IN THE SUPREME COURT OF FLORIDA



MARY ROSE MAZZEO,

Petitioner,

v.

CITY OF SEBASTIAN, etc.,

Respondent.

CASE NO. 72,744

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

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## 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?

## STATEMENT OF FACTS

We disagree with a couple of the facts stated by the City in its Answer Brief, regarding the warnings it posted. The City seems to assert (at p. 2) there is no evidence that the "no diving" signs it once posted on poles around the dock were not still up on the date of the accident in addition to the letters stenciled on the floor of the dock itself. If that is the City's assertion then it is incorrect. The very pages of the transcript cited by the City (R. 230-231) indicate that prior to the date of Plaintiff's accident the City had put up those signs. However, the evidence was uncontradicted that no such signs on poles were up around the dock on the date of Plaintiff's accident. (R. 117, 122, 135, 217, 555-556, 558, 640).

The City also maintains (at p. 12 of its brief) that the stenciled letters on the floor of the dock, although faded, were still "easily readable." None of the pages of the transcript cited by the City indicate that the "no diving" stencil was "easily readable." (see R. 235, 293, 509, 584). In fact, one of those pages (R. 584) indicates the stencil was "readable" but "almost obliterated.

That was corroborated by several witnesses (R. 266-267, 509, 587).

At any rate, the inadequacy of the warning signs is no longer an issue. The jury found that the City was negligent and that issue has not been cross appealed by the City. The only issue before this court is whether assumption **of** the risk is a complete defense in a case of this nature despite the fact that the City was negligent.

## ARGUMENT

The City argues there is no reason to limit the doctrine of express assumption of risk to contact sports. (Answer Brief, p. 5). To the contrary, there is every reason **to** do so because the reason for the doctrine is based on a contractual concept, as explained in our Initial Brief. The City demonstrates its misunderstanding of the doctrine when it states (at p. 8 of its brief) that "voluntary exposure is the bedrock upon which the doctrine of express assumption of risk rests." If that ~~was~~ were true then Ashcroft would not have been entitled to recover against Calder Race Course for the defect on its premises, since there was no question that Ashcroft knew about the negligently placed exit gap on the race track, and voluntarily exposed himself to it.

In this regard the City incorrectly states (at p. 12 of its brief) that "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." That is not true. In fact, there was no question that Ashcroft knew in advance about the negligently placed exit gate on the track since he had even complained about it to the owner of the race course and asked that it be moved after another jockey had been injured on the race track because of it. Ashcroft v. Calder Race Course, Inc., 464 So.2d 1250, 1251 (Fla. 3d DCA 1985). The jury found that Ashcroft "knew of the existence of the danger, realized and appreciated the possibility of injury as a result of such danger, and voluntarily and deliberately exposed himself to the danger." Id. at 1251. That is the same finding made by the jury in the present case, however this court held in Ashcroft that this is not a complete defense in this type of case. Ashcroft v. Calder Race Course, Inc., 492 So.2d 1309 (Fla. 1986). Unless this court decides now to recede from Ashcroft the Fourth DCA in the present case must be quashed because Ashcroft is squarely on point.

Ashcroft teaches us that it is not just "voluntary exposure" that is the bedrock on which express assumption of the risk rests. Rather, the bedrock of the doctrine is a contractual agreement (or the appearance of one as in contact sports) which is relied on by both parties. The City argues (at p. 4 of its brief) that "The risk of breaking one's neck is obvious and inherent in the

aberrant sport of intentionally diving... into known shallow water." However, it is no more so than the risk of dangerous injury from horseracing on a defective track with a known dangerous exit gap that has already caused prior injury to another jockey, as in the Ashcroft case. The City has not successfully distinguished the Ashcroft case from this case because there is no logical way to do so.

The City admits (at p. 6 of its brief), that, as the owner and operator of a public park, it had a duty to maintain the park in a condition reasonably safe for public use. However, the City does not suddenly stop having that duty when an invitee learns about a dangerous condition on the premises. Any other rule would create terrible public policy and would not encourage (as the law should) a landowner to eliminate or ameliorate a dangerous condition on the premises.

The City has cited a very recent case; Warren v. Palm Beach County, 528 So.2d 413 (Fla. 4th DCA 1988); for the proposition that shallow water, insufficient for diving, does not constitute a trap. However, that was not the same type of case as this one. The court in Warren simply held that an owner of a body of water which is not held out as a swimming facility, is not liable for dangerous conditions therein. As we stated in our Initial Brief, the present case does not involve some unknown person diving into a vacant rockpit or canal.

There is another very recent case, however, which is

instructive. In Breaux v. Diamond M. Drilling Co., 850 F2d 239 (5th Cir. 1988) the Federal Appellate Court certified a question to the Louisiana Supreme Court concerning the continued viability of assumption of the risk after adoption **of** comparative negligence and the Louisiana Supreme Court responded:

> The common law doctrine of assumption of risk no longer has a place in Louisiana tort law. The types of plaintiff conduct which the defense has been used to describe are governed by civilian concepts of comparative fault and duty/risk. Assumption of risk should not survive as a distinct legal concept for any purpose. In order to avoid further confusion in this area of the law, we believe that the courts, lawyers and litigants would best be served by no longer utilizing the term assumption of risk. Id. at 242.

When the case returned to the Fifth Circuit, the Federal Court stated:

> In accordance with this definitive, authoritative pronouncement, this Court will not only reject all of the contentions related to assumption of risk, it takes to heart the admonition of the Supreme Court **of** Louisiana never, repeat never, again to use the forbidden words in Louisiana cases. 'Assumption of risk' is banished from our lexicon. Id. at 242.

We believe this is the best way to handle the situatior to avoid the confusion created in this case and to avoid having the assumption of risk defense in the future improperly applied to cases that are really comparative negligence cases. We believe the term "contractual assumption of risk" would be a more accurate and less

confusing term than "express assumption of risk," or that some other more descriptive term be used to make it more clear to future courts and juries when to apply this limited defense as a complete bar to an action.

## CONCLUSION

The certified question cannot just be answered "yes" or "no" because it is a compound question. (See the conclusion in the City's Answer Brief). 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 damages and apportionment of 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 foregoing has been furnished, by mail, this 5th day of October, 1988 to: JANE KREUSLER-WALSH, ESQUIRE, Suite 503, Flagler Bank Building, 501 South Flagler Drive, West Palm Beach, Florida 33401; and CATHY JACKSON LERMAN, ESQUIRE, 1995 East Oakland Park Boulevard, Suite 100, Fort Lauderdale, Florida 33306.

By Richard A. Kupfer
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