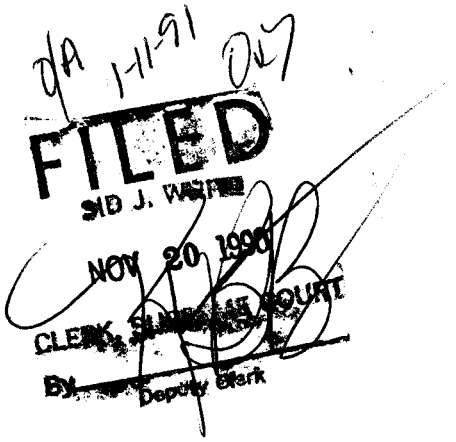

IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

RAYMOND KENDRICK and
SUSIE KENDRICK,

Petitioners,

vs.

CASE NO.: 76,114

ED'S BEACH SERVICE, INC.,
et al,

DCA DOCKET NO: 89-2198

Respondent.

ANSWER BRIEF OF RESPONDENT

CLIFFORD W. SANBORN
BARRON, REDDING, HUGHES, FITE,
BASSETT & FENSOM, P.A.
Post Office Box 2467
Panama City, FL 32402
(904) 785-7454
ATTORNEY FOR RESPONDENT

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INTRODUCTION

In respondent's, Ed's Beach Service, answer brief, citations to the record are made with the designation "R". Citations to the appendix submitted herewith are made with the designation "Ap". Ed's Beach Service, Inc. is referred to herein as "EBS".

STATEMENT OF CASE

This case arises from a diving accident in which petitioner, Raymond Kendrick, sustained paralyzing injuries. The accident occurred on July 30, 1985 in a swimming pool located at Edgewater Beach Resort in Panama City Beach, Florida.

On June 30, 1986, the Kendricks filed a complaint against Ed's Beach Service and seven other defendants. These defendants include:

(1) Middlesex Development Corporation, Wesley Burnham, Nall Development Company and Rime Investment Company, (hereinafter referred to as "the owners") the alleged owners of the real property on which Edgewater Beach Resort was constructed;

(2) Edgewater Beach Resort Community Association, (hereinafter referred to as "the Association") which was formed for the purpose of assuming responsibility for management of Edgewater Beach Resort from the owners;

(3) Edgewater Beach Resort Management, Inc., (hereinafter referred to as "Edgewater") which was allegedly responsible for managing Edgewater Beach Resort for the owners and the Association;

(4) Rocky Roquemore, who allegedly provided architectural services in connection with the construction of Edgewater Beach Resort; and

(5) EBS, which was providing lifeguard services at the pool

on the day the accident occurred.

On March 10, 1989, the Kendricks filed an amended complaint pursuant to a stipulation of the parties. The amended complaint names the following additional defendants and as to each alleges:

(6) Monarch Corporation is one of the owners of the real property on which Edgewater Beach Resort was constructed;

(7) Edward Hickey and Edward F. Hickey, Jr. made arrangements with EBS to provide lifeguard services at Edgewater Beach Resort;

(8) Cox Building Corporation designed and/or built the swimming pool located at Edgewater Beach Resort; and

(9) W. R. Scott and Benigno Soto are engineers who designed the swimming pool at Edgewater Beach Resort and agreed to provide construction plans by which the owners could obtain "appropriate permitting for the swimming pool".

With respect to EBS, the complaint and amended complaint essentially allege that EBS is liable for not properly warning Mr. Kendrick of the dangers associated with diving from the lifeguard tower into water three feet deep. EBS filed an answer denying it was negligent and raising the affirmative defenses of comparative negligence and express assumption of risk. EBS filed a motion for summary judgment on the grounds that: (1) EBS did not have a duty to warn Mr. Kendrick of apparent dangers, and (2) Mr. Kendrick's negligence was the sole proximate cause of his accident. Contrary

to arguments in the Kendricks' brief, EBS's motion for summary judgment was not premised on the doctrine of express assumption of risk. The trial court granted EBS's motion for summary judgment. The First District Court of Appeal affirmed the summary judgment. On October 5, 1990 this court accepted jurisdiction.

STATEMENT OF FACTS

In 1985, EBS entered into an oral agreement with Edgewater. Under the agreement, EBS agreed to provide lifeguard services at the swimming pool located at Edgewater's resort in Panama City Beach, Florida. (R. 843, Ap. Exhibit "A") The pool is owned by the Association and maintained by Edgewater. (R. 446) Aerial photographs of the pool are attached to the appendix as Exhibit "B". In return, Edgewater agreed that the lifeguards furnished by EBS would be permitted to sell suntan lotion and other beachwear products to patrons of the pool. In addition to providing lifeguard services, EBS paid Edgewater $5,000 annually for the right to sell its products around the pool. (R. 843.)

On July 27, 1985, the petitioners, Raymond Kendrick and Susie Kendrick, arrived at the Edgewater resort for a four or five day vacation. (R. 32 and 33) The Kendricks were vacationing with several relatives: Bridgette Macaluso, Sharon Bello, James Bello, Geraldine Guidroz and Brenda Guidroz. (R. 82) The Kendricks stayed in unit 311. (R. 958) From this room, the Kendricks had a clear view of the pool. (R. 224)

Mr. Kendrick was around the pool part of the day on July 28th. (R. 88 and 89) On one occasion, Mr. Kendrick waded through the pool with his daughter to the waterfall located in the center of the pool. (R. 34-36, Ap. Exhibit "C") Mr. Kendrick admitted he

was aware the water was shallow in the area of the pool he waded through to get to the island. (R. 35 and 36, Ap. Exhibit "C") Susie Kendrick testified that she saw Mr. Kendrick with their daughter on the steps located, if facing the Gulf of Mexico, on the right end of the pool. (R. 150-153)

On July 30, 1985, Mr. Kendrick went to the pool deck between 1:00 p.m. and 2:00 p.m. (R. 40) The pool was crowded, and people could easily be seen wading in the water around the lifeguard tower. (R. 331) After arriving at the pool deck, Mr. Kendrick consumed several alcoholic beverages until approximately 5:00 p.m. (R. 41) At that time, Mr. Kendrick climbed onto the lifeguard tower, dove into the pool and struck his head on the cement bottom. The Kendricks' brief asserts that Raymond Kendrick attempted a shallow dive. The only witnesses who described the type of dive which Raymond Kendrick attempted testified that Raymond Kendrick executed a regular dive. (R. 112 and 264) As a result, Mr. Kendrick fractured his neck and was rendered a quadriplegic. At the time of the accident, Mr. Kendrick's blood alcohol level was between .119 and .127. (R. 838, Ap. Exhibit "D")

The water in the area of the lifeguard tower was three feet deep. Depth markers were located on the pool deck approximately six feet to the immediate right and approximately ten feet to the immediate left of the lifeguard tower from which Mr. Kendrick dove.

(R. 832, Ap. Exhibit "E") The weather was clear, the pool water was clear and the bottom of the pool was visible. (R. 48,71, Ap. Exhibit "F")

Mr. Kendrick testified he had normal diving experience. (R. 45) Mr. Kendrick knew he was climbing onto a lifeguard tower when he prepared to dive. (R. 58) He admitted that he had not seen anyone dive from, jump from or climb onto the lifeguard tower. (R. 43 and 44) Mr. Kendrick is not aware of a swimming pool where patrons are permitted to climb onto lifeguard chairs or use them as diving platforms, and he had never climbed onto a lifeguard stand prior to the accident. (R. 53 and 59) Mr. Kendrick was aware at the time of the accident that diving into shallow water is dangerous, and he considers this to be a type of danger that is general, common knowledge. (R. 57, Ap. Exhibit "G") Mr. Kendrick testified that prior to diving, he did not look for depth markers or at the bottom of the pool to ascertain the depth of the water below him. Mr. Kendrick admits he was "cutting up" and "joking around" at the time of his accident. (R. 43) In fact, Mr. Kendrick testified that "I wasn't paying any attention, you know, like to look down and see how deep it was." (R. 48, Ap. Exhibit "F") When asked what possessed him to dive from the lifeguard tower, Mr. Kendrick replied "I have no idea". (R. 44)

On the day of the accident, Jeff Hicks and Lisa Giles were the

lifeguards on duty at the pool. Their hours were from 8:00 a.m. to 5:00 p.m. Around 5:00 p.m., Mr. Hicks began loading EBS products in his car to return them to EBS's office for overnight storage. (R. 845, Ap. Exhibit "H") At the time of the accident, Mr. Hicks was returning to the pool from the parking lot in front of the main Edgewater building. Ms. Giles was standing under a hut located at the end of the pool opposite from the end where the accident occurred. (R. 845)

SUMMARY OF ARGUMENT

To establish a claim against EBS, it must be shown that EBS breached a duty owed to Mr. Kendrick and that the breach of duty was a proximate cause of the accident. The Kendricks allege EBS is liable for Mr. Kendrick's accident since its lifeguards failed to warn Mr. Kendrick of the danger of diving from a lifeguard tower into water three feet deep. Specifically, the Kendricks allege that adequate depth markers were not positioned around the pool and EBS's lifeguards should have advised Mr. Kendrick not to dive from the lifeguard tower. However, the trial court correctly determined that as a matter of law EBS is not liable for Mr. Kendrick's accident.

Under Florida law pertaining to premises liability claims, the owner or occupier of property must warn invitees of concealed, dangerous conditions which the owner or occupier is aware of and which the invitee is not aware of and could not become aware of through the exercise of reasonable care. The owner or occupier of property is not an insurer of invitees' safety and can assume that invitees will exercise reasonable care for their own safety. The undisputed facts in this case demonstrate that the water around the lifeguard tower was observably shallow to persons exercising reasonable care for their own safety, and Mr. Kendrick was aware at the time of the accident that diving into shallow water is

dangerous. Therefore, no duty existed to warn Mr. Kendrick of the danger of diving from the lifeguard tower.

In addition, Florida courts have concluded that summary judgments are appropriate against claimants who dive into water which is observably shallow and which contains no submerged or hidden object creating a concealed, hazardous condition. Even if it were assumed that EBS was negligent, the negligence of EBS merely provided an occasion for Mr. Kendrick's accident. Mr. Kendrick's negligent failure to exercise reasonable care for his own safety was a separate, intervening event which represents the sole proximate cause of the accident.

The trial court's summary judgment does not describe the theory upon which it is based. On review, the summary judgment is presumed to be correct and should be affirmed if it can be supported under any principle of law. EBS is entitled to a summary judgment since it had no duty to warn Raymond Kendrick of apparent dangers and the negligence of Raymond Kendrick is the sole proximate cause of the accident. Therefore, the summary judgment in favor of EBS and the decision of the First District should be affirmed.

ARGUMENT

The motion for summary judgment filed by EBS is premised on alternative theories. One argument supporting the motion for summary judgment is that EBS did not have a duty to warn Mr. Kendrick of an apparent danger. The other basis for the motion for summary judgment is that Mr. Kendrick's negligence was the sole proximate cause of the accident. The summary judgment in favor of EBS is silent as to the theory upon which it is based.

On appeal, the petitioner has the burden of demonstrating from the record that the trial court committed reversible error in entering the judgment from which the appeal is filed. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979). Judgments of trial courts are presumed to be correct. Cohen v. Mohawk, Inc., 137 So. 2d 222 (Fla. 1962). In Mohawk, the Florida Supreme Court stated:

> [3] It should be kept in mind that the judgment of the trial court reached the district court clothed with a presumption in favor of its validity. 1 Fla. Law and Practice, Appeals §152, 2 Fla.Jur, Appeals, § 314, and authorities cited therein. Accordingly, if upon the pleadings and evidence before the trial court, there was **any** theory or principle of law which would support the trial court's judgment in favor of the plaintiffs, the district court was obliged to affirm that judgment.

Id. at 225. Therefore, without regard to whether the rationale adopted by the trial court was correct, under Applegate and Mohawk the summary judgment and the decision of the First District should

be affirmed unless the Kendricks satisfy their burden of demonstrating that the summary judgment cannot be supported under any principle of law. The Kendricks' petition should be denied since the summary judgment was proper under either theory advanced by EBS.

I. ED'S BEACH SERVICE HAD NO DUTY TO WARN MR. KENDRICK OF APPARENT DANGER.

In order to recover from EBS, the Kendricks must prove: (1) EBS had a duty to protect Mr. Kendrick from the accident and injuries alleged in the complaint; (2) EBS failed to perform its duty; and (3) Mr. Kendrick's accident was caused by EBS's failure to perform its duty. Bondu v. Gurvich, 473 So. 2d 1307 (Fla. 3d DCA 1984). Whether or not EBS had a duty to protect Mr. Kendrick from the accident is a question of law properly decided by the trial court. Bassett v. Edwards, 30 So. 2d 374 (Fla. 1947); Robertson v. Deak Perera (Miami), Inc., 396 So. 2d 749 (Fla. 3d DCA 1981). 38 Fla. Jur 2d, Negligence §120 (1982).

Paragraphs 19(f) and 19(g) of the complaint allege:

> 19(f) The Defendants, and/or either of them, failed, or omitted, to post warning signs of the danger and hazards of diving from the side of the swimming pool and/or negligently and carelessly failed to provide lifeguards and personnel to warn persons of the danger of diving where the water was too shallow for safe diving.
>
> 19(g) The Defendants, and/or either of them, in

> providing lifeguards and personnel to supervise the use of the pool, failed to provide sufficient personnel, and failed to provide personnel who were adequately trained, and the personnel in attempting to provide their services did so in a careless, reckless, or negligent manner.

The specific allegations being made against EBS are set forth in the Kendricks' answer to an interrogatory served on them by EBS requesting specification of all negligent acts and omissions of EBS which they contend contributed to the accident. In their answer, the Kendricks state:

> . . . . Ed's Beach Service failed to have a lifeguard stationed at a point that they could supervise persons diving into the pool. Ed's Beach Service failed to provide any restraints or restrictions on diving activities, failed to post adequate markers to show the depth of the water, failed to post warning signs of the dangers and hazards of diving in the pool, failed to provide a sufficient number of lifeguards who could warn of the dangers of diving into shallow areas of the pool, and failed to supervise the activities of lifeguards.

There is no allegation or evidence that any actions of the lifeguards after Mr. Kendrick's accident contributed to his injuries. Rather, the Kendricks are contending that EBS is liable for failure to issue different types of warnings to Mr. Kendrick. Therefore, the Kendricks' claim against EBS is premised on the existence of a duty owed by EBS to warn Mr. Kendrick not to dive from the lifeguard tower into water three feet deep.

It should be recognized that the Kendricks' contention that EBS should be held liable for not posting adequate warning signs and depth markers is without merit. Since EBS was not the owner of

the pool, it would only have a duty to place warning signs and depth markers around the pool if it were required to do so under its agreement with Edgewater. Under the agreement, EBS was not responsible for placing signs or depth markers around the pool. (R. 843, Ap. Exhibit "A"; R. 459-464) Therefore, EBS cannot be held liable for failing to place adequate warning signs and depth markers around the pool.

The Kendricks argue that a duty to warn exists since EBS had a contract with Edgewater to enforce a "no diving" rule. However, on the negligence claim the existence of the contract between EBS and Edgewater is relevant only to the extent that it creates a duty on the part of EBS to use reasonable care for the safety of pool patrons. Navajo Circle, Inc. v. Development Concepts Corporation, 373 So. 2d 689 (Fla. 2nd DCA 1979). In Navajo Circle, the court stated:

> The duty owed by a defendant to a plaintiff may have sprung from a contractual promise made to another; however, the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise. The duty exists independent of the contract.

Id. at 691. The court further stated:

> Foreseeability, the standard of care, and the character of the risk are determined by the reasonable-man test. Geer v. Bennett, supra. . . . .The defendant would be liable for the plaintiff's injury if the defendant's

> affirmative conduct in performance of a contractual obligation to provide services to another was the proximate cause of a foreseeable injury.

Id. at 691. Under Navajo Circle, the extent to which EBS owed a duty to warn Mr. Kendrick of dangers on the premises is determined by application of the reasonable man test.

In Weimar v. Yacht Club Point Estates, Inc., 223 So. 2d 100 (Fla. 4th DCA 1969), the plaintiff filed an action alleging he was the third party beneficiary of a contract breached by the defendant. The complaint also alleged a negligence claim arising from the contract breach. The trial court dismissed the complaint on grounds that it failed to state a cause of action against the defendant. The Fourth District affirmed the dismissal. With respect to the dismissal of the negligence action, the court based its decision on the fact that the complaint improperly relied upon the contract breach itself to state a cause of action for negligence. The court stated:

> The true question in any case involving tort liability is "has the defendant committed a breach of duty apart from the contract". If he has only committed a breach of contract, he is liable only to those with whom he has contracted; but if he has committed a breach of duty apart from the contract, he is not protected by setting up a contract in respect of the same matter with another person. . . . Since there are no allegations of the breach of a duty apart or independent from the contract, privity of the contract must exist between the person charged with the negligence

> and the person who has been injured by such breach.

Id. at 103. Under Weimar, whether or not EBS breached its contract with Edgewater is not dispositive of whether the Kendricks have a negligence claim against EBS. The contract between EBS and Edgewater places EBS in a position where it must use reasonable care for the safety of pool patrons. Whether or not EBS breached a duty which gives rise to a negligence claim is determined by the reasonable man standard applicable in premises liability cases.

Courts have consistently held that the duty owed by the owner or occupier of property to an invitee is to maintain the premises in a reasonably safe condition and to warn invitees of concealed, dangerous conditions of which the owner is aware but which the invitee is unaware of and cannot discover through the exercise of reasonable care. Emmons v. Baptist Hospital, 478 So. 2d 440 (Fla. 1st DCA 1985). The First District Court of Appeal stated that:

> [1] . . . In Florida, a landowner owes two duties to a business invitee: (1) to use reasonable care in maintaining the premises in a reasonably safe condition; and (2) to give the invitee warning of concealed perils which are or should be known to the landowner, and which are unknown to the invitee and cannot be discovered by him through the exercise of due care. Maldonado v. Jack M. Berry Grove Corp., 351 So. 2d 967, 970 (Fla. 1977); Cassel v. Price, 396 So. 2d 258, 264 (Fla. 1st DCA 1981).
>
> [2,3] Looking at the second theory first, it is clear that there was no concealed peril requiring the giving of a warning to the plaintiff . . . .

Id. at 442. The court further stated that:

> There is no duty on the part of the landowner to exercise such control over the business invitee or the premises so as to be an insurer of his safety.

Id. at 442. The Kendricks argue that "although not mentioned directly, the principles of assumption of risk were applied in the Emmons case". (Brief of Petitioner, p. 30) Contrary to the Kendricks' position, the judgment in Emmons is not based on principles of assumption of risk. Instead, the decision in Emmons is based on the fact that there was no duty on the part of the defendant to warn the plaintiff of apparent dangers. The same principle applies in all premises liability claims.

Florida courts have recognized that summary judgments are appropriate in premises liability cases when the undisputed evidence demonstrates that there was no concealed, dangerous condition to create a duty on the owner or occupier of property to take precautionary measures. K.G. v. Winter Springs Community Evangelical Congregational Church, 509 So. 2d 384 (Fla. 5th DCA 1987); Clark v. Lumbermans Mutual Insurance Company, 465 So. 2d 552 (Fla. 1st DCA 1985). In the K.G. case, the plaintiff filed a claim against the owner of property for injuries he sustained on the defendant's premises. It was alleged that the defendant should have warned the plaintiff of the condition which caused the injury. The trial court granted a summary judgment in favor of the defendant. On appeal, the Fifth District Court of Appeal affirmed

after determining the defendant did not have a duty to warn since the plaintiff's injury was not caused by a concealed, dangerous condition.

In Clark, the plaintiff was severely injured when he dove into shallow river water while on a camping trip sponsored by the defendant church organization. The plaintiff alleged the defendant failed to properly supervise the trip and failed to warn him of the dangers associated with diving in the area where he injured himself. The trial court granted a summary judgment in favor of the defendant. On appeal, the First District Court of Appeal affirmed after concluding that, even if the defendant were held to the same standard of care as the owner of the premises, the defendant was entitled to a summary judgment since the danger was open and obvious to the plaintiff. Specifically, the court stated:

> The harmful condition of the beach (assuming without accepting the correctness of this characterization by appellant) was recognized and hence was obvious to all who testified below. Therefore, no breach of duty occurred, since the "harmful condition" was in fact obvious to appellant, who undisputedly possessed sufficient maturity to appreciate the danger, and was not in a dependency relationship with the appellee church.

Id. at 555. In an attempt to distinguish Clark, the Kendricks argue that the summary judgment in that case was based in part on principles of assumption of risk even though the court did not specifically say so in its opinion. As in the Emmons case, the Kendricks are confusing the principles of assumption of risk with

the issue of whether or not a duty exists to warn persons of apparent dangers.

The owner or occupier of property may assume that invitees will use ordinary care for their own safety. Storr v. Proctor, 490 So. 2d 135 (Fla. 3d DCA 1986). In Storr, the trial court granted a motion for summary judgment for the defendant in a premises liability claim. On appeal, the Third District Court of Appeal affirmed the trial court's summary judgment. In reaching its decision, the court stated:

> An owner is entitled to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own sense, and is not required to give the invitee notice or warning of an obvious danger.

Id. at 136. Under the sound reasoning of the Clark, Emmons and Storr cases, EBS is entitled to a summary judgment on all claims brought against it by the Kendricks since the testimony of all witnesses in this case demonstrates that, as a matter of law, the danger of diving from the lifeguard tower was open and obvious.

Mr. Kendrick admits he was aware of the danger of diving into shallow water. However, he assumed the water was six feet deep around the lifeguard tower. This assumption was based on the fact that a pool in which he had previously swam in Louisiana had a lifeguard chair by water that was six feet deep. (R. 53 and 54) Mr. Kendrick also saw Jimmy Bello's head above the water surface and assumed he was standing erect. Mr. Kendrick was not wearing

his glasses and could not see that Mr. Bello was crouching. (R. 46 and 47) Even if true, the testimony of Mr. Kendrick does not convert an obvious hazard into a concealed, dangerous condition.

Mr. Kendrick admits the pool water was clear and the bottom of the pool was clearly visible. (R. 48) There is no evidence that EBS did anything to conceal or mislead anyone as to the depth of the pool. On the contrary, Susie Kendrick, Sharon Bello, Martha Peace and Ruth Colbert testified that on numerous occasions the lifeguards required them and others to remove their rafts from the pool since the shadow on the pool bottom from the rafts created an illusion that the water was deeper than was otherwise apparent. (R. 156,267,334 and 361) Even though the Kendricks maintain they did not see depth markers, the photographs attached to the appendix as Exhibit "B" and the affidavit of Tom Creekmore establish that depth markers were located on both sides of the lifeguard tower. (R. 832) Ruth Colbert and Martha Peace testified that the depth of the pool was marked. (R. 330,331,356 and 357)

Prior to the accident, Mr. Kendrick waded to the island located in the center of the pool and knew the water was shallow in that area. For several hours prior to the accident, Mr. Kendrick was around the pool in clear view of persons wading in the water around the lifeguard tower. Based on these facts, it cannot be disputed that the depth of the pool was open, obvious and readily

ascertainable by Mr. Kendrick through the exercise of reasonable care.

Since the depth of the pool was patent and not latent, the remaining question is whether the danger of diving into shallow water was also open and obvious. That question is easily resolved by Mr. Kendrick's own testimony. Mr. Kendrick admitted he was aware diving into shallow water is dangerous. He considers this to be the type of danger with which the general public is or should be familiar. Mr. Kendrick admits he had been drinking and joking around, and he did not bother to check the depth of the water before he dove.

Based on the foregoing, it cannot be disputed that the depth of the pool was open and obvious to a person exercising reasonable care for their safety. Since Mr. Kendrick was aware of the danger associated with diving into shallow water, EBS was under no duty to warn Mr. Kendrick that it is dangerous to dive from a lifeguard tower into water three feet deep. Consequently, the Kendricks have no cause of action against EBS.

In their brief, the Kendricks rely heavily on Corbin v. Coleco Industries, Inc., 748 F.2d 411 (7th Cir. 1984). However, Corbin involves a product liability claim against the manufacturer of an above-ground swimming pool. The plaintiff injured himself when he attempted a shallow dive from the edge of the pool into water four

feet deep. The plaintiff alleged the side of the pool was not sufficiently rigid for diving since it gave way as he attempted his dive and caused him to enter the water at a deeper angle than he intended; therefore, a warning should have been given that the side of the pool was not suitable for diving. The Seventh Circuit agreed, stating that:

> Even if it were open and obvious that there is some danger in diving into shallow water (a proposition put into question in the preceding section), we cannot say on this record as a matter of law that it was open and obvious that the lip of Corbin's pool wobbled or that a wobbly pool lip increases the danger of a dive from it. Thus the open and obvious rule does not defeat Corbin's strict liability theory at the summary judgment stage.

Id. at 420.

In the present case, no product liability claim is made against EBS. In addition, the facts in Corbin are not consistent with the facts in this case. The plaintiff in Corbin dove from the side of a pool into four feet of water, whereas Mr. Kendrick dove from an elevated lifeguard tower into water three feet deep. Also, there is no evidence that the lifeguard stand used by Mr. Kendrick was defective or caused him to enter the water at a deeper angle than he intended. The fact that the product liability claim alleged in Corbin distinguishes that case from other cases involving diving accidents in observably shallow water is evidenced by the fact that the court in Corbin did not disagree that a summary judgment was appropriate in another case, Sologino v. May

Department Store Co., 466 F.2d 1234 (3d Cir. 1972), which involved a claim by a fifteen year old boy who dove from the side of a pool into water less than three feet deep.

If the Kendricks' interpretation of Corbin is followed, a jury question would be created in any premises liability claim if the plaintiff testifies that he subjectively did not appreciate the dangerous condition which caused the injury. Under Emmons v. Baptist Hospital, supra; Clark v. Lumbermans Mutual Insurance Company, supra, and Storr v. Proctor, supra, the question under Florida law is not what Mr. Kendrick subjectively thought at the time of the accident. Instead, the salient question is whether the danger was open and obvious to Mr. Kendrick if he exercised reasonable care for his own safety.

In the Petitioners' Brief on the Merits, the Kendricks argue that EBS had greater knowledge of the pool conditions than Raymond Kendrick. Apparently, the Kendricks are attempting to argue that a duty to warn exists in any case where the owner or occupier of property possess knowledge of a danger which the invitee has neglected to recognize. Obviously, the duty to warn is not determined by a comparison of the degree to which the parties appreciate a particular danger. Instead, a duty to warn exists only as to those conditions which the invitee could not discover through the exercise of due care.

The Kendricks maintain that the summary judgment should be reversed based on the testimony of George Lawniczak. However, there are two independent reasons supporting the trial court's determination that Mr. Lawniczak's testimony does not create a genuine dispute as to a material fact in this case.

First, in opposing EBS's motion for summary judgment, the Kendricks rely upon Mr. Lawniczak's opinions as to what was or was not obvious to Mr. Kendrick at the time of his accident. However, Mr. Lawniczak is not an expert qualified to give opinion testimony concerning what was open and obvious to Mr. Kendrick at the time of the accident. Mr. Lawniczak's formal educational training is in meteorology, and he admits he is not an expert in the field of human factors. (R. 574-578) Before expert testimony can be relied upon by the Kendricks, the expert witness must be shown to have sufficient qualifications to give the opinions proffered. Sea Fresh Frozen Products v. Abdin, 411 So. 2d 218 (Fla. 5th DCA 1982). Since Mr. Lawniczak is not an expert in the field of human factors or in any other area which would qualify him to give opinions as to why Mr. Kendrick did not recognize an apparent danger, the trial court properly determined that Mr. Lawniczak's testimony does not defeat EBS's motion for summary judgment.

Second, opinion testimony is not warranted on a subject which is not beyond the common understanding of the average layperson.

Florida Power Corporation v. Barron, 481 So. 2d 1309 (Fla. 2nd DCA 1986). In the present case, expert testimony is not needed to evaluate whether the danger of diving from an elevated lifeguard tower into water three feet deep is apparent to a person exercising reasonable care for their own safety. The fact that the danger was obvious to Mr. Kendrick is established by his own testimony that at the time of the accident he was aware of the danger of diving into water three feet deep. Mr. Kendrick further conceded that his awareness of this danger was within his general knowledge of basic things similar to the dangers associated with walking in front of a moving car or pointing a loaded gun at someone. (R. 57) Therefore, opinion testimony is not needed in this case to determine whether or not the danger of diving from a lifeguard tower into water three feet deep was apparent to Mr. Kendrick. The danger would have been apparent to Mr. Kendrick if he had exercised reasonable care for his own safety; therefore, the summary judgment in favor of EBS should be affirmed.

II. MR. KENDRICK'S NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF HIS ACCIDENT.

In cases where the proximate cause of an accident is at issue, the court must determine: (1) whether the defendant's conduct was a substantial factor in producing the result, and (2) whether the defendant's responsibility is superseded by an abnormal intervening

force. These determinations are to be made as a matter of law where reasonable people could not differ. Hoffman v. Bennett, 477 So. 2d 43 (Fla. 3d DCA 1985); Roberts v. Shop & Go, Inc., 502 So. 2d 915 (Fla. 2d DCA 1986). In Roberts, the court determined that even though the defendant was negligent, as a matter of law it was not liable to the plaintiff. In reaching its decision, the court concluded that the intervening act of another was unforeseeable; therefore, the defendant's negligence was not a proximate cause of the accident. The court stated:

> We recognized that the foreseeability of an intervening causation is frequently a question to be determined by the trier of the fact, Vining v. Avis Rent-A-Car Systems, Inc., 354 So. 2d 54 (Fla. 1977), but it may also be determined as a matter of law in the circumstances where, as here, the intervening act is merely "possible" rather than "probable".

Id. at 917.

Courts in Florida and in other jurisdictions have recognized that, even if others may have been negligent, no cause of action exists in favor of a person who sustains injuries diving into water which he or she knew or should have known was shallow. Seitz v. Surfside, Inc., 517 So. 2d 49 (Fla. 3d DCA 1987). In Seitz, the plaintiff was injured when he dove from a pier into shallow water. The plaintiff was a trespasser on the defendant's premises when the accident occurred. The trial court granted the defendant's motion for summary judgment. On appeal, the Third District Court of

Appeal affirmed. In reaching its decision, the court noted that until a property owner discovers a trespasser there is no duty to warn trespassers of concealed, dangerous conditions. The court also recognized that the record failed to show whether the defendant was aware of the plaintiff's presence prior to the accident. However, that question did not need to be answered in ruling on the defendant's motion for summary judgment since the defendant admitted he was familiar with the waters into which he dove. Therefore, the Third District Court of Appeal concluded that the plaintiff's negligence was the sole proximate cause of the accident. Specifically, the court stated:

> Where Seitz admitted to having dived into shallow waters with which he was familiar, his negligence was the sole proximate cause of his resulting injury.

Id. at 50 and 51. The Kendricks argue that Seitz is not applicable since the plaintiff in that case was a trespasser. However, once trespassers are discovered, the owner or occupier of property has a duty to warn of dangers not open to ordinary observation. Wood v. Camp, 284 So. 2d 691 (Fla. 1973). The court in Seitz did not need to resolve the issue of whether the plaintiff had been discovered since the act of diving into observably shallow water was the sole proximate cause of the plaintiff's injuries.

In Hughes v. Roarin 20's, Inc., 455 So. 2d 422 (Fla. 2d DCA 1984), the plaintiff sustained a paralyzing neck injury when he

dove from a platform constructed on a tree into shallow water on the Weekee Wachee River. The defendant, Roarin 20's, Inc., operated a nearby campground resort. The trial court granted the defendant's motion for summary judgment on the grounds that the plaintiff's act of diving into the shallow water was the proximate cause of his injuries. The Second District Court of Appeal affirmed the trial court's entry of a summary judgment in favor of the defendant. In support of its decision, the court cited the following language from an earlier opinion:

> A property owner generally cannot be held liable for dangerous conditions which exist in natural or artificial bodies of water unless they are so constructed as to constitute a trap or unless there is some unusual danger not generally existing in similar bodies of water. 65 C.J.S. Negligence §63(100) (1966); Allen v. William P. McDonald Corp., 42 So. 2d 706 (Fla. 1949). Shallow water, insufficient for diving, does not constitute a trap. Switzer v. Dye, 177 So. 2d 539 (Fla. 1st DCA 1965).

Id. at 424.

In Caraballo v. United States, 830 F.2d 19 (2nd Cir. 1987), the plaintiff was swimming with a group of friends in the Gateway National Recreation Area. The remains of an old pier were located approximately ten feet offshore. The remains of the pier consisted of two vertical boards connected by a horizontal beam 22 feet long. The plaintiff dove from the right end of the beam, which was 53 inches high, into three feet of water. The plaintiff struck his head on the sandy bottom and was rendered a quadriplegic. The

plaintiff testified he decided to dive after observing several other people diving from the piling. The complaint against the United States alleged that the government failed to post adequate warning signs and failed to adequately patrol the beach. At trial, it was determined that the government was 30 percent negligent for failing to give an adequate warning and for failing to properly patrol the beach. On appeal, the Third District Court of Appeals reversed on grounds that the plaintiff's negligence was the sole proximate cause of the accident. The court stated:

> [2] Yet assuming, without deciding, that the government may have been negligent in some respect, we agree with its contention that plaintiff's reckless conduct was, as a matter of law, the sole proximate cause of his injury.

Id. at 22. The court further stated that:

> The shallowness was clearly visible from the point at which [plaintiff] was diving and people were wading and swimming in the area. It should have been observed from their own height what the depth of the water was. Under these circumstances, it was not the government's failure to post signs or its failure to adequately patrol that caused the plaintiff's injury. The proximate cause of plaintiff's injury was his own act - which was unhappily so harmful to him - of diving head first into water that was observably shallow. That unfortunate error of judgment was an unforeseeable superseding cause which bars liability from attaching against the United States.

Id. at 23.

The material facts in the instant case are virtually identical to those in Caraballo. Contrary to the Kendricks representations, the plaintiff in Caraballo was not a trespasser. Without regard to

the adequacy of warnings given by the defendants in both cases, the water was observably shallow for Mr. Kendrick as was the water in which the plaintiff in Caraballo was injured. Unlike the plaintiff in Caraballo, Mr. Kendrick was not prompted to dive by having observed others dive from the lifeguard tower. As previously mentioned, Mr. Kendrick testified that he did not know why he elected to dive head first from the lifeguard tower. If the sound reasoning of Caraballo is applied here, the Kendricks have no cause of action against EBS since Mr. Kendrick's negligence was the sole proximate cause of the accident.

The Kendricks argue that the decisions in Hughes and Caraballo are not applicable in this case since the plaintiffs in those cases apparently did not offer expert testimony in opposition to the summary judgment motions. This distinction is without merit since the expert relied upon by the Kendricks is not qualified to give opinions on what was apparent to Mr. Kendrick at the time of the accident. Furthermore, expert testimony in this case cannot circumvent the undisputed facts which clearly demonstrate that Mr. Kendrick dove into observably shallow water at a time when he admittedly was aware of the danger of diving into shallow water.

In Boltax v. Joy Day Camp, 499 N.Y.S. 2d 660 (Ct. App. 1986), the plaintiff injured himself diving from a lifeguard chair into water on the shallow end of a pool. The plaintiff alleged that the

owner of the pool was negligent in allowing the water level to drop below capacity and by placing a lifeguard chair near the pool's shallow end. The trial court denied the owner's motion for summary judgment and the owner appealed. The Appellate Division of the Supreme Court reversed and the plaintiff appealed to the New York Court of Appeals. The New York Court of Appeals affirmed the Appellate Division of the Supreme Court's ruling that the owner was entitled to a summary judgment. In reaching its decision, the court stated:

> Assuming for purposes of this motion for summary judgment that defendants' alleged negligence - allowing trespassers to gain entry to the pool area and dangerously maintaining the pool by having it filled below capacity and by placing a lifeguard chair near the pool's shallow end - was a causative factor in plaintiff's injuries, the reckless conduct of plaintiff, an adult experienced in swimming and knowledgeable about the general dangers of diving, who admitted his familiarity with the various water levels at each part of the pool, yet chose to dive head first from the lifeguard chair into shallow water, was an unforeseeable superseding event that absolves defendant's liability.

Id. at 661.

The Kendricks' argument that Boltax does not apply since owners and occupiers of property owe no duty to trespassers under New York law is not correct. Under New York law, the owner or occupier of property has a duty to warn trespassers of concealed, dangerous defects. Scurti v. City of New York, 387 N.Y.S.2d 55 (N.Y. 1976). In fact, New York law does not distinguish between

invitees, licensees and trespassers in determining the duty owed by the owner or occupier of property in premises liability claims. Basso v. Miller, 386 N.Y.S.2d 564 (N.Y. 1976).

Shortly after the Boltax case was decided, the New York Court of Appeals affirmed a summary judgment in favor of the manufacturer of a pool in a claim brought by a person who was seriously injured after diving into the shallow end of a pool. Smith v. Stark, 499 N.Y.S.2d 922 (N.Y. 1986). In Stark, the plaintiff alleged the manufacturer was negligent for not placing depth markers around the pool. However, the court held:

> By virtue of plaintiff's general knowledge of pools, his observations prior to the accident, and plain common sense, plaintiff must have known the area into which he dove contained shallow water . . . Therefore, . . . the lack of depth warning devices was not the proximate cause of the plaintiff's injuries.

Id. at 695.

In Roberts v. Town of Colchester, 134 Misc. 2d 109, 509 N.Y.S. 2d 975 (Sup. 1986), the plaintiff was injured while diving from a bridge 25 feet above the water level. The court in Roberts found that the plaintiff was aware the water was six to eight feet deep nearby, but he did not know or check the depth of the water directly under the bridge where he dove. Following Boltax and Smith, the court ruled that the plaintiff had no cause of action since his own negligence was the sole proximate cause of the injury. Specifically, the court stated:

> There is no duty to warn against a condition that can be readily observed by a reasonable use of one's senses (Olsen v. State of New York, 30 A.D.2d 759, 291 N.Y.S. 2d 833, aff'd, 25 N.Y.2d 665, 306 N.Y.S.2d 474, 254 N.E.2d 774). It cannot be gainsaid that the most casual of observations by this plaintiff would have made it totally manifest that the jump from the bridge would result in a drop of some twenty-five feet into a body of water. He admittedly was unaware of the true depth of the water, and was well aware of the potential danger of striking his head on the river bottom. As was said in Abenante v. Balsamo, 110 A.D.2d 802, 488 N.Y.S.2d 620, the value of a warning is particularly questionable where the plaintiff knew or should reasonably have known what dangers were posed.

Id. at 978. The court also noted that:

> Morally, we may look upon ourselves as our brother's keeper, but the duties of conscience will not always equate with that which is imposed by law. To say that each must undertake the responsibility of preventing our fellow humankind from engaging in the folly of self destruction would be to create a duty which is not only improbable, but would drain resources beyond the capacity of replenishment.

Id. at 979.

The Kendricks argue that since there are genuine issues of material facts as to whether EBS was negligent, a jury trial is necessary to resolve the Kendricks' claims against EBS. However, a jury trial is not always necessary when evidence of negligence on the part of the defendant exists. Department of Transportation v. Anglin, 502 So. 2d 896 (Fla. 1987). In Anglin, the trial court's summary judgment in favor of the defendant was reversed by the Fourth District Court of Appeal. The Florida Supreme Court overturned the Fourth District Court of Appeal's decision and

directed that the summary judgment be reinstated for the defendant on grounds that the defendant's negligence merely provided an occasion for the intervening negligence of another party. Specifically, the court stated:

> While it is undisputed that petitioners' negligence was a factual cause of the Anglins' predicament (i.e., "but for" the puddle of water, the Anglins' vehicle would not have stalled), petitioners' negligence simply provided the occasion for the negligence of another. See, e.g. Metropolitan Dade County v. Colina, 456 So. 2d 1233 (Fla. 3d DCA 1984), review denied, 464 So. 2d 554 (Fla. 1985); Pope v. Cruise Boat Co., 380 So. 2d 1151 (Fla. 3d DCA 1980).

Id. at 898. The court concluded that:

> Petitioners' negligent conduct did not set in motion a chain of events resulting in injuries to respondents; it simply provided the occasion for DuBose's gross negligence.

Id. at 900.

In Melton v. Estes, 379 So. 2d 961 (Fla. 1st DCA 1979), the trial court granted a summary judgment in favor of the defendant in a wrongful death claim. The First District Court of Appeal affirmed the summary judgment since the defendant's negligence only provided an occasion for the intervening negligence of the plaintiff's decedent. Specifically, the court stated:

> The activity of Lord and Melton in the procedures followed by them in their effort to extract the house trailer constituted an independent, intervening cause that completely disintegrated the causal connection between Estes prior negligence and the claimant's injuries. It was not foreseeable by Estes that Lord and Melton would not observe that which was obvious and would

> not take reasonable care for their own safety. Therefore, there was no issue of fact for a jury determination. Pope v. Pinkerton Hays Lumber Company, 120 So. 2d 227 (Fla. 1st DCA 1960).

Id. at 963. Under the rationale of the decisions in Estes and Anglin, any negligence on the part of EBS was not a proximate cause of the accident. At most, the conduct of EBS's lifeguards simply provided an occasion for Mr. Kendrick to negligently dive into observably shallow water.

The Kendricks' attempt to distinguish Anglin and Estes on the basis that those cases involved intervening tortfeasors. Apparently, the Kendricks' position is that the intervening negligence must be that of a third party for the defendant to be relieved of any liability. However, the intervening negligence in Estes was that of the plaintiffs decedent. Also, the court in Caraballo stated:

> Conversely, where the plaintiff's intervening actions are not a normal and foreseeable consequence of the defendant's conduct, the plaintiff's conduct becomes a superseding cause which absolves the defendant of liability. Plaintiff's conduct in this case was such a superseding cause.

830 F.2d at 22. Therefore, the trial court and the First District properly determined that the negligence of Raymond Kendrick was the sole proximate cause of the accident.

The Kendricks reliance upon the decision in Mazzeo v. City of Sebastian, 550 So. 2d 1113 (Fla. 1989) is misplaced. To begin

with, the Kendricks' argument that Mazzeo v. City of Sebastian, 526 So. 2d 1003 (Fla. 4th DCA 1989) was relied upon by EBS in its motion for summary judgment is completely unfounded. In its memorandum in support of its motion for summary judgment, EBS cited the Fourth District Court of Appeal's opinion in Mazzeo and argued that if Mr. Kendrick admitted that he was aware of the depth of the pool when he dove from the lifeguard tower, the Kendricks would have no cause of action under the doctrine of express assumption of risk. However, EBS recognized that the doctrine of express assumption of risk could not apply in this case since Mr. Kendrick has not admitted that he was subjectively aware of the depth of the pool when he dove from the lifeguard tower. (R. 1229 and 1230) Therefore, the trial court did not rely upon the Fourth District Court of Appeal's opinion in Mazzeo in granting EBS's motion for summary judgment.

The only issue addressed by the Florida Supreme Court in Mazzeo is whether the doctrine of express assumption of risk should be extended to cases in which persons voluntarily and deliberately participate in activities which are known to be dangerous. In Mazzeo, the Florida Supreme Court concluded that the doctrine of express assumption of risk should be limited to express contracts not to sue and contact sports. However, the court recognized that it was not deciding whether a summary judgment would have been

appropriate under the facts of that case on grounds that the sole proximate cause of the accident was the negligence of the plaintiff. Specifically, the court stated:

> We express no opinion with respect to the issues of negligence and proximate cause because they are not before us.

Id. at 545. Therefore, the Florida Supreme Court's decision in Mazzeo offers no support to the Kendricks' position on this appeal.

In fact, only Justices McDonnall and Overton addressed the proximate cause issue in Mazzeo after the majority concluded that issue was not properly before it. In his separate opinion, Justice McDonnall stated:

> I cannot disagree that the doctrine called assumption of risk does not apply to the facts in this case. I note, however, that any failure to post readable "no diving" signs was not a legal cause of injury when the plaintiff knew both the depth of the water and that it was unsafe to dive, but then voluntarily dived. Likewise, the presence of the pier over shallow water, under these circumstances, would not be a legal cause of injury. Because the record clearly demonstrates the cause of the injuries to be the plaintiff's intentional conduct, the nexus between any claimed negligence and injury is broken. I would therefore approve the judgment for the city. (OVERTON, J., Concurs.)

Id. at 545. The majority opinion does not disagree with Justice McDonnall's analysis of the proximate cause issue.

The Kendricks suggest that EBS's responsibility should be controlled by Robbins v. Department of Natural Resources, 468 So. 2d 1041 (Fla. 1st DCA 1985). Robbins has no application in this

case since the summary judgment granted by the trial court in that case was based on the doctrine of express assumption of risk. The First District Court of Appeal reversed a summary judgment in favor of the defendant after concluding that there was a dispute of fact on the issue of whether the plaintiff subjectively appreciated the danger of diving into the water where the accident occurred; therefore, a jury question was presented on the express assumption of risk defense. As previously stated, the summary judgment in this case is not based on the doctrine of express assumption of risk. Furthermore, the Florida Supreme Court in Mazzeo disapproved of the language in Robbins pertaining to the scope of the doctrine of express assumption of risk. Since Robbins does not address the issues of duty and proximate cause, that case cannot be relied upon in reviewing the summary judgment in favor of EBS.

The Kendricks also cite Onufer v. Seven Springs Farm, Inc., 636 F.2d 46 (3d Cir. 1980) for the proposition that a jury question is presented in this case. However, Onufer offers no assistance to the Kendricks. The plaintiff's decedent in Onufer drowned in a pool operated by the defendant. The complaint alleged that the lifeguard's belated efforts to revive the plaintiff's decedent contributed to his death. The trial court directed a verdict in favor of the defendant on grounds that there was no evidence that the delay in providing assistance caused the death of the

plaintiff's decedent. On appeal, the Third Circuit Court of Appeals reversed after concluding the plaintiff produced sufficient evidence to create a jury question on the issue of causation.

The rationale applied in Onufer does not suggest that the Kendricks have a cause of action against EBS. In Onufer, there was no evidence that the plaintiff subjected himself to an apparent danger. Therefore, Onufer does not address the issues of whether there was a duty to warn or whether the sole proximate cause of the accident was the plaintiff's decedent's failure to exercise reasonable care for his own safety. As a result, Onufer does not apply in the analysis of the issues before the court on this appeal.

In the instant case, Mr. Kendrick admits he was aware the pool was shallow near the lifeguard stand even though he did not check the depth of the pool below the lifeguard tower. The depth of the pool was easily ascertainable to Mr. Kendrick, especially since he had been around the pool for several hours prior to his accident. Through the exercise of reasonable care, Mr. Kendrick could have determined the depth of the pool.

The undisputed facts show that Mr. Kendrick dove from a lifeguard tower into observably shallow water at a time when he understood that diving into shallow water is dangerous. Mr. Kendrick's negligence, regardless of how unfortunate it has been

for the Kendricks, represents the sole proximate cause of his accident.

CONCLUSION

The undisputed facts demonstrate that the depth of the pool was open and obvious. Mr. Kendrick admits he was aware of the danger associated with diving into shallow water. Therefore, EBS had no duty to warn Mr. Kendrick not to dive from the lifeguard tower into shallow water. Even if it is assumed that EBS's lifeguards were negligent in some manner, as a matter of law that negligence only provided an occasion for Mr. Kendrick's intervening negligence. Consequently, Mr. Kendrick's own negligence was the sole proximate cause of his injuries. The summary judgment should be affirmed.

I HEREBY CERTIFY that a true and correct copy of the foregoing

has been furnished to Robert Staats, 229 McKenzie Ave., Panama City, FL 32401, by regular U.S. mail this 19th day of November, 1990.

BARRON, REDDING, HUGHES,
FITE, BASSETT & FENSOM, P.A.

Clifford W. Sanborn
FL Bar No.:0442143
220 McKenzie Avenue
P. O. Box 2467
Panama City, Florida 32402
(904)785-7454
ATTORNEY FOR ED'S BEACH SERVICE