O/a 1-9-86

IN THE SUPREME COURT OF FLORIDA

DAVID CARL ASHCROFT,

Petitioner,

vs.

CALDER RACE COURSE, INC.

Respondent.
_____/

Case No. 66,934

REPLY BRIEF OF PETITIONER

On Discretionary Review from the Third District

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

FLORIDA CASES

OTHER CASES

MISCELLANEOUS

REPLY TO CALDER'S STATEMENT OF THE FACTS

Calder recites 12-1/2 pages of conflicting testimony which is contrary to the jury's findings, and consequently, irrelevant to this appeal. As a basis for this recitation, Calder states the undeniable proposition that the facts on appeal are to be considered in the light most favorable to the jury verdict, and follows this proposition with the erroneous conclusion that the jury returned a "defense verdict". The case was submitted to the jury on a special verdict form and the jury returned the verdict finding Calder 100% negligent and Ashcroft zero percent negligent. The only question for review regarding these findings is whether they are supported by substantial, competent evidence. Glass v. Parrish, 51 So.2d 717 (Fla. 1951). Calder does not even suggest that the jury's findings were unsupported by substantial, competent evidence and Ashcroft, in his initial brief, illustrated that there is overwhelming evidence in the record to support the jury's findings on negligence. Thus, the jury's findings relating to negligence are conclusive and Calder's recitation of conflicting testimony in the light most favorable to Calder is misplaced.

ASSUMPTION OF RISK

In his initial brief, Ashcroft argued that the Court of Appeal erred when it held that assumption of risk applied to completely bar recovery in the case at bar. Calder begins its analysis of this issue with two misstatements of elementary appellate law. First, Calder asserts that Ashcroft has not framed the issues "in a fair or even-handed manner" because, according to Calder, the issue now before the Court is "whether the decision of the District Court of Appeal is in express and direct conflict with the decisions of this Court."[1] This Court already determined the existence of conflict

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[1] Answer Brief of Respondent, p. 13.

when it accepted jurisdiction and ordered that briefs be filed on the merits. Once this Court assumes conflict jurisdiction, its jurisdiction to review the lower court opinion is unlimited. Marley v. Saunders, 249 So.2d 30 (Fla. 1971); Mark v. Hahn, 177 So.2d 5 (Fla. 1965).

Calder next asserts that Ashcroft failed to preserve his right to appeal the issues relating to assumption of risk because he didn't file various motions or object to evidence relating to the issue during the trial. Ashcroft did not object to the introduction of evidence relating to assumption of risk because the same evidence would be admissible on the issue of comparative negligence. Ashcroft did strenuously object to the giving of any instruction relating to assumption of risk or the inclusion of any question relating to assumption of risk on the special verdict form. [T. 1317-1328, 1339-1347, 1351, 1356, 1362-1363] No other motions were required in order for Ashcroft to preserve his right to raise issues relating to assumption of risk on appeal. The weakness of this entire line of reasoning is perhaps best illustrated by Calder's statement that, "In essence, Ashcroft is asking this Court for a judgment notwithstanding the verdict when no similar request was made or preserved below."[2] It is, of course, never necessary to make a motion for judgment notwithstanding the verdict in order to preserve a right of appeal. Fla. R. Civ. P. 1.470(c). Nevertheless, it is a mystery why Calder would suggest that Ashcroft should have moved for a judgment notwithstanding the verdict when the verdict was in his favor.

Calder also makes the statement that, "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."[3] There was no reason for Ashcroft to raise these

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[2] Answer Brief of Respondent, p. 10.

[3] Id.

issues in his initial brief to the District Court because the verdict and judgment were in his favor on the issues of liability. When Calder cross-appealed and filed a brief raising these issues, Ashcroft effectively responded to them in his reply brief in the District Court.

Ashcroft takes the position that this Court did not intend express assumption of risk to be applied as it was in the case at bar to a non-contact sport. Calder responds that there is nothing in this Court's opinion in Kuehner v. Green, 436 So.2d 78 (Fla. 1983), "to suggest or imply a limitation to contact sports."[4] The most obvious indicator of this Court's intent in Kuehner as well as Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977), is the Court's inclusion of the word "contact" in every reference to sports. More important is the Court's admonition in Kuehner, that the doctrine of assumption of risk, "can, if wrongly applied, result in the same inequities which this Court sought to avoid by abolishing contributory negligence in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973)." As noted in Ashcroft's initial brief, if assumption of risk were to be applied to non-contact sports, it would be nothing more than the resurrection of implied assumption of risk under a new label.

Ashcroft further noted that no concept of **express** assumption could be logically or fairly applied in a case such as this in which the Plaintiff specifically protested the risk involved. Calder understandably chooses to ignore this point. Even under traditional applications of assumption of risk recovery was not barred when an employee elected to proceed after protesting the danger and being assured by the employer that it would be corrected. Schumaker v. King, 141 So.2d 807 (Fla. 2d DCA 1962); Prescott v. Erwin, 133 So.2d 332 (Fla. 1961); Restatement of Torts 2d, §496 E,

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[4] Answer brief of Respondent, p. 24.

Comment a. Calder asserts that employment cases are not analogous to the case at bar because Ashcroft was not employed by Calder and was free to refuse to ride. Calder overlooks the fact that Florida law requires jockeys to faithfully fulfill all engagements in respect to racing and subjects them to fine or suspension for failure to do so. Florida Administrative Code, Title 7, Sections 7e-1.23 (8), 7e-1.09 (2), (5).[5] Thus, the pressures on Ashcroft were the same as on any employee faced with the choice of risking danger or loss of employment. In this regard, commentary to the Restatement of Torts is significant:

> The plaintiff's acceptance of the risk is not to be regarded as voluntary where the defendant's tortious conduct has forced upon him a choice of courses of conduct, which leaves him no reasonable alternative to taking his chances. A defendant who, by his own wrong, has compelled the plaintiff to choose between two evils cannot be permitted to say that the plaintiff is barred from recovery because he has made the choice. * * * It is true likewise where the plaintiff is compelled to accept the risk in order to exercise or protect a right or privilege, of which the defendant has no privilege to deprive him. The existence of an alternative course of conduct which would avert the harm, or protect the right or privilege, does not make the plaintiff's choice voluntary, if the alternative is one which he cannot reasonably be required to accept.

Restatement of Torts 2d, 496 E, Comment c.

Ashcroft also argued in his initial brief that in order for assumption of risk to apply, Kuehner requires that the risk be an inherent hazard of the particular sport. Calder asserts that, "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."[6] Calder's statement is an inaccurate characterization of the

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[5] See Martino v. Park Jefferson Racing Association, 315 N.W. 2d 309 (S.D. 1982) recognizing a similar regulation as bearing on the "voluntariness" of the jockeys' assumption of risk.

[6] Answer Brief of Respondent, p. 30.

inherency element required in assumption of risk even before Hoffman. Assumption of risk has never been held to include any injury "regardless of precipitating cause" simply because it is the type of injury that might ordinarily result from the activity. Thus, in Jesters v. Taylor, 105 So.2d 569 (Fla. 1958), this Court held that while a golf caddy who stands on a practice fairway assumes the ordinary risks of being struck by a golf ball, he does not assume the risk of being struck by a ball because of the negligence of another player. Similarly, in Watson v. Drew, 197 So.2d 53 (Fla. 4th DCA 1967), the Court held that an electrical lineman did not assume the risk of being injured when he was thrown to the ground from a utility pole after a cable attached to the pole was struck by an elevated load being carried by a truck. Falling from a utility pole might be a foreseeable risk of working as a lineman. However, as the court stated, "An injured party does not assume the risk of a new element of danger introduced into the scene by way of defendant's ensuing negligence." Id. at 55.

In his initial brief, Ashcroft cites Cole v. New York Racing Association, 24 A.D. 2nd 933, 266 N.Y.S.2d 267 (S. Ct. App. Div. 1965). In Cole, a case decided before the adoption of comparative negligence by New York, the Court held that assumption of risk did not bar recovery to the survivors of a jockey who was killed when his head struck an elevated concrete footing after being thrown from his horse. Calder attempts to distinguish the Cole case on the basis of the Court's comment that the decedent must have been "conscious of the danger of the defect" in order to have assumed the risk. It is true that consciousness of the danger as well as the condition was one of the missing elements of assumption of risk cited by the New York court. However, it was the second of two separate elements connected by the disjunctive pronoun "or". The first reason that the Court declined to apply assumption of risk was that there was a lack of evidence "tending to show that the danger was 'ordinary and necessary' to the sport and thus inherent in the activity itself." Id. at 270. The Third District attempted to distinguish the Cole case on a different basis. The Court in the opinion below stated, "the Cole

court held that a construction deviation from general custom observed in the building of race track courses for economic reasons established the track's negligence. No such evidence was adduced in the case below." Ashcroft v. Calder, 464 So.2d 1250, 1255 (Fla. 3d DCA 1985). In fact, five witnesses presented undisputed testimony that Calder was the only track in the country that placed the exit gap where it was, a location universally considered to be unsafe. [T. 167, 294, 410, 717, 1271]

The Third District overlooked the issue of inherency altogether and rested its decision instead upon the open and obvious nature of the hazard and Ashcroft's apparent knowledge of it.[7] Ashcroft pointed out that the case at bar did not even involve a defendant within the class intended to be protected by Kuehner. Rather, this is simply a premises liability case in which the Third District erroneously applied the traditional "open and obvious" or "patent danger" doctrine. Calder first responds by stating that the Kuehner case was itself a premises liability case in which the hazard was not inherent in the sport since it involved a karate participant who was injured because his head hit a concrete floor. Even the most careful reading of this Court's opinion in Kuehner fails to disclose a single reference to the concrete floor. While the Court of Appeal mentioned the concrete floor, Kuehner v. Green, 406 So.2d 1160 (Fla. 5th DCA 1981), the case was certainly not a premises liability case (there is not even a reference to the owner of the floor). The only conduct charged against the defendant in the Kuehner case as a proximate cause of the plaintiff's injury was a "leg sweep". Risk of injury by bodily contact from a leg sweep is certainly an inherent risk of karate.

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[7] Counsel for Calder makes the statement at page 12 of Calder's brief that this analysis of the Keuhner opinion by counsel for Ashcroft was "not a true statement", "was misleading and false" and "cannot be excused as fair comment." Counsel's statements are inappropriate and unprofessional. It is one thing to accuse opposing counsel of an incorrect analysis and quite another to accuse him of lying.

In his initial brief, Ashcroft pointed out that every District Court of Appeal including, ironically, the Third District, has recognized that the open and obvious hazard doctrine is not applicable in a premises liability situation in light of Hoffman. In rebuttal, Calder cites Rice v. Florida Power and Light Co., 363 So.2d 834 (Fla. 3d DCA 1978), cert. den. 373 So.2d 460 (Fla. 1979). In Rice, the Third District applied the open and obvious hazard doctrine in holding that the power company had no duty to the plaintiff who was electrocuted when he flew a model airplane into exposed wires. Two other districts have since distinguished Rice, holding that landowners were not absolved of their duty of care simply because the plaintiff had equal or greater knowledge of the hazard than the owner. Duff v. Florida Power and Light Co., 449 So.2d 843 (Fla. 4th DCA 1984); Fries v. Florida Power and Light Co., 402 So.2d 1229 (Fla. 5th DCA 1981). See also Cassel v. Price, 396 So.2d 258 (Fla. 1st DCA 1981). The three cited cases noted that one of the essential elements in the Rice opinion was that it was not foreseeable that a person would be injured by the hazard. Duff and Fries held that the owner or occupier of the premises continued to owe a duty of care because it was foreseeable that an invitee would be injured by the hazard despite equal or better knowledge of its existence. This was the traditional law of premises liability even before the adoption of comparative negligence. See Restatement of Torts 2d, §343 A; Ferguson v. Bretton, 375 A.2d 225 (Maine, 1977); Adee v. Evanson, 281 N.W. 2d 177 (Minn. 1979); Tichenor v. Lohaus, 212 Neb. 218, 322 N.W. 2d 629 (1982); McMillan v. Mountain Laurel Racing Inc., 367 A.2d 1106 (Pa. 1976). The Restatement of Torts lays out the generally accepted law on premises liability:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, **unless the possessor should anticipate the harm despite such knowledge or obviousness.**

Restatement of Torts 2d, 343 A(1). [Emphasis supplied] The commentary to the cited section is particularly applicable to the case at bar:

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases, the possessor is not relieved of duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.
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> Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position, the advantages of doing so would outweigh the apparent risk.

Restatement of Torts 2d, §343 A, Comment f. See Emmons v. Baptist Hospital, _____ So.2d _____, 10 F.L.W. 2499 (Fla. lst DCA November 8, 1985). The evidence in the record is undisputed that Calder knew that Ashcroft would race despite his apparent knowledge of the hazard created by the placement of the exit gap. As the Restatement and the cited cases establish, the law even before the adoption of comparative negligence would have imposed a duty of care upon Calder which would not have been alleviated by Ashcroft's knowledge of the danger.[8]

Most importantly, the application of the open and obvious hazard doctrine to totally bar recovery flies in the very face of the hypothetical examples given by this Court in Blackburn v. Dorta, supra, and as has been recognized by all five district courts, would be completely inconsistent with the concept of comparative negligence. Taylor v. Tolbert Enterprises, Inc., 439 So.2d 991 (Fla. lst DCA 1983); Zambito v. Southland Recreation Enterprises, Inc., 383 So.2d 989 (2nd DCA 1980); Metropolitan Dade County v.

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[8] This duty of care has been imposed upon racetracks not only by judicial recognition of the Restatement position, but by administrative rule as well. Racing associations are required, at all times, to "maintain their racetracks in good condition and with a special consideration for the comfort and safety of the public, of the horses stabled, exercised or entered to race thereat, and of all whose business requires their attendance thereat...." Fla. Admin. Code, §7e-1 (35).

Yelvington 392 So.2d 911 (Fla. 3rd DCA 1980); 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).

Calder cites a series of cases in Florida and other jurisdictions in which assumption of risk was applied to cases involving premises liability and non-contact sports. In so doing Calder appears oblivious to the very question before this Court; the extent to which assumption of risk was subsumed by comparative negligence. Every case cited from other jurisdictions was decided in a time and in a jurisdiction in which comparative negligence had not been recognized.[9] All but two of the Florida cases cited were decided before the adoption of comparative negligence in 1973. Calder does cite two Florida cases in the Third District which applied assumption of risk to non-contact sports subsequent to the adoption of comparative negligence, Gary v. Party Time, Inc. 434 So.2d 338 (Fla. 3d DCA 1983) and Blancher v. Metropolitan Dade County, 436 So.2d 1077 (Fla. 3d DCA 1983). The broadening of the application of assumption of risk by the Third District is consistent with its divided opinion in this case. It is the conflict between that position and decisions of this Court and other district courts which resulted in the acceptance of conflict jurisdiction by this Court.

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[9] See App. 1 for analysis of law in respective jurisdictions re following cases: Robillard v. P & R Racetracks, Inc., 405 So.2d 1203 (La. App. 1981) [Cause of action accrued March 7, 1977]; Morton v. California Sports Club, 163 Cal. App. 2d 685, 329 P.2d 967 (1958); Mayer v. Howard, 220 Neb. 328, 370 N.W. 2d 93 (1985); Hollamon v. Eagle Raceway, Inc. 187 Neb. 221, 188 N.W. 2d 710 (1971); McPherson v. Sunset Speedway, Inc. 594 F.2d 711 (8th Cir. 1979); Maltz v. Board of Education of N.Y., 32 Misc. 2d 492, 114 N.Y.S. 2d 856 (1952) affd 282 A.D. 888, 124, N.Y.S. 2d 911 (1953); Paine v. Young Men's Christian Ass'n, 91 N.H. 78, 13 A.2d 820 (1940); Heldman v. Uniroyal, Inc., 53 Ohio App. 2d 21, 371 N.E. 2d 557 (1977); Santiago v. Clark, 444 F.Supp. 1077 (N.D. W. Va. 1978).

REMITTITUR OR NEW TRIAL

Calder incorrectly characterizes Ashcroft's position on the remittitur as being that "the jury verdict is inviolate regardless of its magnitude" in the case of catastrophic intangible loss. In fact, Ashcroft recognizes the undeniable right of the trial court to grant a remittitur or new trial under appropriate, limited circumstances. Calder's analysis, however, goes too far. It suggests that the trial judge's determination as to whether or not the verdict shocks the judicial conscience is completely subjective. If Calder's position is accepted, the trial judge's discretion is not simply broad, but total.

As noted in Ashcroft's initial brief, this Court has imposed objective standards on the trial court's judgment regarding the verdict. The Court stated:

> Although the verdict may be for considerably more or less than in the judgment of the court it ought to have been, still the court should decline to interfere, unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake.

Lassitter v. Intern. Union of Op. Engn., 349 So.2d 622, 627 (Fla. 1977). There is not even a suggestion in the trial court's discussion on the record or subsequent order of remittitur that the jury was influenced by passion, prejudice, or gross mistake. Ashcroft also pointed out in his initial brief that this Court imposed an even more objective standard on the trial court in its Lassiter opinion. The Court stated that:

> 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] Id. Accord: Bould v. Touchette, 349 So.2d 1181 (Fla. 1977). In the appendix to the initial brief, Ashcroft pointed out with detailed references to the record that the testimony considered in the light most favorable to the verdict would surely have sustained the $10,000,000 total. Calder does not discuss the testimony in the light most favorable to the verdict, as it must, but rather emphasizes the testimony which favors its position.

Calder also comments that Ashcroft's attorney did not reduce his requested damages to present money value. However, the Court did instruct the jury on reduction to present value [T. 1606] and, in any case, the failure of the attorney to reduce to present value was balanced by the fact that he did not add an interest factor to his calculations. See Bould v. Touchette, supra.

There is another compelling issue in this case which bears on the question of damages. Calder basically elected to opt out of the damages portion of the case. Of the five main witnesses presented to the jury by Ashcroft on the question of damages, Calder chose not to cross-examine four of them at all. [T. 429-443, 559-584, 586-599, 615-647] As to the fifth, Calder offered a brief cross examination which was only minimally related to the amount that the witness had testified to. Calder offered no rebuttal witnesses as to the amount of damages. [T. 671-677] In short, by choosing to offer the jury no defense on the question of damages and making its argument instead before the trial judge and appellate courts, Calder effectively seeks to shift the responsibility for assessing damages from the jury to the courts. Ashcroft carried his initial burden of presenting a prima facie case on damages and the burden then shifted to the Defendant. By electing not to even attempt to carry that burden, Calder placed itself at risk and should not now be permitted to appeal to the courts to overturn the jury's decision.

BARRY RICHARD

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 2ND day of December, 1985.

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