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IN THE SUPREME COURT OF FLORIDA

MARY ROSE MAZZEO,	)	
Petitioner,	)	
v.	)	CASE NO. 72,744
CITY OF SEBASTIAN, etc.,	)	
Respondent.	)	

PETITIONER'S AMENDED SUPPLEMENTAL BRIEF

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SUMMARY OF ARGUMENT

The jury's express finding that the City's negligence was a legal cause of plaintiff's injuries is supported under several alternative theories of causation. (The City has also failed to raise causation as an issue before this court and before the Fourth DCA below.)

If the City had maintained a legible sign warning that diving off the dock is prohibited, the plaintiff would not have dived, nor allowed her daughter to dive. While there was evidence she may have known the depth of the water, there is no evidence she knew that diving is prohibited by the City. In fact, from all appearances at the public swimming park diving is permitted and invitees are lured into believing it must not be dangerous if it is permitted.

The jury could also have found that if the City had a lifeguard supervising the activity at Swim Lake (as the City's own insurance carrier recommended before this accident occurred), then the City's alleged "no diving" policy would have been enforced and plaintiff would not have been injured. Whether the decision to provide a lifeguard would normally be deemed a planning-level or an operational-level activity becomes moot in light of the fact that the City has one million dollars of liability insurance coverage for this accident.

The jury could also have found that if the City had made the area next to the wooden platform safe for diving by

dredging the man-made lake a few feet deeper at the area next to the platform; or if the City had removed the platform entirely (since that is what caused everyone to dive into the lake) this accident would not have occurred.

Even if plaintiff was aware of the depth of the water, which may constitute comparative negligence, that does not mean the City's breach of its duty of care was not a contributing factor. The City's negligence need not be the only legal cause and any comparative negligence on plaintiff's part would not be a superseding cause unless it was unforeseeable to the City that people would dive into the lake (which admittedly is not the case).

Thus, although the general verdict form does not disclose the theory used by the jury, there are several different ways the jury could have legally reached its conclusion that the City's negligence "was a legal cause of damage to plaintiff." It is probably for that reason that the City has never bothered to raise this issue before any appellate court.

SUPPLEMENTAL ARGUMENT

Pursuant to this court's order dated July 13, 1989 requesting supplemental briefs, Petitioner respectfully presents this supplemental argument addressing the question of whether any negligence on the part of the City was a legal cause of plaintiff's injuries.

Initially it should be noted that the jury specifically answered "yes" to the question; "Was there negligence on the part of City of Sebastian, which was a legal cause of damage to Plaintiff, Mary Rose Mazzeo?" (R. 894). The reason the Fourth DCA's opinion does not address any issue of causation is because the City did not cross appeal or otherwise raise any issue regarding "legal cause" to the Fourth DCA; nor has the City mentioned anything about a causation issue in its brief to this court. Accordingly the City has waived any such issue.

On the merits, the theory of legal cause in this case is straight-forward. There were at least three separate theories of liability in this case. The first basis of liability was for failure to maintain a legible sign warning invitees that diving from the wooden dock is prohibited.

The City admitted it was aware people frequently dive off the dock into the lake. (R. 207, 218). Aside from that admission there was additional evidence and photographs showing this to be a common 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), even though the water was only 3 to 4 feet deep (R. 212, 262). The wooden dock, which was built as a platform for people to walk out onto the lake, is elevated 2 1/2 to 3 feet above the water. (R. 212, 587).

While it may be true (according to the testimony of one eye witness to the accident) that plaintiff knew how deep the water was at the end of the dock, she still did not know that diving was prohibited by the City. She did not know that because the sign (stencil) painted on the dock which says "no diving" was allowed to become faded, obscured and barely readable, due to the City's negligent maintenance program (which is unquestionably an operational-level activity). (R. 266-267, 509-510, 584, 587). Not only was there no readable sign warning plaintiff that diving is prohibited by the City, but from all appearances it is not prohibited since others were also diving off the wooden dock both on this occasion and on prior occasions. Even after knowing the depth of the water a person can be falsely lured into thinking that if diving from the dock was really a hazard the City would surely not allow it to go on all the time.

The record is clear that the City knew people frequently dive off the wooden dock. It was for that reason that the City's insurance company, Aetna, suggested the City should erect "no diving" signs on the dock and should consider providing life guard services. (R. 219-221, 731). The Mayor admitted the City knew people dive off the dock and that it

is dangerous to do so. (R. 218). The jury would be justifie in concluding that, despite the plaintiff's knowledge of the depth of the water, if the City had communicated to her the fact that diving is prohibited, instead of luring her into thinking otherwise, then the plaintiff would not have dived from the dock nor allowed her daughter to dive from the dock.

As it was, the Plaintiff was reluctant to dive in, not even knowing that diving is prohibited. A reasonable jury could find that if the "no diving" sign had been easily readable and if similar signs had been placed at other strategic locations, it would have made the difference between the plaintiff diving or not diving. Thus the "but for" nexus of causation in fact is supported by reasonable inferences arising from the evidence. Moreover the "fore-seeability" element of legal causation is not even in issue. The City admitted it knew that people dive off the end of the dock and that it is dangerous to do so. There is no question this accident was foreseeable to the City.

The issue of legal causation is also met under two separate theories of liability aside from the City's failure to warn that diving is prohibited. The plaintiff sued the City for both negligent failure to warn and for maintaining such a dangerous condition in the first place. (R. 820-822, 870, 736, 662). The City knew that the "no diving" signs were not working since some people were still diving, while others were removing the signs. (R. 230-231).

The City's insurance carrier suggested the City should

consider employing a lifeguard to supervise the conduct at the lake. (R. 219-221, 731). However there was no one present in such a capacity (over the July 4th weekend) when plaintiff was injured. (R. 629). This court has noted that when a city or county operates a public swimming facility it has the same affirmative duty of care to operate it safely that a private owner would have. Avellone v Bd. of County Commissioners of Citrus County, 493 So.2d 1002 (Fla. 1986); Butler v Sarasota County, 501 So.2d 579 (Fla. 1986). A jury would be justified in finding that a lifeguard could well have made the difference between a life of paralysis and a normal life for this plaintiff. A lifeguard would have communicated and enforced the City's "no diving" policy. The "but for" test and the foreseeability test of legal caustion are both met under this theory of liability.

In Avellone, supra, this court held that even though the decision whether to provide lifeguards or other supervisory personnel at a public swimming facility is normally a planning-level activity; when the governmental entity has purchase liability insurance coverage it constitutes a waiver of sovereign immunity (up to the limits of such insurance coverage) for both planning-level and operational level activities.[1] See also Vega v City of Pompano Beach, 498 So.

1. Even Justice McDonald, who dissented in Avellone, stated in his dissenting opinion, "Had the plaintiff's injury been caused by a defect on the premises such as an unsafe dock, providing a dangerous diving area, . . . or the like, I would unhesitatingly join in the ruling that the county has r sovereign immunity and may be liable." Id. at 1007.

2d 532 (Fla. 4th DCA 1986). It is therefore relevant that, in the present case, the City of Sebastian has liability insurance coverage up to one million dollars. (See Appendix to this Brief; Cities' Answers to Interrogatories).[2]

There was also another viable theory of liability and Legal causation. It was plaintiff's position that the City should have made the area next to the platform safe for divin since the City knew its "no diving" sign was not stopping man people from diving. The City could have easily dredged the area at the end of the wooden dock just a few feet deeper to eliminate the hazard.[3] Alternatively the City could have removed the wooden platform extending out onto the shallow Lake since that was the attraction that caused everyone to dive into the lake. While these alternatives might, under other circumstances, be considered planning-level functions, the existance of the one million dollar insurance policy make that point moot (at least, up to the limits of coverage). Avellone, supra.

As a matter of public policy, there should be some instances where a City is charged with the responsibility to

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2. The Florida Legislature, in 1987, amended Section 768.28 (5), to provide that the purchase of liability insurance coverage no longer waives sovereign immunity. However, that statute is not retroactively applicable to this case where the accident occurred in 1982. See Kaisner v Kolb, 543 So.2d 732 (Fla. 1989).

3. Cf. City of Miami v Ameller, 472 So.2d 728 (Fla. 1985) (Held: City may be held legally responsible for maintaining hard-packed ground underneath monkey bars in a public park rather than a softer cushioning surface.)

eliminate an admittedly known danger to its public invitees instead of just relying on the invitee's knowledge of the danger. (Especially when lay people are often not aware of the danger of paralysis from diving into four feet of water.) Proper warnings should be required, at a bare minimum, whenever recreational diving is foreseeable into shallow water used as a public swimming facility. If the hazard itself can be easily eliminated then the City should do so; but if it cannot be then a proper warning is the very least that should be required. We are not suggesting a city should be strictly liable. This is not a strict liability case. The jury's finding of negligence and legal causation is supported by competent evidence.

As discussed in our Initial Brief on the merits, even if we assume the plaintiff was aware of the depth of the wate that does not diminish the City's affirmative duty to maintain safe premises, cf. Ashcroft v Calder Race Course, Inc., 492 So.2d 1309 (Fla. 1986); nor does it mean the City's breach of that duty is not a contributing factor to producing plaintiff's injuries. We have never denied there may be comparative negligence on the plaintiff's part in this case which may have also been a contributing cause of her injuries. However, if the dock was not there she would not have dived. If the lake was two feetdeeper at the end of the dock she probab y would not be injured. If a lifeguard was present and instructed her not to dive, or let her daughter dive, she would not have done so. And even if there

had been an easily readable sign communicating the fact that living off the dock is prohibited, a jury could reasonably conclude that plaintiff would have been more persevering in resisting her boyfriend's urgings to dive, or if the boyfriend knew this he would not have urged plaintiff or her daughter to dive.

There are several different ways the jury in this case could have concluded that the City's negligence "was a legal cause of damage to Plaintiff." (R. 894). The verdict does not disclose which theory the jury used to make this conclusion, because it is a general verdict form, but the record supports that conclusion in several different ways.

This court's request for supplemental briefs asks the parties to address the question of whether any negligence on the City's part was "the" legal cause of plaintiff's injuries With all due respect, we believe the proper question is actually whether any such negligence was "a" legal cause of plaintiff's injuries. It need not be the only legal cause. See F.S.J.I. 5.1. In this case plaintiff's own comparative negligence may have been a contributing cause also, but it would not be a superseding cause unless it was unforeseeable to the City that people dive off the dock into the lake.[4] In this case the City knows that many people dive off the end of

4. An intervening cause only breaks the chain of causation if it is unforeseeable to the original actor, and that is usually a jury question. Gibson v Avis Rent-A-Car System, Inc., 386 So.2d 520 (Fla. 1980).

he dock, climb back on and dive off again repeatedly; and he only action it took to stop this could be called, at best eeble.

We hope the foregoing discussion not only addresses the ourt's inquiry about legal causation, but also further emonstrates why the express assumption of risk defense is otally out of place in this litigation.

Respectfully submitted,

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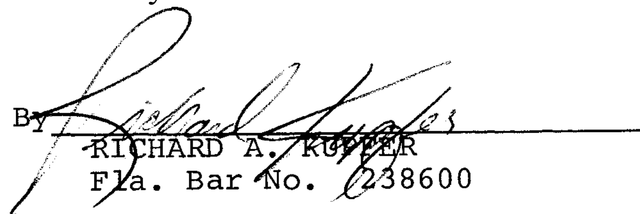

By ______________________
RICHARD A. KUPFER
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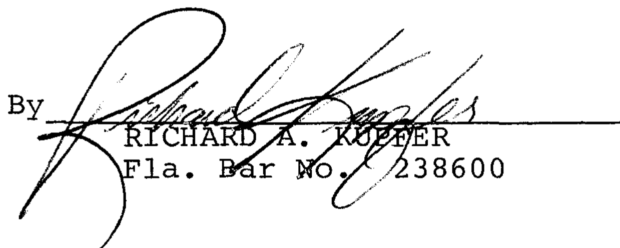
CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 16th day of August, 1989, to: JANE KREUSLER-WALSH, ESQ., Klein & Beranek, P.A., Suite 503, Flagler Center, 501 South Flagler Drive, West Palm Beach, FL 33401; CATHY JACKSON LERMAN, ESQ., P. O. Box 24410, Ft. Lauderdale, FL 33307; and BONITA KNEELAND, ESQ., P. O. Box 1438, Tampa, FL 33601-1438.



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