IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

RAYMOND KENDRICK and
SUSIE KENDRICK,

Petitioners,

vs.

Supreme Court Docket No. ~~76~~,114
DCA Docket No. 89-2198

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

Respondent.

PETITIONERS' JURISDICTIONAL BRIEF

DISCRETIONARY REVIEW
OF THE FIRST DISTRICT COURT OF APPEAL

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CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

We will use the surname of KENDRICK when referring to the Petitioners, RAYMOND KENDRICK and SUSIE KENDRICK, who were the Plaintiffs below. The initials EBS will be used when referring to the Respondent, ED'S BEACH SERVICE, INC., which was one of the Defendants in the Trial Court. The owners of the swimming pool and resort complex located in Panama City Beach, who were the other Defendants, will be referred to, collectively, as EDGEWATER. We will use the symbol "AP" when referring to the Appendix attached to this Jurisdictional Brief.

STATEMENT OF CASE AND OF THE FACTS

The pool at which Mr. KENDRICK was injured was described as the largest swimming pool in the State of Florida. The pool was by regulatory definition, "unsafe and hazardous to public health". EDGEWATER opened the pool in May of 1985, without obtaining a permit. It was warned that the use of the pool, without the permit was a violation of law. (AP #3) Application for permit was made October 2, 1985, and the permit was issued December 5, 1985. (AP #2) Mr. KENDRICK had been injured on July 30, 1985.

The pool was a no-diving pool. State regulations required the words "NO DIVING" appear in four-inch letters

every 25 feet around the deck of the pool, within two feet of the water. (AP #4) No such warning existed. Depth markers at, or above, the water's edge were required. There is a conflict in the testimony as to whether or not depth markers existed. Two witnesses say yes. Seven witnesses say no. There were no depth markers at the water level, and no depth markers at any level on the island toward which Mr. KENDRICK dove. The pool contained no safety lines as required by State regulations.

EBS paid EDGEWATER $5,000.00 annually for the privilege of being able to sell suntan oil and other products at EDGEWATER. As additional consideration for this privilege, EBS was to provide lifeguard services to: (1) enforce the no-diving; (2) keep people off the island; and (3) occupy the lifeguard stands. According to lifeguard, Lisa Giles, there had been prior difficulty with people, diving from or jumping from the lifeguard chairs.

Dr. Lawncizak, an expert witness, testified that EBS should have anticipated and guarded against people diving from elevations such as lifeguard stands. EBS lifeguards received no safety training. They received detailed instructions how best to sell their product. They were paid a commission, based on the amount of product they sold. Lisa Giles, was on duty. She testified that the lifeguards had been instructed not to occupy the lifeguard chairs, because they could not sell their products while in the chairs. Twelve witnesses agreed: (1) they had never seen a lifeguard in the lifeguard stand;

(2) the only thing they had ever seen the lifeguards do was sell suntan products and straighten up chairs; and (3) that the lifeguards usually stayed at the Tiki Hut and not in the pool area. No lifeguard was present when Mr. KENDRICK climbed into the lifeguard stand. Lisa Giles was down at the Tiki Hut and did not know where the other lifeguard was.

All signs had been removed a week or so before the incident. This was verified by the Security Guard. Mr. KENDRICK had spent less than 15 minutes in the pool with his daughter prior to this incident. He was unaware there was an island in the pool; he thought there were two pools. He had walked near the waterfall but had no recollection of walking in the water near the lifeguard stand. Neither he nor any of the members of his group, nor Mrs. Mazer, nor her son, recalled ever seeing any depth markers.

Near the end of his deposition, Mr. Kendrick answered that he knew it would be dangerous to dive, that is, head first from a platform into 3-1/2 feet of water. (AP #8, P.57) Earlier in his deposition he testified that he saw his friend, Jimmy Bello, treading water and believed, therefore, that the water was six foot deep, or deeper. The location of the lifeguard stand caused him to believe the water was 6 foot deep or deeper. He did not dive head first into the pool. He attempted a shallow dive, much like a racer would use at the start of a swimming race. (AP #8) All observers thought he had made a safe entry into the pool. (AP #9-#18)

Documentary evidence provided from the National Safety Council by way of a letter attached to Dr. George Lawniczak's deposition and the testimony of Dr. George Lazniczak were in agreement that a swimming pool for a human being is an unnatural and, therefore, hostile environment and that we cannot rely upon our common sense in dealing with aquatic safety. He testified about the hidden dangers of diving into water and that no matter how clear water is, you cannot see those forces which can make a safe dive into an unsafe dive. He testified that Mr. KENDRICK was rendered a quadriplegic as a result of impacting the bottom of the pool in "an unintended and unplanned manner". He noted that according to Florida Administrative Code 10D-5.111(1) there was inadequate lifeguarding. It was his opinion that: (1) lifeguards need to guard against people diving from elevations; (2) that Mr. KENDRICK's conduct was at least foreseeable; (3) that lifeguarding was inadequate for failure to enforce the minimal no-diving regulations; and (4) their failure to occupy the lifeguard stand and failure to prevent others from occupying the lifeguard stand was inappropriate.

EBS filed a Motion for Summary Judgment with the Trial Judge, N. Russell Bower. EBS argued that the Plaintiffs' claim was barred because of the application of the doctrine of "express assumption of risk". Judge Bower agreed and granted a Motion for Summary Judgment. The First District Court of Appeal ignored the majority Opinion of this Court in the case

of Mazzeo v. City of Sebastian, 550 So.2d 1113 (Fla.1989), and adopted the rationale of the dissenting Opinion in the Mazzeo case, supra, and held that Mr. KENDRICK's claim was barred by his intentional conduct.

It is Petitioners' position that the action of the First District Court of Appeal is in direct conflict with the Opinion of this Court as enunciated in Mazzeo v. City of Sebastian, 550 So.2d 1113 (Fla.1989) and the Opinions of the other District Courts of Appeal which have held that the doctrine of express assumption of risk is merged in the doctrine of comparative negligence and is not an absolute bar to personal injuries, except in those cases involving contact sports or contracts not to sue.

SUMMARY OF ARGUMENT

The District Court of Appeal ignored the holding of this Court in the case of Mazzeo v. City of Sebastian, 550 So.2d 1113 (Fla.1989) and this Court's decision in Blackburn v. Dorta, 348 So.2d 287 (Fla.1987), and furthermore ignored its own Opinion written by an entirely different panel in the case of Robbins v. Department of Natural Resources, 468 So.2d 1041 (1st DCA 1985). The Opinion written by the First District Court did not grant to the Petitioner the privilege of having the Record viewed in the light most favorable to the Petitioner and did not indulge all proper inferences in favor of the Petitioner, as it was required to do in reviewing an Order granting a Motion for Summary Judgment. The Record before the Trial Judge contained sufficient factual matters to establish not only that the Respondent, EBS, was guilty of negligence but also established that the Petitioner in attempting his shallow dive entry into the pool did so at a time and at a place when he was unaware of the depth of the water, believed the depth of the water to be six feet or deeper, and believed, along with others, that the shallow dive entry could be made in a safe manner. He was entitled, therefore, to have his actions at least compared to the actions of the Respondent by the trier of fact, and the entry of Summary Judgment was totally inappropriate.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FOLLOWING DECISIONS OF THE SUPREME COURT:

1. Mazzeo v. City of Sebastian, 550 So.2d 1113 (Fla.1989).

2. Blackburn v. Dorta, 348 So.2d 287 (Fla.1987).

AND THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE OF:

Robbins v. Department of Natural Resources, 468 So.2d 1041 (1st DCA 1985)

This Court in Blackburn v. Dorta, 348 So.2d 287 (Fla.1987) held that in most cases assumption of risk is merged in the doctrine of comparative negligence, and observed:

> "At the outset, we note that assumption of risk is not a favored defense. There is a puissant drift toward abrogating the defense. ... If the only significant form of assumption of risk (implied-qualified) is so readily characterized, conceptualized, and verbalized as contributory negligence, can there be any sound rationale for retaining it as a separate affirmative defense to negligent conduct which bars recovery altogether? In the absence of any historical imperative, the answer must be no.
>
> "We find no discernible basis analytically or historically to maintain a distinction between the affirmative defense of contributory negligence and assumption of risk. The latter appears to be a viable rational doctrine only in the sense described herein as implied-qualified assumption of risk which connotes unreasonable conduct on the part of the plaintiff. ... Therefore, we hold that the affirmative defense of implied assumption of risk is merged into the defense of contributory negligence, and the

> principles of comparative negligence enunciated in Hoffman v. Jones, supra, shall apply in all cases where such defense is asserted."

Following the decision in Blackburn, supra, the District Courts of Appeal aligned themselves with this Court in Blackburn, supra, or found ways to distinguish the Blackburn decision. The conflict between the various District Courts of Appeal was then enunciated, fairly clearly, by the Fourth District in Mazzeo v. City of Sebastian, 526 So.2d 1003 (4th DCA 1988). The Fourth District aligned itself with those Courts which had distinguished Blackburn supra, but certified the following 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?

This Court granted the Plaintiff a new trial.

There are far more compelling reasons, legally, for reversal of the Appellate Court's decision in the case at bar, than existed in Mazzeo. Here we are dealing with a Motion for Summary Judgment. In the Mazzeo case, supra, the Trial Judge had instructed the jury upon the issue of assumption of risk. lhe jury ruled that because of the assumption of risk, that the Plaintiff could not recover. The jury's verdict was reversed by this Court, and a new trial ordered.

Factually, the case at bar is more compelling than the facts in Mazzeo. Both cases involved an artificial body of

water; an artificial lake and a swimming pool. In Mazzeo, the Plaintiff dove from a platform which extended into the lake. Mr. KENDRICK dove from a platform built at the edge of the pool. In both cases, the height of the platform was approximately 2-1/2 feet high. In Mazzeo, the depth of the lake was 3 to 4 feet. In the present case, the depth of the pool varied from 3-1/2 feet to 6 feet. Ms. Mazzeo was seen to stand in the exact spot that she dove. Ms. Mazzeo testified she had no recollection of that fact. No one testified that they had seen Mr. KENDRICK in the water near the lifeguard stand. He testified, that he did not believe that he ever waded in the water near the lifeguard stand. Ms. Mazzeo was shown to be an experienced swimmer and diver. Mr. KENDRICK had no such expertise. Ms. Mazzeo did not deny in her case that the water was only 3 to 4 feet deep. Mr. KENDRICK testified that he thought the water was 6 feet deep. Ms. Mazzeo was trying to demonstrate a safe shallow diving technique. She was encouraged to do so by her boyfriend. According to witnesses, she protested because she thought it might be dangerous. Ms. Mazzeo had no recollection of any such conversation. Mr. KENDRICK agreed with the question put to him by counsel that if he dove, that is head first, into 3-1/2 feet of water from a 2-1/2 foot platform, it would be dangerous. He had testified earlier that he did not dive head first, that he attempted a shallow entry dive into water which he believed was 6 feet deep or deeper.

The Opinion of the First District ignores these factual distinctions. Furthermore, the First District Court by quoting from the dissenting Opinion in Mazzeo, supra,

seems to be challenging this Court. Should this Court fail to accept jurisdiction and resolve the conflict, the trial of negligence cases in this State will be in hopeless disarray. Attorneys for the Plaintiffs will maintain that assumption of risk does not apply except in those few cases covered by express agreements not to sue and contact sports. The insurance bar will be urging that every time a Plaintiff does something intentionally, like dive into a swimming pool or drive a car down a crowded highway, operate a motor vehicle at a high rate of speed, operate a motor vehicle while intoxicated, his action will be barred by that intentional conduct. Trial Judges will be hopelessly confused as to what instruction to give juries. The confusion will reign in all negligence cases but will be manifest, especially in those cases involving swimming pool accidents.

CONCLUSION

It is respectfully submitted that this Court should accept this cause for review and direct a briefing of the case on the merits and resolve the conflict.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioners' Jurisdictional Brief was hand delivered this 28 day of June, 1990, to Clifford W. Sanborn, Esq., 220 McKenzie Avenue, Panama City, Florida, Attorney for Ed's Beach Service, Inc.

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