A-16

IN THE SUPREME COURT OF FLORIDA

MARY ROSE MAZZEO,

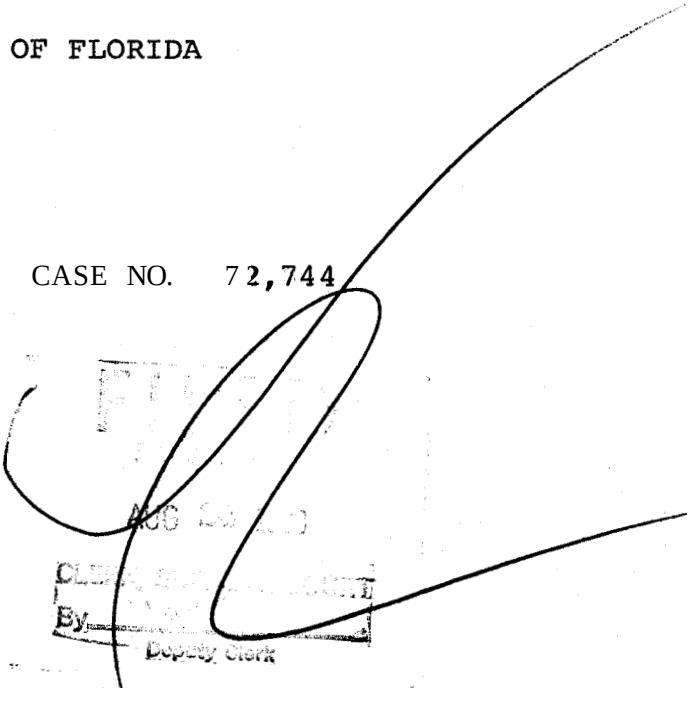
Petitioner,

v.

CITY OF SEBASTIAN, etc.,

Respondent.

CASE NO. 72,744



PETITIONER'S INITIAL BRIEF ON THE MERITS
(On Certified Question From the Fourth District Court of Appeal)

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd.)

PREFACE

This is a certified question proceeding. The plaintiff in a personal injury action appealed a final judgment for the defendant and the denial of plaintiff's post-trial motions. The Fourth District Court of Appeal affirmed the final judgment, with one judge writing a dissenting opinion, and certified a question of great public importance to this court. The parties will be referred to as the "plaintiff" (or "Mary Rose Mazzeo") and the "defendant" (or "The City"). The symbol "R." refers to the record on appeal, including the trial transcript. The symbol "App." refers to the appendix at the end of this brief.

CERTIFIED QUESTION

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?

STATEMENT OF THE CASE AND FACTS

This is a lawsuit involving a tragic accident that occurred on July 5, 1982, at Swim Lake, in the City of Sebastian. Swim Lake is a public recreation park owned and operated by the City (R. 824, 206). The park contains an artificial lake (R. 869, 682, 226-227), along with playground equipment, a pavilion, and various picnic tables (R. 132, 216) and a wooden dock that extends 38 feet out onto the lake. (R. 102, 211, 262). The dock was built as a platform for people to walk out on the lake rather than for boats since there is no boating activity in the lake.[1] (R. 587). The dock is elevated about 2 1/2 to 3 feet above the water. (R. 212).

The City admitted it was aware that people frequently dove off the dock into the lake. (R. 207, 218). There was additional evidence and photographs showing this to be a frequent occurrence at Swim Lake. (R. 102, 122, 555, 677). The Mayor of the City testified at trial that even he and his own children frequently jumped off the dock into Swim Lake. (R. 209-211). At the end of the dock the water was only 3 to 4 feet deep. (R. 212, 262).

In 1979 (several years before the injury to this

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1. The Fourth DCA's majority opinion (App. A-2) states there was no boating on the lake because the lake is too shallow for boating activity. Although the record indicates there was no boating activity on the lake (R. 587), we do not believe the record indicates the reason for that.

Plaintiff) the City received correspondence from its insuranc carrier, Aetna Insurance Company, stating that a safety inspection performed by the carrier disclosed some areas that should be attended to; one of which was that the City should erect "no diving" signs on the dock at Swim Lake and should consider providing lifeguard services. (R. **219-221, 731).** Initially the City put up "no diving" signs on the dock pursuant to Aetna's suggestion but they were occasionally removed by unknown people. (R. **230-231).**

Eventually, instead of nailing up signs the City used a stencil and painted the words "no diving" on the floor of the dock itself. The Mayor of the City admitted at trial that th reason for the stencil was because "we assumed that there would be people diving off the dock" and because the City knew it was dangerous to dive from the dock. (R. **218).** Howe er the City used white paint to paint the letters on a white sunbleached wooden dock and the testimony was uncontradicted that by the time of the **1982** accident the paint had weatherec and the words were faded and obscured. (R. **266-267, 509-510, 584, 587).** There were no other "no diving" signs posted on the dock or anywhere else around the lake on the day of the accident. (R. **117, 122, 135, 217, 555-556, 558,** 640).[2] The

2. The Fourth DCA's majority opinion (App. **A-2)** states that "no diving" signs were exhibited in various places from time to time by the City. However, the evidence at trial was uncontradicted that there were no such signs posted on the dock or around the lake on the day of the accident (other than the faded "no diving" stencil on the dock itself), nor when the area was inspected a few days later (R. **217).**

only sign posted was one in the pavilion which said "swim at your own risk." (R. 122, 216, 640). There were also no lifeguards present. (R. 629).

The only safety expert to testify on the subject at trial (Ronald Dale) was of the opinion that it constitutes a dangerous condition to maintain a platform 2 1/2 feet over the surface of water only 45 to 48 inches deep. (R. 264-266). The minimum recommended depth of water under such a platform would be 8 1/2 feet deep. (R. 265). The City admittedly knew through its Mayor) that a dangerous condition existed. (R. 28).

The potential danger became a reality on July 5, 1982, when Mary Rose Mazzeo, who was then 29 years old (R. 430), and a mother of two children (R. 550), dove into the lake from the platform and broke her neck when she struck her head on the bottom. (R. 166, 177).

When Mary Rose Mazzeo (the Plaintiff) arrived at Swim Lake with James Roberts and her two children there were about 25 other people around the lake area. (R. 132-133). Mary, James and the children swam and jumped off the dock for a while before the accident happened. (R. 134).

There was a conflict in the evidence concerning the events that occurred just before the Plaintiff's fateful dive into the water. A witness (Linda Martino) testified she observed the events that occurred from a vantage point about 50 feet away from where Plaintiff dove into the lake. (R. 602, 618-619). Ms. Martino testified that Plaintiff had been

standing in the water at the end of the dock before the accident with James Roberts who was trying to teach Plaintiff s daughter how to dive into the water. Ms. Martino testified that James Roberts told Plaintiff to get up on the dock and show her daughter how to dive; whereupon Plaintiff initially did not want to and said, "It's not deep enough;" but she later capitulated and dove into the water. (R. **603, 606-608)**

James Roberts testified at trial and disagreed with Ms. Martino. He denied that Plaintiff said anything about the water not being deep enough to dive. (R. **139).** Plaintiff testified she had no recollection about standing in the water at the end of the dock (R. **558, 576)** nor about saying anythir to James Roberts about the water being too shallow to dive. (R. **577-578).**[3]

As a result of the accident the Plaintiff has become an "incomplete **C-5** quadriplegic." (R. **159, 164, 165, 311).** This resulted from a fracture of the **C-3,** the **C-3/4,** and the **C-5** vertibrae (R. **312).** After time and physical therapy Plaintiff has gained back certain limited function of her limbs on one side and is now a "functional hemiplegic." (R. **339).**

The Plaintiff sued the City for maintaining a dangerous condition and negligent failure to warn (R. **820-822; 870).**

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3. For purposes of this appeal we accept, as we must, the testimony of Ms. Martino. We simply point out the conflict to give a complete and accurate synopsis of the testimony at trial.

It was Plaintiff's position that the City should have made the area next to the platform safe for diving instead of just maintaining a faded "no diving" stencil on the floor of the wooden dock, and that the warning itself was insufficient. The City alleged as an affirmative defense that Plaintiff voluntarily exposed herself to a known risk and therefore her action should either be barred entirely or her recovery should be proportionately diminished. (R. 824-825). After the presentation of all the evidence the City requested the lower court to instruct the jury on express assumption of the risk (as well as on comparative negligence) based on a case from the First DCA which analogizes diving to a contact sport (R. 656-657). The City argued that the contact sport cases should also apply to any "aberrant form of participation in a recreational activity, . . notwithstanding the fact that diving is of course not a contact sport and involves no other participants." (R. 661). Over Plaintiff's objection (R. 662 the lower court decided to allow the defense of express assumption of the risk to go to the jury, but expressed great reluctance in doing so:

> The Court: I am still disturbed about it. I mean I am not sure the Supreme Court will uphold that. They may limit express assumption of risk to contact sports because it's based on a contractual relationship. I am not sure you can say that diving or any non-contact sport you are contractually agreeing to the assumption of risk.

> Well, I am going to give your instruction, but I am worried about it. But I feel I have [to] give it, and that's instruction 3.8 (R. 661-662).
>
> * * *
>
> I wouldn't be surprised at all if the Supreme Court held that in non-contact sports even if it could be express assumption of risk that it merges in comparative negligence. (R, 667).

Since the possibility of reversal on appeal was recognize at trial, the lower court suggested that the verdict form allow the jury to answer all questions including the percentage of comparative negligence, amount of damages, etc., ever if the jury should answer "yes" to the assumption of risk question. In that way, if the case was reversed on appeal it would not need to be retried, (R. 667-668). However, the city objected on grounds that it would confuse the jury so the lower court did not press it. (R. 668-669).

The case was submitted to the jury on the dual theories of whether the City was negligent in failing to maintain the park in a reasonably safe condition for its invitees, and whether it negligently failed to warn about a dangerous condition. (R. 736, 662). The jury was first instructed on the assumption of risk defense (R. 737), and then instructed that if they found both Plaintiff and the City negligent the court would reduce the award by the proper percentage. (R. 738, 740-741). Then the jury was instructed that if they answered question #2 (on assumption of risk) "yes," their

verdict was for the City and they should proceed no further expect to sign the verdict and return it to the courtroom, (R. 742). Then they were instructed if they found Plaintiff negligent to any degree the court would just reduce her damages. (R. 743). Plaintiff again objected to the assumption of risk defense. (R. 747).

The jury was confused when it retired to deliberate and it came back again to the court with a request to clarify the instructions concerning the assumption of risk defense. The jury's note to the court stated: "Reading the instructions given seems to contradict question 2. If we find both plaintiff and defendant negligent, do we assign a percentage of negligence, or just sign and date the verdict?" (R. 749). The jury was under the impression that by answering "yes" to questions 1 and 2 they would be finding both plaintiff and defendant negligent. The lower court acknowledged that the jury was obviously confused about express assumption of the risk (R. 749), and that this is why the court had serious questions about the assumption of risk defense in a case of this sort. The court stated, "I think it's very confusing. and I know it's more confusing to a jury." (R. 752). The lower court then re-read to the jury the same instructions that had confused them the first time; including the comparative negligence instructions. (R. 755-757). The jury then retired again and finally returned with a verdict.

The jury found that there was negligence on the part of the City which caused plaintiff's damages, however the jury

lso found an express assumption of the risk by answering yes" to the second question on the verdict form. (R. 760, 94). The jury then just signed and dated the verdict leaving the rest of it blank). Plaintiff immediately moved or a new trial and the court reserved ruling until written otions were received. (R. 762).

Three days after the verdict the clerk of the court filec in affidavit stating that she had been informed by one of the urors that the entire jury thought that its job was to lecide the question of negligence and that the court would apportion the percentage of fault and decide the dollar amount of damages. (R, 896; see also Appendix "B" to this brief). The juror was "shocked" when the clerk told her the meaning of the verdict. (Appendix "B").

Plaintiff timely served motions for new trial on the issue of damages and apportionment of fault only (R. 901) or alternatively on all issues (R. 900, 775). The trial court entered final judgment for the City (R. 916), and denied plaintiff's motion for new trial (R. 920-921). The trial court's order denying a new trial states:

> As to the application of the defense of express assumption of the risk, the court finds this to be a close and difficult question. However, the court finds that the case of Robbins v Department of Natural Resources, 468 So.2d 1041 (Fla. App. 1st Dist. 1985) is applicable and controlling. The facts in Robbins are very similar to the facts in this case. Although it may be an unwarranted extension of the doctrine of express assumption of the risk beyond what was envisioned by the Supreme Court in

> Kuehner v Green, 436 So.2d 78 (Fla. 1983), this court is bound to follow it. State v Hayes, 333 So.2d 51 (Fla. App. 4th DCA 1976). (R. 920-921. See also R. 817).

On appeal to the Fourth DCA, the issue was framed as follows:

> Whether the doctrine of express assumption of the risk applies as a complete bar to a premises liability case such as this one, which does not involve contact sports, nor a contractual waiver of liability, nor any reliance by the defendant on the conduct of the plaintiff?[4]

The Fourth DCA, in a 2 to 1 decision, held:

> We believe . . . that express assumption of risk as a complete defense is not limited to contact sports or express contracts not to sue. [citing a prior Fourth DCA case], Lest there be any doubt as to this court's stance, we so align ourselves with that position at this time.

The Fourth DCA certified the question to this court as an issue of great public importance. Judge Stone wrote a dissenting opinion in which he expressed the belief that the majority was improperly extending the doctrine created by this court in Kuehner v Green, infra, to a fact situation which is not analogous to Kuehner. (App. A-9 and 10). Judge

4. A second issue was also raised on appeal by the plaintiff concerning the trial court's refusal to re-instruct the jury that a finding of assumption of risk will mean that plaintiff obtains no recovery against the City; and the trial court's refusal to allow plaintiff to interview the juror who had stated to the clerk that the entire jury misunderstood the verdict. Since that falls outside the question certified to this court we are not separately raising it as an independent issue in this brief. However, we believe it is still relevant in that it reflects the impropriety of instructing the jury on both assumption of risk and comparative negligence in a case of this nature.

;tone opined that the issue for the jury in this case is :omparative negligence rather than assumption of risk.

This court has tentatively accepted jurisdiction to ınswer the certified question and directed the parties to :ile briefs on the merits.

SUMMARY OF ARGUMENT

This is a premises liability case (not a contact sport :ase and even if Plaintiff knew the depth of the water, that loes not diminish the City's duty to maintain safe premises. :t only goes to the concomitant duty to warn of a dangerous :ondition. Plaintiff's knowledge of a potential danger on :he premises merely raises a comparative negligence issue, ıot a complete defense.

This court has held that assumption of the risk has been ıerged into comparative negligence, except for an express :ontractual assumption of risk, or where consent is exhibited ınd relied on by participating in a contact sport. The :ontact sport exception is premised on Plaintiff's consent :o have other participants (who are relying on such consent) :ngage him in bodily contact which would be deemed tortious ınder other circumstances and which may injure him. That :ationale is totally absent in this case. The City has never :laimed to have relied on the Plaintiff assuming any)articular risk. This court has not extended the doctrine ıny farther than the contact sport scenario and has most :ecently narrowed the doctrine in a premises liability case.

There are two applicable cases from this court on this subject and the present case is much closer to the Ashcroft zase than it is to the Kuehner case. The District Court of Appeal cases which have extended the contact sport exception to cover any "aberrant form of participation in a recreationa activity" have taken this exception far beyond the point authorized by this court.

Also, in order for express assumption of risk to apply the plaintiff must subjectively realize at least the hazard of serious injury and not just the risk of a scrape on the nose or similar trivial injury. There was no evidence in thi zase that Plaintiff subjectively recognized the severity of the risk, and the jury's verdict makes no such finding. The verdict would not be sufficient to preclude all recovery even if express assumption of risk did apply to a case like this.

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 question certified by the Fourth DCA is a fair statement of the issue, but it can be improved upon because it omits a few important details. We prefer the statement of the issue as we had framed it before the Fourth DCA (see p. 9

supra) because this is specifically a premises liability case which does not involve any element of reliance by the defendant on the conduct of the plaintiff, nor does it involve a contractual waiver of liability or a contact sport.

There is no question the City owed the highest duty of care to the Plaintiff and all other invitees in its operation of the entire recreational park, including Swim Lake. Once a governmental entity decides to operate a swimming facility it assumes the duty to operate the facility as safely as any individual property owner would be required to. Avellone v Bd. of County Comm'n. of Citrus County, 493 So.2d 1002 (Fla. 1986); Butler v Sarasota County, 501 So.2d 579 (Fla. 1986). It has long been recognized in Florida that a private landowner may be held responsible for maintaining an unsafe recreational bathing facility and failing to post warnings which caution members of the public not to dive from a particular spot into shallow water. Brightwell v Beem, 90 So.2d 320 (Fla. 1956); Turlington v Tampa Electric Co., 62 Fla. 398, 56 So. 696 (1911); First Arlington Inv. Corp. v McGuire, 311 So.2d 146 (Fla. 2d DCA 1975).

In fact, this court has indicated that a city operating a public park may owe an even higher standard of care than a private landowner would owe to an invitee in his backyard. See City of Miami v Ameller, 472 So.2d 728 (Fla. 1985) (Held: Although a private landowner may have no duty to have a cushioning ground surface beneath monkey bars, a city may have such a duty when it is recognized as being the proper

standard for a public playground.) It therefore bears repeating that Swim Lake is not a natural condition; it was excavated and the wooden dock was later built along with picnic tables, a pavilion, etc., as part of a public attraction. A finding of liability in this case does not mean that a city must post signs around every lake or canal within its geographical boundaries. It also should be noted that the jury did find the city negligent in this case and this appeal does not involve the sufficiency of the evidence to support that finding. The city did not cross appeal on that point, or any other point.

The City argued to the trial court that express assumptio if the risk would act as a complete bar to this lawsuit based in the testimony of Ms. Martino who said she overheard plaintiff say that the water was too shallow to dive just before she dove. Even accepting that testimony and assuming plaintiff knew the depth of the water, that does not diminish the City's duty to maintain safe premises. It only goes to the duty to warn.

Prior to this case, even the Fourth DCA had held that in premises liability cases the plaintiff's equal knowledge of a dangerous condition does not affect the landowner's duty to maintain safe premises, but it only makes it unnecessary to provide a warning. Passaro v The City of Sunrise, Fla., 415 So.2d 162 (Fla. 4th DCA 1982) (Held: Plaintiff's knowledge of the danger on the premises raises a comparative negligence issue). See also Rea v Leadership Housing, Inc., 312 So.2d

818 (Fla. 4th DCA 1975), approved by this court in Blackburn v Dorta, 348 So.2d 287 (Fla. 1977). In Blythe v Williams, 356 So.2d 334 (Fla. 4th DCA 1978) the Fourth DCA held that even though the plaintiff had admittedly checked the depth of the water just before he dove into it from a swing that was constructed and maintained by the defendant, it was a comparative negligence issue. Recently, a different panel of the Fourth DCA stated in Stewart v Boho, Inc., 493 So.2d 95, 96 (Fla. 4th DCA 1986):

> . . . where the danger is of such a nature that the owner should reasonably anticipate that it creates an unreasonable risk of harm to an invitee notwithstanding a warning or the invitee's knowledge of the danger, then reasonable care may require that additional precautions be taken for the safety of the invitee. Concerning such hazards, the owner can be held liable to the invitee for failing to exercise reasonable care, even though the invitee was himself negligent in encountering the known danger, thus subjecting his claim to the defense of comparative negligence. [e.s.] Id. at 96.

Every other district court of appeal in Florida is in accord with this principle in premises liability cases. See Bennett v Mattison, 382 So.2d 873 (Fla. 1st DCA 1980); Zambito v Southland Recreation Enterprises, Inc., 383 So.2d 989 (Fla. 2d DCA 1980); Heath v First Baptist Church, 341 So.2d 265 (Fla. 2d DCA 1977); Metropolitan Dade County v Yelvington, 392 So.2d 911 (Fla. 3d DCA 1980); Pittman v Volusia County, 380 So.2d 1192 (Fla. 5th DCA 1980).

Beginning with products liability cases, this court declared that the doctrine of implied assumption of the risk

as now become merged into the concept of comparative negligence and is no longer an independent defense as it once was. Blackburn v Dorta, 348 So.2d 287, 291 (Fla. 1977) (Held: Assumption of the risk is subsumed in the principle of negligence itself; under our standard jury instructions the jury is instructed on negligence and "to sprinkle the term assumption of risk into the equation can only lead to confusion of the jury.").[5] See also Auburn Mch. Works Co. v Jones, 366 So.2d 1167 (Fla. 1979) (Held: Obviousness of the hazard is not a complete defense but is merged into comparative negligence principles). In Blackburn v Dorta, supra, this court noted:

> We are not here concerned with express assumption of risk which is a contractual concept outside the purview of this inquiry. . . . 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. [e.s.] Id. at 290.

This court had occasion six years later to carve out this limited exception to the general rule. In Kuehner v Green, 436 So.2d 78 (Fla. 1983) the facts involved a high contact sport. The plaintiff was sparring in a karate exercise and was injured when he was taken down by a leg sweep, which is a common karate maneuver. Plaintiff sued his

5. It obviously confused the jury in this case.

:arate opponent. (It was not a premises liability case such
is the present one.) This court recognized the doctrine of
express assumption of the risk in these limited factual
:ircumstances, and explained its reasoning:

> If contact sports are to continue to serve a legitimate recreational function in our society express assumption of the risk must remain a viable defense to negligence actions spawned from these athletic endeavors.
>
> * * *
>
> Express assumption of risk, as it applies in the context of contact sports, rests upon the plaintiff's voluntary consent to take certain chances. This principle may be better expressed in terms of waiver. . . Our judicial system must protect those who rely on such a waiver and engage in otherwise prohibited bodily contacts. [e.s.] Id. at 79-80.

The doctrine of express assumption of the risk could
also be applied to injuries occurring during a football game
and, when restricted to such facts, the doctrine makes sense
It is based on a waiver or estoppel type of conduct on the
Plaintiff's part and depends upon some element of reliance o
:he part of the defendant who is asserting it as an affirma-
:ive defense. Athletes who engage in contact sports must be
able to rely on the fact that the other athletes are assumin
:he risks of injury inherent in the sport. Otherwise a
football player would be afraid to aggressively tackle another
player. A contractual concept underlies the doctrine premised
on reasonable reliance.

However, in a case such as the present one the City

annot claim to have relied upon the Plaintiff assuming any articular risk and diving is not a contact sport. This is trictly a comparative negligence case.

This court has never extended the doctrine (express ıssumption of risk) any farther than the contact sport ;cenario in the Kuehner case, supra. In fact, this court ıas more recently sought to place limits on the narrow loctrine it created in Kuehner.

In Ashcroft v Calder Race Course, Inc., 492 So.2d 309 (Fla. 1986) a jockey was paralyzed in an accident when ıe fell off his horse during a horserace and was run over by ınother horse. He brought a premises liability action agains :he owner of the race course alleging it was the negligent placement of an exit gap on the track that caused his accident. This court held that the trial judge erred by ıstructing the jury on assumption of risk. This court noted t ıat when it had earlier adopted comparative negligence in F Lorida and later held the doctrine of assumption of risk merged into comparative negligence principles, it only carved o ıt a narrow exception to that in the Kuehner case for injuries r ɛceived while participating in a contact sport due to a ɔccidents that are inherent in the risk of engaging in such a sport. That holding did not immunize landowners who negligently maintain premises on which sporting events are conducted.

This court stated in Ashcroft:

> A landowner who assumes the task of providing the physical facility upon which a sport is to be played has a duty to exercise reasonable care to prevent foreseeable injury to the participants that includes foreseeing that they may risk a known danger in order to participate. If injury occurs due to negligent maintenance of the facility, the landowner may be held liable. [e.s.] Id. at 1312.

This court also quoted from Restatement (Second) of Tarts §343A (1965):

> Known or Obvious Dangers
>
> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. Id. at 1312. [emphasis in original]

The most significant part of the Ashcroft case is that which states that an owner of land on which a sport is to be played has a duty to foresee that participants may even risk a danger they know about in order to participate, and the landowner must exercise reasonable care to prevent such a foreseeable injury. In the Ashcroft case the jury specifically found that the injured jockey knew about the location of the exit gap and "knew of the existence of the danger complained of, realized and appreciated the possibility of injury as a result of such danger, and voluntarily and deliberately exposed himself to the danger complained of." See Ashcroft **v** Calder Race Course, Inc., 464 So.2d 1250, 1251 (Fla. 3d DCA 1985). There was even a

prior similar incident where a jockey was injured and Ashcroft knew about it. Id. at 1251. He even asked the race course (before he was injured) to move the location of the exit gap. Id. at 1251. The Third DCA (in a 2 to 1 decision) believed this was sufficient to support the assumption of risk defense as a complete bar to the lawsuit, however this court disagreed and quashed the Third DCA's opinion. The two judge majority in the present case have made the same mistake as the Third DCA majority did in Ashcroft, and should be quashed for the same reason.

In Ashcroft, if the plaintiff had been suing the jockey who was riding the horse that ran him over after he fell to the ground, then the elements of waiver and reliance may warrant the application of express assumption of the risk, even though horseracing is not generally thought to be a contact sport. But the fact that Ashcroft was a case against the owner of the premises, who knew that sports participants may risk a known danger in order to participate and who still failed to make the premises safe, is what distinguished the Ashcroft case from the Kuehner case. It is the same thing that distinguishes the present case from the Kuehner case since this is also a premises liability case against a landowner who admittedly knew that people frequently dive off the wooden dock into water less than 4 feet deep.

The Fourth DCA majority opinion in the present case cited and relied on dicta from Robbins v Dep't. of Natural Resources, 468 So.2d 1041 (Fla. 1st DCA 1985) to the effect

that express assumption of risk applies not only to contact sports but to all aberrant behavior while participating in a recreational activity. (App. A-5).[6] Aside from this language being dicta (because it had nothing to do with the actual disposition of that appeal), the First DCA has more recently taken a position that cannot be reconciled with the dicta in Robbins, supra.

In City of Milton, Fla, v Broxson, 514 So.2d 1116 (Fla. 1st DCA 1987) the plaintiff was attending a softball game at a city-owned baseball field when he was hit by an errantly thrown ball as he was walking near the bleachers where other spectators were also sitting. It was near the players' warm-up area. It was undisputed the plaintiff knew that players warmup in that area and even knew that spectators had been struck in the past by errantly thrown softballs. He had played softball himself in the past and attended past games at that same public park and was familiar with the risks that resulted in his injury. The First DCA held that, notwithstanding plaintiff's admitted knowledge and acceptance of the very risk that resulted in his injury, the City still owed a duty to eliminate the danger to its public invitees instead of just relying on the invitee's knowledge of the danger. The First DCA cited

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6. Query, whether it is "aberrant behavior" to dive from a dock into a shallow lake when many others are doing the same without injury, and the only warning not to do so is an old sunbleached stencil that nobody can see.

the Restatement (.Second) of Torts, §343A, and the Fourth DCA's opinion in Stewart v Boho, Inc., supra. The court stated, "The [land]owner can be held liable to the invitee for failing to exercise reasonable care, even though the invitee was himself negligent in encountering the known danger, thus subjecting his claim to the defense of comparative negligence." [e.s.]

In the present case the Fourth DCA also relied on Strickland v Roberts, 382 So.2d 1338 (Fla. 5th DCA 1980). (App. A-6 and 7). However, as Judge Stone noted in his dissent (App. A-10), the Strickland case is distinguishable. The plaintiff in Strickland was not just water-skiing; he was attempting a dare-devil stunt by skiing as close as possible to a dock piling in order to spray water on the sunbathers on the dock, That was considered by the court to be the functional equivalent of participating in a contact sport. Nothing like that is involved in the present case. Strickland was not a premises liability case like the present case. He was suing the driver of the boat pulling him, and the boat driver had relied on Strickland's apparent willingness to take the risk of hitting a dock piling. No such contractual element of reliance is involved in the present case, however. Moreover, there was "absolute1 no evidence that the manner in which the boat was operated caused the mishap," Strickland, supra at 1340. However in the present case the jury found the defendant city to be negligent and this was not challenged by the city on appeal.

There are several significant differences between the Strickland case and this case. (Strickland was also decided on proximate cause grounds, not on the assumption of risk dicta at the end of the court's opinion.)

The Fourth DCA in this case has now adopted express assumption of risk as a complete defense whenever a plaintif knowingly encounters a danger, For example, if a skating rink has a defect in the floor that everyone knows about and tries to skate around but one time the plaintiff hits it and injures herself, according to the Fourth DCA that would constitute an express assumption of risk which would be a complete bar despite the defect in the premises. That not only conflicts with the rationale expressed by this court in Ashcroft, but it directly conflicts with the facts and holding in Zambito v Southland Recreational Enterprises, Inc., 383 So.2d 989 (Fla. 2d DCA 1980) (skating rink accident case).

If the express assumption of risk doctrine is now going to be extended to any aberrant behavior during the course of a recreational activity, then where should it end? Why limit it to just recreational activities? Why not apply it to any type of aberrant behavior on the part of a plaintiff: That is actually what the Fourth DCA has done in this case. (See App. A-8). This is not a progressive case. The Fourth DCA has taken a step backward in time to the pre-Hoffman v Jones[7] era of contributory negligence, and has

7. 280 So.2d 431 (Fla. 1973).

overlooked this court's admonition in Blackburn v Dorta, supra at 290, that "express assumption of risk is a contractual concept."

Since the Fourth DCA's opinion would have the practical effect of seriously eroding the comparative negligence doctrine, it is appropriate to revisit some of the equitable considerations which led this court to adopt comparative negligence in 1973. As this court noted in Hoffman v Jones, supra:

> Whatever may have been the historical justification for it [contributory negligence], today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise. Id. at 436.
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> Perhaps the best argument in favor of the movement from contributory to comparative negligence is that the latter is simply a more equitable system of determining liability and a more socially desirable method of loss distribution. Id, at 437.

Diving into shallow water is as comparatively negligent as it might be seen by a jury. (Here, we unfortunately do not know what the jury would have found on this issue because the City objected to allowing the jury to complete

the entire verdict form,) It might even be 100% Plaintiff's fault under comparative negligence principles. We are not claiming it would be impossible for a jury to make such a finding (although in this case the jury found that the City was at least partially at fault for what happened to Ms. Mazzeo. R. 894). However, this is not a contact sport, nor has there been any contractual assumption of risk and release of liability. It is simply a comparative negligence case.

There is also a clear distinction between a plaintiff who is aware that one could possibly strike the bottom in a shallow water dive and maybe sustain a superficial injury, and a plaintiff who is aware that there is a substantial risk of sustaining a serious and permanent spinal cord injury from such a dive. In order for express assumption of the risk to apply the plaintiff should subjectively realize at least the hazard of serious injury and not just the risk of a scrape on the nose or similar trivial injury. Compare Kuehner v Green, supra, The jury in this case did not make a finding that plaintiff subjectively recognized the severity of the danger, but only "the possibility of injury." (R. 894). The verdict is not sufficient to preclude any recovery against the City even if express assumption of risk did apply to a case like this.

A lay person is not usually going to be aware of the danger of quadriplegia from diving into shallow water. The pool manufacturers know it, lawyers and judges may know it,

and other experts in the field know it, But the general public is not aware how people can receive an injury of the magnitude of paralysis from such a simple and seemingly innocuous activity as diving into a pool or lake. There is no evidence Ms, Mazzeo was aware of the risk of paralysis. There is only evidence that she knew the water was shallow. Surely if she was aware of a risk of paralysis she would not have assumed such a catastrophic risk, let alone allow her young daughter to dive from the dock and expose her also to such a devastating injury.

It is for this reason that proper warnings should always be required whenever recreational diving is foreseeabl into shallow water used as a swimming facility in a public park. Even warnings may not be enough when the landowner can reasonably eliminate the hazard, but if it cannot be eliminated then a proper warning is the very least that should be required. Once again, this does not mean that a city must post signs around every lake or canal within its jurisdiction. In this case, however, we have a public swimming facility maintained by the city and undisputed knowledge by the city that many people jump and dive off the wooden dock, including the city mayor and his children. This case does not involve some unknown trespasser diving into a vacant rockpit.

In summary, the characterization of one's participation in a contact or competitive sport as an "express assumption of risk" was based by this court on the theory that the

plaintiff expressly consents to subject himself to actions by other persons which in other contexts would be tortious. As noted by Judge Stone in his dissenting opinion (App. A-9), that justification for the doctrine is absent in this case and it was not proper for the Fourth District Court of Appeal to expand the contours of the doctrine beyond that created by this court in Kuehner, supra. In a comparative negligence system the goal is a fair apportionment of liability between the plaintiff and defendant when both are wrongdoers. It is inconsistent and unjust to place the entire loss on one of those wrongdoers (i.e., the plaintiff) simply because her wrongful conduct includes the element of subjective knowledge; especially when the defendant's wrongful conduct also involves subjective knowledge. The fact-finder should be permitted to consider the plaintiff's subjective knowledge of the risk in applying comparative negligence apportionment principles.

For these reasons the majority opinion of the Fourth DCA should be quashed, the dissenting opinion should be approved, and the case should be remanded for either a new trial only on the issues of apportionment of fault and damages (since the jury already found the city at least partially at fault; see Central Taxi Service v Greenburg, 418 So.2d *333* (Fla. 3d DCA 1982)); or alternatively for a new trial on all issues (except assumption of the risk).

CONCLUSION

The majority opinion of the Fourth DCA should be quashed, the dissenting opinion should be approved, and the case should be remanded for either a new trial only on the issu s of apportionment of fault and damages (since a jury has already found the city at least partially at fault) or alternatively for a new trial on all issues,

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoin has been furnished, by mail, this 22nd day of August, 1988, to: JANE KREUSLER-WALSH, ESQ,, Suite 503, Flagler Bank Building, 501 South Flagler Drive, West Palm Beach, FL 33401; and CATHY JACKSON LERMAN, ESQ., 1995 E. Oakland Park Blvd., Suite 100, Ft. Lauderdale, FL 33306.

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