IN THE SUPREME COURT OF FLORIDA

Case No. 66,934

DAVID CARL ASHCROFT, :

Petitioner, :

vs. :

CALDER RACE COURSE, INC., :

Respondent. :

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF CALDER RACE COURSE, INC., RESPONDENT

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INTRODUCTION

This jurisdictional brief is filed on behalf of Calder Race Course, Inc. ("Calder"), the defendant in the trial court, the appellee/cross appellant in the district court of appeal, and the respondent in this Court. The petitioner is David Carl Ashcroft ("Ashcroft"), the plaintiff in the trial court. The opinion of the District Court of Appeal, Third District, is reproduced in the petitioner's appendix ("A") and is now reported at 464 So.2d 1250.

STATEMENT OF THE CASE AND FACTS

For purposes of determining this Court's jurisdiction, it is appropriate to look to the body of the decision on which review is sought for a statement of the case and facts. E.g. Nielsen v. City of Sarasota, 117 So.2d 731, 732 (Fla. 1960). 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...." (A. 1).

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 (A. 1). 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) (A. 1). 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." (A. 1).

Although it is of no jurisdictional significance, the majority opinion is inaccurate when it states that Ashcroft's horse left the race course through the "exit gap." 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'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 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. 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. An estimated two hundred similar incidents occur every year at the same relative location on tracks throughout the country. Being thrown from a horse is a risk inherent in thoroughbred horse racing. The record fully supports the jury verdict and the entry of judgment for Calder.

SUMMARY OF ARGUMENT

Ashcroft skirts the jurisdictional issue. He does not contend that the district court has pronounced a rule of law which conflicts with a rule previously announced. Nor does he contend that the district court has applied a rule of law to produce a different result in this case from that of a prior case which involved substantially the same controlling facts. Instead, he merely reargues the applicability of decisional law to the particular facts of this case. The application of the law to the facts of a given case is the province of the district court of appeal.

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.

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. There is no express or direct conflict upon which further review by this Court is justified.

JURISDICTIONAL ARGUMENT

It is the intendment of Article V of the Florida Constitution that the district courts of appeal are the courts of final appellate jurisdiction. They are not way stations between the trial court and this Court. E.g. Ansin v. Thurston, 101 So.2d 808 (Fla. 1958). 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. [A. 1].

Further review would be redundant and constitutionally unwarranted.

Discretionary review must be predicated upon an express and direct conflict with a decision of this Court or of another district court of appeal. Proper invocation of this Court's discretionary jurisdiction only occurs in two situations. There must either be (1) a pronouncement of a rule of law which conflicts with a rule previously announced, or (2) a rule of law applied to produce a different result in a case which involves substantially the same controlling facts as a prior case. Mancini v. State, 312 So.2d 732, 733 (Fla. 1975); Nielsen v. City of Sarasota, supra, at 734.

Under the first situation the facts are immaterial. It is the announcement of a conflicting rule of law that provokes jurisdiction. That is clearly not the case here, because no conflicting rule of law has been announced. Under the second situation, the controlling facts become critical. Jurisdiction exists only when the district court has applied a recognized rule of law to reach the opposite result of that reached in a previous case involving substantially the same controlling facts. It is equally clear that this second criteria has not been met. No other court has considered the defense of express assumption of risk within the context of professional horse racing.

It is evident that Ashcroft merely seeks to reargue before this Court the weight and sufficiency of the evidence in this case, to determine the applicability of undisputed principles of law. Jurisdiction does not, however, obtain for this purpose. Florida Power & Light Co. v. Bell, 113 So.2d 697, 698 (Fla. 1959). When the cases turn upon different facts, conflict jurisdiction is lacking. Wilson v. Southern Bell Telephone and Telegraph Co., 327 So.2d 220 (Fla. 1976); Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

RESPONSE TO PETITIONER'S POINT I

THE DECISION OF THE THIRD DISTRICT DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH BLACKBURN v. DORTA, 348 So.2d 287 (Fla. 1977) OR KUEHNER v. GREEN, 436 So.2d 78 (Fla. 1983) BUT IS ENTIRELY CONSISTENT WITH THEIR TENETS.

Ashcroft first contends that his case is indistinguishable from that of a person who rushes into a burning building to save a child. He next contends that his situation is precisely the same as the individual who runs into a burning building to retrieve a hat. He then concludes 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. A professional jockey rides for money. His skill and daring is rewarded with a share of the purse. 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, the owners for whom he will race, the horses upon which he will race, and the length of the races to be entered. The historical master/servant assumption of risk perspective is inapposite. Ashcroft did not work for Calder.

If a search were made for the case with the closest factual similarity to this case, Kuehner v. Green would be a likely selection. Kuehner was injured at the home of Green while engaging in the sport of karate upon a cement floor. Kuehner voluntarily assumed the risks inherent in the sport of karate performed upon the unprotected concrete premises of the defendant Green. The trial court, the district court of appeal, and this Court all agreed that the jury returned a defense verdict when it found that Kuehner had voluntarily assumed the risk complained of. Green was entitled to a judgment on the verdict as was Calder. Ashcroft voluntarily assumed the risks inherent in the sport of thoroughbred horse racing on a track of known configuration. Judgment properly follows the verdict.

RESPONSE TO PETITIONER'S POINT II

THE DECISION OF THE THIRD DISTRICT DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH PASSARO v. CITY OF SURNRISE, 415 So.2d 162 (Fla. 4th DCA 1982); PITMANN v. VOLUSIA COUNTY, 380 So.2d 1192 (Fla. 5th DCA 1980); OR HYLAZEWSKI v. WET 'N WILD, INC., 432 So.2d 1371 (Fla. 5th DCA 1983) BECAUSE THERE IS NO FACTUAL OR PROCEDURAL SIMILARITY WITH THESE CASES.

In Passaro v. City of Sunrise, the trial court entered summary judgment for the defendant landowner, finding (1) no duty owed by the defendant and (2) the plaintiff's negligence was the sole cause of the accident. The Fourth District reversed because there were genuine issues of material fact for jury resolution. The opinion makes no mention of the defense of express assumption of risk, its applicability to the facts of the case, or the effect of a jury's finding of express assumption of risk.

In Pitmann v. Volusia County, the trial court directed a verdict for the defendant landowner on an "obvious danger" theory. The Fifth District reversed, holding that the negligence of the defendant was a jury issue. The opinion makes no mention of the defense of express assumption of risk, its applicability to the facts of the case, or the effect of a jury's finding of express assumption of risk.

In Hylazewski v. Wet 'N Wild Inc., the trial court dismissed the plaintiff's complaint for failure to state a cause of action against the defendant landowner. The Fifth District reversed, finding that the plaintiff's complaint did state a cause of action upon the well-pleaded allegations. The opinion makes no mention of the defense of express assumption of risk, its applicability to the facts of the case, or the effect of a jury's finding of express assumption of risk.

None of the decisions cited for conflict involve horse racing or the assumable risks associated with this professional sport. All three decisions involve the threshold question of duty owed by a landowner to an invitee. Here, the scope of

Calder's duty to Ashcroft was an issue presented to the district court of appeal. Calder contended that it was entitled to a directed verdict because it had breached no duty to Ashcroft. The issue was never decided, however, and the opinion is silent on this point. The issue of Calder's duty and any breach thereof was rendered moot with the jury verdict. For notwithstanding any breach of duty owed, there was abundant evidence in this record to support the jury's conclusion that Ashcroft expressly assumed the risk. They reached their verdict on the Court approved Florida Standard Jury Instruction and rendered it upon the special interrogatory verdict form approved by this Court in Kuehner v. Green. There was no error in the verdict. Therefore, Calder was entitled to judgment on the verdict and the district court so held.

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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Calder Race Course, Inc., Respondent, was mailed to Barry Richard, Esq., Roberts, Baggett, LaFace & Richard, Counsel for Petitioner, Post Office Drawer 1838, Tallahassee, Florida 32302 this 20th day of May, 1985.

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