D/A 1-9-86

IN THE SUPREME COURT OF FLORIDA

Case No. 66,934

DAVID CARL ASHCROFT,

Petitioner,

vs.

CALDER RACE COURSE, INC., a Florida corporation,

Respondent.

DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

CALDER'S BRIEF ON THE MERITS

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INTRODUCTION

This brief is filed on behalf of Calder Race Course, Inc. ("Calder"). David Carl Ashcroft ("Ashcroft") was a professional jockey injured when trampled by a thoroughbred race horse during a race at Calder. The jury returned a defense verdict when it found that Ashcroft had expressly assumed the risk complained of. Ashcroft has ignored the time honored rule that the case and facts on appeal are to be presented in the light most favorable to the jury verdict.

STATEMENT OF THE CASE AND FACTS

On October 31, 1981 in the sixth race, Ashcroft was riding a horse named Kentucky Edd (R. 207; T. 786-7). The race was to cover a distance of seven furlongs (7/8ths of a mile) (T. 284). The starting gate was at the end of the seven furlong chute which abuts the back stretch of the main oval portion of the track. As the horses exited the chute onto the main oval,

they crossed the main oval toward the inside rail (T. 415, 991-2). A portable extension rail extended part way across the oval from the inside rail of the chute toward the inside rail of the oval (T. 92, 415, 425).

Kentucky Edd was the number four horse in the starting gate. As Kentucky Edd broke from the starting gate, he was bumped by the number five horse forcing him to the inside and behind most of the other horses (T. 285-7, 795-8, 978-9). Being bumped and forced over by other horses during a race is a risk assumed by professional jockeys (T. 402-3). Ashcroft proceeded to take Kentucky Edd toward the inside rail. As the horse passed the end of the extension rail, he swerved or "ducked in" to the left and vaulted over the inside rail of the oval into the center of the oval (T. 136-7, 286-7, 786-7, 795-8, 1064-5, 1067, 1078). An estimated 100-200 similar incidents occur every year at tracks throughout the country (T. 991-2, 1070, 1079). Thoroughbred race horses have a known propensity for "ducking in" where the chute meets the oval (T. 424, 476, 991-2).

When Kentucky Edd ducked in, Ashcroft lost control of the horse and either he was thrown from or he jumped from the horse to the ground (T. 233-4, 512-3, 786-7). Unknown to Ashcroft, another horse had broken late from the gate and was following him down the race course. As he hit the ground, Ashcroft was run over by the following horse (T. 287). The horse's hoof struck Ashcroft in the upper back, breaking his spine and rendering him quadriplegic (T. 433).

Ashcroft sued Calder alleging that the negligent placement of the "exit gap" caused or contributed to Kentucky Edd's behavior during that particular race (R. 205-15). The exit gap is an opening in the rail around the track, used by the horses to return to the barn area after their morning workout on the race track (T. 72-3). An estimated 900 horses train on Calder's track each morning (T. 72, 321). The sheer volume necessitates a routine practice for traffic management. The horses enter the track through the paddock area near the grandstand. The horses are run counter-clockwise, usually once and a half around the track. When finished, they are stopped, turned outside, and returned along the outside rail to an exit gap, separate and apart from the entrance to avoid congestion (T. 72, 321, 714-5, 1470-1).

The exit gap is closed with a portable rail during the afternoon when the races are actually run. During all of the 1980 racing season and the first part of the 1981 racing season, the exit gap was located on the inside rail of the seven furlong chute, behind the six furlong or three-quarter pole (T. 63-4).

Prior to 1979, the seven furlong chute came into the main oval at an angle to the back stretch (T. 57-8). In 1979, it was decided that the chute should be relocated to a position parallel with the back stretch (T. 58). To make this change in the track layout, it was necessary to dredge and fill a portion of the lake adjacent to the track (T. 1425-6). Between the end of the 1979 racing season and the beginning of the 1980 season, work began on the construction of a new seven furlong chute (T. 62, 1228,

1424). The work was not completed, however, and during the 1980 racing season, only races of six furlongs were run from the new, partially complete chute (T. 63, 1424). No six and one-half or seven furlong races were run during the 1980 season (T. 63-4, 100). During the 1980 season, the exit gap was located behind the six furlong pole on the inside rail of the new chute (T. 63). Between the 1980 and 1981 racing seasons, substantial dredge and fill work was done and the seven furlong chute was completed (T. 527-31, 536, 1425-43, 1446-57). The exit gap remained on the inside rail of the chute behind the six furlong pole (T. 63-4).

Beginning August 28, 1981, several incidents occurred when horses racing out of the chute ducked or bolted at or near the exit gap (T. 76-8). It was believed by some that the location of the exit gap was a factor in these incidents (T. 87). On approximately October 12, 1981, more than two weeks before Ashcroft's accident, the exit gap located on the inside rail of the chute was permanently closed and the path was redirected to a point on the outside rail of the oval below the chute (T. 82, 86-7). After the exit gap on the chute was permanently closed, no further incidents occurred in that area of the chute (T. 326, 328).

After the exit gap was moved and prior to Ashcroft's October 31 accident, two other incidents occurred during races out of the seven furlong chute (T. 326). On October 14 and on October 20, horses ducked in to the left after leaving the chute and before reaching the inside rail of the main oval, in the same proximate location where Ashcroft was injured on the 31st (T.

104-6, 515, 802). These incidents occurred approximately 200 feet beyond the old exit gap (T. 328).

At trial, Ashcroft elicited testimony that the location of the exit gap caused or contributed to the occurrence of each of the incidents from August 28, 1981 to and including Ashcroft's accident of October 31, 1981, although the incidents occurred at different points on the track and at different times relative to the changes made in the location of the exit gap (T. 152, 257, 283, 330, 377, 402, 716). Calder offered testimony that the exit gap had nothing to do with Ashcroft's accident (T. 990, 992, 1002, 1068, 1145, 1151, 1190-1).

A hotly contested issue at trial was the feasibility of relocating the exit gap to the end of the seven furlong chute before or during the 1981 racing season. The end of the seven furlong chute is admittedly the preferred location for an exit gap (T. 295, 407, 1386-7). Additional fill work was done between the 1981 and 1982 racing seasons, permitting relocation of the exit gap to its present location at the end of the seven furlong chute (T. 113, 527-31, 536-43, 1425-43, 1446-57). Calder did not contest the preferability of the present location, only the feasibility of implementing that preference before or during the 1981 racing season.

At trial, Calder offered testimony that it was impossible to relocate the exit gap to the end of the seven furlong chute before or during the 1981 racing season (T. 84, 86, 101, 110, 113, 418, 1223). It was Calder's position that the temporary location of the gap and the remedial measures taken were prudent

and proper, given the transitional stage of the track improvements (T. 101, 419-22). Ashcroft contended that the location of the present exit gap was feasible in 1981 and that the failure to locate the exit gap at the end of the chute was negligence (T. 152, 257, 283, 301, 418, 717-9).

Calder defended this case upon five grounds. The first was the absence of a duty to alter the premises to eliminate known and obvious conditions. Second, Calder denied that it breached any duty owed. Third, Calder asserted a lack of proximate causation, since the horse ducked in 200 feet beyond the exit gap complained of. Fourth, Calder asserted comparative negligence by Ashcroft. These questions were resolved by the jury adverse to Calder upon the jury charge as given.

Fifth, Calder asserted that Ashcroft had expressly assumed the risk of the danger complained of and, as such, was barred from recovery. This issue was submitted to the jury and was resolved favorable to Calder. The jury was instructed:

> On the first defense, the issues for your determination are whether David Ashcroft knew of the existence of the danger complained of, realized and appreciated the possibility of injury as a result of such danger and having a reasonable opportunity to avoid it voluntarily and deliberately exposed himself to the danger complained of. [T. 1601].

The jury was also instructed that assumption of the risk was a complete defense (T. 1602).

Upon the evidence presented and the instruction given, the jury answered the following verdict interrogatory in the affirmative:

> 4. Did David Ashcroft know of the existence of the danger complained of, realize and appreciate the possibility of injury as the result of such danger; and, having a reasonable opportunity to avoid it, voluntarily and deliberately expose himself to the danger complained of?
>
> A. Yes ___X___ No _____ [R. 579].

The facts support the verdict on this issue. The physical location of the exit gap was known to everyone associated with racing at Calder. It was not a hidden or latent defect. In fact, it is the high visibility of the exit gap that creates the very danger complained of. The horses can see the gap as they pass by and are arguably influenced by it (T. 231-2, 243, 257, 283-4, 288-9, 424, 717-9). The perceived danger is predicated upon the common knowledge of horse behavior prevalent in the industry. Horses are known to be creatures of habit (T. 243, 282, 424, 476, 1271). Under pressure they may bolt (T. 157, 196-7, 423-4, 991-2, 1070). Their instinct is to return home to the barn and the exit gap is the way home (T. 51, 221-2, 330, 377, 1108).

The concern over the placement of the gap was shared by Calder, the owners and trainers, and the jockeys themselves (T. 76-8, 86, 96, 517). The jockeys met with Calder on at least two occasions to discuss the location of the exit gap (T. 77-8, 82, 86, 96, 405-7). Ashcroft attended one of these meetings. The jockeys met on the morning after the incident of October 14 (T. 96, 781-3). The meeting was initially called to discuss procedures with the back-up ambulance (T. 96, 782). After the discus-

sion of the ambulance, Ashcroft personally asked about the problem with the gap and inquired whether it was to be changed. He was advised that, "in the future," it would be moved to the back of the seven furlong chute (T. 782-3). He was told it would be moved at the end of the 1981 racing season (T. 86).

Prior to his October 31 race, Ashcroft knew that two different two year old horses had ducked in coming out of the chute (T. 801-2). He knew of the incident on October 14, because coincidentally, it occurred in a race that he won on Kentucky Edd (T. 780, 801-2). Ashcroft had seen a video tape of the incident that occurred on October 20 (T. 801-2). Ashcroft admitted actual knowledge of the two incidents before his accident of October 31 (T. 802).

Ashcroft had been thrown from other horses during his riding career. It is not an unusual occurrence for jockeys to be thrown from their horses (T. 803-4). On March 9, 1981 while racing at Hialeah, Ashcroft was thrown from a horse while coming out of the chute and approaching the main oval, in the same approximate location as his October 31 accident at Calder (T. 798-800, 803-4). The March 9 Hialeah incident was very similar to the October 31 accident at Calder (T. 1071-4, 1090, 1506-8).

Ashcroft first raced at Calder in 1979 (T. 772). He did not race at Calder during the 1980 season (T. 773). He next returned to Calder in late September 1981, riding his first race at Calder on October 2, 1981 (T. 774). Between October 2 and October 31, 1981, Ashcroft rode twenty-one races out of the chute from either six and a half or seven furlongs past the exit gap

(T. 804). Ashcroft rode Kentucky Edd in three races, October 14, October 21, and October 31. He had also ridden Kentucky Edd during morning training exercises (T. 775).

Calder alleged assumption of risk as an affirmative defense (R. 232-3). Ashcroft responded with a denial (R. 237-8), but did not move to strike the affirmative defense and did not test the defense by motion for partial summary judgment (R. 1-640). Throughout the trial, Calder elicited testimony in support of its assumption of risk defense, both in cross-examination of Ashcroft's witnesses and in the presentation of its own case.

Because express assumption of risk was an issue raised by the pleadings and by the proof, Calder requested a jury instruction on the issue (R. 560; T. 1317-27). The requested charge conformed to Florida Standard Jury Instruction 3.8 (R. 560). Ashcroft did not object to the form of the instruction, but objected to any instruction being given at all, arguing that assumption of risk is subsumed in comparative negligence and that no additional instruction was required (T. 1319-21, 1323-6).

Ashcroft makes a misleading statement at page three of his brief when he says, "With both parties preserving objections, it was agreed that in order to avoid retrial, the special verdict form would include both comparative negligence and assumption of risk questions." In response to Ashcroft's implication that all objections were preserved by agreement, Calder says that Ashcroft has entirely failed to preserve any challenge to Calder's pleadings, proof, jury verdict, or entitlement to judgment. Cf.

Prime Motor Inns, Inc. v. Waltman, 10 F.L.W. 550, 551 (Fla. 1985) ("one who submits his cause to the trier of fact without first moving for directed verdict at the end of all evidence has waived the right to make that motion."). In essence, Ashcroft is asking this Court for a judgment notwithstanding the verdict when no similar request was made or preserved below.

If it was Ashcroft's contention that the pleadings or proof failed to establish the separate and distinct defense of express assumption of risk, it was incumbent upon him to challenge the pleadings or proof by appropriate motion. This he did not do. Ashcroft did not move for a directed verdict against Calder on the defense issue of assumption of risk (T. 1256-1609).

Following receipt of the jury verdict, Ashcroft did not file any post-trial motion attacking the weight and sufficiency of the evidence to sustain the jury's finding of assumption of risk (R. 580-643). This precluded any challenge to the legal sufficiency of the factual predicate for Calder's affirmative defense. Winnemore v. Morton, 214 So.2d 509 (Fla. 4th DCA 1968); Baker v. Deeks, 176 So.2d 108 (Fla. 2d DCA 1965), cert. den., 183 So.2d 213 (Fla. 1965).

Ashcroft did not appeal the trial court's instruction to the jury on the law of assumption of risk, nor did he appeal the use of the verdict interrogatory form. These issues were ripe for review. See, Fincher Investigative Agency, Inc. v. Scott, 394 So.2d 559 (Fla. 3d DCA 1981), pet. den., 402 So.2d 609 (Fla. 1981); Royal Castle Systems, Inc. v. Fields, 354 So.2d 947 (Fla. 3d DCA 1978). Cf. Bowen v. Willard, 340 So.2d 110 (Fla. 1976);

Rule 9.110(a)(3) Fla.R.App.P. Issues not appealed are abandoned. Baker v. Deeks, supra; Piowaty v. Regional Agriculture Credit Corp., 160 Fla. 136, 34 So.2d 94 (1948). See, also, Rayne v. Wackenhut Corporation, 169 So.2d 354 (Fla. 3d DCA 1964).

At trial, Calder contended that the evidence supporting its affirmative defense of express assumption of risk was so overwhelming as to require a directed verdict on the issue (T. 809-21, 1364-8; R. 581-4). The trial judge declined to direct a verdict and submitted the issue to the jury upon the above instruction and verdict interrogatory (T. 821, 1368, 1599-1609). Ashcroft was familiar with his horse, was familiar with the track and the location of the exit gap, was familiar with the morning work out routine, and was familiar with racing out of the seven furlong chute (T. 257, 321, 768-86, 801-4). Ashcroft was a professional jockey with admitted expertise and knowledge of horse behavior (T. 768-75, 786, 1271). The evidence fully supported the jury's determination that Ashcroft knew of the existence of the danger complained of, realized and appreciated the possibility of injury as a result of such danger, and having a reasonable opportunity to avoid it, voluntarily and deliberately exposed himself to the danger complained of (T. 257, 402-3, 424, 735-8, 768-86, 795-804, 991, 1070-4, 1090, 1271).

Calder claimed entitlement to judgment on the jury verdict (R. 585-8, 596-600, 742-95). The trial court, however, entered judgment for Ashcroft in the sum of $10,000,000 (R. 595). Thereafter, the court found the verdict excessive, ordered a

remittitur of $5,000,000 and vacated the original judgment (R. 740-1). Ashcroft declined the remittitur, resulting in the grant of a new trial (R. 640). Ashcroft appealed the order granting the new trial and Calder cross-appealed the denial of its motion for judgment on the verdict, for judgment in accordance with its motion for directed verdict, and the errors in the jury charge on liability (R. 641-3).

On appeal, the Third District held that Calder was entitled to a judgment on the verdict. All other issues were rendered moot. The Third District held that the jury was properly instructed on the law; the verdict was rendered on a proper interrogatory; and "There is abundant evidence in this record supporting the jury's conclusion that Ashcroft expressly assumed the risk."

Ashcroft's statement at page eight of his brief that "The Third District applied assumption of risk to bar recovery solely because 'The location of the exit gap was open and obvious, well known to Ashcroft,'" is not a true statement. It is misleading and false. At page ten of his brief Ashcroft contends that, "the Third District held that Ashcroft was barred from any recovery simply because he had knowledge of the location of the gap." At page thirteen of his brief, Ashcroft says that the Third District decision "was based upon a single factor; that the plaintiff had knowledge of the created danger."

These misstatements of the district court's decision are easily shown by a reading of the opinion. They cannot be excused as fair comment. Ashcroft's argument built upon this foundation

will not withstand close scrutiny. The petition to this Court is not well taken and should be denied.

Ashcroft does not frame the issues in a fair or even-handed manner. Ashcroft phrases his Point I in terms of district court error in applying assumption of risk "simply because the plaintiff had knowledge of the risk." The issue on this petition for discretionary review is whether the decision of the district court of appeal is in express and direct conflict with the decisions of this Court.

Ashcroft's wording of his second issue is similarly infirm. The propriety of the remittitur was neither discussed nor decided by the district court of appeal. Even so, the issue and the standard for appellate review of a trial court remittitur order is whether the trial court abused its broad discretion. Ashcroft's argumentative framing of the issues is unacceptable.

ISSUES ON APPEAL

I.

WHETHER THE DISTRICT COURT DECISION DETERMINING THAT THE DEFENSE OF EXPRESS ASSUMPTION OF RISK WAS AVAILABLE WITHIN THE CONTEXT OF PROFESSIONAL HORSE RACING IS IN EXPRESS AND DIRECT CONFLICT WITH KUEHNER V. GREEN OR BLACKBURN V. DORTA.

II.

WHETHER THE TRIAL COURT ABUSED ITS BROAD DISCRETION IN GRANTING A REMITTITUR OR, IN THE ALTERNATIVE, A NEW TRIAL.

SUMMARY OF ARGUMENT

The first sentence of the district court opinion describes the issue presented. "This appeal requires us to determine whether the defense of express assumption of risk is available within the context of professional horse racing activity ... We conclude that such a defense is available...."

In reaching its conclusion, the district court observed three things. First, the jury was instructed with the court approved Florida Standard Jury Instruction 3.8. Second, the jury returned its verdict with a special interrogatory approved verbatim by this Court in Kuehner v. Green, 436 So.2d 78 (Fla. 1983). Third, upon a review of the entire record in the cause, the district court found, "There is abundant evidence in this record supporting the jury's conclusion that Ashcroft expressly assumed the risk."

Ashcroft's accident occurred approximately two hundred feet beyond the closed exit gap. He was thrown from his horse at the point where the seven furlong chute meets the main oval. His horse then jumped the inside rail of the main oval and ran free in the infield. Ashcroft was injured when another horse ran over him.

Ashcroft's horse did not step into a hole or run into an obstruction. There was no defect in the track. Ashcroft was thrown from his horse when it bolted from the track. Ashcroft theorized that his horse was influenced by the location of the closed exit gap after he passed it coming out of the chute. The record reflects that horses leave the track for myriad reasons.

They react to the whip, the spur, to mud or dust, to other horses, birds, and loud noises. They sometimes bolt for no apparent reason at all. It is a risk inherent in the sport.

It is undisputed that Ashcroft was thrown from his horse when it "ducked in" at the end of the extension rail of the seven furlong chute, approaching the main oval. An estimated two hundred similar incidents occur every year at the same relative location on tracks throughout the country. Ashcroft had been thrown from other horses at other tracks during his riding career. While racing at Hialeah Race Course earlier in the year, Ashcroft was thrown from another horse that ducked in at the same comparable intersection of chute and oval.

Being thrown from a horse is a risk inherent in thoroughbred horse racing. Being trampled by a horse is a risk inherent in thoroughbred horse racing. Ashcroft was a professional jockey who, with full appreciation of the risks involved, came to Calder to race.

The district court of appeal applied the law to the facts of this case, found no error in the jury verdict, and ordered entry of judgment on the verdict. There has been no pronouncement of a rule of law which conflicts with the law as announced by this Court or any other district court of appeal. Nor has the district court applied a rule of law to produce a different result from that of a prior case which involved substantially the same controlling facts.

The district courts of appeal are tasked with the responsibility of reviewing the record and applying the law to

the issues presented. That has been done in this case. Here, the district court concluded:

> Calder has met the standard established in Kuehner and properly laid before the jury the question of assumption of risk. The jury having answered that question in the affirmative, Calder is absolved from liability.

This Court's definitive opinion in Kuehner v. Green provides ample precedent and guidance for Florida's trial courts and district courts of appeal in applying the doctrine of assumption of risk to various factual situations as they may arise. The district court of appeal reviewed the record of this case in the light of Kuehner v. Green and rendered its decision accordingly.

ARGUMENT

I.

> THE DISTRICT COURT PROPERLY CONCLUDED THAT CALDER HAD MET THE STANDARD ESTABLISHED IN KUEHNER V. GREEN AND PROPERLY LAID BEFORE THE JURY THE QUESTION OF ASSUMPTION OF RISK AND, THEREFORE, THE EXPRESS AND DIRECT CONFLICT NECESSARY TO THE COURT'S JURISDICTION IS LACKING.

This court's opinion in Kuehner v. Green, 436 So.2d 78 (Fla. 1983), confirms Calder's entitlement to judgment on the verdict.

> It is the jury's function to determine whether a participant voluntarily relinquished a right, or, in terms of the Blackburn decision, "actually consented" to confront certain dangers. ... If it is found that the plaintiff recognized the risk and proceeded to participate in

> the face of such danger the defendant can properly raise the defense of express assumption of risk. ... Here, even though the defendant breached his duty of care and was negligent, the plaintiff should be barred from recovery because he in some way consented to the wrong. [436 So.2d at 80; emphasis by the Court].

In Kuehner v. Green, the jury was called upon to answer a verdict interrogatory identical to the one here. After quoting the verdict interrogatory, this Court said:

> We find that this question adequately addresses all threshold determinations required in applying the doctrine of express assumption of risk. By answering the interrogatory in the affirmative the jury determined that Kuehner subjectively recognized the danger of "leg sweeps" and voluntarily proceeded to spar in the face of such danger. Ample evidence in the record supports this factual determination. [436 So.2d at 81; emphasis by the Court].

This case presents precisely the same situation. The jury charge and the verdict interrogatory addressed all threshold determinations required in applying the doctrine of express assumption of risk. By answering the interrogatory in the affirmative, the jury determined that Ashcroft subjectively recognized the danger of racing at Calder Race Course in its existing condition and voluntarily proceeded to race in the face of such danger. Ample evidence in the record supports this factual determination.

It is apparent from the Kuehner v. Green decision that actual consent or subjective appreciation of the risk is the touchstone of express assumption of risk. If the plaintiff is

found not to have subjectively appreciated the risk, then the question becomes whether the plaintiff should have reasonably anticipated the risk. If the reasonable man would not have anticipated the risk, then the plaintiff should be allowed to recover in full. Conversely, if the jury determines that the plaintiff should have anticipated the risk and did not, then the plaintiff's conduct is subjected to comparative negligence apportionment principles. Kuehner v. Green, 436 So.2d at 80. That is the distinction between express assumption of risk and the implied assumption of risk now merged in comparative negligence.

The distinction between express assumption of risk and the implied assumption of risk included within contributory/comparative negligence has long been recognized. In Byers v. Gunn, 81 So.2d 723 (Fla. 1955) this Court held:

> At times the line of demarcation between contributory negligence and assumption of risk is exceedingly difficult to define. A generally safe rule to follow is that the latter involves a choice made more or less deliberately and negatives liability. Contributory negligence, on the other hand, implies the failure of the plaintiff to exercise due care. Some courts have stated that assumption of risk is a mental condition of willingness, whereas contributory negligence is more a matter of conduct. [81 So.2d at 727].

Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977), did not recede from Byers v. Gunn, but recognized it as the leading case in Florida dealing with the distinction between the doctrines of contributory negligence and assumption of risk. Blackburn, at 289. Ashcroft's decision to race at Calder "involve[d] a choice

made more or less deliberately and negatives liability." It is not unreasonable for a jockey to race at Calder, nor is it contributory negligence to race at Calder. Indeed, the jury here found Ashcroft free of comparative negligence. The jury also found, however, that Ashcroft did knowingly and voluntarily assume the risk of racing at Calder in its existing condition.

Byers v. Gunn was quoted with approval and relied upon by the Second District in Gulf Stream Park Racing Association, Inc. v. Miller, 119 So.2d 749 (Fla. 2d DCA 1960), cert. den., 125 So.2d 872 (Fla. 1961). The plaintiff in Gulf Stream was employed by one of the owners that raced horses at the track. Race track and stable personnel customarily viewed the races from an area along the inside rail of the straightaway in the vicinity of the gate leading onto the track. There, as here, the plaintiff alleged that the defendant race track failed to provide adequate safeguards against the tendency of the horses to jump the railing by the gate.

The Gulf Stream accident occurred during a maiden race of two year old thoroughbreds. The Second District noted that two year old horses are inexperienced and highly nervous and excitable. They have a tendency to want to return to the safety of their barns, so that when they are raced past their stables or the gates leading onto the track, they often swerve toward their barns and may topple over the rail. These propensities were known by the plaintiff and stable personnel, as well as the race track. The plaintiff recovered a judgment against the track for injuries sustained when a horse threw its jockey and jumped the

rail into the spectator area, striking the plaintiff. The Second District reversed, with instructions to enter judgment for the track.

The Second District discussed the distinction between contributory negligence and assumption of risk, ultimately concluding that the plaintiff both assumed the risk and was guilty of contributory negligence. He assumed the risk of his injury by being present at the time and place with full knowledge of the hazards attending that particular race, including the alleged inadequate safeguards at his chosen location. He was guilty of negligence in turning his back to the track during the race.

Robillard v. P & R Racetracks, Inc., 405 So.2d 1203 (La.App. 1981), is analogous. There, a race car driver brought suit against the owner of the drag strip where the plaintiff was injured. The Louisiana court affirmed a verdict and judgment in favor of the track. The assumption of risk doctrine was dispositive of the appeal.

Robillard was injured when his automobile struck a disabled vehicle parked off the racing surface past the finish line of the drag strip. The alleged negligence centered on the track's allowing the disabled vehicle to be left at the end of the track while subsequent races were being run. The evidence at trial demonstrated that the plaintiff knew about the condition of the track and the location of the disabled vehicle prior to his race. Not only was the plaintiff informed of the location of the disabled car, but he could see the car off the track. He was a

capable and experienced driver. Drag racing is a dangerous sport and the plaintiff knew of its dangers.

> He actually, subjectively comprehended the risk of undertaking a time trial run under the existing conditions. Robillard clearly proceeded in the face of the known danger by voluntarily racing his car. [405 So.2d at 1207; emphasis added].

The jury charge in Robillard was comparable to the instruction given here:

> In his charge to the jury, the trial judge instructed the jury that the defendants had the burden of proving that the plaintiff had assumed the risk of harm that happened to him; that in order to conclude that plaintiff had assumed the risk, the jury had to find that plaintiff fully understood the danger which was involved and that plaintiff then voluntarily exposed himself to the danger or the risk of harm. [405 So.2d at 1206].

In Louisiana, as in Florida, the necessary ingredient for a plaintiff to assume a risk is his actual knowledge. There must be a knowing assumption of risk. Robillard, 405 So.2d at 1206; Kuehner v. Green, 436 So.2d at 80-1. In Robillard, as here, the jury affirmatively answered a verdict interrogatory that the plaintiff had assumed the risk. In both cases the track carried its burden of proof and established its affirmative defense before the jury.

In Morton v. California Sports Car Club, 163 Cal.App.2d 685, 329 P.2d 967 (1958), a knowledgeable member of a sports car club was injured while watching a race from behind a picket fence. A car spun out, went through the fence, and injured the

plaintiff. The insubstantiality of the picket fence was obvious. 329 P.2d at 968. The plaintiff's premises liability lawsuit against the sports car club was barred by his assumption of the risk.

> The fact that defendant may have been negligent in failing to provide sufficient protection around the course for all spectators is of no consequence since one may assume a risk even though the dangerous condition is caused by the negligence of others. ... 'Indeed, the cases in which this defense is applied usually involve dangerous conditions created by the negligence of another.' [329 P.2d at 969].

See, also, Mayer v. Howard, 220 Neb. 328, 370 N.W.2d 93 (1985) (motorcycle racer assumed the risk of falling off his motorcycle during drag race on a track of alleged negligent design); Hollamon v. Eagle Raceway, Inc., 187 Neb. 221, 188 N.W.2d 710 (1971) (race car owner assumed the risk of injury in the pit area as a participant in the racing program); McPherson v. Sunset Speedway, Inc., 594 F.2d 711 (8th Cir. 1979).

Ashcroft was not in the employ of Calder and Calder did not require him to race on October 31 or on any other occasion. Ashcroft came to Calder of his own accord and was free to leave (T. 773-4). Ashcroft was free to refuse to ride if he felt the track too hazardous. That such a decision may have affected subsequent demand for his services, does not alter this fact. Cf. Brokaw v. East St. Louis Jockey Club, 12 Ill.App.2d 243, 139 N.E.2d 850, 852-3 (1956); Demarest v. T. C. Bateson Construction Company, 370 F.2d 281, 285-6 (10th Cir. 1966).

Here, Ashcroft assumed the risks incident to racing out of the seven furlong chute past the gap. He knew of the existence of this condition, realized and appreciated the possibility of injury as a result of such condition, and nonetheless voluntarily and deliberately exposed himself to the danger arguably created by the location of the gap. Ashcroft had personally complained of the gap at the jockeys' meeting October 15, one day after a similar incident and more than two weeks prior to his own accident. During that two week period another incident occurred of which Ashcroft was also aware. Ashcroft knew the condition of the track, having ridden there for a month. He also knew his horse better than anyone else, having ridden him in previous races and having exercised him during the preceding month. There was ample evidence of Ashcroft's actual knowledge of the condition of the track as it existed in October, 1981, of his subjective appreciation of the risk, and of his consent to confront this known danger. Therefore, at a very minimum a jury question was presented, a question resolved by the jury in favor of Calder and adverse to Ashcroft. Calder was entitled to judgment on this verdict.

Ashcroft cites no Florida case for his proposition that a plaintiff can never voluntarily and consensually assume a risk related to the condition of the defendant's premises. The defense is available when the facts support it. The best example apropos of this case is Gulf Stream Park Racing Association, Inc. v. Miller, supra. Gulf Stream is clearly a premises liability case. The plaintiff voluntarily assumed the risk of the premises

and was thus barred from recovery. Ashcroft ignores Gulf Stream in his brief.

There is nothing in the Kuehner opinion to suggest or imply a limitation to contact sports. Rather, the opinion makes clear that contact sport is but one example of a variety of situations in which actual consent exists and to which the defense of express assumption of risk obtains. In arguing to the contrary, Ashcroft overlooks the very basis upon which Green was found to be negligent in the Kuehner case. The "danger complained of" was not merely "leg sweeps" common to karate, but was a leg sweep performed on the concrete floor at Green's home. Kuehner was not injured by the leg sweep. He sustained severe injury when his head struck the concrete floor. The danger of leg sweeps is a risk inherent in karate, normally practiced on mats under controlled conditions. Performing them upon a concrete floor was an extraordinary risk. Yet it was a risk that was voluntarily assumed by Kuehner, barring recovery from Green. Stated differently, serious injury is a risk inherent in practicing karate on a concrete floor.

Kuehner voluntarily assumed the risks inherent in the sport of karate performed upon the unprotected concrete premises of the defendant. The trial court, the district court of appeal, and the Supreme Court of Florida all agreed that the jury returned a defense verdict when it found that Kuehner had voluntarily assumed the risk complained of, even though the jury also found Green negligent for performing a leg sweep on a concrete

floor. Green was entitled to a judgment on the verdict. So was Calder.

In Kuehner, this Court said:

> Here, even though the defendant breached his duty of care and was negligent, the plaintiff should be barred from recovery because he in some way consented to the wrong. [citation omitted]; see also Restatement (Second) of Torts §496C, Comment (b) (1965). [436 So.2d at 80].

The reference to the Restatement, §496C, is significant for two reasons. First, §496C provides that:

> ... a plaintiff who fully understands a risk of harm to himself or his things caused by the defendant's conduct or by the condition of the defendant's land or chattels, and who nevertheless voluntarily chooses to enter or remain, ... within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recovery for harm within that risk. [emphasis added].

And as pointed out in Comment (b):

> [T]he basis of the rule is the policy of the law which refuses to permit one who manifests willingness that another shall continue in a course of conduct to complain of it later if he is hurt as a result of it.

The focus in Kuehner is upon subjective appreciation, actual knowledge, and voluntary exposure as constituting the "consent" which bars a plaintiff from recovery. This Court quotes with approval from its earlier decision in Bartholf v. Baker, 71 So.2d 480, 483 (Fla. 1954) that, "Voluntary exposure is the bedrock upon which the doctrine of assumed risk rests." 436 So.2d at 80.

In Gary v. Party Time Company, Inc., 434 So.2d 338 (Fla. 3d DCA 1983), an experienced skater was injured when she hit a bump on a runway over which she was skating. She was aware of the bump before she traversed the runway. Gary sued those responsible for the construction and maintenance of the runway. Since she intentionally and voluntarily chose to expose herself to the risks involved in skating down the runway, her voluntary assumption of the risk barred the action.

In Blancher v. Metropolitan Dade County, 436 So.2d 1077 (Fla. 3d DCA 1983), an experienced softball player slid into second base and sustained injury. He brought a premises liability action against Dade County, claiming that the base was improperly anchored with a metal spike in soil which was too soft. There was evidence that the plaintiff knew of the existence of the danger complained of, realized and appreciated the possibility of injury as a result of such danger, and, having a reasonable opportunity to avoid it, voluntarily exposed himself to the danger complained of. 436 So.2d at 1079. This evidence entitled Dade County to a jury instruction and a verdict interrogatory on the defense of express assumption of risk.

Express assumption of risk can operate as a bar to a premises liability lawsuit and a jury question is presented when there is competent evidence to support it. It has long been the law that the defense of assumption of risk presents issues which should be resolved by the jury. City of Williston v. Cribbs, 82 So.2d 150, 151 (Fla. 1955); Kuehner v. Green, 406 So.2d 1160, 1161 (Fla. 5th DCA 1981), aff'd., Kuehner v. Green, supra, at

80-81. Here the jury was presented with the issue and resolved the question in favor of Calder. Judgment on the verdict was required.

Ashcroft mistakenly relies upon Cole v. New York Racing Association, 24 A.D.2d 933, 266 N.Y.S.2d 267 (1965). There, a jockey was killed when thrown from his horse into a raised concrete footing. Assumed risk was a question of fact and the weight and sufficiency of the evidence was for the jury. The New York court affirmed the plaintiff's judgment entered on the jury verdict noting:

> Appellant's claim that decedent's assumption of the risks inherent in racing embraced the danger occasioned by the elevated condition of the footings was not supported by any evidence tending to show ... that decedent was or should have been conscious of the danger of the defect. [266 N.Y.S.2d at 270].

This statement is immediately followed with a citation to Maltz v. Board of Educ. of New York, 32 Misc.2d 492, 114 N.Y.S.2d 856, (1952), affd., 282 A.D. 888, 124 N.Y.S.2d 911 (1953). The court's citation to Maltz is telling. In Maltz, the plaintiff was a basketball player injured while participating in a basketball game. The danger complained of was the placement of the basket only two feet from a brick wall with a door almost directly behind the basket. The injured plaintiff had played basketball on the court many times before. While running along the court at considerable speed and going up for a shot at the basket, the plaintiff's momentum carried him beyond the basket and into the door jamb. The defendant was entitled to judgment upon the factual finding that:

> [T]he plaintiff assumed the risks of danger inherent in the playing in a game of basketball on this court under the conditions existing at the time of the happening of the accident and for some time prior thereto, and that he knew of the conditions existing and also had a knowledge and appreciation of the danger produced by such condition. [114 N.Y.S. 2d at 858; emphasis added].

The risk of the proximity of the door and wall to the basket were obvious and necessary to the sport "as played on this particular court." 114 N.Y.S.2d at 858. The plaintiff was an experienced basketball player aware of these dangers, voluntarily assumed them, and accepted them with foresight of the consequences. He knew of the existing conditions and had an appreciation of the "danger produced by the physical conditions existing." 114 N.Y.S.2d at 858.

A similar holding was reached in Paine v. Young Men's Christian Ass'n., 91 N.H. 78, 13 A.2d 820 (1940), where a basketball player fell into the bleachers placed near the edge of the court. He voluntarily encountered a known danger and was barred from recovery.

In Heldman v. Uniroyal, Inc., 53 Ohio App.2d 21, 371 N.E.2d 557 (1977), a professional tennis player brought suit against the manufacturer of the synthetic tennis court on which she sustained injury while playing in a tournament. The Ohio court held that a jury issue was presented on whether she assumed the risk. The plaintiff complained that the synthetic surface was uneven and had bubbles which created a dangerous condition. One of the tennis players, Virginia Wade, testified that the

players were concerned about the condition and were afraid of getting hurt. There was sufficient evidence to raise a jury question that the plaintiff, a professional tennis player, also knew that the bubbles created a dangerous condition.

In reaching its conclusions, the Ohio court gave deference to the plaintiff's professional stature. The plaintiff was a professional athlete who played on all types of tennis court surfaces such as grass, clay, concrete, and synthetic surfaces and was familiar with the various risks attendant with playing on these types of courts.

> A higher degree of knowledge and awareness is imputed to professional tennis players than to average nonprofessional tennis players as to the dangers in playing on a synthetic tennis court having obvious bubbles on the playing surface and an inference may be made that a professional tennis player injured while using such a tennis court knew of and recognized the dangers. [371 N.E.2d at 567].

Here, Ashcroft was an experienced, professional, and succesful jockey. He had raced at tracks across the country, was familiar with horse behavior, knew the characteristics of this particular horse, knew the condition of the track at Calder and the current status of the modifications being made to the track, and had full knowledge and appreciation of the risks inherent in thoroughbred horse racing at Calder and elsewhere.

Each of the above cited cases involved some species of premises liability. None of the cases turned upon participation in a contact versus non-contact sport. Even so, Ashcroft's

categorization of horse racing as a non-contact sport is illusory.

> Thoroughbred horse racing, by its own nature, is a sport posing great peril to its participants. Up to a dozen horses, each weighing 1000 to 1200 pounds break from a starting point and attempt to gain a preferred position on the rail as the first turn is approached. Astride these horses moving at full speed are persons weighing in the neighborhood of 100 pounds who jockey their mounts for position. In this dash for position, due to both jockey error and to the difficulties in controlling a Thoroughbred horse, contacts and collisions are commonplace, occasionally resulting in spills with resultant injuries. These dangers are inherent in the sport of Thoroughbred horse racing, and well known to a jockey who had been riding professionally for seven years.

Santiago v. Clark, 444 F.Supp. 1077, 1079 (N.D. W.Va. 1978). Baseball, basketball and tennis are non-contact sports, yet the risks of the premises where they are played may be assumed. Blancher, supra; Maltz, supra; Paine, supra; Heldman, supra.

The risks of injury to a jockey thrown or separated from his horse during a thoroughbred horse race are risks inherent in the sport, regardless of the precipitating cause. Ashcroft voluntarily assumed these risks every time he raced. He exposed himself to these risks because it was lucrative for him to do so. A professional jockey rides for money. His skill and daring is rewarded with a share of the purse. He was familiar with the obvious dangers of horse racing and chose to encounter those dangers by voluntarily participating in the races at Calder under the known conditions existing at the time. The jury charge and

verdict interrogatory were correct in form and substance. Kuehner, supra. Calder was entitled to judgment on the verdict. The district court opinion should not be disturbed.

In an effort to avoid the clear dictates of Kuehner v. Green, Ashcroft reverts to Blackburn v. Dorta and attempts to turn this case into something other than what it is. In Blackburn v. Dorta, this Court discussed and dissected assumption of risk into its many forms. This case falls within that sphere of assumption of risk defined by this Court as "express" because it is a situation, "such as where one voluntarily participates in a contact sport." Blackburn, 348 So.2d at 290. To avoid the obvious consequence of this determination, Ashcroft urges this Court to pick from three of the other disparate forms of assumption of risk discussed in Blackburn.

Ashcroft first contends that his case is indistinguishable from that of a person who rushes into a burning building to save a child. He also contends that his situation is precisely the same as the individual who runs into a burning building to retrieve a hat. He further argues that his case fits squarely with that of the employee bound to endure the risks created by his negligent employer.

Clearly, Ashcroft's situation cannot be the same as three such divergent scenarios. In fact and in law, his situation is similar to none of them. He is not a parent braving danger to rescue a child. He is not the fool that flaunts danger without reward. Nor is he the servant of Calder, for he is free to choose the tracks upon which he will race, and the length of the

races to be entered. Ashcroft did not work for Calder. Ashcroft was a professional jockey voluntarily assuming the risks inherent in the sport of thoroughbred horse racing on a track of known configuration. This falls squarely within this Court's definition of "express" assumption of the risk.

Should this Court choose to revisit the issue of assumption of risk in its various forms, removing voluntary participation in sporting activities from the definition of "express" assumption of risk, then the term to be applied is "primary" assumption of risk. Calder breached no duty owed to Ashcroft.

> The term primary assumption of risk is simply another means of stating that the defendant was not negligent, either because he owed no duty to the plaintiff in the first instance, or because he did not breach the duty owed. [Blackburn, 348 So.2d at 290].

The legal status of the parties is not in dispute. Calder is a landowner and Ashcroft was an invitee. Rice v. Florida Power and Light Co., 363 So.2d 834, 839 (Fla. 3d DCA 1978), cert. den., 373 So.2d 460 (Fla. 1979), sets forth the duty of a landowner to an invitee:

> The duty of a landowner to an invitee is to use ordinary care to maintain the premises in a reasonably safe condition for use in a manner consistent with the invitation, and to warn of latent perils which are known or should be known to the owner but which are not known to the invitee or which, by the exercise of due care, could not be known to him. [emphasis by the Court].

An owner is entitled to assume that the invitee will perceive that which is obvious to him and that the owner is not required to give the invitee notice or warning of an obvious danger. Id.

> Nor need he alter the premises to eliminate known and obvious dangers. [Id.].

In Hall v. Holland, 47 So.2d 889, 892 (1950), this Court said:

> It has also been held that the owner is under no legal duty to alter the premises so as to eliminate known and obvious dangers.

The location of the exit gap was known and obvious to all who were associated with racing at Calder. It was known and obvious to Ashcroft, to all of the other jockeys, to the trainers, and to the owners who all chose to race at Calder. The decision to enter Kentucky Edd in a seven furlong race, run from the chute past the gap, was a decision made by Kentucky Edd's owner and trainer, with the acquiescence or approval of Ashcroft the jockey. Whether or not Kentucky Edd should have been entered in such a race were judgmental factors considered and made by the owner, trainer, and jockey. Calder had no part and no decisional responsibility in entering Kentucky Edd in this particular race or in having Ashcroft as the jockey. Under these circumstances, no duty exists and no liability attaches. See, Melton v. Estes, 379 So.2d 961, 963 (Fla. 1st DCA 1979).

Calder is not asserting "patent danger" as a defense to a breach of duty. Calder asserts that it owed no duty in the first instance. Calder was under no legal duty to alter its premises so as to eliminate known and obvious dangers, by moving the gap or otherwise. Hall v. Holland, supra; Rice v. Florida Power and Light Co., supra; Melton v. Estes, supra. See, also, Rist v. Florida Power & Light Co., 254 So.2d 540 (Fla. 1971); Quinnelly v. Southern Maid Syrup Co., 164 So.2d 240 (Fla. 2d DCA 1964); Somers v. Meyers, 171 So.2d 598 (Fla. 1st DCA 1965).

There is another rule of law applicable to premises liability. A defendant's knowledge of a danger must be superior to that of a business invitee in order to create a duty on the part of the defendant to warn. Hunt v. Slippery Dip of Jacksonville, Inc., 453 So.2d 139 (Fla. 1st DCA 1984); Ball v. Ates, 369 So.2d 1023 (Fla. 1st DCA 1979); Vermont Mutual Insurance Company v. Conway, 358 So.2d 123 (Fla. 1st DCA 1978).

Hunt v. Slippery Dip, supra, is factually closer to this case than any of the premises liability cases relied upon by Ashcroft. In Hunt, as here, there was no evidence of a latent or hidden defect in the premises. The plaintiff was injured at a water slide operated by the defendant. He was injured attempting to cross over a concrete wall that separated two adjoining water slides. The plaintiff had been down this slide twenty to twenty-five times before his accident, attempting to jump the wall. The record demonstrated without dispute that the plaintiff's knowledge of the risk involved in using the waterslide was at least equal to that of the defendant. Applying the rule that

a defendant's knowledge of a danger must be superior to that of a business invitee, summary judgment was affirmed.

The cases relied upon by Ashcroft are factually distinguishable and, to the extent that they are not, represent a misapplication of this Court's decision in Auburn Machine Works Co. v. Jones, 366 So.2d 1167 (Fla. 1979). The duty owed by a manufacturer of a product to the general public is far different than the limited duty owed by a landowner to an invitee. A manufacturer of an unreasonably dangerous product is held strictly liable for injury caused by the product. Restatement of Torts (Second), §402A. A landowner is not strictly liable for injuries sustained on his premises. An owner is entitled to assume that the invitee will perceive that which would be obvious to him and is not required to give the invitee notice or warning of an obvious danger. Moreover, a landowner is under no obligation to alter his premises to eliminate known and obvious dangers. It is upon this absence of duty that Calder was also entitled to judgment.

Assuming for the sake of argument that Auburn Machine v. Jones, supra, is applicable to a landowner with an "obvious" hazard on his premises, the "known" hazard remains one which imposes no duty on the landowner. With a known danger there is a subjective appreciation by the plaintiff, not only of the existence of the condition but also of the danger it involves. When a plaintiff has this knowledge and appreciation, the defendant is relieved of further responsibility to him. It is not a defense to the plaintiff's action, but is an absence of

duty which can properly be recognized as "primary" assumption of risk.

An "obvious" condition tested by the objective standard of the reasonable man may be considered in determining the plaintiff's contributory negligence. If the danger is "known," however, then this subjective knowledge and appreciation of the danger will establish assumption of the risk. This subjective knowledge and appreciation of the risk operates as a bar to the plaintiff's cause of action under Kuehner v. Green, when the known danger is freely, voluntarily, and deliberately encountered.

The jury in this case was called upon to answer a factual verdict interrogatory. The jury determined that Ashcroft knew of the existence of the danger complained of. The jury determined that he realized and appreciated the possibility of injury as a result of such danger. The jury also determined that, having a reasonable opportunity to avoid it, Ashcroft voluntarily and deliberately exposed himself to the danger complained of. These factual findings lend themselves to either of two analyses. These facts will fit squarely within this Court's explanation of "express" assumption of risk found in Kuehner v. Green. They are equally consistent with this Court's description of "primary" assumption of risk. There has been no breach of duty. Cf. Kuehner v. Green, 436 So.2d at 81-2 (Justice Boyd, concurring).

Should this Court accept Ashcroft's invitation to place this case in some risk category other than "express," then the appropriate category is "primary." Under Florida law, a landowner is under no legal duty to alter the premises to eliminate

known and obvious dangers. Nor is there a duty to warn when the invitee's actual knowledge and subjective appreciation of the danger is equal or superior to that of the landowner. Calder is entitled to its judgment on the verdict, regardless of the terminology applied to the facts as found by the jury.

II.

THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION IN GRANTING REMITTITUR OR IN THE ALTERNATIVE, A NEW TRIAL.

If Calder is correct in its entitlement to judgment on the verdict, then the remittitur question, like all of the other questions before the district court of appeal is moot. Should this Court determine that Calder is not entitled to a judgment on the verdict, then the remedy is new trial on all issues. In her dissent, Judge Baskin recognizes the necessity for new trial if Calder is not entitled to its judgment on the verdict. The remittitur is a moot point regardless. Since Ashcroft has briefed the issue, Calder will respond.

In essence, Ashcroft contends that whenever catastrophic intangible loss is sustained, the jury verdict is inviolate regardless of its magnitude. Such is not the law of Florida.

> When either a trial judge or this Court determines that the verdict of a jury is so excessive as to shock the judicial conscience someone invariably accuses either or both of usurping a prerogative of the jury and substituting the court's judgment for that of the jury, thus tending to disparage our system of trial by jury.

Bartholf v. Baker, 71 So.2d 480, 484 (Fla. 1954). This Court rejected this suggestion with an extensive quotation from a Fourth Circuit decision, a portion of which follows:

> The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. ... [It is] a power exercised in the pursuance of a sound judicial discretion, without which the jury system would be a capricious and intolerable tyranny, which no people could long endure. [71 So.2d at 484; emphasis by the Court].

The bulk of the decisional case law relied upon by Ashcroft deals with appellate review of a claimed excessive verdict where the trial court has denied a motion for remittitur or new trial. There is a dramatic difference between the standards applied in those cases and the standard of review applied to a trial court order granting a new trial. Ford Motor Company v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981), reiterated yet again the appropriate standard for district courts on review of a trial court's granting of a motion for new trial.

> The test is whether the trial court abused is 'broad discretion.' If reasonable men could differ as to the propriety of the action taken by the trial court, then there is no abuse of discretion. See Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d at 145 (Fla. 1980); Cloud v. Fallis, 110 So.2d 669 (Fla. 1959); Rivera v. White, 386 So.2d 1233 (Fla. 3d DCA 1980).

In Bell v. Baptist Memorial Hospital, Inc., 363 So.2d 28 (Fla. 1st DCA 1978), the trial court granted a new trial after the jury returned a $450,000 verdict in a wrongful death action. There, much like here, the plaintiff appellant argued that the granting of a new trial was erroneous because the verdict did not "exceed the maximum limit of a reasonable range within which the jury may operate." The First District agreed and reversed. This court, however, quashed the district court decision and remanded for reinstatement of the order granting a new trial. Baptist Memorial Hospital, Inc. v. Bell, 384 So.2d 145 (Fla. 1980). In doing so, this Court found conflict with Cloud v. Fallis, 110 So.2d 669 (Fla. 1959) and Castlewood International Corporation v. LaFleur, 322 So.2d 520 (Fla. 1975). The district court failed to properly apply the "broad discretion" rule granted to trial courts as expressed in Castlewood and Cloud.

> The discretionary power to grant or deny a motion for new trial is given to the trial judge because of his direct and superior vantage point. ...
>
> In reviewing this type of discretionary act of the trial court, the appellate court should apply the reasonableness test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. [384 So.2d at 146].

It is now beyond dispute that the "broad discretion rule" governs over the "substantial competent evidence rule." Ford v. Robinson, 403 So.2d 1379 (Fla. 4th DCA 1981). A trial court's

exercise of its authority is not to be disturbed if reasonable men could differ as to the propriety of the action taken by the trial court. Ford v. Robinson; Ford Motor Company v. Kikis. See, also, Weems v. Dawson, 352 So.2d 1196 (Fla. 4th DCA 1977), cert. den., 359 So.2d 1221 (Fla. 1978).

Although this Court was concerned with the inadequacy rather than the excessiveness of a verdict, Bennett v. Jacksonville Expressway Authority, 131 So.2d 740 (Fla. 1961) has application here. In Bennett, when the trial court became "shocked" by the inadequacy of the verdict, he was conscience-bound to grant a new trial.

> A judge may struggle to conduct a trial that is fair and just and be certain in his mind that this has been accomplished yet become "shocked" in the end by the concluding verdict.
>
> That the judge suffered "shock" not from any incident during the trial but from the amounts read from the verdicts is clear from the provisions of his order ... [131 So.2d at 742].
>
> ***
>
> True, in the present case the judge did not say the verdict was contrary to the manifest weight of the evidence, but he did say the verdict shocked him and he indicated, in terms of money, the exact extent of the shock. [131 So.2d at 743].

Bennett recognized that shock to the judicial conscience is personal to the trial judge, predicated upon his first-hand acquaintance with the trial. See, also, MacLaughlin v. Red Top Cab & Baggage Company, 133 So.2d 560 (Fla. 3d DCA 1961), cert. den., 149 So.2d 51 (Fla. 1962).

At the hearing on post-trial motions here, the trial judge dispensed with oral argument on most of the grounds for new trial.

> The only thing I am concerned about is the excessive amount of the verdict. That's what I am concerned about. [R. 615].

After listening to argument from both sides, he announced his ruling and articulated the reasons for ordering remittitur and alternative new trial (R. 625-6). The trial judge also said:

> I have considered this case day in and day out and many sleepless nights, because I do have a conscience, too, just like you all, and I know your positions in this particular matter [R. 625].

It is a matter of judicial conscience and the "shock" to the judicial conscience does have an element of personal subjectivity. The above cited cases recognize the validity of the trial court's prerogative in this area. His discretion in this regard is subject to reversal only upon a showing of abuse of this broad discretion.

Ashcroft incurred approximately $150,000 in "specials" and will incur in the future lifetime medical and attendant care expense, estimated at $50,000 to $75,000 per year. His future income earning capacity is nil. In his blackboard closing argument, Ashcroft's counsel totaled estimated lifetime medical and attendant care, unreduced to present money value, and asserted future damages of $2,539,000 (T. 1543). To this figure, he added an additional $2,245,000 for future loss of income, al-

though it would take forty years of after tax earnings at $56,000 (Ashcroft's best year) to equal $2,245,000, for a grand total of $4,784,000 future economic loss (T. 1544). Even without challenge to the accuracy of this figure, the present money value of $4,784,000 apportioned over a fifty four year life expectancy is substantially less. Ashcroft's counsel nevertheless urged a full $4,800,000 economic recovery plus an additional $6,000,000 for pain and suffering, for a total recovery of $10,000,000 (T. 1546, 1587). The jury complied with his request.

The trial court found that the damages awarded by the jury were "excessive in an amount of $5,000,000" (R. 740). As reflected in the order, the trial court considered and compared Ashcroft's economic needs with the ten million dollar verdict of the jury. The trial court also considered the final argument of counsel, in which over four million dollars was claimed in unreduced future losses plus six million dollars for pain and suffering. The trial court also considered the investment potential of a multimillion dollar award (R. 740-1; T. 625-6). Consideration of investment potential is appropriate. Bartholf v. Baker, supra.

Using statutory simple interest, ten million dollars generates $100,000 income per month without ever invading principal. Fla. Stat. §687.01. Five million dollars generates $50,000 income per month without invading principal. Taking the testimony most favorable to Ashcroft, optimum medical and attendant care will average no more than $6,500 per month. In his best year, 1980, Ashcroft averaged $8,250 per month in pretax

earnings. Ten million dollars, even five million dollars, is wholly disproportionate to full economic compensation. Five million dollars provides for Ashcroft's lifetime needs many times over.

Ashcroft is of course entitled to additional compensation for his pain, suffering, disfigurement, and loss of capacity for the enjoyment of life. As the jury is instructed, there is no exact standard for measuring such damage. With catastrophic injury, perhaps no amount of money can ever compensate for these intangible losses. There is no quid pro quo. That does not mean, however, that a trial judge cannot determine within his discretion that a particular verdict is sufficiently excessive to warrant remittitur or new trial. The trial judge in this case properly exercised that discretion afforded by the law. His judgment should not be disturbed.

CONCLUSION

No conflict having been demonstrated, the petition for discretionary review of the decision of the Third District should be denied for lack of jurisdiction. In the alternative, the district court opinion should be affirmed. Calder is entitled to its judgment on the verdict.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Calder's Brief on the Merits was mailed to BARRY RICHARD, ESQ., Roberts, Baggett, LaFace & Richard, Counsel for Petitioner, Post Office Box 1838, Tallahassee, Florida 32302, this 7th day of November, 1985.

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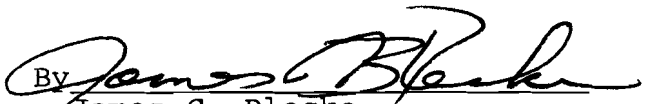
By 
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