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THE SUPREME COURT
STATE OF FLORIDA

FILED
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APR 29 1985
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DAVID CARL ASHCROFT,

Petitioner/Plaintiff,

vs.

Case No. 66,934

CALDER RACE COURSE, INC.,

Respondent/Defendant.

ON PETITION FOR DISCRETIONARY REVIEW FROM THIRD DISTRICT

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE FACTS

The following are the facts relevant to the issue of conflict as reflected in the opinion of the Third District.

Petitioner, DAVID ASHCROFT, was a jockey who was racing at Defendant CALDER RACE COURSE, INC. when another rider's horse bolted through the exit gap at the seven furlong point in the midst of a race. Following the incident, a meeting took place between the jockeys and the Calder management at which the location of the seven furlong exit gap was discussed. Ashcroft asked whether the location would be changed and was advised that it would be moved at the end of the racing season. In a subsequent race before the seven furlong exit gap was moved, Ashcroft's horse veered across the race course and through the gap causing Ashcroft to fall to the ground where he was run over by another horse and rendered a quadriplegic.

The trial judge gave the express assumption of risk instruction provided in Florida Standard Instruction 3.8 and presented the jury with a special interrogatory verdict. The verdict included the following question, answered by the jury as indicated:

> Question #4 - Did David Ashcroft know the existence of the danger complained of, realize and appreciate the possibility of injury as a result of such danger; and having reasonable opportunity to avoid it, voluntarily and deliberately expose himself to the danger complained of?
>
> __X__ Yes
> _____ No

The jury found Calder negligent, Ashcroft not negligent, and assessed damages at $10,000,000.

The Third District held that express assumption of the risk applied to completely bar recovery and reversed.

ARGUMENT

POINT I

THE OPINION OF THE THIRD DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S OPINIONS IN BLACKBURN v. DORTA, 348 So.2d 287 (Fla. 1977) AND KUEHNER v. GREEN, 436 So.2d 78 (Fla. 1983).

Subsequent to this Court's adoption of comparative negligence in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), the Third District held that the doctrine of assumption of the risk was still viable as an absolute bar to recovery, thereby splitting with the First, Second and Fourth Districts. In Blackburn v. Dorta, supra, this Court rejected the Third District's view, all but eliminating the availability of assumption of the risk in Florida. In a thorough analysis of the confusing and overlapping theories and sub-theories of assumption of the risk which had developed over the years, this Court rejected all concepts of implied assumption of the 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 as recited in the lower court opinion are indistinguishable from the facts in the two hypothetical situations posed in Blackburn. The negligence alleged in the case at bar was the improper placement of the exit gap in the fence, a hazard which Calder had agreed to eliminate at the end of the racing season. The hazard was not inherent within the sport of horse racing and the lower court did not base its opinion upon inherent risk. Rather, it based it solely upon the fact that the risk was subjectively known to the Plaintiff. This is precisely the situation in the two hypotheticals in Blackburn which this Court emphatically rejected. In fact, 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 notice of such negligence:

> Ashcroft, an experienced jockey, admitted his familiarity with the particular horse, the track, and the location of the exit gap. * * * The location of the exist gap was open and obvious, well known to Ashcroft. It could hardly be characterized as a latent defect.

Ashcroft v. Calder Race Course, Inc., _____ So.2d _____ (Fla. 3d DCA 1985)[App. 1].

In Blackburn, the Court reserved judgment as to express assumption of the risk, including "situations in which actual consent exists such as where one voluntarily participates in a contact sport." Id. at 290. In the recent case of Kuehner v. Green, supra, this Court returned to the question of express assumption of the 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" assmption even in the absence of an actual contract. 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. Even this assumption, however, 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 attempts 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.

Id. at 80. [emphasis by court] Thus, not only did this Court in Kuehner limit the application of assumption of the risk to contact sports, but limited it as well to those risks which are inherent in the chances taken.

The Third District in the case at bar disregarded entirely the limitations placed upon assumption of risk by both Kuehner and Blackburn. First, the Court refused to limit the doctrine to contractual agreements and contact sports despite the fact that this Court has never extended it beyond those two circumstances:

> 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 [App. 1]. 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. A reading of the lower opinion discloses that it was based upon a single factor; that the plaintiff had knowledge of the 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. 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 thrusts us right back where we started from before this Court's careful analysis in Blackburn and Kuehner.

POINT II

THE OPINION OF THE THIRD DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH OPINIONS OF THE FOURTH AND FIFTH DISTRICTS IN PASSARO v. CITY OF SUNRISE, 415 So.2d 162 (Fla. 4th DCA 1982); PITTMAN v. VOLUSIA COUNTY, 380 So.2d 1192 (Fla. 5th DCA 1980) and HYLAZEWSKI v. WET 'N WILD, INC., 432 So.2d 1371 (Fla. 5th DCA 1983).

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. 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. Kuehner, which extended express assumption of the risk to a participant in a karate match, was not analogous. 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 essence of the lower court opinion is that knowledge by Ashcroft, the invitee, relieved Calder of its duty to Ashcroft to maintain the premises in a reasonably safe condition. To this extent, the opinion expressly and directly conflicts with the above-cited cases in the Fourth and Fifth Districts.

In Pittman v. Volusia County, 380 So.2d 1192 (Fla. 5th DCA 1980), 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 Fifth District 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.

Id. at 1193, 1194.

Hylazewski v. Wet 'n Wild, Inc., supra, reached the same conclusion in a sporting activity situation. The plaintiff was a swimmer in a swimming pool owned by the defendant. The Fifth District, 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.

Id. at 1373. Finally, the Fourth District reached the same conclusion in Passaro v. City of Sunrise, supra, in which the plaintiff's minor child was injured as a result of a hazard on a defective bleacher known to the plaintiff prior to the accident. The opinions in Pittman, Hylazewski and Passaro cannot be reconciled with the opinion of the Third District in the case at bar.

CONCLUSION

It is respectfully urged that this Court grant discretionary review of the decision of the Third District Court of Appeal.

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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, Esquire, of Blackwell, Walker, Gray, et al, 2400 AmeriFirst Building, One S.E. Third Avenue, Miami, Florida 33131 on this 26th day of April, 1985.

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