IN THE SUPREME COURT
OF THE STATE OF FLORIDA

MARY ROSE MAZZEO,

Petitioner,

v.

CITY OF SEBASTIAN, etc.,

Respondent.

CASE NO.: 72,744

BRIEF OF AMICUS CURIAE OF THE ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING POSITION OF PETITIONER MARY ROSE MAZZEO

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On Behalf of Amicus Curiae,
ACADEMY OF FLORIDA TRIAL LAWYERS

TABLE OF CONTENTS

TABLE OF CITATIONS

QUESTION PRESENTED

WHETHER THE DOCTRINE OF EXPRESS ASSUMPTION OF THE RISK DOES NOT APPLY TO A PREMISES LIABILITY ACTION THAT DOES NOT INVOLVE A CONTACT SPORT, A CONTRACTUAL WAIVER OF LIABILITY, NOR ANY RELIANCE BY THE DEFENDANT ON THE CONDUCT OF THE PLAINTIFF?

STATEMENT OF THE CASE AND FACTS

This brief is submitted on behalf of the ACADEMY OF FLORIDA TRIAL LAWYERS, a large statewide association of trial lawyers specializing in all areas of the law, in support of the position of the Plainitiff/Petitioner MARY ROSE MAZZEO.

Since the ACADEMY does not have a complete copy of the Record on Appeal, we will assume the accuracy of the Statement of the Case and Facts as set forth by the Plaintiff/Petitioner in her initial brief on the merits.

In this brief, references to the Plaintiff/Petitioner will be by name or as the Plaintiff, and the Respondent/Defendant will be referred to as the City or as the Defendant. Any emphasis in this brief is that of the writer unless otherwise indicated.

SUMMARY OF ARGUMENT

It is the position of the ACADEMY that the doctrine of express assumption of the risk does not apply in premises liability cases other than those where there is an express contractual assumption of the risk or where consent is exhibited by those participating in a contact sport and is, in fact, relied upon by the participants. The decision of the Fourth District in this case incorrectly extends the application of express assumption of the risk such that it eliminates the jury's consideration of the Plaintiff's comparative negligence as required by this Court's decision in HOFFMAN V. JONES, 280 So. 2d 431 (Fla. 1973). Moreover, this decision also improperly eliminates the City/Landowner's duty to exercise reasonable care and to warn of dangerous conditions of which it is aware, thus immunizing the Landowner from its own negligence.

The ACADEMY OF FLORIDA TRIAL LAWYERS submits that the Fourth District incorrectly applied the doctrine of express assumption of the risk to this premises liability action and misconstrued this Court's decisions in BLACKBURN V. DORTA, 348 So. 2d 287 (Fla. 1982), KUEHNER V. GREEN, 436 So. 2d 78 (Fla. 1983) and ASHCROFT V. CALDER RACE COURSE, INC., 492 So. 2d 1309 (Fla. 1986). This was simply a premises liability case to which comparative negligence principles apply. The City/Landowner and the Plaintiff should be held responsible for their negligence, if any, by the jury's apportionment of liability based upon comparative negligence principles.

ARGUMENT

POINT 1

THE DOCTRINE OF EXPRESS ASSUMPTION OF THE RISK DOES NOT APPLY TO A PREMISES LIABILITY ACTION THAT DOES NOT INVOLVE A CONTACT SPORT, A CONTRACTUAL WAIVER OF LIABILITY, NOR ANY RELIANCE BY THE DEFENDANT ON THE CONDUCT OF THE PLAINTIFF.

This is a premises liability action arising from the operation of a swimming facility by a governmental entity, therefore the standard of care for the City/Landowner is the same as that of an individual property owner, i.e., it has the duty to exercise reasonable care for the protection of invitees on its property. AVALLONE V. BOARD OF COUNTY COMMISIONERS OF CITRUS COUNTY, **493** So. 2d 1002 (Fla. **1986).** This includes the duty to warn. FIRST ARLINGTON INV. CORP. V. McGUIRE, **311** So. 2d **146** (Fla. 2d DCA **1985).**

The Fourth District determined in this case that the doctrine of express assumption of the risk was a complete defense to this premises liability action. The Court, citing decisions from other districts, held that express assumption of the risk is applicable in all cases where the plaintiff, with knowledge of the facts and dangers, takes action causing an injury.

The District Court found that the Plaintiff voluntarily exposed herself to the risk of breaking her neck by diving off the municipal dock in question into shallow water. Even though the jury found that there was negligence on the part of the City/Landowner herein, the Court nevertheless determined that the Plaintiff was barred from recovery.

This is a classic case as recognized in KUEHNER V. GREEN, 436 So. 2d 78, 80 (Fla. 1983), where the doctrine of assumption of the risk overlaps the doctrine of contributory negligence. However, if we accept the reasoning of the District Court, then the purpose and effect intended by the Court's adoption of comparative negligence in HOFFMAN V. JONES, will have been defeated.

The cornerstone of the application of express assumption of the risk is the plaintiff's knowledge and acceptance of the dangers in his or her participation in the activity giving rise to the injury. For well stated policy reasons, this Court has applied express assumption of the risk to contact sport cases simply because of the obvious waiver by the participants of any injuries or danger inherent in such activities.

Nevertheless, diving is not a contact sport nor does it involve a contractual undertaking such as in KUEHNER. This Court's decision in BLACKBURN specifically pointed out that express assumption of the risk was a "contractual concept." BLACKBURN at 290. There is no contractual agreement, either express or implied, between the Plaintiff and Defendant here.

As an Ohio Court of Appeals noted in COLLIER V. NORTHLAND SWIM CLUB, 35 Ohio App. 3d 35, 518 N.E. 2d 1226, 1229 (1987):

> Clearly, there is a risk of injury while diving into a shallow pool. The risk, however, is not so inherent as to relieve pool operators from any duty whatsoever to all divers. A rule stating that the risk is inherent would imply that all divers know of and accept the risk, regardless

> ~~inherent would imply~~ that all divers ~~know of and accept the risk, regardless~~ of whether the dive is their first or fifty-first. We cannot believe that such a rule attends aquatic activities as it does baseball games. Rather, proper instructions, warnings and supervision on diving can, and do, minimize the risk.

The Court in COLLIER rejected the notion that the plaintiff, who was injured while diving into a pool, was barred from recovery by assumption of the risk since it found that the plaintiff's conduct was such that contributory negligence principles applied. ID.

It is contrary to the doctrine of comparative negligence to bar the recovery of a plaintiff simply because the plaintiff may have subjective knowledge of the risk, particularly where the defendant's wrongful conduct also involves subjective knowledge of the danger. The Plaintiff in this case may have negligently proceeded to dive off the dock in question but did not actually agree to accept the risk of breaking her neck. If this Court's decision in HOFFMAN V. JONES is to have effect, the courts of this State must apply comparative negligence principles to all cases other than those involving contact sports or contractual waivers of liability. See, e.g., ASHCROFT V. CALDER RACE COURSE, INC., where this Court rejected application of the doctrine of express assumption of the risk to a case where the plaintiff knew of the risk, had complained of it and was aware of a similiar prior injury.

For the reasons stated above, the ACADEMY submits that the majority opinion of the Fourth District Court of Appeal should

be quashed and the dissenting opinion should be approved by this Court.

CONCLUSION

The ACADEMY OF FLORIDA TRIAL LAWYERS respectfully requests that this Court quash the majority opinion of the Fourth District Court of Appeal and adopt the dissenting opinion for the reasons stated herein.

Respectfully submitted,

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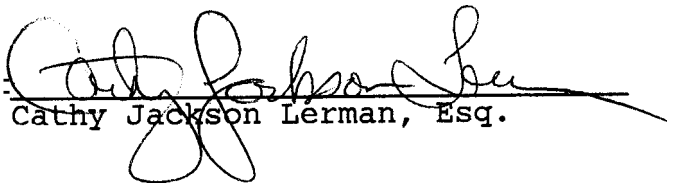
By: 
Cathy Jackson Lerman, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of August, 1988 to: JANE KREUSLER-WALSH, ESQ., and JOHN BERANEK, ESQ., 501 South Flagler Drive, West Palm Beach, Florida 33402; GEORGE ROBERTS, ESQ., Roberts & Reynolds, Suite 308, Comeau Building, 319 Clemantis Street, West Palm Beach, Florida 33401; WILLIAM HARRELL, ESQ., P.O. Drawer 639, Melbourne, Florida 32901; and RICHARD A. KUPFER, ESQ., Flagler Center Tower, Suite 200-300, 505 South Flagler Drive, West Palm Beach, Florida 33401.

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