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' BRIEF ON THE MERITS

DISCRETIONARY REVIEW
OF THE FIRST DISTRICT COURT OF APPEAL

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THERE IS A CONFLICT BETWEEN THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL AND THE FLORIDA SUPREME COURT'S OPINION IN MAZZEO V. CITY OF SEBASTIAN, 550 SO.2D 1113 (FLA. 1989), BECAUSE THE RECORD DEMONSTRATES THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER OR NOT ED'S BEACH SERVICE, INC., WAS INDIVIDUALLY, OR CONCURRENTLY, NEGLIGENT BY ALLOWING THE PLAINTIFF TO ENTER THE POOL IN AN AREA WHERE THERE WAS INSUFFICIENT DEPTH OF WATER, OR BY FAILING TO STRETCH ROPES ACROSS THE POOL SO AS TO MARK A LINE OF DEMARCATION SEPARATING THE SHALLOW WATER FROM THE DEEP WATER, OR BY FAILING TO POST ADEQUATE MARKERS, OR ADEQUATE SIGNS, TO SHOW THE DEPTH OF THE WATER, OR BY FAILING TO PROVIDE PROPER DEPTH OF WATER BY WHICH THE PLAINTIFF COULD SAFELY ENTER THE WATER, OR BY FAILING TO POST NECESSARY WARNING SIGNS, OR BY FAILING TO PROVIDE ADEQUATE LIFEGUARD AND PERSONNEL TO WARN OF THE DANGERS AND SHALLOWNESS OF THE WATER, OR BY FAILING TO PROVIDE SUFFICIENT LIFEGUARD PERSONNEL, OR BY FAILING TO PROVIDE ADEQUATELY TRAINED LIFEGUARD PERSONNEL, OR BY FAILING TO PROVIDE ADEQUATE PRECAUTIONS TO PREVENT PERSONS, SUCH AS THE PLAINTIFF, FROM ENTERING THE POOL AT A POINT WHICH WAS DANGEROUS FOR THE PLAINTIFF TO DO SO, OR BY FAILING TO PROVIDE ADEQUATE LIFEGUARDING, AND BY FAILING TO TAKE NECESSARY PRECAUTIONS TO PREVENT PATRONS OF THE POOL FROM DIVING FROM THE LIFEGUARD STAND INTO THE POOL.

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PRELIMINARY STATEMENT

This Brief is submitted on behalf of the Petitioners, RAYMOND KENDRICK and SUSIE KENDRICK who were the Plaintiffs below. The Petitioners will be referred to throughout this Brief as MR. and MRS. KENDRICK. The Respondent, ED'S BEACH SERVICE, INC., was one of the Defendants below, and will be referred to throughout this Brief as EBS. Since the Transcript of the testimony and the Transcript of the depositions has been included in the Record on Appeal, the symbol "R" will be used when referring to the Record on Appeal and to the Transcript of testimony. We will use the symbol "Ap" when referring to the Appendix to this Brief. When referring to the other Defendants collectively, we will use the word "Edgewater".

STATEMENT OF CASE

This action was commenced on June 30, 1986, when a Complaint was filed in Bay County Circuit Court seeking damages for personal injuries which resulted from a swimming pool diving incident which had occurred July 30, 1985. (R 768-775) Several persons were named as Defendants, including the owners of the swimming pool, Edgewater, at which MR. KENDRICK had been injured; the corporation in charge of managing the swimming pool, as well as the condominium complex; the builders and the designers of the swimming pool; and EBS, which had contracted with the owner/manager to provide lifeguard services. (R 769) It was alleged by the KENDRICKS, who were business invitees at the time, that MR. KENDRICK entered the swimming pool, which was dangerously shallow, as a result of which he struck the bottom of the pool and sustained severe and permanent injuries. (R 771)

The Complaint alleged that the various Defendants were jointly and/or concurrently negligent in that they:

> a. Failed to construct the pool so that it was deep enough.
> b. Constructed the pool so that the deep area was far removed from the area in which the Plaintiff entered the pool.
> c. Failed to make any clear separation between the shallow end and the deep end of the pool.
> d. Failed to provide adequate depth markers.
> e. Failed to provide signs warning of the hazards of entering the pool.

> f. Failed to provide lifeguards to warn of the hazards of diving into the swimming pool.
> g. Failed to adequately supervise or train the lifeguards.
> h. Failed to provide a sufficient number of lifeguards.
> i. Designed the pool in such a manner that MR. KENDRICK was not aware that it was unsafe to enter the pool at the place and in the manner that he did. (R 771-773)

All of the Defendants filed their Answer and Defenses in which they set up two affirmative defenses: (a) comparative negligence, and (b) assumption of risk. (R 797, 818-820)

EBS, then on October 10, 1988, filed its Motion for Summary Judgment. It is apparent from the reading of that Motion that EBS argued that KENDRICK'S claim was barred because of the operation of the doctrine of express assumption of risk. (R 822-823) Various Affidavits (R 832-846; 847-850; 857-922) were then filed, and together with several depositions (R 1-767) were before the Trial Court on May 9, 1989, when the Circuit Judge entered his Order granting the summary judgment in favor of EBS. (R 994) That Order was made final and therefore appealable when the Court denied the Motion for Rehearing and entered a Summary Final Judgment in favor of EBS. (R 1022)

The Order dated July 24, 1989, which the Trial Judge entered, provided:

> "A Summary Final Judgment . . . in favor of the Defendant, Ed's Beach Service, Inc., and against the Plaintiffs, Raymond Kendrick and Susie Kendrick, and the Plaintiffs shall go hence without day." (R 1022)

was the subject matter of the appeal to the First District Court of Appeal. (R 1027)

The First District Court of Appeal entered its Opinion dated April 3, 1990, (Ap p.1-2) in which it affirmed Summary Judgment in favor of EBS. This Opinion adopted the rationale of Justice McDonald in his dissent to this Court's Opinion in the case of Mazzeo v. City of Sebastian, 550 So.2d 1113 (Fla. 1989) and ignored the holding of the majority. Jurisdictional conflict was thereby created, and this Brief is submitted by the Petitioners to resolve that conflict.

STATEMENT OF FACTS

I. FACTUAL SUMMARY:

Edgewater Beach Resort is a condominium complex located in Bay County, Florida. It contains a swimming pool for use by its patrons. (R 768-775) Edgewater contracted with EBS to provide lifeguard services at the pool. By agreeing to perform these lifeguard services, EBS assumed a duty specifically to enforce the rules and regulations against diving, (R 456) undertook the duty to supervise and train its lifeguards to protect the health and safety of all users of the swimming pool, undertook the duty to provide three lifeguards, at least one of whom would man the lifeguard chairs at all times, (R 411; 456) to enforce the no-diving regulation to insure that the users of the pool were made aware of the dangers of diving and to insure that the users of the pool were prohibited from diving. (R400-401; 410; 465)

On July 30, 1985, at about 4:30 p.m. MR. KENDRICK climbed onto one of the lifeguard chairs. (R 864; 861; 90) There were no signs which warned of the dangers of diving into the pool. (R 115; 864; 865; 861-862) There were no lifeguards present. (R 864; 43-44; 105-106; 197) He stood in the chair approximately a minute and a half (R 48), and was observed by numerous people (R 159; 109-110; 253; 186; 276; 354; 327), except the lifeguards. He attempted a shallow dive into the pool towards his friend. Because of the location of the

lifeguard chair, and because he thought his friend was treading water, MR. KENDRICK assumed that he was diving into six feet of water. (R 48) MR. KENDRICK did not know it, because of his lack of familiarity with the pool and because of inadequate depth markers and warning signs, but the water into which he dove was only 3-1/2 feet deep. (R 37; 44-45; 48) Most observers thought he had safely executed the shallow dive. (R 109-110; 161; 334; 276) He did not. His head struck the bottom of the pool, his neck was broken, and he was rendered a quadriplegic.

II. CONTENTS OF RECORD ON APPEAL AS TO PLAINTIFF'S STATUS AS BUSINESS INVITEE:

The KENDRICKS alleged in their Complaint that they were business invitees. (R 770) EBS in its Answer, denied this allegation. (R 818-820) Every member of the KENDRICK party, including MR. and MRS. KENDRICK, Mr. and Mrs. Bellow, Geraldine Guidroz, Brenda Guidroz, Bridgett Macalose, as well as other guests, Susan Mazer and her son, Stephen Mazer, Ruth Colbert and her sister, Martha Peace, all agreed that MR. KENDRICK was a registered and paying guest at Edgewater from July 27, 1985 through July 30, 1985. As guests, they were entitled to use the pool facility. In addition, at the April 27, 1989, hearing, EBS finally admitted that MR. KENDRICK was a business invitee. (See Page 7 of April 27, 1989, hearing Transcript.)

III. CONTENTS OF RECORD ON APPEAL WHICH RELATE TO THE DUTIES ASSUMED BY EBS TO ALL BUSINESS INVITEES:

Some time prior to July 30, 1985, EBS, through its President, Ed Hickey, and Edgewater, through its President, Tom Creekmore, met and concluded the arrangements under which EBS would provide lifeguard services at the swimming pool in question. (R 456) EBS was not paid to perform those services, but in fact paid Edgewater either $5,000.00 (R 456) or $2,500.00 (R 406) annually, for the privilege of being able to sell its suntan oil and other products at the beach at Edgewater, and at the pool at Edgewater. In addition to the money paid for that privilege, EBS was to provide lifeguard services at the pool. (R 456) According to Mr. Creekmore, EBS was to provide lifeguards between the hours of 8:00 a.m. and 5:00 p.m., one of whom would be stationed in one of the lifeguard chairs. (R 456) Mr. Hickey stated that EBS was responsible to provide three lifeguards. (R 411) One of those lifeguards was to do nothing but sit in the lifeguard chair to enforce pool regulations. (R 400-401) Although Edgewater was to formulate rules for the use of the pool, and was responsible for posting the necessary signs (R 464-465), both Mr. Creekmore and Mr. Hickey agreed that it was the responsibility of EBS, through its lifeguards, to enforce those rules concerning the patrons' use of the pool. (R 464-465; 410) Mr. Hickey, in fact, stated that the main regulation they were to enforce was to keep people off the "island", and to enforce the ban against

diving. (R 420, 424, 425)

In addition, the Florida Administrative Code 10D-5.111 imposes upon managers, and other attendants, such as lifeguards, the duty of supervising the pool for the benefit of and safety of those using the pool. Under that Code, lifeguards have the full authority, and responsibility, to enforce all rules and regulations. (R 596-603)

IV. CONTENTS OF RECORD ON APPEAL AS IT RELATES TO TRAINING AND SUPERVISING OF LIFEGUARDS:

Mr. Creekmore, on behalf of Edgewater, made no inquiry as to the qualifications of the lifeguards, but left that responsibility entirely to EBS. (R 458) According to Mr. Hickey, their lifeguards were considered qualified if they had the American Red Cross lifesaving certificate, or were in the process of securing one. (R 394) Any additional training and instruction was the sole responsibility of EBS. No further instructions were given as to matters pertaining to the health and safety of the users of the pool. Mr. Hickey and his company, EBS, gave instructions as to how to sell suntan oil and related beach products, such as t-shirts, sun visors and beach lounges. They also instructed lifeguards how to keep the pool area clean. (R 416; 399-400) In fact, although EBS had agreed to pay one of the lifeguards a flat salary to occupy the lifeguard chair (R 456; 400-401), it developed that all of the employees were in fact paid a commission or percentage of the

sales of suntan oil and related products. Mr. Hickey admitted that. (R 399-400) That fact was verified by Lisa Giles, one of the lifeguards on duty at the time MR. KENDRICK was injured. (R 864) She testified that she and all the other lifeguards were compensated strictly upon the basis of the sales of suntan oil and other products they sold. (R 865)

If, as Mr. Hickey testified, EBS was responsible for the enforcement of the rules and regulations, "especially the ban on diving", there was no evidence to indicate that EBS supervised their lifeguards to see that they were properly performing these duties. There is no doubt that there were two lifeguard chairs at the pool, across the pool from each other. (R 409; 941; 942) However, the person in charge of supervising the lifeguards was not sure how many chairs there were; in fact, Mr. Hickey testified at one point that there was only one chair. (R 419)

The security guard who investigated the incident the day it occurred, and filed his official incident report (R 861), noted that it was common knowledge that the lifeguards spent little time at the pool, and seldom occupied the lifeguard chairs, but could usually be found in the beach area, near the Tiki Hut, selling products. (R 862) Even EBS Chief Executive Officer, Mr. Hickey, noted that the lifeguards did not like to use the lifeguard chairs because it would ruin their suntans, and they stayed, therefore, on the beach near the Tiki Hut. (R 409) Despite this knowledge, EBS encouraged,

rather than discouraged, this conduct on the part of its lifeguards. Ms. Giles, an EBS lifeguard, testified that she was instructed by both Edgewater and EBS that they should not be sitting in the lifeguard chairs because they could not sell as much suntan oil and other products. They were specifically instructed to roam the beach and pool deck to find customers for their products. (R 865)

V. CONTENTS OF RECORD ON APPEAL CONCERNING THE USE AND OCCUPANCY OF THE LIFEGUARD CHAIRS:

Plaintiff offered the testimony of Dr. George Lawniczak. Dr. Lawniczak was offered as an expert witness. There was no objection by the Defendant as to the use of Dr. Lawniczak's deposition or the use of his Affidavit in opposition to the Defendant's Motion for Summary Judgment.

Dr. George Lawniczak testified that had the lifeguard occupied the lifeguard chair, MR. KENDRICK never would have sustained the injuries complained of. (R 614-618) EBS knew that the lifeguards were not occupying these chairs. (R 409) In fact, the agents of EBS gave the lifeguards direct instructions not to sit in the chairs. (R 865) This, despite the fact that the agreement between EBS and Edgewater called for one lifeguard to sell no products, and to be paid to do nothing but occupy the lifeguard chair to survey the use of the pool, and to enforce pool regulations. (R 456; 400-401) Not one witness ever saw a lifeguard in the lifeguard chair. Even

Mr. Hickey was aware of the fact that they did not usually sit in the chairs. (R 409) Lisa Giles testified that she was told not to sit in them, but to roam around. (R 865) The security guard seldom saw any lifeguards there. (R 862) Mr. Bellow (R 105-106), his wife, Sharon Bellow (R 266), Bridgett Macalose (R 245), Susan Mazer (R 197), her son, Stephen (R 276), Ruth Colbert (R 366), and her sister, Martha Peace (R 335), all of whom were guests at Edgewater on July 30, 1985, and who witnessed all, or part, of the incident in question, testified they had never seen a lifeguard in the lifeguard chair.

According to Dr. Lawniczak, the American Red Cross Manual provided that lifeguards should guard against people, who were swimming pool patrons, diving from elevations. A lifeguard chair is an elevation. (R 659) Additionally, the Record reflects that EBS had actual knowledge that pool patrons were using the lifeguard chairs in a dangerous or unsafe manner. Lisa Giles was told by EBS that guests, particularly young children, had been diving off the lifeguard chairs. (R 865) There was discussion shortly before this incident, about removing the lifeguard chairs because they were dangerous. (R 865)

VI. CONTENTS OF RECORD ON APPEAL CONCERNING THE EXISTENCE OF DEPTH MARKERS AND WARNING SIGNS

The Florida Administrative Code 10D-5, provides that in pools, such as this pool, where no diving is permitted, that

at a minimum there should be letters 4 inches high, every 25 feet around the deck of the pool, with the specific warning "NO DIVING". (R 601) Additionally, depth markers are required on the pool deck, and at a point at or above the water line. (R 596-597)

Dr. Lawniczak offered his uncontradicted opinion that had there been signs which warned that diving into the pool could result in paralysis, that MR. KENDRICK would probably not have made the dive which resulted in his injuries; that a sign, to be a sufficient warning, had to furnish enough information to allow the individual to make an informed decision. The depth markers observed by Dr. Lawniczak two years after the accident were not in conformity with Code. Those on the water side of the pool were half in and half out of the water (R 596-597), which causes distortion. There were no depth markers on the island toward which MR. KENDRICK was diving at the time of the incident. (R 595-597)

The Record is in conflict as to whether depth markers were present, and if so, where they were. Of all the witnesses who were called, only two, Mrs. Colbert and Mrs. Peace, recalled seeing the depth markers. And the ones they saw were on the water side, and not in the pool deck. (R 357, 370, 337, 338) Neither MR. or MRS. KENDRICK recalled seeing depth markers. (R 37; 170-171) Neither did Jimmy Bellow (R 101-102), his wife, Sharon (R 262-266), Bridgett Macalose (R

243), Susan Mazer (R 183), or her son, Stephen (R 278). If there were depth markers, they were not seen and observed by most of the eyewitnesses, and therefore, ineffective.

VII. CONTENTS OF RECORD ON APPEAL CONCERNING MR. KENDRICK'S KNOWLEDGE OF THE EXISTENCE OF A DANGEROUS CONDITION

We believe the Record establishes in an uncontradicted fashion that MR. KENDRICK did not know the depth of the water into which he dove. At the very least, there is a conflict in the evidence on this point. He did in fact dive into 3-1/2 feet of water while attempting a shallow dive, as a result of which he hit his head on the bottom of the pool, broke his neck, and was rendered a quadriplegic. (R 61; 592-594) The Defendant, EBS, argues that because the water was clear, because there were depth markings, because MR. KENDRICK acknowledged that it was dangerous to dive head first into 3 feet of water, that the danger was open and notorious, and he cannot recover. (See Transcript of April 27, 1989, Hearing, Pages 11-16) One witness testified that she told MR. KENDRICK that it would be dangerous to dive from the lifeguard chair. (R 186) She did not know if MR. KENDRICK ever heard her comment, and acknowledged that he made no comment in response, and did nothing to indicate that he had heard what she had said. (R 196) MR. KENDRICK testified that no one ever made any such statement to him. (R 50, 51, 70)

The water was clear. The depth of the water was only

3-1/2 feet where MR. KENDRICK dove. He dove toward the "island" where he believed the water was 6 feet or deeper. (R 48) Mrs. Mazer knew the water near the lifeguard chair was about 3-1/2 feet deep, because she had walked in the area, and the water came up somewhere above her waist. (R 183) She had no recollection of seeing depth markers. (R 183) She did believe that the water got deeper toward the island, which was the direction which MR. KENDRICK dove (R 183)

MR. KENDRICK denied any knowledge of the depth of the pool in the area of the lifeguard chair. (R 37) He believed it to be 6 feet deep or more. (R 48) Although he and his family had been at the condominium complex for two full days prior to the incident, (R 34) MR. KENDRICK himself had spent less than 15 minutes in the pool. (R 34) He and his friend, Jimmy Bellow, described him as not being a "pool person"; he was someone who preferred to use the beach. (R 37, 88) One of the two days it rained. (R 149) The morning of the incident, he and his friend, Jimmy, had gone shopping with his mother-in-law and returned about 1:00 p.m. (R 41) He and Mr. Bellow took their children to the beach. (R 157) They also spent some time lounging around the pool. (R 41-43) The only time that he had spent in the pool was when he had gone wading with his daughter near the steps, and perhaps near the waterfall. (R 34) He wasn't sure whether he was in the pool that day, or the day before. (R 34) Neither was his wife. (R 142) Other witnesses were unsure as to when he had previously

entered the pool. Mrs. Colbert thought she had seen MR. KENDRICK in the pool the morning of July 30, 1985. (R 350) Neither Mrs. Mazer, nor her son, recalled ever seeing MR. KENDRICK in the pool before. (R 190; 287-288) MR. KENDRICK was not sure where the lifeguard chairs were in relation to where he had walked with his daughter. (R 35) MR. KENDRICK did not know if there were diving boards in the pool. (R 37) In fact, he was not aware there was an island in the pool; he thought it was two distinct pools. (R 35) He did not recall ever seeing anyone else in the pool. (R 36) This is consistent with Stephen Mazer's observation that when he was in the pool, there was no one else in it. (R 287-288)

This was not a small pool. It was a free form pool (R 941, 942), which was described by the President of EBS as the largest swimming pool in the State of Florida at that time. (R 402)

MR. KENDRICK could not recall why he got on the lifeguard chair, nor does he recall getting on it. (R 44) He remembers being on the lifeguard chair and kidding with his friend, Jimmy. (R 44-45) MR. KENDRICK, who was nearsighted, (R 46-47) saw his friend, Jimmy, treading water some 30 feet away and believed that Jimmy was in water at least 6 feet deep. (R 44047) Unknown to MR. KENDRICK, his friend was kneeling on his knees in the water, or squatting down, and was in water only 3-1/2 feet deep. (R 97-101; 261) MR. KENDRICK believed he was diving into 6 feet of water for the additional reason that

he had never seen a lifeguard chair placed over water which was less than 6 feet deep. (R 45-46)

MR. KENDRICK then dove into a hostile and unnatural environment (R 671-672); he impacted the bottom of the pool in an unintended and unplanned manner. (R 592-594) He has no recollection of ever seeing the bottom of the pool. (R 48) The hidden danger existed because no matter how clear the water was, MR. KENDRICK could not see or appreciate those forces which could alter a dive from a safe dive into an unsafe dive. Most divers do not know that you can hit the bottom of the pool when you don't plan to. (R 611)

Although MR. KENDRICK participated in many sports, particularly basketball, he had no great experience in swimming or diving. (R 31-32) He didn't really like pools. (R 37) Although he doesn't recall why he climbed onto the lifeguard chair, he did not feel that he was violating any rules by doing so. (R57) He had not seen a lifeguard in the chair before, and testified that had there been one in the chair at that time, he wouldn't have gotten into it. (R 58)

VIII. CONTENTS OF RECORD ON APPEAL AS IT RELATES TO MR. KENDRICK'S USE OF ALCOHOLIC BEVERAGES:

All of the alcoholic beverages which MR. KENDRICK had consumed had been sold to him by the employees of Edgewater, within the sight and sound, and supposedly under the supervision of the employees of EBS. (R 41, 108) The Trial

Court had before it an Affidavit of Dr. Sybers, which stated that MR. KENDRICK's blood level at 6:30 on the evening of July 30, 1985, was .09. He then estimated the blood-alcohol level two hours earlier, at 4:30 p.m., to have been .119. (R 839) MR. KENDRICK testified that between the time he arrived at the pool, which he felt was some time around 1:00 p.m. (R 41), and the time of the accident, which was about 4:30 p.m. (R 864), he had between two and four drinks. (R 41) He did not believe the alcohol had any affect upon him; (R 43) and neither did his friend, Jimmy Bellow. (R 109)

IX. CONTENTS OF RECORD ON APPEAL AS IT RELATES TO THE LEGAL STATUS OF THE POOL:

Although the swimming pool was in use on July 30, 1985, and had been all that summer (R 860-863; 864-865; 894-896), and although a permit for its use had been applied for, no permit had been issued. (R 894-922) The employees of the Department of Health and Rehabilitative Services had, on several occasions, warned the agents of Edgewater that the pool was not permitted, and that its continued use was in violation of state law and could subject them to legal action. No permit was issued for the pool's use until December 5, 1985, over 4 months after the date of MR. KENDRICK's injury. (R 894-896)

Legally, the pool was classified as a public nuisance, because it was operated without a permit, and because

it was constructed, maintained, and operated in violation of Florida Administrative Code 10D-5. The pool was considered, therefore, dangerous to public health, and a public nuisance. (R 594) See, Florida Administrative Code, 10D-5.96(8).

X. CONTENTS OF RECORD ON APPEAL IN REGARD TO EXPERT TESTIMONY:

Only one expert witness was called, whose expertise related to the design, construction and safety of swimming pools. His testimony and Affidavit were offered, without objection. This was Dr. George Lawniczak, whose qualifications were made a part of the Record. (R 573-584) He reviewed all depositions and all Affidavits, including the Affidavit of Dr. Sybers, and the employees of the Department of Health and Rehabilitative Services. (R 592-594) He reviewed the provisions of Florida Administrative Code 10D-5 (R 594). Among the publications which he considered were the American Red Cross Manual relative to lifeguard training (R 657), and the publications of the National Safety Council. (See National Safety Council letter attached as an Exhibit to Dr. Lawniczak's deposition). Dr. Lawniczak concluded:

a. MR. KENDRICK was rendered a quadriplegic as a result of impacting the pool in an unintended and unplanned manner. (R 592-594)

b. The pool was a public nuisance and dangerous to public health. (R 594)

c. That the pool was not properly permitted. (R 595)

d. That the depth markings were not installed in accordance with Florida Administrative Code 10D-5. (R 596-597)

e. That there was no safety line between the shallow end and the deep end, in accordance with Florida Administrative Code 10D-5. (R 599)

f. That even if "no diving" signs described by Mr. Creekmore had been present, they would not have been in compliance with Florida Administrative Code 10D-5. (R 601)

g. That the Defendants knew, or should have known, the inherent dangers of diving into shallow water, and failed to adequately warn MR. KENDRICK or supervise MR. KENDRICK's activities. (R 605-608)

h. That the lifeguarding was inadequate because:

(1) They failed to sit in the chairs; (R 614-615)
(2) They failed to remove the chairs not in use; (R 614-615)
(3) They failed to provide adequate warning of the hidden dangers of entering the pool; (R 614-615)
(4) They failed to take steps to prevent others, such as MR. KENDRICK, from using the lifeguard chairs; (R 616-618)
(5) They failed to be present so that they could enforce the rules and regulations for use of the pool; (R 620)
(6) They were not present in any authoritative manner. (R 616-618)

i. That they failed to refrain from serving MR. KENDRICK alcoholic beverages in the vicinity of a hostile and unnatural environment. (R 652)

There was no other expert testimony offered on these points. These points may be considered, therefore, uncontradicted.

XI. SUMMARY OF THE RECORD ON APPEAL

The Record on appeal includes pleadings. The only pleadings which are relevant to the issues before this Court are: the Complaint filed by MR. and MRS. KENDRICK (R 768-775); the Answer of EBS (R 818-820); the Motion for Summary Judgment filed by EBS (R 822-823); the Trial Court's Order granting Motion for Summary Judgment (R 994; 1022); and the Opinion of the First District Court of Appeal dated April 3, 1990. (Ap p. 1-2)

The witnesses who appeared by deposition, and whose testimonies were properly before the Trial Court for the Motion for Summary Judgment, are:

1. RAYMOND KENDRICK (R 1-74)
2. James Bellow (R 75-104)
3. SUSAN KENDRICK (R 141-176)
4. Susan Mazer (R 177-202)
5. Brenda Guidroz (R203-219)
6. Geraldine Guidroz (R 220-234)
7. Bridgette Macalose (R 235-248)
8. Sharon Bellow (R 249-272)
9. Steven Mazer (R 273-320)
10. Martha Peace (R 321-343)
11. Ruth Colbert (R 344-380)
12. Ed Hickey (R 381-441)

13. Thomas Creekmore (R 442-447)
14. James Beveridge (R 475-508)
15. George Lawniczak (R 570-734)

In addition, pertinent Affidavits before the Trial Court were:

1. Affidavit of Thomas Creekmore (R 832-837)
2. Affidavit of Dr. William Sybers (R 838-840)
3. Affidavit of Ed Hickey (R 843-844)
4. Affidavit of James A. Beveridge (R 860-863)
5. Affidavit of Lisa Giles (R 864-865)
6. Affidavit of Dr. George E. Lawniczak (R 874-893)
7. Affidavit of Carl B. Darsey (R 894-922)

For the convenience of the Court, the Petitioners have summarized these pertinent depositions and Affidavits. They are included in the Appendix.

POINT INVOLVED

THERE IS A CONFLICT BETWEEN THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL AND THE FLORIDA SUPREME COURT'S OPINION IN MAZZEO V. CITY OF SEBASTIAN, 550 SO.2D 1113 (FLA. 1989), BECAUSE THE RECORD DEMONSTRATES THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER OR NOT ED'S BEACH SERVICE, INC., WAS INDIVIDUALLY, OR CONCURRENTLY, NEGLIGENT BY ALLOWING THE PLAINTIFF TO ENTER THE POOL IN AN AREA WHERE THERE WAS INSUFFICIENT DEPTH OF WATER, OR BY FAILING TO STRETCH ROPES ACROSS THE POOL SO AS TO MARK A LINE OF DEMARCATION SEPARATING THE SHALLOW WATER FROM THE DEEP WATER, OR BY FAILING TO POST ADEQUATE MARKERS, OR ADEQUATE SIGNS, TO SHOW THE DEPTH OF THE WATER, OR BY FAILING TO PROVIDE PROPER DEPTH OF WATER BY WHICH THE PLAINTIFF COULD SAFELY ENTER THE WATER, OR BY FAILING TO POST NECESSARY WARNING SIGNS, OR BY FAILING TO PROVIDE ADEQUATE LIFEGUARD AND PERSONNEL TO WARN OF THE DANGERS AND SHALLOWNESS OF THE WATER, OR BY FAILING TO PROVIDE SUFFICIENT LIFEGUARD PERSONNEL, OR BY FAILING TO PROVIDE ADEQUATELY TRAINED LIFEGUARD PERSONNEL, OR BY FAILING TO PROVIDE ADEQUATE PRECAUTIONS TO PREVENT PERSONS, SUCH AS THE PLAINTIFF, FROM ENTERING THE POOL AT A POINT WHICH WAS DANGEROUS FOR THE PLAINTIFF TO DO SO, OR BY FAILING TO PROVIDE ADEQUATE LIFEGUARDING, AND BY FAILING TO TAKE NECESSARY PRECAUTIONS TO PREVENT PATRONS OF THE POOL FROM DIVING FROM THE LIFEGUARD STAND INTO THE POOL.

SUMMARY OF ARGUMENT

The Respondent, EBS, failed to meet the burden of proof required of it to support its position, at the trial level, that it was entitled to Summary Judgment, as a matter of law. The Record on Appeal contains sufficient evidence, or sufficient conflicts in the evidence, to demonstrate that MR. KENDRICK's injuries were caused, or could have been caused, by the negligence of EBS, either individually, or concurrently with the acts of other named Defendants. The Trial Court inappropriately granted EBS' Motion for Summary Judgment.

The First District Court of Appeal failed to follow the precedent established by the Florida Supreme Court in the case of Mazzeo v. City of Sebastian, 550 So.2d 1113 (Fla. 1989). This Opinion in effect holds that the law of the State of Florida is that it is for the trier of fact to compare the negligence of the parties in determining whether or not the Plaintiff is entitled to recover for personal injuries sustained when he or she unsuccessfully attempts to make a shallow dive into a swimming pool (or lake). This is especially true where the Record is in conflict as to Plaintiff's knowledge of the depth of the water, the Plaintiff's knowledge and appreciation of all the risks associated with such a shallow dive. The mere act of diving into the water is not an act which, as a matter of law, will bar recovery.

ARGUMENT

THERE IS A CONFLICT BETWEEN THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL AND THE FLORIDA SUPREME COURT'S OPINION IN MAZZEO V. CITY OF SEBASTIAN, 550 SO.2D 1113 (FLA. 1989), BECAUSE THE RECORD DEMONSTRATES THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER OR NOT ED'S BEACH SERVICE, INC., WAS INDIVIDUALLY, OR CONCURRENTLY, NEGLIGENT BY ALLOWING THE PLAINTIFF TO ENTER THE POOL IN AN AREA WHERE THERE WAS INSUFFICIENT DEPTH OF WATER, OR BY FAILING TO STRETCH ROPES ACROSS THE POOL SO AS TO MARK A LINE OF DEMARCATION SEPARATING THE SHALLOW WATER FROM THE DEEP WATER, OR BY FAILING TO POST ADEQUATE MARKERS, OR ADEQUATE SIGNS, TO SHOW THE DEPTH OF THE WATER, OR BY FAILING TO PROVIDE PROPER DEPTH OF WATER BY WHICH THE PLAINTIFF COULD SAFELY ENTER THE WATER, OR BY FAILING TO POST NECESSARY WARNING SIGNS, OR BY FAILING TO PROVIDE ADEQUATE LIFEGUARD AND PERSONNEL TO WARN OF THE DANGERS AND SHALLOWNESS OF THE WATER, OR BY FAILING TO PROVIDE SUFFICIENT LIFEGUARD PERSONNEL, OR BY FAILING TO PROVIDE ADEQUATELY TRAINED LIFEGUARD PERSONNEL, OR BY FAILING TO PROVIDE ADEQUATE PRECAUTIONS TO PREVENT PERSONS, SUCH AS THE PLAINTIFF, FROM ENTERING THE POOL AT A POINT WHICH WAS DANGEROUS FOR THE PLAINTIFF TO DO SO, OR BY FAILING TO PROVIDE ADEQUATE LIFEGUARDING, AND BY FAILING TO TAKE NECESSARY PRECAUTIONS TO PREVENT PATRONS OF THE POOL FROM DIVING FROM THE LIFEGUARD STAND INTO THE POOL.

I. STANDARD BY WHICH SUMMARY JUDGMENTS ARE REVIEWED:

There are in fact genuine issues of material fact. In accordance with the law applicable to review of Orders granting summary judgment, if issues of fact exist, and are demonstrated by the Record, and the slightest doubt remains, an Order granting a Motion for Summary Judgment cannot be

upheld. See, Fletcher v. Petmen Enterprises, Inc., 324 So.2d 135 (3d DCA 1975); Southern Pine Island Corp. v. Capital National Bank, 324 So.2d 112 (3d DCA 1975). The Petitioners, MR. and MRS. KENDRICK, are entitled to have this Record reviewed in a light most favorable to them, so that every reasonable inference of fact and intent of the testimony is to be indulged in their favor and against EBS. See, Fletcher Company v. Melrow Manufacturing Company, 261 So.2d 191 (1st DCA 1972); Salgueiro v. Fiumara, 305 So.2d 5 (3d DCA 1974). It is incumbent upon the Respondent to conclusively show the non-existence of genuine issues of material fact. Rautbord v. Industrial Avenue Realties, Ltd., 356 So.2d 1289 (3d DCA 1978).

We believe that we can demonstrate that the reliance of EBS upon the factual matters alleged in support of its Motion for Summary Judgment, and its reliance upon the authority provided, are completely without support and in conflict with the decisions of this Court and other District Court Opinions.

II. DUTY OF EBS TO PERFORM LIFEGUARD RESPONSIBILITIES AND BREACH OF THAT DUTY:

EBS argues erroneously that whether or not a duty is owed by one person to another is always a question of law. To the extent that the Trial Judge must determine whether or not a Complaint states a cause of action, that position is correct. Interestingly, in this case EBS does not challenge the legal

sufficiency of the Amended Complaint. Of course, a legal duty can arise by operation of law, by implication, or by contract.

Florida has held that the failure to provide appropriate lifeguards is in fact actionable. See, Smith v. Jung, 241 So.2d 874 (3d CA 1970), which held that where an employer assigns responsibility to a lifeguard in such a fashion that his attention is diverted from his duties, or he is otherwise prevented from performing those duties, a cause of action arises. See, Onufer v. Southern Springs Farms, Inc., 636 F.2d 46 (3rd CA 1980) wherein it is stated:

> "The Appellant proferred evidence that constituted negligence of the lifeguard's failure to utilize the lifeguard perch and his diversion from attending solely to those duties. The alleged instance of negligence thus caused resuscitative efforts to be rendered belatedly. We find the evidence presented in support of these claims of negligent conduct suggest a prima facie case. ... James Utichney was the only lifeguard on duty. ... His attention was diverted from the swimming pool while he assumed the additional responsibility of monitoring admissions to the area."

An entire section of the Respondent's Brief before the District Court of Appeal was devoted to the proposition that:

> "Ed's Beach Service had no duty to warn Mr. Kendrick of apparent danger."

This position entirely ignores the testimony of all of the

witnesses whose depositions were offered, whose Affidavits were considered, summaries of which are included in the Appendix attached to this Brief. We direct this Court's attention to the summaries of the depositions of both Mr. Creekmore and Mr. Hickey. Mr. Creekmore acknowledged that as the owner and developer of the pool, as the joint designer of the pool, the owner, builder and designer had some responsibility for placing warning signs in the area of the swimming pool. He testified that the establishment of these signs had been contracted to Cox Pools Builders, and that these signs were in place. He further testified that he had contracted with EBS to provide lifeguard service, which included enforcement of the rules and regulations concerning the use of the pool, and specifically EBS was to enforce the no-diving provisions. Mr. Hickey, as President of EBS, agreed that pursuant to his contract, that the lifeguards which he was to provide had the responsibility to enforce those swimming pool regulations, and specifically the no-diving regulations. In keeping with this contractual arrangement, Mr. Hickey testified that EBS was to provide one lifeguard, who would not be on a commission basis, but who would be paid a flat hourly rate for the sole purpose of sitting in the lifeguard chair and enforcing those rules and regulations.

According to Mr. Hickey, there were to have been three (3) lifeguards on duty. The evidence establishes, through lifeguard Lisa Giles, that there were only two (2)

lifeguards on duty. The Record also establishes that she had been instructed by both EBS and Edgewater that they did not want the lifeguards to occupy the lifeguard stands. There was even discussion, according to Lisa Giles, about tearing the lifeguard stands down because they were dangerous; they had had problems with other people jumping off of, or diving off, these lifeguard chairs. There is no conflict in the Record of that particular point.

There is conflict in the Record as to whether or not the signs existed. Mr. Creekmore testified that he thought they were present. One of the guests, Ruth Colbert, testified she thought that the signs were present. None of these witnesses were able to testify that the warning signs in fact existed. However, all of the other witnesses testified that the signs did not exist. That includes MR. and MRS. KENDRICK and all of those in his party; Lisa Giles, the lifeguard; and James Beveridge, the security guard; and Cindy Howell, another off-duty lifeguard; and even Mr. Hickey, President of EBS. (R 426; 435; 865; 862; 37; 170-171; 101-102; 115; 266)

Counsel for EBS would urge there is uncontradicted evidence that at the time of the incident, depth markings were in existence. The Florida Administrative Code requires depth markings to be on the deck of the pool and inside the pool at, or above, the water line. Mr. Creekmore testified that he was not certain whether or not there were any depth markings in compliance with Florida Administrative Code. The Defendants'

witnesses, Mrs. Mazer and her son, wre not aware of the existence of depth markings. Mrs. Colbert and Mrs. Peace were aware of depth markings at the water line, but did not see any depth markings on the deck of the pool. MR. KENDRICK and all those in his party failed to see and observe the depth markers and testified that they did not exist.

What is uncontradicted is that if depth markings existed, they were not in compliance with Florida Administrative Code. According to the uncontradicted testimony of Dr. Lawniczak, depth markings were half below the waterline and half out of the waterline. This causes a severe distortion of the depth markings. There were no depth markings in the area of the island, according to Dr. Lawniczak. This is important because the lifeguard stand in question faces the island, and MR. KENDRICK, in his dive, was diving toward that island.

Furthermore, there is no conflict in the testimony contained in the Record, that the 4 inch "No Diving" warnings required by Florida Administrative Code, to be every 25 feet around the edge of the pool on the pool deck did not exist. Furthermore, there is no conflict in the fact that the Record establishes that there had not been a permit issued for the operation of this pool at the time of this incident. None was issued until December, 1985.

Furthermore, there was no conflict in the testimony that the warnings which the Defendants claim were present were

not sufficient warnings. Dr. Lawniczak, the expert called by the KENDRICKS, testified that assuming that there were signs which stated no diving, that that would not have been sufficient. Assuming, therefore, that the signs were present, the signs did not constitute a sufficient warning to the Plaintiff.

The absence of depth markers and warning signs and the failure to obtain necessary permits would impose an even greater duty on the part of individual lifeguards and thus, EBS, to supervise the safety of the persons using the swimming pool. The lifeguards would need to be that much more diligent in enforcing the ban against diving.

III. KNOWN AND OBVIOUS PERILS:

EBS relies heavily upon those cases which hold that where a claimant subjects himself intentionally to a known or obvious peril, he cannot recover. That was the rationale behind such decisions as Emmons v. Baptist Hospital, 478 So.2d 440 (1st DCA 1985). Although not mentioned directly, the principles of assumption of risk were applied in the Emmons case, supra, and the Court talked about the Plaintiff being barred from recovery, because of their knowledge of the dangerous condition, which knowledge was equal to, or superior to, that of the Defendants. In the case at bar, EBS knew, absolutely, that the water was only 3-1/2 feet deep. EBS knew, absolutely, that it was dangerous to attempt to dive from the

lifeguard stand. EBS knew, absolutely, of its duty to man the lifeguard stand and to enforce the no-diving regulations. MR. KENDRICK, on the other hand, believed that the water was 6 feet, or deeper. Further, he believed that he could safely enter the pool from the lifeguard stand with the execution of a shallow dive. In fact, all persons who observed the dive thought that MR. KENDRICK had done so safely.

If we assume that MR. KENDRICK had knowledge of the physical characteristics of the pool, that is, the depth was only 3-1/2 feet, that does not in and of itself bar his recovery. We hasten to point out that the Record is not conclusive on this point, but at best, is in conflict. It is appreciation of the peril which the shallowness of the pool presents, rather than the knowledge of the pool's shallow depth, which can affect the Plaintiff's recovery. See, 38 Fla.Jur.2d, Negligence, Section 77; Williston v. Cribbs, 82 So.2d 150 (Fla.1955); Beikirch v. Jacksonville Beach, 159 So.2d 898 (1st DCA 1964).

EBS also relies on those cases in which the owners or operators of a premises are excused from liability because the danger or peril was open and obvious. We submit that these cases, such as K.G. v. Winter Springs Community Evangelical Congregational Church, 509 So.2d 384 (5th DCA 1987), and Clark v. Lumbermen's Mutual Insurance Company, 565 So.2d 552 (1st DCA 1985) are inapplicable for that reason. In the Clark case, supra, the Plaintiff participated in a church

outing on a public river. The outing had been sponsored by the church. The Plaintiff had been canoeing and pulled his canoe to the side of the river, dove into the river, and either hit his head on the bottom or on some submerged object. He sued the church. The Trial Court entered Summary Judgment which was affirmed on appeal. The basis of the Court's Summary Judgment can be found in the following paragraph of this Court's Opinion, to-wit:

> "There are no facts in this case which would tend to satisfy the elements of possession or control. ... here ... the church had no actual or constructive presence at the beach prior to the accident. Appellant and Brannon were the first two canoeists to reach the beach and hence occupy it. ... here, new evidence was produced to establish the existence of any hidden danger at the site of the accident. It was uncontradicted that the river bottom and the beach contained no rocks or obstructions. Nor can the depth of the water itself be considered a hidden danger since both the Appellant and Brannon testified that they were well aware of its relatively shallow depth. ... Appellant testified that he was aware of the danger of diving into shallow water, and was aware that the water depth at the beach where he was injured was indeed properly characterized as shallow. Hence, there existed in the case at bar no 'hidden danger'."

Again, without saying so, principles of assumption of risk, not ngeligence, were applied.

Likewise, the case of Hughes v. Roaring Twenties, Inc., 455 So.2d 422 (2d DCA 1984) involved a situation in which a person tubing down a river at Weeki Wachee Springs dove from a platform which had been nailed on to the limbs of a tree.

The pertinent facts of that case can be found in the following quotation:

> "At the time of the accident, Appellant was 17 years of age, and was experienced in diving into shallow water. On this occasion, Appellant tested the depth of the water in the area he intended to dive, and determined that he could make the dive safely. Unfortunately, the shallow dive was not successfully completed and the Appellant suffered a neck injury which resulted in paralysis."

It appears in the Hughes case, supra, that the Plaintiff attempted to try the case at summary judgment level, without benefit of appropriate expert testimony concerning what was and what was not a hostile environment. Furthermore, Plaintiff in that case, contrary to the facts of this case, had actual knowledge of the depth of the water, had actually tested the depth of the water, and was experienced in the matter of diving into shallow water. None of these facts exist in the case at bar.

IV. NO DUTY TO TRESPASSER; AND INTERVENING CAUSES:

Similarly, the reliance of EBS on such decisions as Caraballo v. U.S., 830 F.2d 19 (2d DC 1987) is not appropriate. The Plaintiff was a trespasser. The Court noted that under the law of the State of New York, no duty was owed to a trespasser. Furthermore, the facts of that case show that the Plaintiff admitted his familiarity with the water level. Yet he chose to dive "head first" into the shallow water. He

did not attempt to make a shallow dive, and he knew absolutely that the water was shallow. Furthermore, there was no expert testimony offered as to the hidden dangers which accompany hostile environments. Also, the case of Boltax v. Joy Daycamp, 499 NYS 2d 660 (NY 1986) involved a trespasser to whom the Defendant owed absolutely no duty. The cases of Department of Transp. v. Anglin, 502 So.2d 896 (Fla. 1987), Roberts v. Shop & Go, Inc., 502 So.2d 915 (Fla.App. 2 Dist. 1986), and Melton v. Estes, 379 So.2d 961 (Fla.App. 1979) all involve non-liability because of the acts of intervening tort feasors and have no application to the facts of this case.

V. COMPARATIVE NEGLIGENCE V. ASSUMPTION OF RISK:

We believe that the liability and the responsibility of EBS is more appropriately controlled by decisions such as those found in Robbins v. Department of Natural Resources, 468 So.2d 1041 (1st DCA 1985), in which an 18-year-old Plaintiff was paralyzed as a result of a "shallow water dive" in a public swimming area in Wekiva Springs State Park. The Court summarized the pertinent facts as follows:

> "The spring-fed swimming area ... is surrounded by a short-lipped concrete retaining wall. In the area from which the Plaintiff entered the water, there is a wide concrete platform at the edge of the water. The depth of the water in front of that platform varies. In some places, it is as shallow as two feet, while it is three to four feet in others. There are occasional deeper holes in the area. Although the bottom is mostly sand and gravel, there are

large rocks embedded in it which stuck up within ten to fifteen inches of the surface of the water. The water is generally clear, and the bottom ordinarily visible, but visibility is obscured when the surface is interrupted by such things as splashing of other swimmers. Reflections from late afternoon sun can also affect the visual depth determination.

"According to the testimony of an expert, the configuration of the retaining wall and concrete platform invites diving, which situation called for measures to prevent injury, including the erection of a rail at the edge of the platform to prevent diving or of adequate warning sign regarding the danger of diving in the area.

"According to ... one of the lifeguards, they began to experience problems with diving in that area resulting in minor injuries such as nose scrapes. ... The park superintendent ... discussed the need for 'no diving' signs. Also, there were no markings or signs indicating water depth. Instead, lifeguards were simply instructed to enforce a no-diving policy. ... It was the Plaintiff's first visit to the park. ... the Plaintiff then jumped in, swam around a little and climbed out of the water. He testified that he did not see the bottom of the spring or any of the rocks embedded in the bottom."

The Court noted that the Trial Court's action in granting summary judgment was done on the basis that there was an express assumption of risk. In responding, the Court said:

"But although a jury might properly find the existence of an express assumption of risk, the record we have before us would not support summary judgment on that theory because there exists a genuine issue of fact on an essential element of the defense. A party relying upon such a defense must show that the 'Plaintiff subjectively appreciated

> the risk giving rise to the injury'. The record in this case certainly does not conclusively establish that the Plaintiff actually knew of the danger of executing a dive in the area involved." (Emphasis added)

The Court went further and said really what you're talking about when you talk about assumption of risk is comparative negligence. The exact language of the Court is as follows:

> "The defense of implied assumption of risk has been merged into the defense of contributory negligence and the principles of comparative negligence apply in all cases where such defense is asserted. ... And so even if it were conceded that the Plaintiff should have appreciated the danger that caused his injury, principles of comparative negligence would govern. The summary judgment cannot be sustained on that basis. ... There is evidence from which the jury might find that DNR was negligent in failing to take appropriate action, such as the placement of warning signs at strategic locations in the swimming area in order to advise swimmers of dangerous conditions which may not be apparent to them and that such negligence was a proximate cause of the Plaintiff's injuries."

Actually, the law applicable to the duty owed by the operator of a recreational facility, such as a swimming pool has not changed since it was first announced by the Florida Supreme Court in Turlington v. Tampa Electric Company, 56 So. 696 (Fla. 1911). In that case, the Plaintiff dove from the diving board into 3-1/2 feet of water and died. The Plaintiff's action was dismissed "because of the open and obvious nature of the condition which caused the injury". This is one of the elements of the assumption of risk. That case

was reversed. The responsibility of the owner-operator of that facility as stated in the Turlington Opinion, remains:

> "One who maintains a public resort is required by law to keep it in a reasonably safe condition for those who properly frequent the place. Where the public is invited to attend the resort, it is the duty of the one who invites to exercise all proper precautions, skill and care commensurate with the circumstances to put and maintain the place and every part of it in a reasonably safe condition for the uses for which it might rightly be devoted. A failure to comply with this duty may be negligence; and for an injury proximately caused by the negligence, the negligent party may be liable in damage, if a party injured is not guilty of (comparative negligence)."

Part of the problem in cases involving swimming pool accidents, appear to be the confusion in whether or not the Plaintiff objectively knew of the danger of diving into the area in question. We believe that that involves a discussion of assumption of risk. However, this was the exact purpose in securing the services and testimony of Dr. Lawniczak, who testified basically that a swimming pool, or other water environment, is a hostile environment. By that, he meant that it was an environment in which man does not ordinarily function in his God-given abilities; and that, few people can appreciate the hidden dangers and forces which can alter a safe dive into an unsafe dive even if executed properly. We invite the Court to read the summary of Dr. Lawniczak's testimony and invite the Court to read his entire testimony. Such testimony was absent in all but a handful of the cases reported involving injuries at swimming pools. We believe that that was the

primary distinguishing feature in the case of Corbin v. Coleco Industries, Inc., 748 F.2d 411 (7th CA 1984). The pertinent portions of that Opinion are found at Page 417. The District Court had denied the Plaintiff's recovery as a matter of law. In reversing, the Circuit Court of Appeals said:

> "The District Court held as a matter of law and Coleco vigorously asserts in this Court, that the danger of diving into four feet of water is open and notorious."

That's exactly the argument which the Defendant, EBS, is now making. The Court then continued:

> "We are persuaded that Corbin put on the record, before the District Court evidence that the dangers of serious spinal cord injury from diving into shallow water is not open and obvious, and that this evidence is sufficient to preclude the summary judgment for Coleco on the basis of the open and obvious defense."

The Court then referred, rather emphatically, to what that evidence was. The evidence was the Opinion of the Plaintiff's expert, Gene D. Litwin, who testified in part as follows:

> "The only important thing that the users of a pool typically carry in their head is the belief that there is a safe and proper particular way to dive in pools of approximate, or bodies of water that approximate, depth of 3-1/2 feet, flat and shallow dives. People have the belief that if they dive into water in approximately the depth we are concerned with here, and if they strike the bottom, their hands will absorb or cushion the blow, the only thing that they will do is strike their heads on the bottom."

The critical point of his testimony is that even though people are generally aware of the danger of diving into shallow water, they believe it is safe to do so. If people do in fact generally hold such a belief, then it cannot be said as a matter of law that the risk of spinal injury from diving into shallow water is open and obvious. Whether a danger is open and obvious depends not just on what people can see with their eyes, but also what they know and believe about what they see. In particular, if people generally believe that there is a danger associated with a use of a product, but that there is a safe way to use the product the danger ceases to be in their mind.

It is apparent that counsel for EBS argued principles of assumption of risk, in his position before the Trial Court. In his Memorandum in support of this position, Mr. Sanborn relied upon the decision of Mazzeo v. City of Sebastian, 526 So.2d 1003 (4th DCA 1988). In fairness to Mr. Sanborn, and to the Trial Judge, at the time of our appearance before the Trial Court, no one had the benefit of the Supreme Court's decision in Mazzeo v. City of Sebastian, 550 So.2d 1113, (Fla. 1989) In that decision, the 4th District Court of Appeal had certified to the Supreme Court, 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 activities in which a person, fully appreciating the danger inherent in the

activity, voluntarily and deliberately participates in the activity."

In answering this question, the Florida Supreme Court held that the doctrine of assumption of risk applies only to contracts not to sue, and contact sports, and does not apply to ordinary negligent situations.

VI. CONFLICT WITH MAZZEO V. CITY OF SEBASTIAN:

The facts of the Mazzeo case are strikingly similar to the facts of the case at bar. Ms. Mazzeo had brought a negligence action against the City for maintaining a dangerous condition, in a public park, and for their failure to warn of the dangerous condition. She had suffered a broken neck when she dove off a platform into Swim Lake, which is an artificial lake located within the municipal park. Swimming was permitted, though no lifeguards were provided. The water was between 3 and 4 feet deep where Mazzeo dove. The City was aware that from time to time persons dove off the platform. The City had periodically posted "no diving" signs, but on the day of the accident these signs were gone. To this point, the facts are strikingly similar to the facts of the case at bar. However, Mazzeo was shown, by the Record, to be an experienced swimmer. She dove off the platform in order to demonstrate the correct diving form for her young daughter. There was considerable evidence in the Record to indicate that Ms. Mazzeo's boyfriend was the one who had urged her to dive into

the water, and that she initially refused to do so, because she was afraid the water was not deep enough. Although there was evidence to indicate that Mazzeo had stood in the very water which she dove into, Ms. Mazzeo testified that she had no recollection of standing in that water, nor did she have any recollection about saying anything to her boyfriend about the water being too shallow. A swimming pool expert had expressed the opinion in the Mazzeo case, that to maintain a platform 2-1/2 feet over the surface of the water only 4 feet deep constituted a dangerous condition.

At the trial level, the jury had found negligence on the part of the City but also concluded that Mazzeo knew of the existence of the shallow water, therefore, she voluntarily exposed herself to the dangers of diving into the water and that she had, therefore, assumed the risk. The Trial Court concluded that the Plaintiff's recovery was barred because of the application of the doctrine of assumption of risk.

In discussing the doctrine of assumption of risk, the Florida Supreme Court quoted from its prior decision in Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977) as follows:

> "'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 behalf of the Plaintiff. This result comports with the definition of contributory

negligence appearing in the Restatement of Torts. ... Furthermore, were we not otherwise persuaded to elimination of assumption of risk as a separate affirmative defense in the context herein described, the decision of this Court in Hoffman v. Jones, supra, would dictate such a result. ... Therefore, we hold that the affirmative defense of implied assumption of risk is merged to the defense of contributory negligence, and the principles of comparative negligence enunciated in Hoffman v. Jones, supra, shall apply to all cases where such defense is asserted.'"

In answering the certified question, Florida Supreme Court said:

"The knowing and voluntary participation in contact sports is at best only loosely characterized as an expressed assumption of risk. However, as we recognize in Kuehner, this exception is based on waiver and is essential to protect the other participants from unwarranted liability for injuries due to bodily contact inherent in the sport. To expand this exception to include aberrant conduct in non-contact sport collides with the merger of assumption of risk into comparative negligence which was accomplished in Blackburn.

"Accepting the jury's findings as representing the true facts, there is little doubt that Mazzeo engaged in foolhardy conduct by diving into four feet of water. On the other hand, it seems equally clear that she did not dive with the intention of injuring herself and did not expressly agree to absolve the City of any liabilities if she did. While recognizing the danger, she dived in with the improvident belief that she would be able to avoid being hurt. Under Blackburn Mazzeo's conduct is properly characterized as implied secondary assumption of risk which is unreasonable (qualified) in nature, analogous in some respects to the tenant who rushes into the negligently burning house to retrieve his hat. As such, Mazzeo's conduct

must be evaluated by the jury under the principles of comparative negligence."

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.

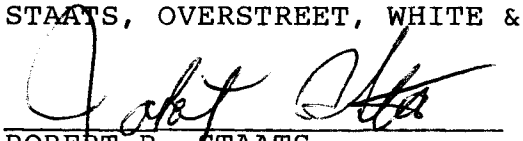
CONCLUSION

EBS does not deny that their lifeguards were ill-trained. EBS does not deny that they failed to post the warning signs, as they had contracted to do. EBS does not deny that the lifeguards failed to man the lifeguard chair as they had contracted to do. EBS does not deny that the lifeguards, at the time of the incident which is the subject matter of this lawsuit, were inattentive, and tending to other duties. In fact, the Record on Appeal demonstrates, emphatically, EBS was guilty of these breaches of conduct. EBS has taken the position, as did the City of Sebastian in the Mazzeo case, supra, that because the water was obviously shallow, the danger of diving into it should have been known to MR. KENDRICK, and he cannot recover. This position can no longer be legally sustained, as a result of the recent Mazzeo decision. Nor can it be factually sustained. There is definite conflict in the Record as to whether or not MR. KENDRICK knew the water into which he was diving, was only 3-1/2 feet deep. The jury was entitled, under all the facts and circumstances to determine whether or not EBS was guilty of negligence, and if so, how that negligence compared to the

negligence, if any, of the Plaintiff. It was error for the Trial Court to grant the Motion for Summary Judgment.

Respectfully submitted,

STAATS, OVERSTREET, WHITE & CLARKE



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 29 day of October, 1990, to Clifford W. Sanborn, Esq., P. O. Box 2467, Panama City, Florida, 32402, Attorney for Respondent.

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