IN THE SUPREME COURT OF FLQRIDA

Tallahassee, Florida

CASE NO. 72,744

MARY ROSE MAZZEO,

Petitioner,

v.

(FOURTH DCA CASE NO. 87-1605)

CITY OF SEBASTIAN, etc.,

Respondent.

FILED
SID J. WHITE
SEP 5 1989
CLERK, SUPREME COURT
By________
Deputy Clerk

ON CERTIFIED QUESTION FROM
THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S SUPPLEMENTAL BRIEF

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SUMMARY OF ARGUMENT

By order of July 13, 1989, this court requested the parties to file supplemental briefs on whether any negligence on the part of the respondent/city was the legal cause of petitioner's injuries. The jury found negligence on the part the City which was **a** legal cause of damage to the plaintiff and that the plaintiff expressly assumed the risk.

Express assumption of the risk negates liability and renders the plaintiff's conduct **the** sole proximate cause of her injuries. While evidence exists from which the jury could have found that the City was **a** proximate cause of the plaintiff's injuries, the plaintiff's voluntary and deliberate exposure to the danger, knowing the risks involved, was the sole proximate cause of her injuries. There was no negligence on the part of the City which **was the** legal cause of the plaintiff's injuries.

ARGUMENT

QUESTION

WHETHER ANY NEGLIGENCE ON **THE** PART OF THE RESPONDENT **WAS** THE **LEGAL** CAUSE OF PETITIONER'S INJURIES.

The petitioner's supplemental brief addresses whether any negligence on the part of the City was **a** legal cause of plaintiff's injuries. This is not the question this court requested the parties to address. There is an important distinction between a

defendant's being **a** legal cause of the plaintiff's injuries and **the** legal cause of the plaintiff's injuries.

Express assumption of risk involves participation in an 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. Express assumption of the risk neaates liability. As this court stated in Kuehner v. Green, 436 So.2d 78 (Fla. 1983), on page 80 of the opinion:

> 'Voluntary exposure is the bedrock upon which the doctrine of assumed risk rests." Bartholf v. Baker, 71 So.2d 480, 483 (Fla. 1954). Here, even thoush the defendant breached its duty of care and was negligent, the plaintiff should be barred from recovery because he in some way consented to the wronu. [citations omitted]. (Emphasis added).

By finding that the plaintiff expressly assumed the risk here, the jury found that the plaintiff's conduct was the sole proximate cause of her injuries.

Clark v. Lumberman's Mutual Insurance Co., 465 So.2d 552 (Fla. 1st DCA 1985), pet. for rev. denied, 476 So. 2d 673 (Fla. 1985), is directly on point. The plaintiff was injured while on a church organized canoe trip when he dove into shallow water. The evidence showed that the plaintiff was in excellent health, a good swimmer, aware of the shallow depth of the water, and knew, by his own admission, the danger of diving into shallow water. Plaintiff sued the church, alleging that it violated its duty to warn and to

adequately supervise the canoeing trip. The First District upheld the summary judgment for the church, stating as follows on page ***556*** of the opinion:

> Even assuming, arguendo, that the church owed a duty of adequate supervision to the appellant, the breach of which would render it liable for ordinary negligence, appellant can be barred from recovery if his own action in diving into the shallow water was the sole proximate cause of his accident. Phillips v. Styers, 388 So.2d 221 (Fla. 2d DCA 1980), quoting Haufman [sic] v. Jones, 280 So.2d 431, 438 (Fla. 1973): "A plaintiff is barred from recovering damages for loss or injury caused by the negligence of another only when the plaintiff's negligence is the sole legal cause of the damage." We hold that appellant was properly barred from proceeding further with his claim because the evidence below is susceptible to no conclusion other than that he had sufficient intelligence, experience, and knowledge to--and in fact did--both detect and appreciate the physical characteristics of the swimming place in question and the potential danger involved in attempting his shallow water dive. **See**, Lister v. Campbell, 371 So.2d 133 (Fla. 1st DCA 1979), Hughes v. Roarin 20's, Inc., **455** So.2d **422** (Fla. 2d DCA 1984). [footnotes omitted]. (Emphasis added).

Similarly, the jury found that the plaintiff knew of the existence of the shallow water, realized and appreciated the possibility of injury as a result of diving into the water, and, having had a reasonable opportunity to avoid it, voluntarily and deliberately exposed herself to the danger by diving into the water. While evidence exists from which the jury could have found that the City was **a** proximate cause of the plaintiff's injuries, the plaintiff's voluntary and deliberate exposure to the danger,

knowing the risks involved, was the sole proximate cause of her injuries. In short, there was no negligence on the part of the City which was **the** legal cause of the plaintiff's injuries.

The plaintiff's supplemental brief states that the jury could have found the City liable under at least three theories: 1) failure to maintain legible signs warning invitees that diving from the wooden dock was prohibited, 2) negligent maintenance of a dangerous condition by failing to provide supervisory personnel, and 3) failure to make the area next to the platform safe by dredging and/or removing the platform.

Regarding theory number one, the plaintiff argues that even if she knew how deep the water was, she did not know that the City prohibited diving. The evidence shows that 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 (R 231, 237). The City also stenciled "No Diving" in numerous places on the platform itself (R 230-231). In this regard the Fourth District stated as follows on page 1004 of the opinion in this case:

> Although "No Diving" signs were exhibited in various places from time to time by the City, people occasionally dove off of the dock. ... At the time of the accident, a somewhat faded "No Diving" sign was stenciled on the surface of the dock.

The plaintiff's own "safety expert" admitted that one could reasonably assume from the "No Diving" stencils on the platform that the City did not intend for it to be used for diving (R 293). Most importantly, however, whether plaintiff knew or did not know that the City prohibited diving is irrelevant. She 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. Plaintiff introduced no evidence at trial regarding her second theory which claims that the jury would have been justified in finding that a lifeguard could have made a difference here by communicating and enforcing the City's no diving policy.

While the City may have been negligent in failing to maintain the premises in a reasonably safe condition or failing to provide adequate signage, the plaintiff was barred from recovery because her own action in diving into the shallow water was the sole proximate cause of her accident. The record contains no evidence demonstrating any negligence on the part of the City which was the legal cause of the plaintiff's injuries.

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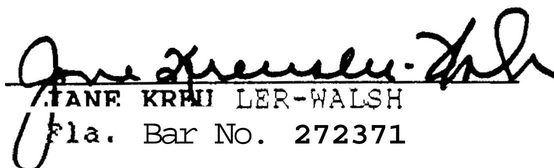
By: 
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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, this 1st day of September, 1989 to:

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