STATE OF NEW YORK: SUPREME COURT:

COUNTY OF ONONDAGA: MOTION TERM: ROOM No. 318:

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Index #: 2010-1387
RJI #: 33-12-0534

FREDERICK G. KNIGHT,

Plaintiff,

vs.

COURT DECISION
AFTER MOTION ARGUMENT

ROBERT HOLLAND and
CIRCLE L, LLC,

Defendants.

- -

Onondaga County Courthouse
401 Montgomery Street
Syracuse, New York 13202
Tuesday, September 29, 2015

BEFORE:

HONORABLE **DONALD A. GREENWOOD,**
Justice of the Supreme Court,
Fifth Judicial District

APPEARANCES:

For the Plaintiff: BY: TIMOTHY P. MURPHY, ESQ.
Hancock & Estabrook, LLP
1500 AXA Tower I, 100 Madison Street
Syracuse, New York 13202

For the Defendant: BY: EDWARD J. SMITH, III, ESQ.
Smith Sovik Kendrick & Sugnet, PC
250 South Clinton Street
Syracuse, New York 13202

Reported By:
Patrick J. Reagan, RDR
Official Court Reporter

THE CLERK: Please state your appearances.

MR. SMITH: Good morning, Your Honor. Ted Smith from Smith Sovik on behalf of the defendants.

MR. MURPHY: Timothy Murphy from Hancock Estabrook on behalf of plaintiff Frederick Knight.

THE COURT: Okay. Go ahead, Mr. Smith, it's your application.

* * *

(After Motion argument of both attorneys, the following occurred:)

THE COURT: Okay. All right. Okay, Patrick? Defendants move to set aside the $440,000 verdict after a trial in this matter. The grounds asserted are that: One, That the Court incorrectly failed to direct a verdict in defendants' favor or the primary assumption of risk defense further incorrectly directed verdict in favor of plaintiff on the assumption of the risk defense and separate issue of the enforceability of plaintiff's written waiver under General Obligations Law 5326; Two, The Court failed to instruct the jury with regard to secondary assumption of risk; Three, The defendants were entitled to directed verdict because plaintiff failed to submit sufficient evidence of negligence; Four, The damages for loss of household services was not supported by the evidence; And Five, The verdict was against the weight of

the evidence, and the individual and combined errors were unfairly prejudicial.

With respect to the defendants' first ground, that this Court incorrectly failed to direct a verdict in the defendants' favor on the primary assumption of risk defense and further incorrectly directed a verdict in favor of the plaintiff on the assumption of the risk defense and separate issue of the enforceability of plaintiff's written waiver under General Obligations Law 5-326, the record demonstrated the plaintiff was a user rather than a participant within the meaning of the statute. Under the statute, the release/waiver is void and unenforceable if (1) the injured person who entered into the agreement was a user of the facility, and (2) the owner received a fee or other compensation for the use of the facility. The evidence showed that the plaintiff paid a fee to Fulton Speedway for access to the pit area, plaintiff paid a fee to enter the pit area of a racetrack and signed a release form, which specifically stated, as did plaintiff's waiver, that plaintiff recognized inherent risks in entering the area, and released the owners from all claims and liabilities arising out of strict liability or ordinary negligence. The plaintiff was not a member of the pit crew at a racetrack as in the cases relied upon by defendants, and the undisputed evidence showed that he was not a

participant rather than a user. defendants rely upon the plaintiff's deposition testimony where he stated he had in the past helped his son in the pit area and that he injured plaintiff when he was standing in front of a board posted on the concession building where he had gone to check his son's start position. The record was devoid of any proof that plaintiff was acting as part of the pit crew on the night of the incident. Nor was the Court's holding at the close of the proof that the waiver was unenforceable, barred by its prior denial of the summary judgment motion. See, Duval v. Skouras, 70 NYS2d 150 (NY Co. 1947).

The defendants' argument that the Court reversed its own rulings or violate the law of the case doctrine is without merit. The primary issue on the summary judgment motion with respect to the unenforceability of the waiver under the statute was plaintiff's status as a user or participant. In deciding the summary judgment motion, the Court determined the issue was factual in nature and depended on a presentation of proof at trial regarding plaintiff's role and activities on the night he was injured. Thus, plaintiff's motion to have the waiver declared void as a matter of law and his motion in limine seeking that same relief were denied. At the close of proof, however, after hearing the testimony of plaintiff's activities, and of other witnesses and experts, the Court

determined the issue in favor of plaintiff and directed a verdict on the issue of unenforceability of the waiver. As stated previously, no rational jury, after hearing that evidence, could have returned that the plaintiff in this matter was a participant in any way, shape or form. There was no proof at all. Thus there was no inconsistency in the Court's ruling.

With respect to the second ground that the Court failed to instruct the jury with regard to secondary assumption of the risk, the first caveat to PJI 2:55, Implied Assumption of the Risk, states that "as a general rule application of primary assumption of risk should be limited to cases appropriate for absolution of duties, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities or athletic and recreational pursuits that take place at designated venues." Since the doctrine serves to preclude a plaintiff's claim entirely, its use must be limited to cases that are appropriate to relieve a defendant of all duty of care and completely bar any recovery by the plaintiff as opposed to applying the principle of comparative negligence to reduce recovery. See, PJI 2:55. As a result, application of the doctrine is generally limited solely to cases where the injured plaintiff is a knowing and willing participant in a professional or

organized competitive sporting event. The duty of care owed to a participant in a professional sporting event must be evaluated by considering the risks the participant assumed when he or she freely elected to participate. See, Turcotte v. Fell, 68 NY2d 432 (1986). The key issue is a particular participant's awareness of the risks based upon his or her skill and experience. See, Morgan v. State, 90 NY2d 471 (1997). The rationale is that where the risks of the activity are fully comprehended or obvious, the participant's actual consent is implied from the act of electing to participate, and therefore as a matter of law the consent relieves the defendant of its duty of care. See, PJI 2:55 Comment, p. 356 - 357. The law is well settled that a person who chooses to participate in a sport or recreational activity necessarily consents to certain risks that are inherent and arise out of the nature of the sport generally and flow from such participation. See, Custodi v. Amherst, 20 NY3d 83 (2012). The undisputed evidence did not support the application of the doctrine here since plaintiff was not participating in a sport or recreational activity and did not agree to assume any risk that might flow from such participation. He was undisputedly a spectator.

In addition, the Court's denial of defendants' request to charge secondary assumption of risk separate and

apart from comparative negligence was proper. Defendants failed to make an exception on the record to the Court's denial of their request for that charge and therefore they cannot now argue the verdict should be set aside because the charge was improper. See, CPLR 4110-b; see also, Genet v. Appel, 118 AD3d 519 (1st Dept. 2004). In addition, the Court's refusal of defendants' request to charge on secondary assumption of the risk separate from comparative negligence was proper. There was no such principle discussed in the PJI and there is no charge. While primary assumption of the risk is a recognized doctrine, secondary assumption of risk is not. The doctrine of secondary assumption of the risk "has never been discussed by name or analyzed in any reported New York State case" and that a doctrine "rests upon principles of comparative negligence. The trier of fact under secondary assumption of the risk reduces the plaintiff's recovery by the percentage determined to relate to his or her own culpable conduct." See, Livshitz v. US Tennis Association National Tennis Center, 196 Misc.2d 460 (NY Co. 2003).

With respect to the defendants' third ground, that they were entitled to a directed verdict because plaintiff failed to submit sufficient evidence of negligence, defendants claim that plaintiff testified that. However, when asked if he found defendant Holland

responsible for his injuries, plaintiff testified "I find him responsible, yes." (Transcript, p. 203). With respect to defendant Circle L Speedway, defendants argue that plaintiff's expert failed to apply actual industry standards to his assessment of the practices at the Speedway and failed to express an opinion as to causation. However, a review of the record shows that Barnard testified that there are standards in the motor sports industry relating to the pit areas of racetracks and as to what those standards were (pp 242-44). He also testified the industry standards were not met by this defendant (pp. 244-47; 287-89). The plaintiff established this defendant's negligence based on the totality of proof at trial and the jury is capable of concluding that the dangerous conditions in the pit area to which Barnard testified were a substantial cause of the plaintiff's injuries. See, Kioleidis by Kioleidis v. Permagent United Sales, Inc., 150 AD2d 526 (2d Dept. 1989).

The fourth prong of the defendants' motion is that the damages for loss of household services was not supported by the record. This argument is without merit as well. Plaintiff is correct in opposition that defendants waived any right to raise this argument because they failed to preserve the right to do so at trial. They consented to the verdict sheet which contained lines for past and future

loss of household services. There was extensive discussion following objection by defendants' counsel regarding the liability questions on the verdict sheet and those were changed in response to defendants' objections (pp. 511-12). As to damages, however, the Court specifically noted the verdict sheet included "loss of possible services and pain and suffering" up to the date of the verdict." Then Question 10: What is the future amount of household services and pain and suffering? Defendants raised no objection to the inclusion of the line on the verdict sheet for past or future loss of household services, and the Court then asked again whether either side had any objection to the verdict sheet. Defense counsel answered in the negative. By consenting to the verdict sheet submitted, defendants failed to preserve any objection to it for post verdict review. See, Mauerer v. Tops Markets, LLC, 70 AD3d 1504 (4th Dept. 2010). Moreover, even if the new trial were ordered, it would be limited solely to past and future household expenses, as in the Smith, supra case relied upon by defendants. Where several elements of damages are awarded by a jury and only some are challenged, any new trial that may be ordered is only with respect to the challenged element. See, Birmingham v. Peter, Senior and Mary L. Liberator Family, LP, 90 AD3d 1483 (4th Dept. 2011). In addition, the jury's award for loss of household

services was supported by the evidence.

Finally, defendants argue the verdict was against the weight of the evidence and the individual and combined record were unfairly prejudicial. To grant such a motion, the trial court must conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational people to the conclusion reached by the jury on the basis of the evidence at trial. See, Winiarski v. Harris, 78 AD3d 1556 (4th Dept. 2012). This means that the moving party must establish the evidence presented by the nonmoving party was legally insufficient. A court should not set aside a verdict on this ground unless the evidence is found to preponderate so heavily in favor of the losing party that the jury could not have reached its verdict on any fair interpretation of the evidence. See, Jurkowski Ex Rel Cosgrove v. Sheehan Memorial Hospital, 85 AD3d 1672 (4th Dept. 2011). That is not the case here. Much of the defendants' argument on this point is a restatement of the contention that the Court erred in holding that the waiver was unenforceable, and this has been addressed. The remainder of the defendants' arguments suggest that this ruling was fatal to their defense, since it was made after the close of proof. However, the record shows that the defendants also offered proof to challenge plaintiff's negligence claim as well.

As such, the defendants' motion is denied in all respects.

Would you submit an order, Mr. Murphy? And have a copy of transcript attached thereto.

MR. MURPHY: Yes, Your Honor.

THE COURT: Thank you both.

MR. SMITH: Thank you, Judge.

MR. MURPHY: Thank you, Judge.

THE COURT: Okay.

(End of Court Decision after Motion argument.)

* * *

C E R T I F I C A T E

I, Patrick J. Reagan, a Senior Court Reporter, Fifth Judicial District, State of New York, do hereby certify that the foregoing is a true and correct transcript of my stenographic notes taken in the above-entitled matter, of the Court Decision after Motion argument, recorded at the time and place first above-mentioned.

Date: 10/1/15

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