O/A 1-9-86

IN THE SUPREME COURT OF FLORIDA

DAVID CARL ASHCROFT,

Petitioner,

vs. Case No. 66,934

CALDER RACE COURSE, INC.

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Review from the Third District

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STATEMENT OF THE FACTS

Petitioner, David Carl Ashcroft, a young, award winning jockey, was rendered a quadriplegic as a result of the negligent design and maintenance of a race course by Respondent, Calder Race Course, Inc.

Race horses are "flight animals" and creatures of habit. They have a tendency to bolt from a race in an attempt to return to their stables if they see an exit gap or path which they have been conditioned to know leads home. [T. 51, 221, 222-223, 230-232, 242-243, 283, 425-426, 476, 1108, 1271][1] For this reason, the location of the exit gap through which the horses daily return to their stables is generally designed with the safety of the jockeys in mind. [T. 1109] Since American horse races run counter-clockwise and horses are trained to run to the left, the proper place to locate the exit gap is on the right side of the track, out of the horse's field of vision during the race. [T. 1480] At Calder Race Course, the exit gap and the path to the stables was located on the horses' left as they entered the race track oval. [T. 79-80] There is no other major race track in the United States with the exit gap located on the left-hand side within the horses' field of vision as it was at Calder. [T. 167, 294, 410, 717, 1271] There is evidence that Calder was aware of the problem with the exit gap as early as 1976. [T. 482] By 1979 the chairman of the Florida Horsemen Benevelent Protective Association was urging the general manager of Calder to change the location of the gap because of problems of horses attempting to come out of the gap. Nevertheless, no action was taken before 1981. [T. 464, 466-467, 482]

In a period of only five weeks between August 31, 1981, and October 5, 1981, five horses bolted in the vicinity of the exit gap and path. [T. 128-132, 500, 507-508] At the

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[1] T = Transcript of trial testimony.
R = Record on Appeal.

request of the jockeys, Calder's manager held several meetings at which the jockeys demanded a change in the location of the exit gap and recommended several alternatives that would have moved the gap and path to a safe location. [T. 82, 86, 95-96, 405, 407-408] Calder's manager admitted that Calder recognized the danger posed by the location of the gap, but rejected the suggestions of the jockeys. Instead, Calder first attempted to camouflage the gap with shrubbery. When that failed, Calder did move the gap to a new location. However, the new location was still on the horses' left as they entered the track and the path remained in the same location, still visible to the horses. [T. 72, 75-82, 86, 89, 98-99] The changes did not resolve the problem and horses continued to bolt in the location of the gap. [T. 90, 132-135, 378, 408-410, 507-509, 718-719]

Ashcroft did not arrive at Calder for the 1981 meet until late September and rode his first race in the meet on October 2, 1981. [T. 773-774] He did not attend the earlier meetings at which the jockeys complained about the location of the exit gap. However, he did attend a meeting on October 14, 1981, that had been called for the discussion of another issue, and told the Calder manager that he had heard something about a problem with the exit gap and wanted to know what the problem was and whether Calder intended to resolve it. He was told that Calder intended to move the gap at some time in the future. [T. 781-783] Calder took no further action to resolve the problem with the exit gap, and on October 31, 1981, Ashcroft's horse bolted toward the exit gap causing Ashcroft to fall to the ground where he was trampled by another horse and permanently paralyzed from the neck down. [T. 136, 233-234, 238-239, 284-287, 387-389, 433, 441]

STATEMENT OF THE CASE

Ashcroft filed this action against Calder in the Eleventh Circuit. The Trial Court, over Ashcroft's objection, instructed the jury on assumption of risk. [T. 1321-1328] 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. [T. 1338-1362]

The jury returned the following verdict:

> We, the jury, return the following verdict:
>
> 1. Was there negligence on the part of defendant, Calder Race Course, Inc., which was a legal cause of damage to plaintiff, David Ashcroft?
>
> Yes X No___
>
> If your answer to question No. 1 is NO, your verdict is for the defendant and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If your answer to question 1 is YES, please answer question 2.
>
> 2. Was there negligence on the part of plaintiff, David Ashcroft, which was a legal cause of his damage?
>
> Yes___ No X
>
> If your answer to question 2 is YES, please answer question 3. If your answer to question 2 is NO, skip question 3 and answer question 4.
>
> . . . . .
>
> 4. Did David Ashcroft know of the existence of the danger complained of, realize and appreciate the possibility of injury as a result of such danger; and, having a reasonable opportunity to avoid it, voluntarily and deliberately expose himself to the danger complained of?
>
> Yes X No___
>
> 5. What is the total amount (100%) of any damages sustained by plaintiff, David Ashcroft, and caused by the incident in question?
>
> $ 10 MILLION

[R. 578-579] The Trial Court ordered a remittitur in the amount of $5 million dollars or, in the alternative, a new trial. [R. 601] Both parties appealed to the Third District. The Third District held that express assumption of risk applied to completely bar recovery and reversed. This Court granted Ashcroft's petition for conflict review.

SUMMARY OF ARGUMENT

POINT I

The decision of the District Court of Appeal should be reversed for any of three reasons. First, this Court has limited the application of assumption of risk in sports activities to contact sports. The Court should continue to limit its application to contact sports. The case at bar did not involve a contact sport or an injury resulting from physical contact.

Second, assumption of risk only applies when the injury results from a risk which is an inherent hazard of the sport. In the case at bar, the injury did not result from an inherent hazard of horse racing, but from the negligent design and maintenance of the track. Calder placed an exit gap in a position which is generally regarded as unsafe and which is avoided at every other major track in the United States. Calder retained the gap despite knowing that it was causing jockeys to be thrown from their horses and despite protests by the jockeys.

Third, the District Court's decision was based solely upon the fact that the exit gap was open and obvious and Ashcroft, arriving late in the season, had knowledge that there had been some problem connected with the gap. The existence of knowledge of a hazard or its open and obvious state has been consistently rejected as a bar to recovery since the adoption by this Court of comparative negligence. The affirmation of the decision of the District Court would thrust Florida jurisprudence back to the "unjust and inequitable" situation that preceded the adoption of comparative negligence.

POINT II

The Trial Court erred by requiring a remittitur or, in the alternative, a new trial. The record indicates that the Trial Court sat as a "seventh juror" and simply substituted its view of the evidence for that of the jury. A verdict must be upheld if it is within the

highest range of recovery supported by substantial, competent evidence in the record. The evidence in the record in the case at bar of past and future medical costs, future expenses for medical supplies and equipment, lost earnings and pain and suffering and loss of the capacity for enjoyment of life is more than sufficient to sustain the jury's verdict.

ARGUMENT

POINT I

THE THIRD DISTRICT ERRED BY HOLDING THAT ASSUMPTION OF RISK APPLIES TO BAR RECOVERY SIMPLY BECAUSE THE PLAINTIFF HAD KNOWLEDGE OF THE RISK WHEN THE INJURY RESULTED FROM THE NEGLIGENT ACT OF A NON-PARTICIPANT IN A NON-CONTACT SPORT AND WAS NOT THE RESULT OF AN INHERENT HAZARD OF THE SPORT.

More than a decade ago this Court rejected the doctrine of contributory negligence as "unjust and inequitable". Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). The Court noted that the injustice was so patent that it caused juries to disregard instructions and engendered a plethora of legal fictions to ameliorate its harshness. If this Court were to affirm the decision of the Third District, the result would be a regression to a doctrine as unjust and inequitable as existed before Hoffman.

There is nothing unique about the facts in the case at bar. It is a typical case of failure to maintain premises in a reasonably safe condition. The testimony was overwhelming that Calder had placed and retained an exit gap in a location which posed a danger to the jockeys [T. 281, 283-284, 377-378, 406, 419, 495], that it was contrary to the generally accepted safety practice for the location of such gaps at race tracks [T. 167, 294, 410, 1271], that no other major track in the country placed an exit gap in such location [T. 167, 294, 410, 717, 1271] and that Calder was fully cognizant of the problem for years before Ashcroft's accident. Nevertheless, Calder and took no action despite its knowledge that the gap had caused a number of horses to bolt and unseat riders. [T. 75-79, 82-89, 98-99, 464-467]. The evidence further established the gap was the proximate cause of Ashcroft's catastrophic accident. [T. 245-247, 260-262, 287-288, 288-289, 716-719] In the face of this overwhelming evidence of the clear and continuing negligence by Calder, the Third District held that Ashcroft was completely barred from recovery. What was the act of Ashcroft that subjected him to this harsh result? It was certainly

not any negligence by Ashcroft. Witnesses for both Ashcroft and Calder were in agreement that he did nothing wrong which contributed to his injuries. [T. 278, 1029, 1052, 1111] 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." Ashcroft v. Calder Race Court, Inc., 464 So.2d So.2d 1250 at 252 (3d DCA 1985). The application of assumption of risk to the facts in the case at bar cannot be reconciled with the comments of this Court in Hoffman regarding contributory negligence:

> Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidential loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss.
>
> * * * * *
>
> The injustice which occurs when a Plaintiff suffers severe injuries as the result of an accident for which he is only slightly responsible, and is thereby denied any damages, is readily apparent. The rule of contributory negligence is a harsh one which either places the burden of a loss for which two are responsible upon only one party or relegates to Lady Luck the determination of the damages for which each of two negligent parties will be liable.

Id. at 437. Fortunately, nothing in the opinions of this Court since Hoffman requires such a result. The opinion of the Court below seeks to expand assumption of risk beyond any parameters this Court has drawn since Hoffman.

The Third District's reluctance to abandon assumption of risk is not new. The Court split with the First, Second and Fourth Districts and held that the doctrine was still viable in Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977). On review, this Court, noting that "assumption of risk is not a favored defense", rejected the Third District's view, all but eliminating assumption of risk as a defense in Florida. In a thorough analysis of the confusing and overlapping theories and sub-theories of assumption of risk which had developed over the years, this Court rejected all concepts of implied assumption of risk. In so doing, the Court presented two hypothetical fact patterns of particular significance to the case at bar:

> Application of pure or strict assumption of risk is exemplified by the hypothetical situation in which a landlord has negligently permitted his tenant's premises to become highly flammable and a fire ensues. The tenant returns from work to find the premises a blazing inferno with his infant child trapped within. He rushes in to retrieve the child and is injured in so doing. Under the pure doctrine of assumption of risk, the tenant is barred from recovery **because it can be said he voluntarily exposed himself to a known risk.** Under this view of assumption of risk, the tenant is precluded from recovery notwithstanding the fact that his conduct could be said to be entirely reasonable under the circumstances. [citations omitted] There is little to commend this doctrine of implied-pure or strict assumption of risk, and our research discloses no Florida case in which it has been applied. Certainly, in light of Hoffman v. Jones, supra, there is no reason supported by law or justice in this state to give credence to such a principle of law.
>
> There remains, then, for analysis only the principle of implied-qualified assumption of risk, and it can be demonstrated in the hypothetical recited above with the minor alteration that the tenant rushes into the blazing premises to retrieve his favorite fedora. Such conduct on the tenant's part clearly would be unreasonable. Consequently, his conduct can just as readily be characterized as contributory negligence. It is the failure to exercise the care of a reasonably prudent man under similar circumstances.
>
> * * * * *
>
> If the only significant form of assumption of risk (implied-qualified) is so readily characterized, conceptualized, and verbalized as contributory negligence, can there be any sound rationale for retaining it as a separate affirmative defense to negligent conduct which bars recovery altogether? In the absence of any historical imperative, the answer must be no. We are persuaded that there is no historical significance to the doctrine of implied-secondary assumption of risk.

Id. at 291, 292. (emphasis supplied)

The facts of the case at bar are indistinguishable from the facts in the two hypothetical situations posed in Blackburn. It is significant that the Court chose to illustrate the hypotheticals with premises liability situations. In the hypotheticals, the negligence was permitting the tenant's premises to become flammable. In the case at bar the negligence was the improper placement of the exit gap in the fence. The Third District based its decision solely upon the fact that Ashcroft had knowledge of the

location of the gap. This is precisely the situation in the two hypotheticals in Blackburn which this Court emphatically rejected. While Ashcroft's participation in the race may not rise to the level of saving a child, it does not fall to the level of saving a fedora. In any case, this Court rejected assumption of risk in either situation. Ashcroft's decision to race falls somewhere in between the fedora and the child. He was not racing for amusement, but to make a living. This too was addressed in Blackburn. In the course of emphasizing the lack of historical justification for assumption of risk, the Blackburn opinion discussed the doctrine within the context of the employment situation:

> The opinion of the United States Supreme Court in Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943), demonstrates that the doctrine has not only been indiscriminately misapplied historically but also represents a morally unacceptable social policy which was calculated to advance the industrial revolution regardless of the cost of human suffering. Mr. Justice Frankfurter, concurring, put it aptly when he stated:
>
> * * * * *
>
> [I]n the setting of one set of circumstances, "assumption of risk" has been used as a shorthand way of saying that although an employer may have violated the duty of care which he owed his employee, he could nevertheless escape liability for damages resulting from his negligence if the employee by accepting or continuing in the employment **with "notice" of such negligence**,"assumed the risk". In such situations "assumption of risk" is a defense which enables a negligent employer to defeat recovery against him.

Blackburn v. Dorta, supra at 292. [emphasis supplied] The facts of the case at bar fit squarely within the quoted description. Calder was found by the jury to have violated its duty of care which it owed to Ashcroft. Nevertheless, the Third District held that Ashcroft was barred from any recovery simply because he had knowledge of location of the gap.

In Blackburn, this Court reserved judgment as to express assumption of risk, including "situations in which actual consent exists such as where one voluntarily

participates in a contact sport." Id. at 290. In Kuehner v. Green, 436 So.2d 78 (Fla. 1983), the Court returned to the question of express assumption of risk and held that it was available as a bar in those cases involving contact sports. It is significant that both Blackburn and Kuehner included contact sports within the category of "express" assumption, rather than "implied" assumption even in the absence of an actual contractual agreement. Contact sports are unique in our society. They represent the only class of conduct (other than medical necessity) in which the law permits us to consent to violent bodily contact. The risks inherent in such contact are so patent that it is reasonable to say that voluntary participation in contact sports is tantamount to an express assumption of those risks.[2] In a non-contact sport, simple participation is not sufficient to rise to the level of voluntary consent. If it were, the court would simply be changing labels from what was considered "implied" assumption before Hoffman. Even in the case of contact sports, the risk assumed is not unlimited. This Court stated in Kuehner:

> From the outset we find that a participant in a contact sport does not automatically assume all risks except those resulting from deliberate attempt to injure. Express assumption of risk, as it applies in the context of contact sports, rests upon the plaintiff's voluntary consent to take certain chances. [citation omitted] This principle may be better expressed in terms of waiver. When a participant volunteers to take certain chances, he waives his right to be free from those bodily contacts **inherent in the chances taken.** Our judicial system must protect those who rely on such a waiver and engage in otherwise prohibited bodily contacts.

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[2] Any concept of express assumption of risk would be particularly inapplicable in the case at bar considering the fact that the jockeys and their representatives, on several occasions prior to Ashcroft's accident, had objected to the location of the gap and demanded that it be changed. [T. 79-86, 95-96, 281, 405-419, 461-487, 516-519] Even in a contact sport it would be unreasonable to hold that a person has expressly assumed a risk which he has, in fact, expressly refused to assume. Under the facts of the case at bar it could certainly not be said that the jockeys "voluntarily consented" to the location of the exit gap which they consistently objected to.

Id. at 80. [emphasis supplied] Thus, not only did this Court in Kuehner limit the application of assumption of risk to **contact** sports, but limited it as well to those risks which are **inherent** in the chances taken. Any interpretation of Kuehner which did not include a requirement of inherence would have clearly unintended results. A participant in a boxing match clearly assumes those risks which are inherent risks of the sport of boxing. On the other hand, Kuehner surely did not intend to bar recovery for a boxer who is injured when the ring collapses due to defective construction.

The Third District entirely disregarded the limitations placed upon assumption of risk by both Kuehner and Blackburn. First, the Court refused to limit the doctrine to contact sports despite the fact that this Court has never extended it to non-contact sports:

> Ashcroft argues that the court's language in Blackburn limits the defense of express assumption of risk to contractual agreements or contact sports. That view, in our judgment, is too narrow. The Blackburn court clearly contemplated other professional sporting activities when it used the term "such as" when defining those cases in which actual consent exists and the express-assumption-of-risk defense is available.

Ashcroft v. Calder Race Course, Inc., supra at 1251.

Second, the lower court ignored the fact that the case at bar did not involve an inherent risk of horse racing but, rather, a created hazard that does not exist at other major racetracks. The same issue was addressed in a strickingly similar factual situation in the New York case of Cole v. New York Racing Commission, 24 A.D.2d 933, 266 N.Y.S. 2d 267 (N.Y.S. Ct., App. Div. 1965). In that case, a jockey was thrown from his horse after it collided with an in-field track rail and was fatally injured when his head struck a raised concrete footing below the rail. The jockey alleged that the track was negligent in erecting and maintaining the concrete footings. The appellate court rejected the defense of assumption of risk stating:

> Appellant's claim that the decedent's assumption of 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 the danger was "ordinary and necessary" to the sport and thus inherent in the activity itself [citation omitted] or that decedent was or should have been conscious of the **danger** of the defect [citations omitted]. [Emphasis by the court]

As in the New York case, a reading of the lower court opinion discloses that it was not based upon a danger inherent in the sport of horseracing. Rather it was based upon a single factor; that the plaintiff had knowledge of the created danger. Racing with knowledge of a hazardous exit gap is materially no different than entering a house to retreive a child or fedora with knowledge of a blazing fire. The lower court has simply taken what was rejected by this Court in Blackburn as "implied" assumption of risk and resurrected it under the label of "express" assumption of risk. If that opinion is permitted to stand, then assumption of risk would logically apply in any case in which a plaintiff engages in an activity with notice of a danger, whether or not assumption as thus applied is, in this Court's words in Blackburn, "readily characterized, conceptualized and verbalized as contributory negligence." Id. at 291. This is precisely what was rejected in Blackburn when it concluded that this form of assumption of risk was, logically, merged with comparative negligence. If allowed to stand, the District Court opinion will thrust us right back where we were before this Court's careful analysis in Blackburn and Kuehner.

The application of express assumption of risk by this Court in Kuehner, was not only limited to contact sports, but was limited as well to **the participants** in such sports:

> This principle may be better expressed in terms of waiver. When a **participant** volunteers to take certain chances, he waives his right to be free from those bodily contacts inherent in the chances taken. Our judicial system must protect **those who rely on such waiver and engage in otherwise prohibited bodily contacts.**

Kuehner v. Green, supra at 80. [emphasis supplied] Calder does not fall into the category of those intended to be protected since it was not a participant in any sport, much less a contact sport. Calder was simply the owner or occupier of the premises on

which the accident occurred. The Kuehner case, besides involving a contact sport, was also distinguishable because it extended express assumption of risk to a **participant** in a karate match. In this respect, it would have been analogous if the action had been brought against the owner of the premises in which the karate match was taking place alleging that the owner had permitted a dangerous obstruction to remain on the floor causing the plaintiff to fall and injure himself. Under the circumstances of this case, the appropriate law applicable to Calder is the traditional duty of the owner or occupier of the premises to maintain it in a reasonably safe condition and protect invitees from hazards known to the owner or occupier. Post v. Lunney, 261 So.2d 146 (Fla. 1972). The lower court opinion was actually nothing more than an application of the old "open and obvious hazard" or "patent danger" doctrine which, prior to Hoffman v. Jones, supra, would have barred recovery. Since Hoffman, every District Court of Appeal **including the Third District** has recognized that the doctrine is no longer applicable in a premises liability situation. Taylor v. Tolbert Enterprises, Inc., 439 So.2d 991 (Fla. 1st DCA 1983); Zambito v. Southland Recreation Enterprises, Inc., 383 So.2d 989 (2nd DCA 1980); Metropolitian Dade County v. Yelvington, 392 So.2d 911 (Fla. 3rd DCA 1980); Pittman v. Volusia County, 380 So.2d 1192 (Fla. 5th DCA 1980). While this Court has not addressed the issue in the context of a premises liability case, it has rejected the doctrine in product liability cases. In doing so, the Court stated:

> The patent danger doctrine protects manufacturers who negligently design machines which pose formidable dangers to their users. It puts the entire accidential loss on the injured plaintiff, notwithstanding the fact that the manufacturer was partly at fault. This is inconsistent with the general philosophy espoused by this Court in Hoffman v. Jones, 287 So.2d 431 (Fla. 1973).

Auburn Mach. Works Co., Inc. v. Jones, 366 So.2d 1167 at 1171 (Fla. 1979). The Court's comments apply equally to a premises liability case and there is no rational basis for applying the patent danger doctrine in one case and not the other. In fact, the First, Second and, again, even the Third District have each cited the Auburn case as authority

for the elimination of the open and obvious or patent danger doctrine in premises liability cases. Taylor v. Tolbert Enterprises, Inc., supra; Zambito v. Southland Recreation Enterprises, supra; Metropolitian Dade County v. Yelvington, supra.[3]

In Pittman v. Volusia County, supra at 1193, 1194, the plaintiff brought suit against the owner of property as a result of injuries suffered in a slip and fall. The evidence indicated that the plaintiff had actual knowledge of the danger while the owner had only constructive knowledge. In reversing a directed verdict for the defendant, the Court stated:

> The Defendant, at the conclusion of the Plaintiff's case convinced the trial court that it was entitled to a directed verdict on the basis of the obvious danger principle * * * that a duty to warn does not arise if the invitee has knowledge of the danger equal or superior to that of the occupier. * * * The fallacy is in the premise that the discharge of the occupier's duty to warn by the plaintiff's actual knowledge necessarily discharges the duty to maintain the premises in a reasonably safe condition by correcting dangers of which the occupier has actual or constructive knowledge. To extend the obvious danger doctrine to bar a plaintiff from recovery by negating a land owner's or occupier's duty to invitees to maintain his premises in a reasonably safe condition would be inconsistent with the philosophy of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), that liability should be apportioned according to fault.

In Hylazewski v. Wet 'n Wild, Inc., 432 So.2d 1371 at 1373 (5th DCA 1983), the Court reached the same conclusion in a sports setting. The plaintiff was a swimmer in a swimming pool owned by the defendant. The Court, citing Pittman, stated:

> Knowledge of the condition by the invitee such as obviates the necessity of warning does not discharge the owner's duty to keep the premises in a reasonably safe condition by correcting dangers of which the owner has actual or constructive knowledge.

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[3] The Restatement of Torts (Second), Section 343A, also rejects the doctrine of obvious hazard as a bar to recovery in a premises liability case.

The overwhelming consensus of the District Courts on the issue is not surprising. The rejection of the obvious danger doctrine as a complete bar is entirely sensible in light of Hoffman v. Jones. There is nothing in the factual situation in the case at bar which would remove it from the context of the those cases or the logic of those opinions. If the District Court's opinion were to become the law of this state, it would bring about the same unjust and inequitable results that compelled the adoption of comparative negligence by this Court and would undoubtedly lead to the development of the same type of ameliorating legal fictions condemned in Hoffman.

POINT II

THE TRIAL COURT ERRED WHEN IT ACTED AS A "SEVENTH JUROR" AND ORDERED A NEW TRIAL AS AN ALTERNATIVE TO A REMITTITUR IN THE ABSENCE OF ANY INDICATION THAT THE JURY WAS UNDER THE INFLUENCE OF PASSION, PREJUDICE, OR GROSS MISTAKE.[4]

The power of a trial court to order a new trial as an alternative to a remittitur strikes at the very heart of the constitutional right to trial by jury. This Court, cognizant of the implications of the remittitur power on the right to trial by jury, has often cautioned trial judges as to the limited range of discretion with regard to the size of a verdict. See Higbee v. Dorigo, 66 So.2d 684 (Fla. 1953); Sproule v. Nelson, 81 So.2d 478 (Fla. 1955); Merwin v. Kellems, 78 So.2d 865 (Fla. 1955); Laskey v. Smith, 239 So.2d 13 (Fla. 1970); Lassitter v. Intern Union of Op. Engn., 349 So.2d 622 (Fla. 1977); Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978).

The criteria for the exercise of the power to order a remittitur was announced by this Court in Laskey v. Smith, supra at 14, when it stated:

> The record must affirmatively show the impropriety of the verdict or there must be an independent determination by the trial judge that the jury was influenced by considerations outside the record.
>
> The trial judge does not sit as a seventh juror with veto power. His setting aside a verdict must be supported by the record ... or by findings reasonably amenable to judicial review. Not every verdict which raises a judicial eyebrow should shock the judicial conscience.

In Wackenhut Corp. v. Canty, supra. at 436, 437, the Court reaffirmed its earlier announcement:

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[4] The Trial Court erroneously ordered a new trial as to liability as well as damages. The jury properly decided all factual issues of liability. Even if the remittitur had been proper, the only issue for new trial was damages. Gould v. Nat. Bank of Fla., 421 So.2d 798 (3d DCA 1982).

> Accordingly, we reaffirm the Cloud rule as this Court has applied it in Laskey to orders for new trial which are entered as alternatives to remittiturs. Before such an alternative order may be entered, either the record must affirmatively show the impropriety of the verdict or there must be an independent determination that the jury was influenced by considerations outside the record. The trial judge in this case acted as a seventh juror with veto power. The province of the jury ought not to be invaded by a judge because he raises a judicial eyebrow at its verdict.

There is no evidence in the record of the case at bar, and no indication of the existence of evidence outside the record, to suggest that the jury verdict was influenced by passion, prejudice, or gross mistake. The order of the Trial Court requiring a remittitur or, in the alternative, a new trial, makes no findings and cites no evidence regarding passion, prejudice, or gross mistake:

> The Court finds that the damages awarded by the jury are excessive in the amount of $5,000,000.00. The Court finds that the motion for remittitur filed by the Defendant, "Calder Race Course, Inc.", should be granted and is granted, for the reasons expressed by this Court at the hearing on October 18, 1982, said reasons including:
>
> a. The Court's consideration of the evidence presented concerning David Ashcroft's future maintenance and medical expenses and the evidence presented concerning David Ashcroft's loss of future earning capacity in light of the verdict returned by the jury in an amount of $10,000,000.00;
>
> b. The Court's consideration of the evidence concerning Calder Race Track's degree of negligence and David Ashcroft's negligence;
>
> c. This Court's consideration of the final argument presented by counsel for the Plaintiff to the effect that Plaintiff's counsel sought adequate compensation for David Ashcroft;
>
> d. This Court's consideration of the fact that $5,000,000.00 would be adequate compensation under the evidence presented and that an amount of $10,000,000.00 is excessive for the reasons advanced by this Court at the hearing on October 18, 1982.

[R. 740-74I] The judge's comments at the hearing on October 18, referred to in his order, also failed to make any of the findings required by Laskey and Wakenhut. To the contrary, his comments clearly indicate that he simply disagreed with the jury and was exercising the "veto power" prohibited in Wackenhut:

> THE COURT: Actually I have taken all of that into consideration, and I take into consideration that Mr. Highsmith's conclusionary argument to the jury was to the effect that he wanted Mr. David Ashcroft to be adequately compensated.
>
> What I am going to do--and 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.
>
> I also have to consider the defendant, Calder Race Track, as well, and when I consider their degree of negligence and Mr. Ashcroft's negligence, I am of the opinion that I think that an adequate compensatory award would probably be, and I am going to designate the figure of, five million dollars.
>
> I also look at the fact that if he does receive this award, that this sum certainly would adequately compensate him, knowing that his attorneys will probably get 40 percent of that particular figure.
>
> If he wisely invests the remainder of his net, I think that would probably adequately compensate him for the rest of his life.
>
> Therefore, I am going to reduce the figure to $5,000,000.

It is clear from the order that the lower Court simply considered the evidence and substituted its judgement for that of the jury. In essence, the Court sat as a "seventh juror".

In Lassitter v. Inter. Union of Op. Engin., supra at 627, this Court stated the test to be applied by a trial court in determining whether a verdict is excessive:

> This test should be applied in deciding whether a remittitur should be required as a condition for denying a motion for new trial. A court is never free to reduce a verdict, by remittitur, to that amount which the court itself considers the jury should have allowed. **It can only be reduced to the highest amount which the jury could properly have awarded.**

[emphasis supplied] Accord: Anderson v. Sears, Roebuck & Co., 377 F. Supp. 136 (E.D. La. 1974). Hence, the verdict cannot be reduced by remittitur if it is within the highest range supported by substantial, competent evidence in the record. Review of the evidence in the case at bar indicates that the verdict was within an acceptable range supported by substantial, competent, **undisputed** evidence.

Ashcroft presented the testimony of the neurological surgeon who performed his initial surgery [T. 429], the medical director of Craig Hospital in Denver where Ashcroft was hospitalized for two months, a specialist in spinal cord injury [T. 559], the registered nurse who cared for Ashcroft twenty-four hours a day during his first hospitalization [T. 585-586], a specialist in rehabilitation medicine and spinal cord injury care who examined Ashcroft prior to trial [T. 615, 619], and a rehabilitation and vocational consultant. [T. 647] The undisputed testimony of these witnesses established that, with optimum medical care, Ashcroft could be expected to live a normal lifespan[5] and that the cost of his medical care, hospitalization, medical and rehabilitation supplies and equipment, and special attendants necessitated by his disabilities, could reasonably be expected to total $3,375,987 during his lifetime.[6]

At the time of the accident Ashcroft was twenty years old. [T. 764] During his brief racing career he showed extraordinary promise. His first win came within a month of his first race and he won a total of about 275 races before his accident, winning as many as four in one day. [T. 768-770] He received awards as leading apprentice at Hialeah, Gulfstream and Monmoth Park and both leading apprentice and leading rider at Meadowlands. [T. 706, 772] In 1980, he was the second leading apprentice in the United States and second in the amount of money won, having won purses totaling $1,964,958. Ashcroft had gross earnings for the year 1980, the only full year prior to his accident, in the amount of $170,000 and net profit from jockey earnings that year in the amount of $99,000. [T. 681] Evidence indicated that a jockey could continue to be a leading rider and a leading purse winner into his 40's. [T. 960] The evidence would easily have

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[5] According to the motality table, Ashcroft had a life expectancy as of the date of trial of 54.23 years. [T. 806]

[6] An itemized breakdown of costs with citations to the record is attached as Appendix I.

supported a jury determination that Ashcroft could be expected to have had net earnings over his racing career in an amount over $2,500,000 in the absence of his catastrophic injury. Thus, the evidence in the record supports total damages including the cost of medical care, hospitalization, medical and rehabilitative supplies and lost future earnings in an amount in the $6 million range. In addition to this, however, the jury was entitled to consider the likelihood of significant additional expenses for extraordinary medical care likely to occur as a result of his disabled condition and compensation for pain, suffering and loss of capacity for the enjoyment of life.

Quadriplegics are more susceptible than other persons to contracting certain types of diseases including bronchitis, bronchial pneumonia, bladder and kidney infections, bladder and kidney stones, high blood pressure and cubitous ulcers or pressure sores. The average cost alone for the treatment of a large cubitous ulcer, which requires hospitalization, is $17,500 for each such ulcer. [T. 640-642]

As astronomical as the costs of medical and rehabilitative care for a quadriplegic may be (in this case over $3 million), they pale in comparison to the pain, suffering and loss of capacity for the enjoyment of life suffered by the victim. Whatever meaning those terms may have in the context of other injuries, it surely cannot be disputed that in the case of permanent, total paralysis they refer to the most extreme limits of human suffering. The differences in the degree of suffering to be measured and compensated in such cases lies not in the disability itself, but in the comparative age, income and lifestyle of the victim prior to the injury. Ashcroft would be at the top of the list in terms of the quantum of suffering. Prior to the accident Ashcroft was a muscular, broad shouldered, athletic young man who took joy in outdoor, athletic activities such as hunting and fishing. [T. 587, 705, 753-758] He was totally committed to horse racing as a career and at times would work seven days a week from daylight until after dark with his training. [T. 705, 753] The accident has left him permanently paralyzed from the neck down. He cannot feel his hands, wrists or body and has virtually no control over his

bodily functions. He must have a permanent catheter to his bladder and has no bowel control without manual manipulation by another person. His body is incapable of sweating, and consequently he cannot be left outdoors or in rooms without a narrow range of temperature for more than a short time. He must be attended twenty-four hours a day. [T. 429-644, 789-790] His body has become thin and drooped and his hands have become frozen into deformed hooks. [T. 588] All this he must endure for the rest of his life with an acute recollection of what life was like before his tragically avoidable accident.

While the comparison of jury awards with awards in other cases should not be controlling,[7] such a comparison may be instructive in appropriate instances. In City of Tamarac v. Garchar 398 So.2d 889 (Fla. 4th DCA 1981), the Court upheld a personal injury verdict in the amount of $6 million for a plaintiff suffering essentially the same injury as Ashcroft. The Plaintiff, however, was a 24 year old salesman with an annual salary of only about $25,000 per year. The Court's description of the injury is an exact description of the condition of Ashcroft as established in the trial record:

> It is impossible to describe the totality of the devastation to plaintiff by his injuries. After some eight months in the hospital and surgical procedures and endless hours of physical and occupational therapy, he has been left a permanent C5-6 quadriplegic. He is unable to walk or even sit upright and has only the most limited use of his upper extremities. He has no bowel or bladder control and is sexually impotent. He cannot even perspire below the neck. He is on continual medication

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[7] See Rodriguez v. McDonnell Corp., 151 Cal. Rptr. 399 at 414 (2nd DCA 1979), in which the court stated:

> The fact that an award may set a precedent by its size does not in and of itself render it suspect. The determination of an injury can only be assessed by examination of the particular circumstances involved.... The determination of damages is primarily a factual matter on which the inevitable wide differences of opinion do not call for the intervention of appellate courts.

> and prophylactic care is necessary to guard against respiratory and urinary tract infection and breakdown of skin tissue. He is unable to provide himself with the most elementary of daily care, such as bathing, shaving and other grooming, and cannot be left alone for any extended period of time. The future will be the same.
>
> * * * * *
>
> There were either introduced into evidence or described by various therapists and physicians who testified in this case a depressing array of mechanical paraphernalia that the plaintiff must utilize in some grotesque approach at daily living, ranging from mechanical and pneumatic hand splints to catheters and diapers.

Id at 897.

The verdict in the case at bar was undoubtedly large, but the injuries were larger still. As this Court stated in Laskey v. Smith, supra at 14, "not every verdict which raises a judicial eyebrow should shock the judicial conscience." It cannot reasonably be said that the verdict in this case should shock the judicial conscience sufficient to invade the province of the jury, when full consideration is given to the extraordinarily promising future that was so prematurely cut short, the astronomical cost of subsistence, and the catastrophic impact upon Ashcroft's ability to enjoy even the simplest things in life.

CONCLUSION

The Court is respectfully urged to reverse the decision of the District Court of Appeal and remand with instructions for entry of a judgment in accordance with the verdict of the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been served by U.S. Mail upon James C. Blecke, Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida 33130 on this 7th day of October, 1985.

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