The Reemergence of Implied Assumption of Risk in Florida

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Abstract

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KEYWORDS: risk, reemergence, Florida
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I. Introduction

Florida plaintiffs injured by the negligence of others face a familiar obstacle in our court system in their pursuit of compensation for their injuries. Florida is experiencing the reemergence of the traditional defense of assumption of risk. This defense, if proved, can completely bar a plaintiff's recovery of damages.¹

In 1977, the Florida Supreme Court, in the landmark case of Blackburn v. Dorta,² sought to eliminate the confusion arising from judicial applications of the defense by merging the defense of implied assumption of risk³ into the defense of contributory negligence.⁴ Since the plaintiff's recovery could be reduced according to fault, although not completely prohibited, legal commentators believed that the elimination of this defense would benefit the treatment of a negligence action.⁶

1. Restatement (Second) of Torts § 496A (1956); See generally Comment, Assumption of Risk — Adoption of Comparative Negligence, 6 Fla. St. L. Rev. 211 (1978); James, Assumption of Risk, 61 Yale L.J. 141 (1952).
2. 348 So. 2d 287 (Fla. 1977).
3. Implied assumption of risk exists when the plaintiff's consent to assume a risk is implied from his conduct, rather than from an express agreement. For example, a person playing golf assumes all obvious and ordinary risks of the game even though he has not entered into an actual agreement to do so. Brady v. Kane, 111 So. 2d 472 (Fla. 3d Dist. Ct. App. 1959).
4. The defense of contributory negligence eliminates or reduces the defendant's liability because the plaintiff contributed to his own injury by failing to act reasonably. For example, a person who is injured by walking in a dangerously darkened area may be contributorily negligent because he failed to look out for his own safety. Brandt v. Van Zandt, 77 So. 2d 858 (Fla. 1954) (en banc).
6. Legal commentators have stated their dissatisfaction with the doctrine of assumption of risk:

   The expression, assumption of risk, is a very confusing one. In application it conceals many policy issues, and it is constantly being used to beg the real question. Accurate analysis in the law of negligence would probably
However, the Blackburn holding did not address the separate defense of express assumption of risk, which remains a total bar to the recovery of damages in negligence actions. Unfortunately, the Blackburn court's statement in dicta, concerning the disposition of express assumption of risk, has resulted in a plethora of interpretations which have led to an expansion of the doctrine beyond its traditional and historic meaning.

be advanced if the term were eradicated and the cases divided under the topic of consent, lack of duty, and contributory negligence. Then the true issues involved would be more clearly presented and the determinations, whether by judge or jury, could be more accurately and realistically rendered.


"Except for express assumption of risk, the term and concept, assumption of risk, should be abolished. It adds nothing to modern law except confusion." James, Assumption of Risk, 61 Yale L. J. 141, 169 (1952).

Upon close analysis, it becomes apparent that the defense traditionally known as 'implied assumption of risk' is in reality nothing more than a particular form of contributory negligence. Since in negligence cases, with the advent of comparative fault, it has become totally superfluous, it should be abolished by name in these cases. Its perpetuation can only lead to confusion and error.


In the decade . . . [since] . . . 1956 there came to be substantial judicial and scholarly support for the point of view . . . that the doctrine deserves no existence (except for express assumption of risk) and is simply a confusing way of stating no duty rules or, where there has been a breach of duty toward plaintiff, simply one kind of contributory negligence.


7. Blackburn, 348 So. 2d at 290. The defense of express assumption of risk is characterized by an actual agreement, made in advance, that the defendant will not be responsible for injuries to the plaintiff caused by specific risks. See generally McClain, Contractual Limitation of Liability for Negligence, 28 Harv. L. Rev. 550 (1915).

8. Blackburn, 348 So. 2d at 290.

9. As a general rule, the doctrine of assumption of risk pertains to controversies between masters and servants, though circumstances may arise between parties other than masters and servants when the doctrine may apply; but such defense is never available, unless it rests on contract, or . . . an act done so spontaneously by the party against whom the defense is invoked that he was volunteer, and any bad result of the act must be attributed to an exercise of his free volition, instead of to the conduct of his
The effect of this expansion can be devastating to injured plaintiffs. For example, a jockey was paralyzed as a result of an incident which occurred during a race. The jury decided that the cause of this injury was the negligence of the owners of the racetrack. They also found that the jockey was not at fault. The jury awarded the jockey ten million in damages. However, the Third District Court of Appeal held that the jockey should be denied recovery because the jury found that he had expressly assumed the risk of injury.

This note suggests that Florida court decisions since Blackburn have clouded the distinction between express and implied assumption of risk. Consequently, what the Blackburn court sought to eliminate from Florida tort law has now been revived by judicial opinions enlarging the conduct which can be labeled as express assumption of risk.

This avoidance of the Blackburn mandate can be seen by an examination of recent decisions which expand and redefine a plaintiff's express assumption of the risk of injury. This note will examine Florida decisions conflicting with Blackburn, as well as possible options available to the supreme court concerning the doctrine of assumption of risk.

II. The Doctrine of Assumption of Risk

A. History

The doctrine of assumption of risk emerged from the master-servant relationship in the late nineteenth century. This doctrine was adversarial.


11. Id. at 1252.


used in several distinct ways to excuse the master from liability when a servant was injured because of the master's negligence. The application of assumption of risk eased the development of the Industrial Revolution by reducing the cost of "human overhead." The added expense of compensating an employee for injuries which occurred at work was avoided. As a result, the cost of doing business was lowered.

The employer owed the employee the duty to act as a reasonable person in a comparable situation. For example, the master's duty to his servant was to provide a reasonably safe place to work. However, the master did not have a duty to protect his servants from risks which were inherent in the particular employment. In order to hold a master responsible for negligence the servant would have to demonstrate that his injuries did not result from these inherent risks. Consequently, either the master had not violated his obligation to the servant or he had no duty to protect the servant from the cause of his injury.

In addition, if the servant proved that the master was negligent, the master could employ the doctrine of assumption of risk as a defense. This aspect of the doctrine stated that if the servant continued to work at the master's place of business despite knowledge of the danger, the master was absolved from liability.

305 (2d ed. 1913).
16. "The assumption of risk doctrine . . . was attributed by this Court to a rule of public policy inasmuch as an opposite doctrine would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business but would also encourage carelessness on the part of the employee." Tiller v. Atlantic Coastline Ry. Co., 318 U.S. 54, 59 (1943) (quoting Mr. Justice Bradley in Tuttle v. Detroit, Grand Haven & Milwaukee Ry., 122 U.S. 189, 196 (1887)).
17. Martin, 106 N.W. at 361.
20. 3 H. Labatt, supra note 13, at 3188. See, e.g., Swanson v. Miami Home Milk Producers' Ass'n, 117 Fla. 110, 157 So. 415 (1934).
21. The first case of note in this area was Priestly v. Fowler, 150 Eng. Rep. 1030 (1837).
23. Id.
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The basis of the master-servant relationship is contractual. The master agrees to pay the servant and the servant agrees to perform specific tasks for the master. Logically, the doctrine of assumption of risk was also implemented in contractual agreements independent of master-servant relationships. Parties were free to enter into contracts which contained exculpatory clauses. These clauses shifted the burden of loss or injury. The party was said to have assumed the risk.

As assumption of risk evolved, the courts utilized the doctrine to describe different concepts. Courts used assumption of risk to define the scope of the master's duty, the consent of the servant to work with knowledge of specific dangers, and express agreements to shift the risk of loss. Courts and commentators attempted to clarify the ensuing confusion by assigning labels and differentiating among several variations of the doctrine. This effort was unsuccessful, however, and assumption of risk became commingled with other traditional defenses to negligence.

B. Assumption of Risk: A General Definition

The doctrine of assumption of risk includes several concepts. Generally, the doctrine refers to situations where a party voluntarily consents to encounter a known risk. The doctrine is divided into two basic areas: implied and express assumption of risk.

Express assumption of risk is traditionally characterized as an actual agreement between two parties who agree to shift the risk of loss. One party agrees to assume the risk of injury, and the other party is relieved from liability. The agreement may be either oral or written. Although these agreements are not favored by the courts, they will be

29. Bartholf, 71 So. 2d at 483.
31. Id.
upheld if certain conditions are met. First, the intention of assuming the risk must be clear and unequivocal. Second, the parties to the agreement must have comparable bargaining power. Third, the agreement must not be against public policy. For example, an agreement between an employer and employee whereby the employee assumes all risks of injury will not be upheld. The employer would be using his superior bargaining position to take advantage of an employee; the employee's agreement may be the result of economic necessity.

Implied assumption of risk is divided into two subcategories: primary and secondary implied assumption of risk. In a negligence action, primary implied assumption of risk focuses on the scope of the defendant's duty. It is used when the defendant either had no duty to prevent the plaintiff's injury, or he had a duty but did not breach it. For example, if a train passenger falls as a result of the normal jostling movement of the train, the passenger can not recover damages from the railway company. The train company does not have a duty to protect its passengers from normal movement of the train.

Primary implied assumption of risk, like negligence, focuses on the duty owed by a negligent defendant to the injured party. This doctrine applies to activities which have built-in and unavoidable risks. Therefore, the scope of the defendant's duty does not extend to protecting the plaintiff from injuries caused by these specific dangers. In this context, assumption of risk is just another way of saying that the defendant is not negligent, since no breach of duty could have caused the plaintiff to suffer injury.

Secondary implied assumption of risk is an affirmative defense which can be raised by the defendant to bar the plaintiff from recovery.

33. O'Connell v. Walt Disney World Co., 413 So. 2d 444, 447 (Fla. 5th Dist. Ct. App. 1982).
34. Ivey Plants, 282 So. 2d at 208. See Blanton v. Dold, 109 Mo. 64, 65, 18 S.W. 1149, 1151 (1892).
35. RESTATEMENT (SECOND) OF TORTS § 496B comment e (1965).
36. Id. § 496B comment f.
37. 2 F. HARPER & F. JAMES, LAW OF TORTS § 21.6 at 1185-87 (1956).
40. Meistrich, 31 N.J. at 56, 155 A.2d at 97.
41. Blackburn, 348 So. 2d at 290.
42. See O'Connell, 413 So. 2d 444, 448 (Fla. 5th Dist. Ct. App. 1982).
A party who does not expressly assume the risk of injury, but voluntarily encounters a known risk, has impliedly assumed the risk. His conduct creates an inference that he has consented to assume the risk. This segment of the doctrine focuses on the plaintiff's behavior. The plaintiff's conduct may be reasonable (strict) or unreasonable (qualified). For example, if a person accepts a ride in a car which he knows has defective brakes, his behavior may be characterized as unreasonable secondary implied assumption of risk. However, if he accepts a ride in the same car because it is late at night and it is the only available transportation, his behavior may be described as reasonable secondary implied assumption of risk.

As indicated, secondary assumption of risk may be characterized as reasonable or unreasonable. When the plaintiff voluntarily encounters a known risk in an unreasonable manner, the defendant may raise the defense of assumption of risk. In addition, the plaintiff is contributorily negligent because he failed to act as a reasonable person. However, the latter defense cannot be raised if the plaintiff's behavior in assuming the risk was reasonable.

In Florida, the defenses of secondary (unreasonable) implied assumption of risk and contributory fault both served to completely absolve the defendant from liability in spite of his negligence. Although the Florida courts reached conflicting conclusions as to the similarity and differences of these doctrines, the findings were not crucial to the

43. Restatement (Second) of Torts § 496C (1965).
44. Id.
45. See Parker v. Redden, 421 S.W.2d 586 (Ky. 1967).
47. Blackburn, 348 So. 2d at 291.
48. Id.
49. Id. at 292.
51. The distinctions between assumption of risk and contributory negligence have been clouded by Florida courts. "The doctrine of assumption of risk is only an engraftment upon the well-established law applicable to contributory negligence." Martin v. Plymouth Cordage Co., 209 So. 2d 481, 483 (Fla. 1st Dist. Ct. App. 1968).
52. "Since both [assumption of risk and contributory negligence] are available to bar the action, it makes no differences what the defense is called." Kaplan v. Wolff, 198 So. 2d 103, 107 (Fla. 3d Dist. Ct. App. 1967).
53. "There is little distinction between the two defenses of [assumption of risk and
outcome of these cases because the effect was the same. The plaintiff was barred from recovery regardless of which defense was successfully pled.

III. Hoffman v. Jones: Elimination of Contributory Negligence

In 1973, the importance of distinguishing between these defenses became crucial when the Supreme Court of Florida decided the landmark case of Hoffman v. Jones. In Hoffman, a widow was precluded from recovering damages for her husband’s death, which was the result of the defendant’s negligence, because the plaintiff’s decedent was found to be contributorily negligent. In order to alleviate the “harshness” of this result, the court held that contributory negligence was no longer a complete bar to recovery. The principles of pure comparative negligence would apply whenever the defense of contributory negligence was raised. Therefore, if both the plaintiff and the defendant were negligent, the plaintiff’s recovery would merely be reduced in proportion to the degree that his negligence contributed to the injury.

The court stated that they adopted the system of comparative negligence because it was the most equitable system. Since comparative negligence “equate[s] liability with fault,” the court concluded that

contributory negligence]. Both partake of exposure by a plaintiff to danger, knowledge of which is attributed to plaintiff; actual knowledge in assumption of risk, and at least constructive knowledge in contributory negligence.” Rickerton v. Seaboard Airline R.R. Co., 403 F.2d 836, 839 n. 3 (5th Cir. 1968).

In attempting to differentiate between contributory negligence and assumption of risk, the Blackburn court stated, “[t]he leading case in Florida dealing with the distinction between the doctrines recognizes that ‘[a]t times the line of demarcation between contributory negligence and assumption of risk is exceedingly difficult to define.’” Blackburn, 348 So. 2d at 289 (quoting Byers v. Gunn, 81 So. 2d 723, 727 (Fla. 1955)).

52. 280 So. 2d 431 (Fla. 1973); See Timmons & Silvis, Pure Comparative Negligence in Florida: A New Adventure in the Common Law, 28 U. of Miami L. Rev. 737, 766 (1974).
53. Hoffman, 280 So. 2d at 437.
54. Id.
55. See Timmons & Silvis, supra note 52, at 743-749.
56. Hoffman, 280 So. 2d at 438.
57. Id.
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this was "the better doctrine." 58

Although the implementation of this system raised questions about corollary doctrines, the court did not answer these questions. 59 The court suggested that the lower courts look to the case law decided under a Florida railroad statute. 60 This statute delineated a comparative negligence system in the limited area of negligence actions against the railroad companies. However, there are no cases dealing with assumption of risk under this statute. A provision of the statute stated that a person who consents to the injury cannot recover. 61 It has been suggested that this exclusionary provision resulted in the absence of any case law applicable to assumption of risk. 62

With the adoption of comparative negligence, the courts were faced with two threshold problems: 1) the courts had to reexamine the differences between assumption of risk and contributory negligence; and 2) the courts had to determine whether assumption of risk survived the adoption of comparative negligence. Predictably the confusion surrounding assumption of risk generated conflicting trial and appellate court decisions. 63

58. Id.
59. Id. at 439.
60. Fla. Stat. § 768.06 (1977), repealed by 1979 Fla. Laws C. 79-163 § 6. This statute was passed in 1887. It applied only to actions involving the railroads. The statute was held unconstitutional in Georgia S. & Fla. R.R. v. Seven-Up Bottling Co., 175 So. 2d 39 (Fla. 1965), based on due process and equal protective grounds.
61. "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence." Fla. Stat. § 768.06 (1977), repealed by 1979 Fla. Laws C. 79-163 § 6.
63. See, e.g., Dorta v. Blackburn, 302 So. 2d 450 (Fla. 3d Dist. Ct. App. 1974) (rev'd 348 So. 2d 287, on remand 350 So. 2d 25) held that defense of assumption of risk continues to bar recovery in negligence actions despite adoption of a comparative negligence system.


These decisions stated that the defense of assumption of risk was no longer a complete bar to recovery.
IV. Assumption of Risk in Florida

A. Blackburn v. Dorta

1. Elimination of Implied Assumption of Risk

In 1977, the Florida Supreme Court sought to eliminate resulting inconsistencies by determining the effect of the adoption of comparative negligence on the doctrine of assumption of risk. The court granted certiorari under conflict certiorari jurisdiction to review three conflicting District Court of Appeal decisions. The cases of Dorta v. Blackburn, Leadership Housing v. Rea, and Maule Industries v. Parker were consolidated for review.

In the landmark case of Blackburn v. Dorta, the Florida Supreme Court held that the doctrine of implied assumption of risk did not survive the adoption of comparative negligence. The court based its opinion on the premise that if the defenses of implied assumption of risk and contributory negligence are the same then assumption of risk must be abolished pursuant to the holding in Hoffman v. Jones. In addition, the Blackburn court stated that aspects of implied assumption of risk which overlap other principles of negligence will also be eliminated. To reach this decision, the court systematically defined "a potpourri of labels, concepts, definitions, thoughts and doctrines" which comprise the doctrine of assumption of risk.

64. See .FLA. CONST. art. V, § 3(b)(3).
65. 302 So. 2d 450. The plaintiff, Kevin Blackburn, was injured while he was a passenger in a dune buggy operated by the defendant. The trial court refused to give an instruction on assumption of risk and the Florida Third District Court of Appeal affirmed the trial court's action.
66. 312 So. 2d 818 (Fla. 4th Dist. Ct. App. 1975). The plaintiff was injured when she tripped in a hole in her driveway. She alleged the defendant negligently installed the driveway. The trial court granted a summary judgment to the defendant. However, the Fourth District Court of Appeal reversed and stated that assumption of risk was not a bar to recovery.
67. 321 So. 2d 106 (Fla. 1st Dist. Ct. App. 1975). Plaintiff was injured because of the defendant's negligent operation of a truck. At trial, the defendant prevailed. However, the plaintiff contended that it was error to instruct the jury that if plaintiff assumed the risk of injury, he was completely barred from recovery. The Fourth District Court of Appeal agreed and reversed the decision.
68. Blackburn, 348 So. 2d at 293.
69. Id. at 289.
70. Id. at 291.
71. Id. at 290.
After excluding express assumption of risk from their analysis, the court discarded each aspect of implied assumption of risk for various reasons. The court described primary implied assumption of risk as either a lack of duty to protect the plaintiff from the inherent risks of the plaintiff's activities or that the duty owed by the defendant was not breached. This aspect of assumption of risk is abrogated because the concepts of duty and breach are already included in the analysis to determine the defendant's negligence.

Secondary implied assumption of risk included reasonable and unreasonable behavior. Since unreasonable implied assumption of risk is so similar to contributory negligence and it espouses no separate function, the court merged this aspect of secondary implied assumption of risk into contributory negligence. Reasonable implied assumption of risk is also eliminated. The court reasoned that the retention of this concept would be unfair and inconsistent with the explicit equitable reasoning applied in *Hoffman v. Jones*. The inequity of granting recovery to a plaintiff who unreasonably assumed a risk and denying recovery to a plaintiff whose behavior was reasonable is readily apparent.

Equitable considerations were a collateral basis of the court's decision. The court clearly stated that their decision would have been the same based on the reasoning in *Hoffman v. Jones*.

The *Hoffman* decision underscored the court's determination to resolve cases as equitably as possible. In adopting comparative negligence, the *Hoffman* court indicated that the "equation of liability with fault" to determine the plaintiff's recovery achieves this goal. The *Blackburn* court adopted this formula. The court held that the defenses of implied assumption of risk and contributory negligence are merged. Thereafter, when the defense of implied assumption of risk is successfully raised, the principles of comparative negligence will govern the effect of this defense on the plaintiff's recovery.

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72. *Id.*
73. *Id.* at 291.
74. *Id.* at 291-92.
75. *Id.* at 293. The *Blackburn* court stated: "There is little to commend this doctrine of implied-pure or strict assumption of risk and our research discloses no Florida cases in which it has been applied." *Id.* at 291.
76. *Id.* at 292.
77. *Hoffman*, 280 So. 2d at 438.
78. *Id.*
79. *Blackburn*, 348 So. 2d at 293.
2. **Treatment of Express Assumption of Risk**

Although express assumption of risk generally encompassed only a contractual concept based on actual oral or written consent to a risk of injury,\(^8\) the confusion as to the parameters of this doctrine was fostered by dicta in the *Blackburn* decision. The court stated:

> It should be pointed out that we are not here concerned with express assumption of risk which is a contractual concept outside the purview of this inquiry and upon which we express no opinion herein. . . . Included within the definition of express assumption of risk are express contracts not to sue for injury or loss which may thereafter be occasioned by the convenantee's negligence as well as situations in which actual consent exists such as where one voluntarily participates in a contact sport.\(^1\)

The trial and appellate courts in Florida have viewed the non-inclusive words "such as" as an invitation to expand the doctrine of express assumption of risk beyond the *Blackburn* definition.

Traditionally, the courts applied express assumption of risk to contracts, releases and waivers.\(^2\) Implied assumption of risk was applied in all other situations in which a person voluntarily encountered a known risk and therefore, indicated his consent to assume the risk. These cases included sporting and recreational activities. Historically, however, the lower courts often used the generic term assumption of risk without indicating which facet of the doctrine they were applying.\(^3\)

Prior to *Blackburn* the commingling of these terms was not critical to the outcome of the case. However, after *Blackburn*, the distinctions were crucial as to whether the plaintiff was precluded from recovering damages for his injury.

B. **Interpretation of Blackburn: Definition of Express Assumption of Risk by Florida Courts**

Subsequently, the trial and appellate courts interpreted the defini-
tion of express assumption of risk as stated in *Blackburn* in a decidedly expansive manner. Florida courts have determined that express assumption of risk remains a total bar to recovery in four situations: contractual waivers, contact sports, aberrant forms of non-contact sports, and professional non-contact sports. An examination of the cases which comprise this area is helpful to understand the present status of the doctrine.

1. **Contracts**

The Fifth District Court Appeal addressed the issue of express assumption of risk in *O'Connell v. Walt Disney World*. In this case the plaintiff, a minor, was injured while on a guided horseback ride. The plaintiffs alleged that the negligent actions of the defendant caused the horses to stampede, resulting in plaintiff's injury. The trial court granted summary judgment to the defendant, and the plaintiff appealed. The appellate court reversed the trial court, holding that the release signed by the plaintiff's parents did not contain the specific language necessary to absolve the defendants from liability.

The court added to the expansion of the doctrine in two ways. The opinion repeatedly altered the *Blackburn* definition of express assumption of risk. The court incorrectly characterized the defense as applying to participation in a "sport," "sport situation," "contact or competitive sports," and "an activity such as a sport." The court also examined plaintiff's behavior to determine if the defense of express assumption of risk could be applied because the plaintiff was engaged in an aberrant form of horseback riding. However, there was no evidence of participation in an unusual or aberrant form of horseback riding. Therefore, the court stated that the defense did not apply in this situation. This analysis serves to add momentum to the use of a concept which is outside the supreme court's definition of the defense.

The opinion does lend some insight into the reasons for the courts' advocacy of the expansion of the doctrine. The court stated that the theory of primary implied assumption of risk is more applicable to this

84. 413 So. 2d 444 (Fla. Dist. Ct. App. 1982).
85. *Id.* at 447.
86. *Id.* at 447-48.
87. *Id.* at 447.
88. Although the plaintiff in this case was not barred from recovery, the court's language may be indicative of its inclination to apply the defense of express assumption of risk if the plaintiff participated in an aberrant form of horseback riding.
situation. This theory is usually applied to inherently dangerous activities. If the plaintiff was engaged in such an activity, the defendant would have no duty to protect him from these risks unless the defendant added to these risks. However, this defense is no longer available because Blackburn held that “[t]his branch or trunk of assumption of risk is subsumed in the principle of negligence itself.” Therefore, in order to continue to bar the plaintiff from recovery, the courts must resort to the legal fiction of applying express assumption of risk.

Contractual assumption of risk is discussed further in Van Tuyn v. Zurich American Insurance Co. The Fourth District Court of Appeal stated that the waiver signed by the plaintiff before she rode and was injured by a mechanical bull ride at defendant’s club did not bar recovery. The court held that the trial court erred in granting summary judgment to the defendant. The waiver was invalid because it did not contain specific language manifesting intent to either release or indemnify the club for its own negligence.

After concluding that the release did not preclude recovery, the court sought to determine whether the plaintiff expressly assumed the risk by riding the mechanical bull. They stated that this defense was unavailable unless plaintiff subjectively understood the risks inherent in mechanical bull riding and actually intended to assume these risks. Therefore, the case was remanded to determine whether these factors could be proven.

Although the plaintiff was not denied recovery, it is disconcerting that the court attempted to apply the defense to this case since mechanical bull riding is not a contact sport. The court’s discussion may be explained by its statement of the facets of the defense. The court states, “[f]or express assumption of risk to be valid, either by contract or by voluntary participation in an activity, it must be clear that the plaintiff understood that she was assuming the particular conduct by the defendant which caused her injury.”

89. Id. at 448.
90. Blackburn, 348 So. 2d at 291.
91. 447 So. 2d 318 (Fla. 4th Dist. Ct. App. 1984).
92. Id. at 320.
93. Of course it is arguable whether mechanical bull riding is a contact sport. This author views a contact sport as one in which contact is a certainty (part of the game) and not merely a possibility. Otherwise, all recreational activities could be viewed as contact sports.
94. Id. (emphasis added).
word "activity" in place of "contact sport." Furthermore, in dicta, the Fourth District Court of Appeal in *Van Tuyn* agreed with the Fifth District Court of Appeal in *O'Connell* that this situation is more clearly analyzed as primary implied assumption of risk.95

2. *Aberrant Forms of Non-Contact Sports*

In *Strickland v. Roberts*,96 the plaintiff, a waterskier, was injured when he hit a stationary dock. Strickland was trying to spray water on some youngsters sunbathing on the dock by skiing as close as possible to the dock. The trial court granted summary judgment to the defendant who was driving the tow boat. On appeal, the Fifth District Court of Appeal agreed with the trial court that the defendant was not negligent. Although this finding resolved all the issues raised on appeal, the District Court seized the opportunity to discuss the application of express assumption of risk to the facts before it.

In dictum, the court noted that *Blackburn* excluded contact sports from the abrogation of assumption of risk as a defense. Judge Cobb, writing for the majority, stated that usually waterskiing was not a contact sport. However, the plaintiff was engaged in an aberrant form of the sport. Therefore, the court inferred that the consequence of engaging in unusual forms of sport was the application of express assumption of risk. The court concluded that "[t]he risk of hitting a dock inheres in the sport of narrowly missing it. Strickland having assumed the risk of his game, played it one too often and lost."97 Thus the expansion of express assumption of risk to include aberrant forms of non-contact sports was implemented.

In *Gary v. Party-time Co.*,98 the plaintiff was injured while roller-skating down a ramp holding ski poles. The trial court granted a directed verdict to the defendant based solely on a release signed by the plaintiff. The Third District Court of Appeal, without discussion, affirmed the trial court's determination as to the sufficiency of the written release.99 Although the trial court rejected the validity of express assumption of risk (based on participation in a situation such as a contact

95. *Id.* at 321.
96. 382 So. 2d 1338 (Fla. 5th Dist. Ct. App.), petition for rev. denied, 389 So. 2d 1115 (Fla. 1980).
97. *Id.* at 1340.
99. *Id.* at 339-40.

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sport) and it was not an issue on appeal,\textsuperscript{100} the appellate court took this opportunity to interpret the non-contractual aspect of express assumption of risk as stated in \textit{Blackburn}. This discussion is premised by the court's approval of the \textit{Strickland} court's expansion of the doctrine to include "aberrant forms of non-contact sports."\textsuperscript{101} The court then applied the \textit{Strickland} rationale to this case. The court stated that roller skating down a ramp holding ski poles is aberrant behavior. Therefore, the court concluded that the plaintiff's action was within \textit{Strickland}'s definition of express assumption of risk. In a confusing attempt to justify the \textit{Strickland} conclusion, the \textit{Gary} court indicated that participation in an aberrant form of non-contact sport is somehow analogous to participation in contact sports.

The Third District Court of Appeal further confused the issue by stating that the plaintiff is barred from recovery on the basis of the release "coupled"\textsuperscript{102} or "combined"\textsuperscript{103} with voluntary aberrant acts.\textsuperscript{104} However, \textit{Blackburn} states that express assumption of risk is a valid defense on the basis of "express contracts not to sue as well as situations in which actual consent exists such as where one voluntarily participates in a contact sport."\textsuperscript{105} The \textit{Gary} court circumvented the release as the sole basis for the directed verdict in order to reinforce the inclusion of aberrant forms of non-contact sports within the definition of express assumption of risk. It characterized the release merely as additional "evidence of actual consent to assume the risk of injury"\textsuperscript{106} and not as an express contract not to sue.\textsuperscript{107}

In \textit{Caravel v. Alverez},\textsuperscript{108} aberrant forms of non-contact sports were again included within the scope of express assumption of risk. Plaintiff's decedent died as a result of a fall while horseback riding. The jury determined that the plaintiff expressly assumed the risk of his injuries. The trial court then granted a judgment in favor of the defendant. Appellants argued that the court erred in giving the instruction on express assumption of risk to the jury, since horsebacking riding could not be considered a contact sport. In affirming the trial court's

\begin{footnotesize}
\begin{enumerate}
\item Id. at 339 n.3.
\item Id. at 339-40.
\item Id. at 340.
\item Id. at 339.
\item Id.
\item Blackburn, 348 So. 2d at 290.
\item Gary, 434 So. 2d at 339 n.3.
\item Blackburn, 348 So. 2d at 290.
\item 462 So. 2d 1156 (Fla. 3d Dist. Ct. App. 1984).
\end{enumerate}
\end{footnotesize}
decision, the Third District Court of Appeal stated that the jury may have decided that riding double on one horse was "an aberrant form of the sport of horseback riding." Therefore, the instruction was proper.

The concurrence implied that this situation was more applicable to the theory of primary implied assumption of risk. Judge Ferguson stated that "appellees breached no duty owed to the deceased." Although this theory was raised by the defendant, the majority opinion stated that it was unnecessary to address this issue.

In Robbins v. Department of Natural Resources, the First District Court of Appeal joined the Third, Fourth and Fifth District Courts of Appeal in Florida in agreement that the doctrine of express assumption of risk may be raised when the situation involves aberrant forms of activities. In Robbins, the plaintiff became a quadriplegic as a result of diving into shallow water at a public park. The accident occurred the second time he went into the lake. However, he testified that he was not aware of the depth of the water. The trial court granted the defendant's motion for summary judgment. The DNR successfully argued that Robbins should be barred recovery because he had expressly assumed the risk of injury. The First District Court of Appeal reversed the lower court's decision. On appeal, the court held that summary judgment was precluded because the evidence presented material issues of fact. Robbins argued further that, as a matter of law, the doctrine of express assumption of risk was not applicable in this case. The District Court of Appeals rejected this argument. The court emphatically endorsed the application of this doctrine to aberrant forms of activities.

Such an aberrant form of participation in the recreational activity of diving would be an appropriate occasion for the application of the defense of express assumption of risk, notwithstanding the fact that diving is, of course, not a contact sport and involves no other participants, and that no formal release, consent or waiver form was involved.

109. Id. at 1157.
110. Id.
111. Id. at 1157 n.1.
113. Id. at 1043.
114. Id. at 1044.
115. Id. at 1043.
116. Id.
The *Robbins* court stated that if Robbins was subjectively aware of the depth of the water and the presence of rocks on the bottom of the lake, and he knew of the risks but voluntarily dove into the water anyway, the defense of express assumption of risk could be raised. The court cited *Kuehner* in support of this conclusion. The application of *Kuehner* to this case is disconcerting. *Kuehner* applied this criteria to a case in which the injury was caused by participation in a contact sport—karate. The injury in the *Robbins* case occurred while the plaintiff was diving. Clearly, diving is not a contact sport. Although the *Robbins* court noted this significant difference, the court did not support their statement by further reasoning. This decision lends additional encouragement to the inclusion of aberrant forms of activities within the limits of the assumption of risk doctrine.

3. **Contact Sports**

An opportunity to clarify the status of this defense was presented when the supreme court granted certiorari to answer the following certified question asked by the Third District Court of Appeal in *Kuehner v. Green*:

"Does express assumption of risk absolutely bar a plaintiff’s recovery where he engages in a contact sport with another participant who injures him without deliberate attempt to injure?"

In *Kuehner*, a participant in a karate practice session was injured when his partner performed a "leg sweep." The Third District Court of Appeal affirmed the trial court’s decision that express assumption of risk served to absolve the defendant from liability. The Florida Supreme Court reviewed and affirmed the decision but did not answer the certified question. The court stated that the question was "inapposite" to the present case. Since the plaintiff was absolutely barred from recovery and the evidence did not show that the defendant intended to injure the plaintiff this conclusion is unclear. The supreme court’s reasoning failed to clarify the issue and, in fact, added to the increasing confusion surrounding the doctrine of express assumption of risk.

117. *Id.* at 1043-44.
118. *Kuehner*, 436 So. 2d at 80-81.
120. *Id.* at 1161 (emphasis added).
122. *Id.* at 81.
The supreme court did take this opportunity to extrapolate on the impact of the doctrine of express assumption of risk as it arises in "situations in which actual consent exists such as where one voluntarily participates in a contact sport."\textsuperscript{123} The court stated that the viability of contact sports as recreation is dependent on the defense of express assumption of risk.\textsuperscript{124} However, since the basis of the adoption of comparative negligence was the desire to foster an equitable relationship between liability and fault, the court warned that the doctrine of express assumption of risk must not be used to incur the same harsh unfairness as contributory negligence. The doctrine must be "compatible" with the comparative negligence system.\textsuperscript{125} If express assumption of risk is expanded beyond its intended scope, it may evade the intention of the court's adoption of comparative negligence as evidenced by the subsequent merger of assumption of risk and contributory negligence.\textsuperscript{126}

In defining the boundaries of the doctrine of express assumption of risk, the court emphatically stated that the contact sport participant "does not automatically assume all risks" merely by participation.\textsuperscript{127} It noted that voluntary consent to a specific risk is the foundation of express assumption of risk. The jury must address several issues in determining whether the participant actually consented to a specific risk. If the jury finds that the plaintiff subjectively appreciated the risk which caused the injury and voluntarily participated, express assumption of risk can be raised by the defendant. The plaintiff's consent relieves the defendant of liability from the latter's negligence. But if the injury-causing risk would not have been foreseen by a reasonable man, the plaintiff's recovery is not affected. However, if a reasonable man would have expected the risk, the plaintiff's recovery is governed by compara-
tive negligence principles. The state high court concluded that the special verdict submitted to the *Kuehner* jury included the factors necessary to make a proper analysis of the application of express assumption of risk. Therefore, the decision of the Third District Court of Appeal was affirmed.

It is significant that the factors that the court examined to determine the appropriate application of express assumption of risk in the context of contact sports are the very same factors which were necessary before *Blackburn* to support the defense of implied assumption of risk.

In addition, the inclusion of contact sports within the context of express assumption of risk, instead of implied assumption of risk, is important. It is suggested that consent to actual contact which is necessitated by this type of activity justifies this placement. However, this reasoning cannot be similarly justified relative to non-contact recreational activities. Unlike contact sports, participation in non-contact activities does not constitute the same consent.

The special concurring opinion of Justice Boyd in *Kuehner* addressed the goal the lower courts are trying to achieve by their interpretation of *Blackburn*. The Justice reiterated that traditional reluctance to allow recovery for injuries incurred by sports participants. In order to retain this policy, Justice Boyd suggested an alternative. Rather than the "absurd legal semantics which classify voluntary participation in a contact sport as an 'express' assumption of the risk," the Justice recommended that the scope of liability may be reduced by holding that "[t]he only duty that a person participating in a contact sport has toward a fellow participant is to refrain from intentional or

128. *Id.*
129. "Did the Plaintiff, CLIFFORD R. KUEHNER, know of 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 exposed himself to the danger complained of?" *Id.* at 79.
130. The defense of assumption of risk is applicable when the plaintiff knows and appreciates the risk of danger and voluntarily consents to exposure to that particular risk. Bartholf v. Baker, 71 So. 2d 480 (Fla. 1954); Byers v. Gunn, 81 So. 2d 723 (Fla. 1955); Brady v. Kane, 111 So. 2d 472 (Fla. 3d Dist. Ct. App. 1959).
132. *Id.*
133. *Kuehner*, 436 So. 2d at 81.
134. *Id.* at 81-82.
reckless misconduct that is not customary to the sport game."\textsuperscript{135}

In \textit{Kuehner}, the court limited the application of the doctrine to contact sports and the inherent risks associated with them.\textsuperscript{136} It did not answer the certified question or clarify the limitations of the application of the doctrine beyond \textit{Kuehner} or contact sports.

4. \textit{Professional Non-Contact Sports}

Possible devastating consequences can result from the application of express assumption of risk to professional non-contact sports. In \textit{Ashcroft v. Calder Race Course, Inc.},\textsuperscript{137} a jockey at the defendant's track received injuries during a race which resulted in his becoming a quadriplegic. The jury found that the negligent design of the track caused his injury. However, the jury also found that although the plaintiff was not negligent, he assumed the risk of injury. Plaintiff and defendant both appealed.\textsuperscript{138} Notwithstanding the fact that Ashcroft had not signed a release and that horse racing is not a contact sport, the Third District Court of Appeal held that the defense of express assumption of risk was applicable to professional horse racing, and thereby completely barred Ashcroft from any recovery.\textsuperscript{139}

The Third District relied upon \textit{Blackburn} and \textit{Kuehner}. The court stated that the \textit{Blackburn} court did not limit express assumption of risk to contracts and contact sports. The appellate court stated that such an interpretation would be too constricted: "The \textit{Blackburn} court clearly contemplated other professional sporting activity 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."\textsuperscript{140} The court also held that the special verdict given to the jury was within the standard expressed by \textit{Kuehner}.

The \textit{Ashcroft} court's interpretation of the \textit{Blackburn} and \textit{Kuehner} opinions is confusing. The \textit{Ashcroft} court ascribes an intention to the

\textsuperscript{135} \textit{Id.} at 81.
\textsuperscript{136} \textit{Id.} at 80.
\textsuperscript{137} \textit{Ashcroft v. Calder Race Course, Inc.}, 464 So. 2d 1250 (Fla. 3d Dist. Ct. App. 1985), \textit{rev'd}, 492 So. 2d 1309 (Fla. 1986).
\textsuperscript{138} The trial judge refused to apply the jury's finding of express assumption of risk. Instead, the judge granted a remittitur reducing the plaintiff's award from the jury of $10 million to $5 million. The plaintiff refused to accept the remittitur. \textit{Ashcroft}, 464 So. 2d at 1253-54 (Baskin, J. dissenting).
\textsuperscript{139} \textit{Ashcroft}, 464 So. 2d at 1251.
\textsuperscript{140} \textit{Id.}
supreme court to include professional non-contact sports within the definition of express assumption of risk.\textsuperscript{141} This conclusion seems faulty in light of the supreme court's concern that “[i]f contact sports are to continue to serve a legitimate recreational function in our society express assumption of risk must remain a viable defense to negligence actions spawned from these athletic endeavors.”\textsuperscript{142} In addition, although the jury instruction\textsuperscript{143} was in accordance with the \textit{Kuehner} standard,\textsuperscript{144} \textit{Kuehner} applied this instruction to a fact pattern involving karate, a contact sport. The \textit{Ashcroft} court ignored the threshold requirement that the injury resulted from participation in a contact sport.

Also, the \textit{Kuehner} court clearly limited the application of the doctrine to “those bodily contacts inherent in the chances taken.”\textsuperscript{145} Since negligent track design is not within the inherent risks of horse racing, Calder should not have been allowed to raise the defense which barred Ashcroft's recovery.

Most important, \textit{Ashcroft} ignores the \textit{Kuehner} reiteration of the supreme court's equitable objectives as stated in \textit{Hoffman v. Jones}.\textsuperscript{146} This equitable concept was advanced by \textit{Hoffman's} abrogation of contributory negligence and the discarding of implied assumption of risk in \textit{Blackburn}.

In her \textit{Ashcroft} dissent,\textsuperscript{147} Judge Baskin stated that she “would narrow the focus of the inquiry to the propriety of the jury instruction on express assumption of risk under the facts of this case.”\textsuperscript{148} In a straightforward analysis, she concluded that Ashcroft did not assume the risk of injury by express contract or participation in a contact sport. A further examination of the facts in light of the inherent risks of horse racing also does not absolve Calder of liability. Although a participant may assume inherent risks, Judge Baskin concluded that “the dangerous condition created by Calder [is not] an inherent danger in the sport of horse racing.”\textsuperscript{149} Finally, Ashcroft's behavior was neither unusual nor aberrant. Therefore, according to Judge Baskin, the jury instruction was incorrect and a new trial should have been granted.

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\textsuperscript{141} See supra text accompanying note 125.  
\textsuperscript{142} \textit{Kuehner}, 436 So. 2d at 79.  
\textsuperscript{143} Fla. Standard Jury Instruction (Civil) § 3.8.  
\textsuperscript{144} See supra text accompanying note 128.  
\textsuperscript{145} \textit{Kuehner}, 436 So. 2d at 80.  
\textsuperscript{146} Id.  
\textsuperscript{147} \textit{Ashcroft}, 464 So. 2d at 1252.  
\textsuperscript{148} \textit{Id.} at 1254.  
\textsuperscript{149} \textit{Id.} at 1255.  
\end{flushleft}
The Supreme Court of Florida granted review in Ashcroft v. Calder Race Course, Inc.\textsuperscript{150} It was hoped that this opinion would give explicit guidance to the lower courts as to the application of express assumption of risk in Florida.

The Florida Supreme Court’s review of Ashcroft did not result in an emphatical clarification of contexts in which the doctrine of express assumption of risk may be viable. In its reconsideration of the Ashcroft decision by the Third District Court of Appeal, the supreme court held that “there was no express assumption of risk with respect to the negligent placement of the exit gap and it was error for the judge to instruct the jury on assumption of risk.”\textsuperscript{151} Pursuant to Kuehner, the court stated that the doctrine only applies to risks inherent in the particular sport.\textsuperscript{152} The court agreed with Judge Baskin’s dissent\textsuperscript{153} that negligent placement of the exit gap was not such a risk.\textsuperscript{154} Therefore, the court reversed the decision of the lower court and ordered the reinstatement of the $10 million jury award to Ashcroft.\textsuperscript{155}

However the supreme court did not expressly state that the doctrine of express assumption of risk is applicable to horse racing. In beginning their analysis by stating that they are “[a]ssuming that express assumption of risk applies to horse racing...”\textsuperscript{156} the court extenuates the inclusion of the sport of horse racing within the doctrine. Arguably, the court has failed to make a policy decision concerning the doctrine’s applicability to horse racing. The court has skirted that issue by holding that the negligent placement of the exit gap wasn’t an inherent risk of horse racing. Therefore, it was unnecessary for the court to decide if express assumption of risk was applicable to the activity in which the plaintiff was participating when he was injured.

\textsuperscript{150} Ashcroft v. Calder Race Course, Inc., 464 So. 2d 1250 (Fla. 3d Dist. Ct. App. 1985), rev’d, 492 So. 2d 1309 (Fla. 1986).
\textsuperscript{152} Id. at 307 (quoting Kuehner v. Green, 436 So. 2d 78, 80 (Fla. 1983)).
\textsuperscript{153} See supra notes 147-149 and accompanying text.
\textsuperscript{154} Ashcroft, 492 So. 2d at 1311.
\textsuperscript{155} Id. at 1314. The court also based their decision on the duty of reasonable care which a landowner owes to an invitee. Further the court held that the trial judge had abused his discretion in granting a remittitur. Id. at 1313.
\textsuperscript{156} Id. at 1311.
V. Options

There is a myriad of approaches available to the Supreme Court of Florida to resolve the confusion regarding the parameters of express assumption of risk. Although the particular approach chosen may be disadvantageous to plaintiffs, it is of paramount importance that the court delineate a clear standard that the lower courts can follow in a consistent and predictable manner. Further, injured parties will be better able to judge the viability of a possible complaint if a straightforward test is adopted by the court.

The Supreme Court of Florida may choose to put its seal of approval on the application of express assumption of risk to situations involving contracts and contact sports. However, even in cases involving contracts and contact sports, courts will have to decide on the scope of the doctrine on a case-by-case adjudication.

The doctrine will preclude recovery in those instances when a party has expressly consented to expose himself to a particular risk, either by contract or participation in a contact sport. These sports may include wrestling, football, karate, hockey, and similar activities where consent to contact is a necessary part of the game.

However, if the contact which was the proximate cause of his injury was not a normal part of the sporting activity, then the injured plaintiff will be allowed to recover. These instances may include intentional or reckless conduct, and behavior which is a violation of the rules. A case-by-case examination of the type of action which caused the injury would determine whether the defense of express assumption of risk should be applied to bar the plaintiff's recovery.

The obvious weakness of this proposal is that determinations based on this method may yield inconsistent rulings which would create confusion as to the parties rights and obligations under Florida law. Numerous decisions would be necessary before a framework of consented behavior could be formulated. In addition, this option abandons the traditional legal theory which limited express assumption of risk to contracts or other forms of express agreement.

However, this course is in accordance with the Florida Supreme Court's decision in Kuehner v. Green. The fact situation in Kuehner involved a contact sport and the court did not give any indication of an

157. The proposal is merely consistent with the treatment of express assumption of risk by the Florida Supreme Court. The supreme court has never applied the doctrine of express assumption of risk beyond contracts or contact sports.
intention to further expand the doctrine of express assumption of risk beyond contracts and contact sports.

The supreme court may also attempt to reconcile the various lower court decisions by reaffirming the fact that Florida has adopted a system of comparative negligence and, consequently, assumption of risk is no longer a viable defense. Therefore, in those situations where the defense of assumption of risk would have been raised, a correct analysis would require a finding of no duty owed.

In theory, this option revives primary assumption of risk. In other words, it is lack of duty owed by the defendant to the plaintiff that precludes recovery rather than a finding that the plaintiff had expressly assumed the risk of injury. For example, in the context of football, the players have no duty to protect each other from anticipated contact.

Several states have totally abolished all assumption of risk terminology on the rationale that "the bench and bar . . . unhappily cling to the terminology of assumption of risk and continue to be misled by it even while purporting to think of it as merely a convertible equivalent of negligence . . . ." It is suggested that contract law competently governs express assumption of risk.

The Utah Supreme Court in Jacobson Construction v. Structo-Lite Engineering stated that "[w]hat is important is the concept embodied in the comparative negligence statute, and the particular labels assigned to the type of fault should not interfere therewith."

This proposition is consistent with the evolution of Florida negligence law. It avoids a departure from the principles of a comparative negligence system which eschews the complete denial of recovery to an injured plaintiff. Yet, this option also allows the Florida Supreme Court to make a more definitive public policy statement.

The trial court's analysis would begin with an inquiry into the scope of duty owed by the defendant to the plaintiff under each particular fact situation. This eliminates the necessity for the jury to consider the application of assumption of risk in reaching its verdict.

When the jury makes its determination as to the defendant's negli-

161. Id.
162. See, e.g., McGrath, 41 N.J. at 272, 196 A.2d at 238.
gence, it will be resolving as well the issue of whether the plaintiff is precluded from recovering damages. Therefore, the jury's findings as to damages will be in keeping with the equity of comparative negligence principles.

Under existing decisions the jury can easily become confused by the process of determining defendant's negligence, plaintiff's contributory negligence, as well as considering non-contractual express assumption of risk.

An example of this confusion is demonstrated by the verdict in Ashcroft. Although defendant Calder Race Course, Inc. was negligent, plaintiff Ashcroft, who was not negligent, was completely barred from recovery because the jury found that Ashcroft had expressly assumed that risk of injury.163

Finally, the supreme court may choose to allow the expansion of express assumption of risk in negligence actions to include contracts as well as all recreational and sports activities. Defendants will be permitted to raise the defense of contributory negligence to reduce the plaintiff's recovery and assumption of risk to bar recovery.

The plaintiff will be prevented from recovering damages in a wide range of activities. Since these activities were formerly included within the area of implied assumption of risk, this would signal a re-examination of Blackburn. A clear statement of the risks which the plaintiff is deemed to have assumed is required. Otherwise, participation in recreation activities may be discouraged by the certain preclusion of recovery for injuries suffered.

This approach is especially harmful because participation in recreational sports activities has a positive effect on the individual as well as the entire community. This type of activity should be fostered and not discouraged.164

VI. Conclusion

Throughout the State of Florida, the doctrine of express assumption of risk has been expanding haphazardly. The Florida Supreme

163. Ashcroft, 464 So. 2d at 1251. Ashcroft knew and appreciated the specific danger caused by the design defect in the track. It is arguable whether his choice to ride was voluntary. However, the issue is whether the jury should have been instructed as to the defense of express assumption of risk.

Court should define the parameters of the doctrine in a clear and definite manner to avoid the abrogation of the comparative negligence system. The stature of this system must be supported by the body which created it. Not only is it unfair to bar recovery to a party in a negligence action, merely because he has made the reasonable decision to participate in a sporting activity, but it is not in keeping with the spirit of the supreme court's decision in *Hoffman v. Jones* to adopt a comparative negligence system in Florida which "equate[s] liability with fault." 162

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165. *Hoffman*, 280 So. 2d at 438.