 VOTE, THIS COURT HELD THAT A MUNICIPALITY THAT PLATES A -- THAT OPERATES A PUBLIC SWIMMING AREA, AND WE CAN ASSUME THAT FACT, OWES A DUTY TO PROTECT, WHICH INCLUDES A LIFEGUARD, A DUTY TO WARN OF KNOWN HAZARDS IN THE OCEAN AND TO PROVIDE A SAFETY AREA, AND IN WHICH THE SWIMMERS ARE NOT AWARE OF THE KNOWN HAZARDS, AND IN THE DISSENTING OPINION IN BUTLER, WRITTEN BY JUSTICE McDONALD, SAID THAT I DON'T THINK THAT MUNICIPALITIES OUGHT TO BE HELD LIABLE FOR NATURALLY OCCURRING DANGEROUS CONDITIONS IN THE OCEAN. THE MAJORITY OPINION IN THE THIRD DISTRICT'S CASE IS SIMPLY A REPRIZE OF THE JUSTICE MacDONALD'S DISSENT IN BUTLER, AND FOR THIS COURT TO APPROVE THE MAJORITY OPINION IN THE THIRD DISTRICT CASE, IT WILL HAVE TO SAY WE WERE WRONG IN McKINNEY VERSUS ADAMS IN 1914. WE WERE WRONG IN IDE VERSUS CITY OF CLOUD IN 1942. WE WERE WRONG IN THE AVALLONE CASE. WE WERE WRONG IN THE BUTLER CASE, AND WE WERE WRONG THREE YEARS AGO IN THE GARCIA CASE, WHEN WE WROTE THAT GOVERNMENTAL ENTITIES OWE A DUTY OF REASONABLE CARE AT THE CITY OF MIAMI BEACH'S PUBLIC BEACHES. WE RESPECTFULLY SUBMIT THAT THE DECISION SHOULD BE QUASHED AND THAT THE PLAINTIFFS SHOULD BE ALLOWED TO PROVE THEIR CASE AS A MATTER OF FACT. THANK YOU.

CHIEF JUSTICE: THANK YOU ALL VERY MUCH.