

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-20772-CIV-HIGHSMITH/MCALILEY

ARLIN VALDEZ-CASTILLO

Plaintiff,

v.

BUSCH ENTERTAINMENT CORPORATION
d/b/a BUSCH GARDENS TAMPA BAY,
BOYKIN MIAMI HOTEL, L.P.,
BOYKIN MANAGEMENT COMPANY, LLC, and
CONSERVATION AMBASSADORS, INC. f/k/a
ZOO TO YOU WILDLIFE EDUCATION, INC. f/k/a
WILDLIFE ON WHEELS, INC.Defendants.

**CONSERVATION AMBASSADORS, INC.'S MOTION FOR FINAL SUMMARY
JUDGMENT AND SUPPORTING MEMORANDUM OF LAW**

Defendant, CONSERVATION AMBASSADORS, INC., by and through its undersigned counsel, hereby files this Motion for Final Summary Judgment and Supporting Memorandum of Law and as grounds therefor states as follows:

I. INTRODUCTION

Plaintiff ARLIN VALDEZ-CASTILLO (“Valdez-Castillo” or “Plaintiff”) filed an action against several Defendants, including CONSERVATION AMBASSADORS, INC. (“Conservation Ambassadors” or “Defendant”), for injuries consisting of an allergic reaction which she claims arose out of her exposure to dander, feces, and excrement from wild animals. These animals were owned and kept by Conservation Ambassadors. However, because Plaintiff’s alleged injuries were not caused by actual physical contact with the animals, Conservation Ambassadors is entitled to

summary judgment as a matter of law on Plaintiff's strict liability claim. Additionally, Plaintiff's negligence claim fails as a matter of law because of Plaintiff's failure to establish the essential elements of the negligence cause of action.

II. ADOPTION OF BUSCH GARDENS' MOTION FOR SUMMARY JUDGMENT

On November 29, 2006, Conservation Ambassadors' Co-Defendant, Busch Entertainment Corp. ("BEC"), filed a Motion for Summary Judgment. Conservation Ambassadors adopts BEC's motion, in part, for purposes of this Motion for Summary Judgment.¹ However, in addition to the facts alleged in BEC's motion under the heading of "Introduction," Conservation Ambassadors adds the following.

Conservation Ambassadors is a corporation which is responsible for wildlife education and exhibiting animals at various locations throughout the country. Conservation Ambassadors contracted with BEC to present a promotional event in Miami between the dates of February 9 and 16, 2004.² Prior to the trip, on February 6, 2004, Conservation Ambassadors received a Certificate of Veterinary Inspection for all of the animals that were taken on this trip.³ The certificate states that an accredited veterinarian, Sheri McVeigh, inspected the animals and they were not showing signs of "infectious, contagious, and/or communicable disease. . . . [t]o the best of [her] knowledge, the animals listed on the certificate [met] the state of destination and federal interstate requirements."⁴

During their visit in Miami, employees of Conservation Ambassadors stayed at the Hampton

¹BEC's Motion for Summary Judgment. (Exhibit A).

²Conservation Ambassadors Answer to Plaintiff's Interrogatories, No. 3. (Exhibit B).

³Conservation Ambassadors Response to BEC's Request for Admissions, Nos. 4, 5, 11 and 12. (Exhibit C); State of California Certificate of Veterinary Inspection dated February 6, 2004. (Exhibit D).

⁴Exhibit D.

Inn in Miami, where Valdez-Castillo was employed as a maid.⁵ Conservation Ambassadors brought two baby lemurs, a spider monkey, a macaw, and an alligator to Miami for the event.⁶ Hampton Inn, sued herein as BOYKIN MIAMI HOTEL, L.P., BOYKIN MANAGEMENT COMPANY, LLC (“Boykin”), permitted Conservation Ambassadors to stay at the hotel with these animals.⁷

Buchholz: Did Edgardo Rodriguez, the hotel manager, are you aware whether he knew that there animals staying at the hotel?
 Valdez-Castillo: Of course.
 Buchholz: Did he know the first day?
 Valdez-Castillo: Exactly.

* * * * *

Buchholz: But the day that the people with the animals checked in, the hotel manager and the housekeeping supervisor, both knew that animals were staying, at the Hampton Inn.
 Valdez-Castillo: They knew that the animals were there.

Valdez-Castillo was expressly made aware that representatives from Conservation Ambassadors would be staying at the hotel and would have zoo animals with them.⁸

Valdez-Castillo: Otilia [Plaintiff’s supervisor] stated different animals came into the hotel. The hotel now looks like a zoo, and Arlin is going to clean it.

* * * * *

Landsberg: How is it that you learned that there was going to be some animals that were going to be at the hotel?
 Valdez-Castillo: The day that I showed up for work, she said that the hotel was going to look like a zoo.

Upon arrival at the Hampton Inn, representatives from Conservation Ambassadors told the

⁵ Conservation Ambassadors Answer to Plaintiff’s Interrogatories, No. 2. (Exhibit B).

⁶ Conservation Ambassadors Answer to Plaintiff’s Interrogatories, No. 6. (Exhibit B).

⁷ Depo. of Valdez-Castillo, p. 75, ln. 20-25; p. 76, ln. 4-8. (Exhibit E).

⁸ Depo. of Valdez-Castillo, p. 50, ln. 7-9; p. 324, ln. 6-11. (Exhibit E).

person at the front desk that no one was to come into the room and clean.⁹ The animals were kept in their respective cages at all times when the animals were present in the rooms at the Hampton Inn.¹⁰ Because the animals were kept only in their cages in their hotel rooms, that is the only place where they were able to urinate or defecate.¹¹ Conservation Ambassadors' representatives were in charge of cleaning up the animals' actual cages.¹²

Additionally, taking Valdez-Castillo's testimony as true, she saw the animals outside of the rooms on two occasions. She saw a man grabbing a Coca-Cola with a monkey on his shoulder in a hallway at the hotel.¹³ She also saw a woman with a bird in the elevator.¹⁴ On neither of these occasions did Valdez-Castillo come into contact with the animals or their dander, feces, and excrement.¹⁵

Further, the animals were never present in the rooms when Valdez-Castillo was cleaning the rooms.¹⁶

Buchholz: Okay. Of those eleven or twelve times you cleaned the rooms, how many of those times were there----were the animals there when you arrived?

Valdez-Castillo: When I knocked on the door, and I said, "Housekeeping," they would come out with the cage or with the animal on most of the occasions. Many times, I just came in and there was nobody, just the cage.

Buchholz: Do you have an idea how many times there was nobody?

⁹Conservation Ambassadors Answer to Plaintiff's Interrogatories, No. 16. (Exhibit B).

¹⁰Conservation Ambassadors Answer to Plaintiff's Interrogatories, No. 14. (Exhibit B).

¹¹Conservation Ambassadors Answer to Plaintiff's Interrogatories, No. 14. (Exhibit B)

¹²Conservation Ambassadors Answer to Plaintiff's Interrogatories, No. 14. (Exhibit B).

¹³Depo. of Valdez-Castillo, p. 236, ln. 5-11. (Exhibit E).

¹⁴Depo. of Valdez-Castillo, p. 237, ln. 8-13. (Exhibit E).

¹⁵Depo. of Valdez-Castillo, p. 236, ln. 14-16; p. 237, ln. 25; p. 238, ln. 1-4. (Exhibit E).

¹⁶Depo. of Valdez-Castillo, p. 69, ln. 1-16. (Exhibit E).

Valdez-Castillo: No, at the moment, I do not have an idea.
 Buchholz: Okay. But you never went in the rooms and there were animals and no people?
 Valdez-Castillo: No.

Plaintiff cleaned the rooms at the instruction of her employer Boykin as part of her duties as a hotel housekeeper.¹⁷

Valdez-Castillo: Otilia stated different animals came into the hotel. The hotel now looks like a zoo, and Arlin is going to clean it.

* * * * *

Buchholz: Okay. So Otilia, when she was having this meeting, in the - - in the dining area, she looked at the report to see who was assigned those particular rooms, where the animals would be staying, and that was you.

Valdez-Castillo: She pulls out the report form the computer. And whatever names are assigned on the format, that's it. "Arlin, you go there. You go there. You go there."

* * * * *

Buchholz: Did you determine, while at this meeting, that it was you who was going to be cleaning those rooms?

Valdez-Castillo: Exactly.

* * * * *

Buchholz: So did you say anything to Otilia about this during the meeting?
 Valdez-Castillo: Of course.
 Buchholz: Tell me what you said.
 Valdez-Castillo: She told me that I had to clean the rooms, because that was my job.

Plaintiff Valdez-Castillo is alleging that she had an allergic reaction from exposure to dander, feces, and excrement from animals owned by Conservation Ambassadors. She asserts that this reaction damaged her immune system and that Conservation Ambassadors, as the owner of the animals, is liable to her for any damages she sustained based on theories of negligence and strict

¹⁷Depo. of Valdez-Castillo, p. 50, ln. 7-9; p. 53 ln. 18-25; p. 54 ln. 1-2; p. 55, ln. 13-16; p. 57, ln. 4-9. (Exhibit E).

liability. These claims fail as a matter of law.

III. MEMORANDUM OF LAW IN SUPPORT

A. Summary Judgment Standard

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). In 1986, the Supreme Court decided a trio of cases which encourage the use of summary judgment as a means to dispose of cases which are not factually or legally supported. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp.*, 477 U.S. at 317; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Here, the standard is met, and Conservation Ambassadors is entitled to judgment in its favor as a matter of law.

B. Plaintiff’s Claim for Negligence Fails

Count VI of Plaintiff’s Complaint alleges a cause of action for Negligence. Valdez-Castillo asserts that Conservation Ambassadors had a duty to handle and keep the animals in a reasonably safe condition and free from defects and conditions that would render them dangerous. Plaintiff’s First Amended Complaint, ¶ 51. She also asserts that it owed a duty to exercise reasonable care to Plaintiff, by inspection and other affirmative acts, from the danger of any reasonably foreseeable injury. *Id.* at ¶ 52. Additionally, Valdez-Castillo states that Conservation Ambassadors had a duty to warn Plaintiff of any unsafe conditions, and that it created a dangerous condition of which it had actual and/or constructive knowledge. *Id.* at ¶¶ 53-55. Each of Plaintiff’s claims fail as a matter of law.

i. Conservation Ambassadors did not owe a duty to Plaintiff and therefore cannot be held liable for Plaintiff’s accusations which consist of the following:

- (1) Allegedly creating a dangerous condition [Complaint, ¶ 56(a)];
 - (2) Allegedly failing to properly care for, handle, keep, clean up after, and maintain zoo animals in a reasonably safe condition [Complaint, ¶ 56(c)];
 - (3) Allegedly exposing Plaintiff to a dangerous condition which was known to, or which should have been known to Conservation Ambassadors [Complaint, ¶ 56(d)].
- (a) Duty

Valdez-Castillo alleges that Conservation Ambassadors created a dangerous condition and exposed her to said condition, and as a result she was injured. She asserts that Conservation Ambassadors owed a duty to her, which it failed to meet. Assuming for purposes of this argument that Valdez-Castillo was injured from Conservation Ambassadors' animals, which she was not, Conservation Ambassadors did not owe her a duty.

Traditionally, a cause of action based on negligence comprises four elements:

1. A duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the [defendant's] part to conform to the standard required: a breach of the duty. . . .
3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
4. Actual loss or damage. . . .

Clay Elec. Co-op., Inv. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003) (quoting Prosser and Keaton on the Law of Torts 164-65 (W. Page Keeton ed., 5th ed.1984)).

"[D]uty is a question of law." *McCain v. Florida Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). "Absent a duty, there can be no breach of a duty." *Wallace v. Tri-State Motor Transit Co.*, 741 F.2d 375, 377 (11th Cir. 1984). The principle of "duty" is linked to foreseeability and may arise

from four sources:

(1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case.

Clay Elec. Co-op., Inv., 873 So. 2d at 1185. Here, Plaintiff is apparently asserting that Conservation Ambassadors' duty arose from the general facts of the case. However, this argument fails for several reasons.

“A registered guest in a hotel is a business invitee to whom the hotel owes a duty of reasonable care for their safety.” *Phillips Petroleum Co. of Bartlesville, Okl. v. Dorn*, 292 So. 2d 429, 432 (Fla. 4th DCA 1974). “It is well settled that a property owner owes two duties to an invitee, to use reasonable care in maintaining the premises in a reasonably safe condition and to give the invitee warning of concealed perils which are or should be known to the property owner, and which are unknown to the invitee and cannot be discovered by him through the exercise of due care.” *Fenster v. Publix Supermarkets*, 785 So. 2d 737, 739 (Fla. 4th DCA 2001). Most, if not all cases, involving a duty to an injured party at a business or residence, find that it is the owner or the keeper of the premises who owes that duty, not the guest or business invitee.

In this case, the Plaintiff is not a guest of the hotel, but instead is an employee who is suing a guest for injuries allegedly sustained while performing her job at the hotel. The undersigned has searched both state and federal case law and has not come across any case in which it has been found that a hotel guest owes a duty to the hotel or its employees to maintain a room in a certain condition. This case does not exist and this is a case of first impression.

In fact, in cases which are analogous to the case at hand, in which people became ill or injured during their stay at a hotel or on a cruise, it is **always** the hotel or cruise line which has been held responsible for the injuries, not the source of the illness. *See Reno Hilton Resort Corp. v.*

Verderber, 106 P.3d 134 (Nev. 2005) (holding that the Defendant hotel was liable to several guests following an outbreak of a Norwalk-like virus); *Celebrity Cruises, Inc. v. Essef Corp.*, 434 F.Supp.2d 169 (S.D.N.Y. 2006) (finding that cruise line and manufacturer of whirlpool spa on cruise ship were responsible for spread of Legionnaires' Disease after passengers waded in whirlpool on cruise ship). The sources of the illnesses in these cases are not even mentioned in dicta as possible Defendants.

Additionally, to hold a hotel guest, Conservation Ambassadors, responsible to a hotel employee, Valdez-Castillo, for alleged injuries she sustained as a result of being allergic to **animals which were permitted to stay at the hotel**, would open up the floodgates of litigation. Based on his or her status as an animal owner, every person who owns an animal would owe a duty to every other person who was exposed to the dander, feces, and excrement of the animals, but who did not come into contact with said animals. Surely, this type of imposition would be contrary to public policy and expose every animal owner to unlimited liability. *See Gilbert v. St. Johns University*, 1998 WL 19971 (E.D.N.Y. 1998) (affirming entry of summary judgment in favor of university on negligence claim because university did not owe duty to non-student who was injured while playing rugby with university's non-sanctioned rugby team and stating "[a] finding of a duty in this case would potentially expose universities to unlimited liability in situations where their students or possibly even non-students are injured"). Because Defendant did not owe a duty to Plaintiff, the Court should enter judgment as a matter of law in favor of Conservation Ambassadors.

(b) Causation

Further, Plaintiff's claim that Conservation Ambassadors was negligent because it created a dangerous condition, failed to keep the animals in a reasonably safe condition, and exposed Plaintiff to said condition also fails because she cannot establish causation, an essential element of

a negligence claim. *Clay Elec. Co-op., Inv.*, 873 So. 2d at 1185. This is because in a negligence case involving an animal, the injury **must** result from the animal's affirmative or aggressive act. This is not the case here.

6 Fla. Prac., Personal Injury & Wrongful Death Actions § 6.15 (2007 ed.) discusses this concept in detail. It states, "the dog injury statute imposes strict liability on owners for 'any damage done by their dogs.'" *Id.* (citing § 767.01, Fla. Stat.). To be held liable, the plaintiff must establish that an affirmative or aggressive act of the dog in fact caused the plaintiff's injury. *Id.* In explaining this requirement, 6 Fla. Prac., § 6.15 quotes the opinion from the Florida Supreme Court in *Jones v. Utica Mutual Insurance Co.*, 463 So. 2d 1153, 1157 (Fla. 1985), which states:

This "affirmative act" requirement is a reasonable safeguard insofar as it forbids the imposition of liability in cases in which the animal is merely a passive instrumentality in a chain of events leading to injury. Even a strict liability statute should not reach that far. This interpretation is consistent with the general notion of proximate causation, since other factors would constitute superseding or overwhelming causes when the dog is merely passive or retreating.

6 Fla. Prac., § 6.15. **"Although the courts have not addressed the specific issue of whether an affirmative or aggressive act on the part of the wild animal is necessary in order to establish causation, it is hard to rationalize this as a requirement for dogs under the dog injury statute but not for wild animals under common law principles."** *Id.* (Emphasis supplied).

Foreseeability is the second element of the proximate causation which is required for negligence causes of action. *Id.* The primary reason for applying the foreseeability standard in negligence cases is to protect the defendant from tort liability for results which, although actually caused by the defendant's negligent act, seem highly unusual, freakish, or bizarre. *Id.* See *McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992) (stating "an injury caused by a freakish and improbable chain of events would not be 'proximate' precisely because it is unquestionably unforeseeable, even where the injury may have arisen from a zone of risk").

In this case, it just simply not possible that assuming Conservation Ambassadors had a duty and breached it, which it did not, the injury to Plaintiff was foreseeable. The undisputed evidence establishes that Valdez-Castillo never came into direct contact with these animals.¹⁸ These animals have been displayed at over 500 events throughout the country.¹⁹ Conservation Ambassadors is not aware of a single incident in which a person suffered an allergic reaction from exposure to these animals or their excrement.²⁰ In fact, these circumstances are so unusual, that there is not one case in this country which is on-point with the facts alleged in this case. Thus, Plaintiff's claims fails as a matter of law for this reason.

Because there are no issues of facts as to whether Conservation Ambassadors owed a duty to Plaintiff, summary judgment must be granted in favor of Conservation Ambassadors. Further, because an aggressive or affirmative act on the part of a wild animal is necessary to establish causation on a negligence claim, Conservation Ambassadors is entitled to judgment as matter of law.

ii. Conservation Ambassadors did not breach its duty in the maintenance and keeping of the animals and therefore cannot be held liable for Plaintiff's accusation which consists of the following:

(1) Allegedly failing to properly insect its zoo animals prior to exposing Plaintiff to same. [Complaint, ¶ 56(f)].

Plaintiff alleges that the animals were not kept in a reasonably safe condition and free from defects or conditions because Conservation Ambassadors failed to properly inspect them. She states that as a result of Conservation Ambassadors failure to keep the animals in a reasonably safe condition, she was injured. Plaintiff's claim that Defendant failed to properly inspect the animals fails as a matter of law because Plaintiff has not established a breach.

¹⁸ Depo. of Valdez-Castillo, p. 70, ln. 4-6. (Exhibit E).

¹⁹ Affidavit of Anita Jackson, ¶ 3. (Exhibit F).

²⁰ Affidavit of Anita Jackson, ¶ 4. (Exhibit F).

A summary judgment is properly granted in negligence cases where there are no genuine issues of material fact. *Martinez v. Letica Corp.*, 617 So. 2d 453, 453 (Fla. 3d DCA 1993). In *Martinez*, the appellate court upheld the trial court's entry of summary judgment on a negligence claim in favor of defendants where the "defendants unequivocally demonstrated the absence of negligence on their part." *Id.* Therefore, the negligence claim was properly resolved as a matter of law.

The facts in this case show that three days prior to this trip, February 6, 2004, Conservation Ambassadors received a Certificate of Veterinary Inspection for all of the animals that were taken on this trip.²¹ The certificate states that an accredited veterinarian, Sheri McVeigh, inspected the animals and they were not showing signs of "infectious, contagious, and/or communicable disease. . . . [t]o the best of [her] knowledge, the animals listed on the certificate [met] the state of destination and federal interstate requirements."²² Thus, the undisputed evidence shows that the animals were properly inspected. Plaintiff has submitted no evidence demonstrating that the animals were not inspected and in a "reasonably safe" condition when they were brought to Miami.

In this case, assuming that Conservation Ambassadors had a duty, which it did not, it met that duty and there are no issues of fact as to whether there was a breach. Conservation Ambassadors took all necessary precautions by having every animal that was taken on the trip inspected and approved by an accredited veterinarian. Plaintiff has failed to submit any evidence to the contrary and this claim fails as a matter of law.

iii. Conservation Ambassadors did not fail to obtain all required licenses and

²¹ Conservation Ambassadors Response to BEC's Request for Admissions, Nos. 4, 5, 11, and 12. (Exhibit C); State of California Certificate of Veterinary Inspection dated February 6, 2004. (Exhibit D).

²² State of California Certificate of Veterinary Inspection dated February 6, 2004. (Exhibit D).

permits [Complaint ¶56(e)].

Plaintiff also makes an allegation that Conservation Ambassadors failed to obtain the proper licensing for the animals. However, Plaintiff has submitted absolutely no evidence in support of this allegation. In fact, the undisputed evidence shows that the proper licensing was obtained.²³

Moreover, assuming arguendo that the proper licensing was not obtained, Plaintiff has not alleged or asserted that the improper licensing was a cause of her injuries. The failure to obtain licenses cannot be the “cause in fact” of Plaintiff’s injury. To establish cause in fact, the Plaintiff must prove that “but for” the lack of the licenses the plaintiff would not have been injured. *Watson v. City of Hialeah*, 552 So. 2d 1146, 1149 (Fla. 3d DCA 1980) (applying the traditional “but for” test results to conclude that officer’s employment was not a cause in fact of a murder). In other words, Plaintiff must demonstrate that a license would have prevented the injury. Because Plaintiff has not demonstrated that Conservation Ambassadors failed to obtain the proper licenses or that, assuming arguendo the proper licenses were not obtained, it was a cause in fact of her injury, this claim fails.

iv. Plaintiff’s Claim for Failure to Warn Fails.

Plaintiff further alleges Conservation Ambassadors was negligent in failing to warn the Plaintiff of any dangerous, unsafe, or concealed perils associated with exposure to its zoo animals and/or their dander, feces, and excrement. As a matter of law, Conservation Ambassadors was under no duty to warn the Plaintiff that exposure to the animals and/or their dander, feces and excrement could cause injury. As previously discussed, the parties lack the necessary relationship to impose a duty upon the Defendant. In addition to the lack of duty between the parties, the Plaintiff was warned that the animals would be present.

²³Resp. Plaintiff’s Request to Produce; Supp. Resp. Plaintiff’s Request to Produce.

(a) **Duty**

A duty to warn only arises when a party knew or should have known of a dangerous condition that is not obvious to the Plaintiff. *Portal v. Asencio*, 824 So. 2d 1041, 1042 (Fla. 3d DCA 2002). This requirement of actual or constructive knowledge on behalf of the defendant is a prerequisite to establishing a duty to warn in both the products and premises liability contexts. *Lester's Diner II, Inc. v. Gilliam*, 788 So. 2d 283, 285 (Fla. 4th DCA 2000) (requiring plaintiff to show the defendant failed to warn of concealed oil leak of which it either knew or should of known); *Insua v. JD/BBJ, LLC*, 913 So. 2d 1262, 1263-64 (Fla. 4th DCA 2005) (supplier of a product who knows or has reason to know that the product is likely to be dangerous in normal use has a duty to warn those who may not fully appreciate the possibility of such danger). The basis for liability in these scenarios is the constructive or actual possession of **superior** knowledge by one party over the other. In other words, a duty to warn arises when person "A" has the ability to warn person "B" because of actual or constructive possession of superior knowledge.

When both parties have equal knowledge or the plaintiff has greater knowledge than the defendant, the duty to warn does not exist. *See Insua*, 913 So. 2d at 1264 (no duty to warn electrician of known inherent danger of electrocution from installation of vacuum sewage system); *St. Joseph's Hospital v. Cowart*, 891 So. 2d 1039, 1042 (Fla. 2d DCA 2004) (finding no duty to warn where black widow spider bit plaintiff because landowner had no knowledge or reason to know of spider's presence); *Jackson v. H.L. Bouton Co., Inc.*, 630 So. 2d 1173, 1176 (Fla. 1st DCA 1994) (stating, "one measure of the duty element of a negligence cause of action is the defendant's actual or implied knowledge of a defect in items it has produced or sold"). When the condition is obvious, no duty to warn arises because both parties have equal knowledge. *Cohen v. General Motors Corp., Cadillac Div.*, 427 So. 2d 389, 391 (Fla. 4th DCA 1983) (no duty to warn of the danger of manually

releasing the emergency brake while the car was running and in gear because it was obvious).

In this instance, neither party possessed any knowledge that could prevent injury. The Defendant had no actual or constructive knowledge that the animals' feces, dander, and/or excrement could injure anyone, if indeed it did. An accredited veterinarian examined the animals prior to their arrival and determined they were not suffering from infectious, contagious, or communicable diseases.²⁴ The animals were deemed safe for normal persons by contemporary medical standards. In products liability actions "no liability is imposed . . . where the product is harmless to normal persons and the injury is attributable to hypersensitivity or allergy." *Advanced Chemical Co. v. Harter*, 478 So. 2d 444, 448 (Fla. 1st DCA 1985). This rule is subject to the caveat that the Defendant must be without knowledge that someone might be injured by the product. *Id.* Again, the absence of knowledge prevents the imposition of a duty to warn. Without knowledge of a potential forthcoming injury, the Plaintiff is unforeseeable. There is no duty to warn unforeseeable plaintiffs. *Ragsdale v. Mount Sinai Med. Ctr. of Miami*, 770 So. 2d 167, 169 (Fla. 3d DCA 2000).

In this instance, the Plaintiff herself was unaware of her alleged allergic condition. In fact, Plaintiff had been exposed to various animals without consequence. The Plaintiff visited several zoos without experiencing an allergic reaction to the animals. (Valdez-Castillo's depo., p. 219, ln. 12-25; p. 220, ln.1-3; p. 221, ln. 7-16). Plaintiff also stayed at a farm and suffered no allergic reaction from the farm animals. (Valdez-Castillo's depo., p. 220, ln. 14-25; p. 221, ln. 1-6). Plaintiff owned dogs and kittens, and the Plaintiff **never** experienced an allergic reaction to an animal before the incident at the Hampton Inn. (Valdez-Castillo's depo., p. 221, ln. 17-25; p. 222, ln. 15-16; p. 223, ln. 4-24; p. 224, ln. 1-8; p. 255, ln. 4-9). In addition, Plaintiff readily admits to using all types

²⁴Exhibit D.

of household products without ever having an allergic reaction. (Valdez-Castillo's depo., p. 216, ln. 5-13; p. 217, ln. 12-20; p. 218, ln. 6-8). When these facts are taken together, there is simply no indication that Plaintiff would experience an allergic reaction. Therefore, not only did the Defendant have no duty to warn the Plaintiff, but a warning under these facts serves no useful purpose because the Plaintiff did not know she could potentially have an allergic reaction.

Furthermore, the imposition of liability in this context would create a precedent that every animal owner must warn any individual that comes in contact with their animal that they may potentially suffer an allergic reaction. For example, every person the animal approaches while being walked by their owner down the street or in a dog park would have to be warned. Otherwise, a Plaintiff that was unaware of their own condition could successfully bring suit against an animal owner for failure to warn of a potential allergic reaction. Certainly, no duty extends so far.

(b) Causation

Not only does the Defendant owe no duty to the Plaintiff, but the failure to warn cannot be the "cause in fact" of Plaintiff's injury. To establish cause in fact, the Plaintiff must prove that "but for" the lack of warning the plaintiff would not have been injured. *Metropolitan Dade County v. Colina*, 456 So. 2d 1233, 1235 (Fla. 3d DCA 1984) (applying the traditional "but for" test results in a conclusion that the county's omission was a cause in fact of the wrongful death). In other words, Plaintiff must demonstrate that a warning would have prevented the injury.

In contrast to Plaintiff's position, a warning could not prevent Plaintiff's injuries. *Grau v. Proctor and Gamble*, 324 F.2d 309, 310 (5th Cir. 1963) is instructive. In *Grau*, an individual sought recovery from the manufacturer of Crest Toothpaste for an alleged allergic reaction to a chemical ingredient. *Id.* The plaintiff was unaware of his own allergic or hypersensitive condition. *Id.* The Court found it "difficult to conceive of any warning which would have afforded any probability of

preventing plaintiff's injury." *Id.* Consequently, a warning was not required. *Id.* Florida Courts have adopted this reasoning. See *Advance Chemical Company v. Harter*, 478 So. 2d 444, 449 (Fla. 1st DCA 1985).

In this instance, the Plaintiff was not aware of her allergic or hypersensitive condition. (Valdez-Castillo's depo., p. 255, ln. 4-9). Because the Plaintiff was not cognizant of her allergy or hypersensitivity, a warning would not have changed her behavior or prevented her injury. *Grau*, 324 F.2d at 310. Indeed, the Plaintiff received a warning from her employer, BOYKIN or the Hampton Inn, that "zoo animals" would be present and the Plaintiff did not react to such a warning. (Valdez-Castillo's depo., p. 324, ln. 7-11). In fact, management informed the maid service prior to the beginning of their shift that "the hotel was going to look like a zoo." *Id.* The adequacy of a warning is immaterial when a plaintiff is in fact warned of a danger. *Talquin Elec. Co-op., Inc. v. Amchem Products, Inc.*, 427 So. 2d 1032 (Fla. 1st DCA 1983) (knowing that herbicide was dangerous to crops is sufficient warning although the exact manner of injury to crops was not unknown). The Plaintiff can neither complain that she received no warning because she admitted she did, nor can she argue a warning would have prevented the injury because it did not.

v. Conclusion-Negligence

Plaintiff's claim for negligence fails as matter of law because she has failed to establish that any material issues of fact exist as to Defendant's liability. That is, Conservation Ambassadors had no duty to Plaintiff and assuming it did have a duty, it was met. Additionally, her injuries were not caused by Defendant. Defendant also had no duty to warn Plaintiff because it did not have superior knowledge and the failure to warn was not a cause in fact of Plaintiff's injury. Because Plaintiff's claim for Negligence fails for the reasons discussed supra, summary final judgment should be entered in favor of Conservation Ambassadors.

C. Plaintiff's Claim for Strict Liability Fails

Plaintiff alleges the Defendant Conservation Ambassadors is liable under a theory of strict liability as the owner and keeper of the subject zoo animals. Plaintiff's First Amended Complaint, ¶ 58. Plaintiff argues that exposure to the zoo animals and their dander, urine, and excrement resulted in a compensable injury. *Id.* at ¶ 59. As a matter of law, Plaintiff's argument must fail. In this regard, the Defendant Conservation Ambassadors, adopts the arguments of Busch Entertainment Corporation in its Motion for Summary Judgment and Reply to Plaintiff's Opposition to Motion for Final Summary Judgment.

Florida imposes strict liability on the owners and keepers of wild animals. *Isaacs v. Powell*, 267 So. 2d 864, 867 (Fla. 2nd DCA 1962). However, Florida limits strict liability by adopting the position of the Restatement (Second) of Torts ("Restatement"), which distinguishes between damages that result from the inherently dangerous propensities of animals and those that are incident to the presence of the animal. *Restatement (Second) of Torts, cmt. e.* See *Scorza v. Martinez*, 683 So. 2d 1115, 1117 (Fla. 4th DCA 1996) (citing *Restatement (Second) of Torts cmt. d* in a claim for damages as a result of injuries inflicted by a monkey).

Florida's adoption of the Restatement's view of liability for wild animals is consistent with Florida's treatment of dogs. Florida applies strict liability to dogs by statute, but found there "must be a limit to the rule of absolute strict liability." § 767.01, Fla. Stat. (2004); *Smith v. Allison*, 332 So. 2d 631, 633 (Fla. 3d DCA 1976). Much like the Restatement, Florida Courts draw a distinction between the damages that results from the aggressive acts of dogs and their mere passive presence. *Jones v. Utica Mut. Ins. Co.*, 463 So. 2d 1153, 1157 (Fla. 1985) (requiring "affirmative act" to prevent the imposition of strict liability when the animal is merely a passive instrumentality in a chain of events leading to injury); *Smith*, 332 So. 2d at 631-33 (refusing to impose strict liability

when dog ran into plaintiff's path while operating a motorcycle absent an affirmative or aggressive act); *Rutland v. Biel*, 277 So. 2d 807, 808 (Fla. 2nd DCA 1973) (strict liability does not apply to presence of dog over which the plaintiff tripped and fell because no affirmative or aggressive acts were present). Florida's limitation on strict liability with dogs reflects how Florida law interprets strict liability with animals generally. As a consequence, a successful plaintiff must prove an aggressive or affirmative act on behalf of an animal to recover under strict liability.

In this instance, the Plaintiff's injuries do not result from the affirmative or aggressive acts of animals. None of the animals maintained by Conservation Ambassadors bit or scratched the Plaintiff. (Valdez-Castillo's depo., p. 70, ln. 4-6). In fact, the Plaintiff **never had any physical contact** with the subject animals. (Valdez-Castillo's depo., p. 69, ln. 17-23; p. 70, ln. 7-13). As a result, the Plaintiff cannot maintain a viable cause of action under Florida Law based on strict liability. There is simply no authority, statutory or otherwise, to impose strict liability based upon the passive acts or presence of an animal.

Conclusion-Strict Liability

Plaintiff's claim for strict liability fails because her injuries did not result from the dangerous propensities of the animals. There was no aggressive or affirmative act by the animals which would permit a finding against Defendant for strict liability. Because Plaintiff's claim for Strict Liability fails for the reasons discussed supra, summary final judgment should be entered in favor of Conservation Ambassadors.

WHEREFORE, the Defendant, CONSERVATION AMBASSADORS, respectfully requests that this Court enter an Order granting this Motion for Summary Judgment.

I HEREBY CERTIFY that on the 27th day of February, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing

document is being served this day on **Eric S. Kleinman, Esq.**, Attorney for Plaintiff, Kleinman & Arrizabalaga, P.A., 105 S.E. 2nd Avenue, Suite 1105, Miami, Florida 33131, Tel: 305-377-2728; Fax: 305-377-8390, **Robert Blank, Esq.**, Attorney for Busch, Rumberger Kirk & Caldwell, 100 N. Tampa Street, Suite 2000, P.O. Box 3390, Tampa, FL 33601-3390 Tel: 813-223-4253, Fax: 813-221-4752 and **John R. Buchholz, Esq.**, Attorney for Boykin, Kelley, Kronenberg, et al., Plaza Royale, Suite 204, 15600 NW 67th Avenue, Miami Lakes, FL 33014 Tel: 305-774-7058, Fax: 305-774-6632 via transmission of Notices of Electronic Filing generated by CM/ECF.

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