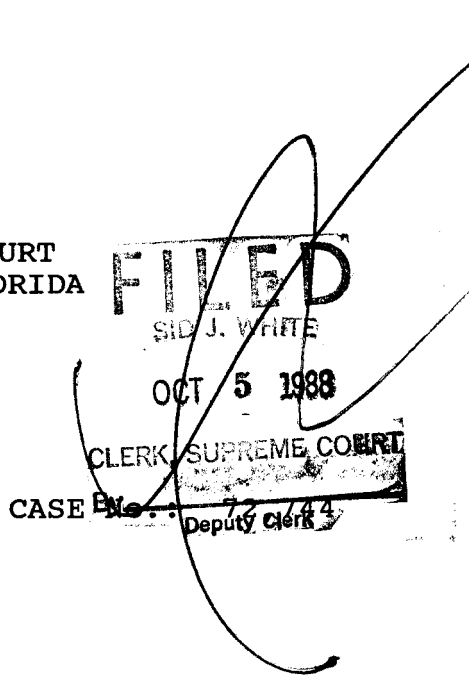
IN THE SUPREME COURT
OF THE STATE OF FLORIDA



MARY ROSE MAZZEO,

Petitioner,

v.

CASE No.: 72,744

CITY OF SEBASTIAN, etc.,

Respondent.

BRIEF OF AMICUS CURIAE OF THE FLORIDA ASSOCIATION FOR INSURANCE REVIEW SUPPORTING POSITION OF RESPONDENT CITY OF SEBASTIAN

Bonita L. Kneeland, Esquire and
~~Chris W. Altenbernd, Esquire~~ JLB 3-31-89
FOWLER, WHITE, GILLEN, BOGGS
VILLAREAL & BANKER, P. A.
(he is a judge now)
P. O. Box 1438
Tampa, Florida **33601-1438**
(813) 228-7411

On Behalf of Amicus Curiae
FLORIDA ASSOCIATION FOR INSURANCE REVIEW

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INTEREST OF THE FLORIDA ASSOCIATION FOR INSURANCE REVIEW AS AMICUS CURIAE

This amicus brief is submitted by the Florida Association for Insurance Review on behalf of the defendant/respondent, THE CITY OF SEBASTIAN. The Florida Association for Insurance Review is a non-profit organization consisting of insurance companies doing business in the State of Florida.

The purposes and objectives of this Association are two-fold. First, the Association provides a regular educational forum to discuss current developments in Florida law affecting the claims submitted to casualty insurance companies and the insurance coverage typically provided in casualty insurance policies. Secondly, the Association submits amicus briefing to assist Florida courts concerning major issues which affect casualty insurance coverage and the claims which are payable by that coverage.

STATEMENT OF THE CASE AND FACTS

This amicus would rely upon the Statement of the Case and FActs as contained in the Answer Brief on the Merits filed by the defendant/respondent, CITY OF SEBASTIAN and the facts contained in the Fourth District's opinion, Mazzeo V. City of Sebastian, ___ So.2d ___ (Fla. 4th DCA 1988) [13 FLW 1406 June 24, 1988].

The plaintiff/petitioner will be referred to as "plaintiff" or "Ms. Mazzeo". The defendant/respondent will be referred to as "defendant" or "The City."

CERTIFIED QUESTION

IS THE DOCTRINE OF EXPRESS ASSUMPTION OF RISK RESTRICTED TO EXPRESS CONTRACTS NOT TO SUE IN CONTACT SPORTS, OR DOES IT ALSO INCLUDE OTHER ACTIVITIES IN WHICH A PERSON, FULLY APPRECIATING THE DANGER INHERENT IN THE ACTIVITY, VOLUNTARILY AND DELIBERATELY PARTICIPATES IN THE ACTIVITY?

ANSWER OF AMICUS CURIAE

EXPRESS ASSUMPTION OF THE RISK SHOULD BAR A CLAIM IN NEGLIGENCE FOR DAMAGES WHEN THE PLAINTIFF'S INJURIES ARISE OUT OF THE PLAINTIFF'S INTENTIONAL ACT WHERE SHE HAS ACTUAL KNOWLEDGE OF A SUBSTANTIAL RISK OF HARM (i.e. A DANGER), AND SUBJECTIVELY FORESEES THE POSSIBILITY OF RISK. IN CASES IN WHICH PUBLIC POLICY OR SOCIAL UTILITIES WEIGH HEAVILY AGAINST THE USE OF THE DOCTRINE, THE COURT (NOT THE JURY) SHOULD HAVE AUTHORITY TO OVERRULE THE DOCTRINE.

SUMMARY OF THE ARGUMENT

The position of the Florida Association for Insurance Review is that the Fourth District Court of Appeals correctly applied the doctrine of express assumption of risk to the instant case. The plaintiff, MARY ROSE MAZZEO, deliberately exposed herself to a known risk of harm when she dove into 3½ foot deep water which, by herown admission, she knew was too shallow for diving. Ms. Mazzeo's behavior illustrates each of the basic requirements necessary in applying the doctrine of express assumption of risk as set out by this court in Kuehner v. Green, 436 So.2d 78 (Fla. 1983). Specifically, Ms. Mazzeo had actual knowledge of the danger of diving into shallow water, a danger which is not an ordinary risk. Next, Ms. Mazzeo's actual knowledge of the danger was subjective. That is, she was an experienced swimmer who was knowledgeable in the risks of shallow water diving. She expressed this knowledge to her companion, yet proceeded to dive. Furthermore, her decision was a deliberate act amounting to an intentional tort committed against herself. Any duty on the part of the defendant to maintain the dock or the water were irrelevant because this objective standard of care was overridden by the subjective knowledge and decision of the plaintiff herself.

The decision of the Fourth District Court of Appeal also comported with an established line of cases in Florida. These cases hold that assumption of risk is an appropriate defense against a plaintiff who performs an activity in an aberrant or

dangerous fashion when that plaintiff is fully cognizant of the inherent danger of the activity itself. The First District Court of Appeal in Robbins v. Department of Natural Resources, 468 So.2d 1041 (Fla. 1st DCA 1985) specifically noted that diving into water which a person knows to be too shallow would be an appropriate occasion for applying the doctrine of express assumption of risk.

The Florida Association for Insurance Review does not believe that the doctrine of express assumption of risk should be narrowly limited to circumstances involving only contracts or contact sports. For purposes of this doctrine, the plaintiff should be found to assume a risk when engaged in conduct for which an ordinary reasonable person would not expect protection from the public. Ms. Mazzeo had given up all reliance on any duty owed by the City when she voluntarily risked her own well-being by deliberately diving into shallow water. The judgment below should be affirmed.

ARGUMENT

EXPRESS ASSUMPTION OF THE RISK SHOULD BAR A CLAIM IN NEGLIGENCE FOR DAMAGES WHEN THE PLAINTIFF'S INJURIES ARISE OUT OF THE PLAINTIFF'S INTENTIONAL ACT WHERE SHE HAS ACTUAL KNOWLEDGE OF A SUBSTANTIAL RISK OF HARM (i.e. A DANGER), AND SUBJECTIVELY FORESEES THE POSSIBILITY OF RISK. IN CASES IN WHICH PUBLIC POLICY OR SOCIAL UTILITIES WEIGH HEAVILY AGAINST THE USE OF THE DOCTRINE, THE COURT (NOT THE JURY) SHOULD HAVE AUTHORITY TO OVERRULE THE DOCTRINE.

In the trial below, the jury answered YES to the following question:

Did the plaintiff, MARY ROSE MAZZEO know of the existence of the shallow water; realize and appreciate the possibility of injury as the result of diving in the said water; and having a reasonable opportunity to avoid it, voluntarily and deliberately expose herself to the danger by diving into the water?

The Fourth District Court of Appeals correctly held that this jury instruction and verdict form were appropriate in this case. Specifically, the Appellate Court stated that by engaging in the activity of diving in shallow water, the plaintiff expressly assumed the risk of her own actions, risks which she fully appreciated at the time. Under these circumstances, the court found the "actual consent" of the plaintiff in voluntarily

and deliberately exposing herself to the risk of the danger to herself.

This jury instruction below was in total conformity to the jury instruction in this court's decision of Kuehner v. Green, 436 So.2d 78 (Fla.1983). There, this court noted that this jury instruction "adequately addresses all threshold determinations required in applying the doctrine of express assumption of risk." Id. at 81.

The basic Kuehner elements are three-fold: The first element is actual knowledge of "the existence of the danger complained of." This element requires that the jury find actual, subjective knowledge on the part of the plaintiff which recognizes the danger inherent in the activity which the plaintiff is performing. The second element requires the plaintiff's actual realization and appreciation of the possibility of injury. This is an element of actual, subjective foreseeability. Third, the instruction requires the jury to determine that there has been a voluntary and deliberate exposure to the danger on the part of the plaintiff. In other words, the plaintiff's response must be an intentional act. It is the position of this amicus curiae that a court is correct in retaining the viability of assumption of risk in non-contract activities when these elements are satisfied and when public policy would not be offended by application of the doctrine.

The type of "danger" referred to in the Kuehner decision does not involve the ordinary risks of life, i.e. driving,

walking, grocery shopping. These are ordinary risks that involve a statistically low possibility of injury. People engage in these ordinary risks because they believe they have a reasonable right to protection. That is, they expect potential tortfeasors to act prudently and safely. These ordinary risks typically result in injury only if another person acts negligently or commits an intentional tort. Obviously, Ms. Mazzeo was not engaging in an ordinary risk when she proceeded to dive into water which she herself recognized as too shallow.

The **"danger"** referred to in Kuehner involves a substantial risk of harm. This is a danger which involves a higher statistical possibility (not necessarily probability) of injury. A danger for purposes of this doctrine is conduct for which an ordinary reasonable person would **not** expect protection from the public. As a matter of tort law it is an area of conduct in which protection is not normally provided by another. From the concept of **"social** contract" it is a situation in which a person does not believe that he has entered into a contract with the public to receive protection. A danger of this type is thus found in an activity which can result in injury without any clear cut negligence or intentional tort by another person.

The "actual knowledge" requirement in Kuehner is a subjective test and is not the objective test used for comparative negligence. It is based upon the experience of the plaintiff. Actual knowledge of a danger may exist on the part of a plaintiff even in the total absence of warning by defendants.

Actual knowledge measures the knowledge of the plaintiff rather than the conduct of the defendant.

In the case at hand, Ms. Mazzeo was an experienced diver and an adult. Nevertheless, it is not even necessary in this case to determine whether actual knowledge could be implied from her background. Actual knowledge was professed by the plaintiff herself. She stood in the 3½ foot water at the end of the pier. A witness heard her state that she did not want to dive from the pier since she knew that the water was not deep enough. She expressed actual knowledge and realization of the danger apart from any action or inaction on the part of the defendant City.

This situation demonstrates behavior on the plaintiff's part which is knowing rather than negligent. It is akin to playing Russian Roulette. An extreme example of this type would be a situation in which a piano is falling from an upstairs window. If a party rushes to dash underneath the piano and then on to safety, the plaintiff would be, in effect, "testing fate." The plaintiff would be pitting his or her sprinting skills against the speed of the falling piano. It cannot seriously be stated, under these circumstances, that there is not an assumption of risk created. No matter how negligent the piano mover, the runner would be negating any duty on the part of the defendant to protect him when, knowing the danger, he chooses to engage in such risky behavior.

On the other hand, an impatient or distracted jaywalker who rushes into the street despite traffic, may simply believe that

the other drivers will take precautions to avoid him. One cannot say that he has necessarily relieved the other drivers of their obligation to protect him. Therefore, if comparative negligence affects assumption of risk, its impact should be limited only to that portion of the doctrine which is functionally similar to contributory negligence. Ms. Mazzeo had given up all reliance on any duty owed to her by the City when she voluntarily risked her own well-being.

The Kuehner court also requires actual foreseeability on the part of the plaintiff in **"appreciating"** the risk of injury. There is no requirement, under this standard, that the plaintiff actually foresee or know of the specific injury involved in this case. This would create an unworkably limited doctrine. The petitioner, however, attempts to create an artificial distinction between Ms. Mazzeo's behavior and assumption of risk. Specifically, the argument is that she could not have assumed the risk because she did not actually agree to the risk of breaking her neck, as opposed to, for example, skinning her nose. It is certainly enough, however, that she knew of the risk of an injury which could naturally follow the act of shallow water diving. None of the applicable assumption of risk cases cited by the petitioner involves a situation where assumption of risk depended on knowing exactly what **type** of injury would result. To say that one may assume the risk of a skinned knee, but not that of a broken leg when engaging in a risky sport is absurd.

The element of "realization" of the risk of injury requires subjective foreseeability rather than objective foreseeability. Thus, it is the actual plaintiff who must perceive the possibility of injury -- not the ordinary reasonable person. A person of below average intelligence or a person inexperienced in the activity, for example, may not subjectively foresee the possibility of injury.

An accident resulting from the judgment of a child is another situation where subjective foreseeability would be questionable. The brief submitted by amicus curiae, The Academy of Florida Trial Lawyers, demonstrates a situation where the Kuehner element of subjective foreseeability is lacking. The incident in the Ohio Appellate Court decision of Collier v. Northland Swim Club, 518 N.E.2d 1226 (Ohio App. 1987) involves the operation of a swimming pool. An 11½ year old child was injured after diving into the shallow end of the pool. The Collier case is totally distinguishable from the instant case. The child's dive was performed under the observation of a volunteer swimming instructor and a lifeguard who apparently allowed the child to use her own judgment. She had been diving over and over in this area until she eventually struck her head. The Collier court stressed that there was absolutely nothing in the record to show that the child had knowledge of the potential risk of what she was doing.

Under the circumstances, the Ohio court determined that there had not been an express assumption of risk The case stood

for the proposition that it cannot be implied that all divers know and accept the risk of diving into a shallow pool. Thus, the Collier case does not involve a situation, such as the one at hand, where a person realizes and appreciates the danger, expressly manifests this appreciation, yet voluntarily and deliberately dives into shallow water.

The doctrine of actual foreseeability also applies only to injuries arising out of the danger. If the injury occurs due to a risk outside the danger, the doctrine would not apply. For example, this court recognized such a distinction in the case of Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309 (Fla. 1986). There, this court realized that riding on a race track with a negligently placed exit gap was not an inherent risk for jockeys in the sport of horse racing. On the other hand, the risk of shallow water diving is hitting the bottom of the lake. This was the risk perceived by this plaintiff, by her own admission, and the risk which materialized in her injuries. The doctrine should apply.

The Kuehner doctrine also limits assumption of risk to deliberate decisions of the party. This element does not involve the forced decision of a rescuer. nor does it involve a spontaneous decision made without considering the danger and the possibility of injury. The instant case, however, is completely illustrative of this element of deliberation. Ms. Mazzeo was not diving in the water to rescue her daughter. She was not pushed. The only pressure on her to jump was the repeated urgings of her

boyfriend to demonstrate a dive for the child. Ms. Mazzeo, as an adult cognizant of the dangers, had a choice. It is obvious that she made the choice deliberately and voluntarily. Noting the danger, she repeatedly refused to dive, but finally acquiesced and took her chances.

Express assumption of risk based on actual knowledge and actual consent to take one's chances is essentially an intentional tort committed against oneself. Public policy is unfavorable toward protecting those who commit an intentional tort. Typically, an intentional tort does not allow the tort feasor to receive the benefits of comparative negligence, or contribution and indemnity. Dean v. Johnston, 104 So.2d **3** (Fla. **1958)**; Nesbitt v. Auto-Owners Insurance Company, **390** So.2d 1209 (Fla. 5th DCA **1980).**

The same should be true when the victim is also the intentional tort feasor. Thus, a person who intentionally subjects himself to a danger, i.e., manifests actual consent to the risk, should not be able to receive a recovery from a defendant under a comparative negligence type of analysis. Express assumption of the risk is an affirmative defense which overrides the defendant's duty. In this case, the plaintiff had actual knowledge of the depth of the water. She had actual knowledge of the danger which this depth created for divers. Assuming there was some duty to maintain the dock or the water, those duties in negligence are irrelevant because this subjective standard care is overridden by the subjective knowledge and

decision of the plaintiff. To hold otherwise would be to encourage knowing, deliberate, and reckless behavior.

An established line of decisions from the Florida District Courts has refused to protect people from their own bizarre, aberrant and non-traditional behavior in performing activities other than contact sports. E.g., Strickland v. Roberts, 382 So.2d 1338 (Fla. 5th DCA 1980) (holding that plaintiff assumed risk in engaging in the activity of deliberately narrowly missing the dock while water skiing); Gary v. Party Time Company, Inc., 434 So.2d 338 (Fla. 3rd DCA 1983) (holding that an experienced skater who intentionally and voluntarily chose to expose herself to the risks involved in performing a dangerous stunt was **"undoubtedly"** outside the Blackburn holding merging assumption of risk into the principals of comparative negligence); Carvajal v. Alvarez, 462 So.2d 1156 (Fla. 3rd DCA 1984) (finding assumption of risk in riding horseback in a dangerous fashion); Robbins v. Department of Natural Resources, 468 So.2d 1041 (Fla. 1st DCA 1985) (holding that diving into water which a person knows to be too shallow **"would** be an appropriate occasion for application of the defense of express assumption of **risk.")** These cases reiterate the logic that participation in certain activities requires the participant to respect the inherent dangers of the activity.

The courts may then choose to override the doctrine of assumption of the risk in cases in which the defendant is guilty of intentional torts, illegal acts, or in cases in which the public policy and social utilities weigh heavily against the doctrine.

For example, assumption of the risk would not be appropriate in cases of intentional torts. Thus, if one athlete intentionally commits assault and battery upon another, the doctrine is inapplicable. Lyons v. State, 437 So.2d 711 (Fla. 1st DCA 1983).

As a part of the intentional act limitation, the doctrine of assumption of the risk should not apply in cases in which the defendant is engaged in illegal conduct. A particularly relevant example would be the selling of drugs. If a plaintiff dies because he takes crack cocaine, his estate should still be able to sue the person who provided the illegal drugs. In a sense, this is a case involving an illegal "social contract." So, too, when two people engage in an illegal activity such as drag racing, assumption of risk should not apply.

There may also be cases in which social utility or public policy outweighs the doctrine of assumption of risk. These areas are more difficult to define than areas in which the legislature has weighed the social utility and declared the activity criminal. This type of decision under tort law should be a judicial decision rather than a jury decision. This results in consistency in the law and avoids prejudice. Possible examples of such instances would be where there has been the transmission of a social disease, the selling of products with reason to believe that they will be misused (such as sterno to an alcoholic or glue to a glue sniffer) and fraternity hazings.

The instant case does not involve such criteria. As between herself and the City, Ms. Mazzeo's behavior demonstrated "actual

consent" to assume the risk of diving into water that she knew to be too shallow. Her behavior conforms to the elements which make up the threshold determination required in applying the doctrine of express assumption of risk as set out by this court in Kuehner v. Green. They are subjective realization and appreciation of a known danger and deliberate exposure to that very danger.

The Florida Association for Insurance Review does not believe that the doctrine of express assumption of risk should be narrowly limited to circumstances involving contracts or contact sports. The Association believes that the laws have been made to compensate victims for injuries that are not their own fault. The Association urges this court to recognize the doctrine of express assumption of risk to reflect a sense of fairness to the public as a whole. The decision of the Fourth District comports with numerous decisions of district courts in Florida that have found knowing participation in an activity in a dangerous fashion to be an appropriate occasion for applying the defense of express assumption of risk. The jury's verdict should be affirmed.

CONCLUSION

The Fourth District Court of Appeals correctly applied the doctrine of express assumption of risk in the instant case, following the elements of this court's decision in Kuehner v. Green, 436 So.2d 78 (Fla. 1983). The opinion should be affirmed.

BONITA L. KNEELAND and
CHRIS W. ALTENBERND, of
FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL& BANKER, P. A.
P. O. BOX 1438
TAMPA, FLORIDA 33601-1438
813/228-7411

By Bonita J. Kneeland
BONITA L. KNEELAND

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 3rd day of October, 1988, to:

WILLIAM H. HARRELL
P. O. Drawer 639
Melbourne, Fl. 32901
33402

RICHARD A. KUPFER
P. O. Box 3466
West Palm Beach, Fl.

GEORGE P. ROBERTS, JR.
P. O. Box 709
West Palm Beach, Fl. 33402-0709

CATHY JACKSON LERMAN
P. O. Box 24110
Ft. Lauderdale, Fl. 33307

JANE KREUSLER-WALSH
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Bech, Fl. 33401