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IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

FILED

SID J. WHITE

CASE NO. 72,744

OCT 3 1988

CLERK, SUPREME COURT

By Deputy Clerk

MARY ROSE MAZZEO,
Petitioner,

v.

(FOURTH DCA CASE NO. 87-1605)

CITY OF SEBASTIAN, etc.,
Respondent.

_____ /

ON CERTIFIED QUESTION FROM THE FOURTH DISTRICT
COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PREFACE

Petitioner, Mary Rose Mazzeo, was the appellant/plaintiff in the lower court and respondent, City of Sebastian, was the appellee/defendant. They are referred to herein as plaintiff and defendant or by their proper names.

The following symbols are used:

(R) - Record on Appeal

(A) - Petitioner's Appendix.

STATEMENT OF THE CASE AND FACTS

Plaintiff has unnecessarily complicated the facts here; accordingly, defendant provides the following:

This case involved a self avowed excellent swimmer and diver who had swum in this particular lake and dived from the platform on several occasions (R 134, 555-556, 575). The platform was two and one-half to three feet above the water (R 212). The water at the end of the platform was three to four feet deep (R 212, 507). Plaintiff dove from the platform several times the day of her accident (R 134). Shortly before her accident, plaintiff stood in the water at the end of the dock while her boyfriend tried to teach her daughter how to dive (R 136, 138, 603-604). When the daughter continued jumping instead of diving, the boyfriend

became very angry and told the plaintiff to show her daughter how to do it (R 139, 606). The plaintiff refused, telling the boyfriend the water was too shallow (R 606, 608). After repeated urging and angry comments by the boyfriend, the plaintiff stood next to her daughter on the dock and showed her the form of a shallow dive (R 140, 577). She cautioned her daughter to put her arms over her head to protect her head so it would not hit the bottom when she went down (R 577). Plaintiff then dove into the water and broke her neck. Plaintiff's injuries were severe and she remembers almost nothing of the events in question. An eyewitness reported most of the above facts (R 602-615).

The City regularly posted "No Diving" signs on poles around the platform (R 230-231, 236-237). The City had a constant battle with people tearing the signs down, but steadily replaced them (R 231, 237). There is no evidence that the City stopped putting up the "No Diving" signs. The City also stenciled "No Diving" in numerous places on the platform itself (R 230-231).

While the court allowed plaintiff to elicit opinions from its "safety expert", Ronald Dale, as to whether the depth of the water was hazardous and the signage adequate, it refused to qualify Mr. Dale as an expert in the field of

safety analysis (R 256-257). Mr. Dale's conclusions were based on design considerations and minimum depth for swimming pools (R 264-265). He admitted that one could reasonably assume from the "No Diving" stencils on the platform that the City did not intend it to be used for diving (R 293). He also said that the deck around the shallow end of a pool would present the same problem as the platform over the water here, yet pools are not required to erect "No Diving" signs over the shallow end (R 285-286, 297).

Having been to the lake and dived from the platform many times before this accident, plaintiff was thoroughly familiar with the depth of the water (R 555, 575). Lonnie Powell, a witness called by plaintiff, was at the lake the day that plaintiff was injured. He testified that he never dove off the platform because he knew the water was shallow (R 123). He did not require a sign to tell him that (R 123-124). Eyewitness Linda Martino similarly stated that she knew plaintiff would break her neck if she dove from the platform (R 607). Plaintiff, at the angry urging of her boyfriend, voluntarily attempted to show her child how to perform the dangerous act in question.

SUMMARY OF ARGUMENT

Express assumption of the risk extends to situations where the plaintiff assumes the risk pursuant to an express contract and where the plaintiff is injured while engaged in a contact sport or aberrant form of activity where the plaintiff subjectively appreciated the risk giving rise to the injury yet proceeded to participate in the face of such danger. The risk of breaking one's neck is obvious and inherent in the aberrant sport of intentionally diving from a platform containing numerous "No Diving" stencils into known shallow water while trying to train a child how to do it without getting hurt.

The jury here found that the plaintiff actually consented to confront certain known dangers. If the jury had only found that the plaintiff should have appreciated the danger that caused her injury, comparative negligence would govern; however, the jury answered each of the questions regarding express assumption of the risk affirmatively. Plaintiff knew the depth of the water, had dived from the platform many times, and knew that diving into the shallow water could hurt her. She knew the risks and voluntarily chose to encounter them.

Contact sports are simply one application of express assumption of the risk. A continuing line of cases have expanded the doctrine to situations other than contact sports. The Fourth District properly affirmed the jury's verdict applying the doctrine of express assumption of the risk to this aberrant form of sporting activity, shallow water diving.

ARGUMENT

QUESTION CERTIFIED:

IS THE DOCTRINE OF EXPRESS ASSUMPTION OF RISK RESTRICTED TO EXPRESS CONTRACTS NOT TO SUE AND 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?

The Fourth District Court of Appeal correctly found that the doctrine of express assumption of risk applies here where the jury found the plaintiff knew of the existence of the shallow water, realized and appreciated that she or her daughter would be injured as a result of diving into the water, and, having had every opportunity to avoid it, voluntarily and deliberately exposed herself to the danger by diving into the water. There is no reason to limit the doctrine to contact sports since there is no difference between contact sports and an aberrant form of a sporting

activity. In both, the participant volunteers to take certain chances and waives his right to impose liability on another for the injury from bodily contacts inherent in the chances taken.

As the owner and operator of a public park, the City had a duty to maintain the park in a condition reasonably safe for public use. City of Miami v. Ameller, 472 So,2d 728 (Fla. 1985). In Ameller, this Court approved the District Court's reversing the dismissal of plaintiff's complaint with prejudice because the City had adopted standards governing the equipment in question and allegedly violated its own standards. Ameller does **not** impose a higher standard of care on a city to an invitee than a private land owner. The duty imposed on the landowner is one of ordinary care, not to exercise such control as to be an insurer of the entrant's safety. Emmons v. Baptist Hospital, 478 So,2d 440 (Fla. 1st DCA 1985), review denied, 488 So,2d 67 (Fla. 1986); Cassel v. Price, 396 So,2d 258 (Fla. 1st DCA 1981), review denied, 407 So,2d 1102 (Fla. 1981).

Under premises liability concepts, a property owner is not responsible for dangerous conditions existing in natural or artificial bodies of water unless **they are** so constructed

as to constitute a trap or there is some unusual danger not generally existing in similar bodies of water. Hughes v. Roarin 20's Inc., 455 So.2d 422 (Fla. 2d DCA 1984), review denied, 462 So.2d 1107 (Fla. 1985); Savignac v. Department of Transportation, 406 So.2d 1143 (Fla. 2d DCA 1981), review denied, 413 So.2d 875 (Fla. 1982). Shallow water insufficient for diving does not constitute a trap. Warren v. Palm Beach County, 528 So.2d 413 (Fla. 4th DCA 1988); Hughes v. Roarin 20's, Inc., supra. The City posted warning signs here in the form of "No Diving" stencils on the platform. In the cases plaintiff cites on page 12 of her brief, there was no evidence of any warnings. Brightwell v. Beem, 90 So.2d 320 (Fla. 1956); Turlington v. Tampa Electric Co., 62 Fla. 398, 56 So. 696 (1911); First Arlington Investment Corporation v. McGuire, 311 So.2d 146 (Fla. 2d DCA 1975), cert. denied, 330 So.2d 16 (Fla. 1976).

The City has never contended that plaintiff's express assumption of the risk diminished its duty to maintain safe premises. The City agrees that a plaintiff's equal knowledge of a dangerous condition in premises liability cases does not affect the land owner's duty to maintain safe premises. A plaintiff's equal knowledge of a dangerous condition, however, is not equivalent to a plaintiff's express assumption of the risk.

None of the cases plaintiff cites on pages 13-15 of her brief involve express assumption of the risk. In each cited case, the court held that a patent danger or obvious hazard is equivalent to implied assumption of the risk, i.e. comparative negligence. In Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977), this Court held implied assumption of the risk merged with comparative negligence but excluded express assumption of the risk, defined as follows, on page 290 of the opinion, from the merger:

Included within the definition of express assumption of risk are express contracts not to sue for injury or loss which may thereafter be occasioned by the covenantee's negligence as well as situations in which actual consent exists such as where one voluntarily participates in a contact sport. (Emphasis added).

See Blaw-Knox Food & Chemical Equipment Corporation v. Holmes, 348 So.2d 604 (Fla. 4th DCA 1977).

Plaintiff narrowly reads Blackburn and its progeny, particularly Kuehner v. Green, 436 So.2d 78 (Fla. 1983), in claiming that express assumption of the risk is limited to contact sports. This clearly was not the intent of this Court nor the cases interpreting its decisions. Voluntary exposure or "actual consent" is the bedrock upon which the doctrine of express assumption of the risk rests. Kuehner v. Green, supra, 80. It is the jury's function to decide whether a participant actually consented to confront certain

danger. Kuehner v. Green, supra. In reaching that determination, the jury must decide whether the plaintiff subjectively appreciated the risk giving rise to the injury. If the jury finds the plaintiff recognized the risk and voluntarily proceeded to participate in the face of such danger, the jury can find the plaintiff expressly assumed the risk. Kuehner v. Green, supra.

Kuehner v. Green, supra, dealt with whether "express assumption of risk absolutely [bars] a plaintiff's recovery where he engages in a contact sport with another who injures him without deliberate intent to injure?" Kuehner applied the doctrine to contact sports but made no attempt to limit the holding to contact sports. If this Court had intended to limit the doctrine to only contact sports, it would have done so in Blackburn or Kuehner rather than limiting application of the doctrine to situations where actual consent exists and using contact sports as one example of such an application.

A continuing line of cases have expanded express assumption of the risk to situations other than contact sports. In Black v. District Board of Trustees of Broward Community College Florida, 491 So.2d 303 (Fla. 4th DCA 1986), review denied, 500 So.2d 543 (Fla. 1986), the Fourth

District Court of Appeal affirmed a jury verdict finding a police officer trainee had expressly assumed the risk of the injuries she incurred during a police academy training exercise. In so holding, the Fourth District noted on page 305 how Kuehner and its progeny have expanded express assumption of the risk to include situations besides contact sports:

Subsequent case law has expanded the doctrine of express assumption of risk to a variety of situations, including riding a "mechanical bull," Van Tuyn v. Zurich American Insurance Co., 447 So.2d 318 (Fla. 4th DCA 1984); horseback riding with another rider on a single saddle, Carvajal v. Alvarez, 462 So.2d 1156 (Fla. 3d DCA 1984); knowingly diving into shallow water, Robbins v. Department of Natural Resources, 468 So.2d 1041 (Fla. 1st DCA 1985); and racing horses professionally, Ashcroft v. Calder Race Course, Inc., 464 So.2d 1250 (Fla. 3d DCA 1985). Although the courts in the above cases were not always satisfied that the defendants had met their burden of proof on the assumption of risk defense, in each case the court rejected the plaintiff's contention that express assumption of risk was inapplicable as a matter of law. (Emphasis added).

Similarly, Strickland v. Roberts, 382 So.2d 1338 (Fla. 5th DCA 1980), review denied, 389 So.2d 1115 (Fla. 1980), affirmed a summary judgment for defendant where the plaintiff sued for negligence based on a water skiing accident at a church summer camp lake because the plaintiff "was injured while engaged in an aberrant form of the sport: swinging in as close as possible to a stationary dock for the purpose of spraying water on sunbathers." Likewise,

Gary v. Party Time Company, Inc., 434 So.2d 338 (Fla. 3d DCA 1983), affirmed a directed verdict for the defendant where plaintiff expressly assumed the risk of injury resulting from her roller skating down a ramp onto a runway while holding ski poles in either hand.

Plaintiff has mischaracterized this Court's holding in Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309 (Fla. 1986), on pages 17-20 of her brief. Nowhere in Ashcroft does this Court state, "it only carved out a narrow exception to that [implied assumption of the risk merging with comparative negligence] in the Kuehner case for injuries received while participating in a contact sport due to accidents that are inherent in the risk of engaging in such a sport." (Petitioner's brief p. 17). Ashcroft did not hold that express assumption of the risk could not apply as a matter of law to horse racing. This Court reversed the District Court's reversal of the jury verdict because, "express assumption of risk waives only risks inherent in the sport itself. Riding on a track with a negligently placed exit gap is not an inherent risk in the sport of horse racing." (Emphasis added) Ashcroft v. Calder Race Course, Inc., supra, 1311.

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Unlike the present situation, the plaintiff in Ashcroft could not have anticipated the risk of a negligently placed gate, not inherent in the activity of horse racing. Moreover, plaintiff's participation in the horse race did not involve any aberrant or intentional conduct on his part for which he might be held to have assumed the risk. Compare, Carvajal v. Alvarez, 462 So.2d 1156 (Fla. 3d DCA 1984); Gary v. Party Time Co., Inc., supra; Strickland v. Robert, supra.

The risk of breaking one's neck is inherent in the aberrant sport of intentionally diving from a designated "No Diving" platform into known shallow water, while trying to train a child how to do it without getting hurt. Plaintiff's footnote 6 on page 20 of her brief, claiming that no one could see the "No Diving" stencils is incorrect. The stencils were faded but easily readable (R 235, 293, 509, 584). In any event, the plaintiff/mother knew the diving was dangerous. She initially refused to dive, stating the water was too shallow. Only when her boyfriend forced her did she try to show her daughter how to keep from hitting her head on the bottom (R 577). She then dove and hit her own head.

Robbins v. Department of Natural Resources, 468 So.2d 1041 (Fla. 1st DCA 1985), is directly on point. Plaintiff there was paralyzed as a result of diving into shallow water at a public swimming area. The trial court granted summary judgment for the defendant on the basis of express assumption of the risk. The First District reversed because express assumption of the risk is a jury question, but specifically discounted the plaintiff's contention that express assumption of the risk cannot, as a matter of law, apply in this sort of case. In so holding, the First District stated as follows on pages 1043-1044 of the opinion:

If the evidence in this case were to be evaluated by a jury under the express assumption of risk criteria approved in Kuehner v. Green, 436 So.2d 78 (Fla. 1983), the jury could find the following: (1) that the plaintiff had, in fact, upon his first entry into the water, become fully aware of the shallow depth of the water and the existence of the protruding rocks; (2) that he had been able to see the bottom clearly from the platform; and (3) that he subjectively recognized the risk but, nevertheless proceeded to execute his dive. Such an aberrant form of participation in the recreational activity of diving would be an appropriate occasion for application of the defense of express assumption of risk, notwithstanding the fact that diving is, of course, not a contact sport and involves no other participants, Gary v. Party Time Co., Inc., 434 So.2d 338 (Fla. 3d DCA 1983), and that no formal release, consent or waiver form was involved., Kuehner, supra. (Emphasis added).

This language in Robbins was not dicta. The sole issue on appeal in Robbins was whether the trial court had properly granted a summary judgment in favor of the defendant on the ground of express assumption of the risk. The plaintiff argued that the defense of express assumption of the risk was not properly before the court because it was not pled and could not, as a matter of law, be applied in this sort of case.

The plaintiff's further contention that the First District receded from or modified Robbins in the City of Milton v. Broxson, 514 So.2d 1116 (Fla. 1st DCA 1987), is also without merit. The City of Milton argued on appeal that the trial court should have granted its motion for summary judgment and motions for directed verdict because it was not legally responsible for the plaintiff's injuries since it had no duty to warn him of dangers or risks which should have been apparent to those attending the softball games at the park, especially where the plaintiff had played softball in the past, had previously attended games at the park as a spectator, and was familiar with the risks involved in the positioning of one's self in the area and dispute while players were warming up. This is not analogous to a finding that the plaintiff expressly assumed the risk. Rather, the City there contended it owed no duty

to the plaintiff as a matter of law. There is a tremendous difference between a jury's finding a plaintiff did have knowledge versus should have had knowledge. Broxson in no way modified Robbins.

The jury here found that the plaintiff actually consented to confront certain known dangers which she subjectively appreciated. The Fourth District properly affirmed the verdict since ample evidence existed to support the jury's findings. If the jury had only found that the plaintiff should have appreciated the danger that caused her injury, comparative negligence would govern; however, the jury answered each of the questions regarding express assumption of the risk affirmatively. Plaintiff knew the depth of the water, had dived from the platform many times, and knew that diving into the shallow water could hurt her. Plaintiff knew the risks and voluntarily chose to encounter them. She was trying to show her child how to do a dangerous act without getting hurt.

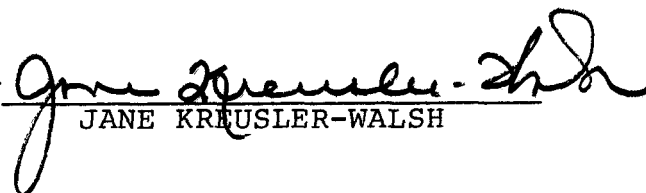
Express assumption of the risk extends to situations where the plaintiff assumes the risk pursuant to an express contract and where the plaintiff is injured while engaged in a contact sport or an aberrant form of activity under circumstances where the plaintiff subjectively appreciated

the risk giving rise to the injury yet proceeded to participate in the face of such danger. This case meets every requirement of the latter category.

CONCLUSION

The certified question should be answered in the negative and the opinion of the Fourth District affirmed.

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