



ISSUE BOOKLET



2009 Florida High School



Appellate Program

A collaborative project of

The Florida Law Related Education Association, Inc.

Funded with assistance from
The Florida Bar Foundation
The Florida Bar Appellate Practice Section

Case materials authored by
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**FLORIDA HIGH SCHOOL
APPELLATE COMPETITION
2009 REGISTRATION FORM**

_____ Yes, we would like to submit a brief for the Appellate Competition. Teams are limited to two students per brief. Briefs must be received in Tallahassee by March 30th, 2009.

I. Student's Name: _____

School: _____

Address: _____

City: _____ State: _____ Zip: _____

E-mail: _____ Phone: _____ Fax: _____

II. Student's Name: _____

School: _____

Address: _____

City: _____ State: _____ Zip: _____

E-mail: _____ Phone: _____ Fax: _____

III. Teacher's Name: _____

School: _____

Address: _____

City: _____ State: _____ Zip: _____

E-mail: _____ Phone: _____ Fax: _____

IV. Attorney Coach's Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Firm Name: _____

E-mail: _____ Phone: _____ Fax: _____

Brief submitted on behalf of: (Check One)

Appellant/Petitioner or Appellee/Respondent

Return 3 copies of this form and 3 copies of the brief to the address listed below.

The Florida Law Related Education Association, Inc.
2874 Remington Green Circle, Suite A
Tallahassee, Florida 32308
Phone: (850) 386-8223
Fax: (850) 386-8292

Rules and Guidelines

Introduction

An appeal from a trial court to an appellate court normally involves two components: a written brief and an oral argument. In this exercise, you will prepare a brief which will serve as the basis of an oral argument. The top brief writers in each Appellate District will compete in oral arguments at the district level, with the district finalists having the opportunity to argue before appellate court judges in each District Court of Appeal. The winner of each district will proceed in the competition to the state level, with the statewide finalists having the opportunity to argue before the justices of the Florida Supreme Court in Tallahassee on May 18-19th, 2009, expenses to be covered. In determining which side you choose, you should read and analyze the cases cited in the case materials.

A. Rule 1: Teams

1. Each team must consist of two students.
2. Each team will submit only one brief for either the petitioner or respondent.
3. Teams will need to prepare oral arguments for the party they wrote a brief supporting.
4. Teams may use attorney coaches and teachers as advisors to guide them through the process of preparing the brief and oral arguments; however, the writing of the briefs must be the sole work of the students. Attorneys and teachers are strictly prohibited from writing any portion of the brief.

5. Team Roster

Team rosters should be completed and submitted to the competition coordinator before the date of the competition. At registration, teams will be identified only by code.

6. Roll Call

Before a round of competition begins, the students should submit their roll call sheets, found in the packet, to the judges. No information identifying the team, beyond the students' names and team code, should appear on the form.

Rules and Guidelines

B. Rule 2: The Packet

1. Students should assume the moot court packet is complete and factual. Briefs which challenge the validity of issues beyond the scope of the issues questioned in the moot court packet will not be entertained. Students should not reference information contained in the mock trial materials unless so stated in the moot court packet. The moot court and mock trial packets are not interchangeable.
2. Students may only utilize the case law referenced in the moot court packet. Any deviation is a rules violation.
3. Students may not construct additional facts not found in the moot court packet specifically. Any information utilized that cannot be fairly inferred from the moot court information packet will be considered beyond the scope, and therefore, a rules violation. Students cannot cite information from the mock trial materials if not explicitly found in the moot court packet.

C. Rule 3: Competition Format

1. This competition is composed of two phases: (1) the brief-writing phase; and (2) the oral argument phase.

D. Rule 4: The Brief

1. Three copies of the students' brief must be submitted to The Florida Law Related Education Association by March 30, 2009.
2. Each brief should follow the format of the enclosed brief outline. Failure to adhere to the format may lead to disqualification. The entire brief must be no longer than 15 pages, letter-sized 8 ½" x 11." Format the text by allowing one-inch margins. All briefs must be typed and double-spaced. The type style should be Times New Roman 12 point font and each paragraph should be indented. Page numbers should appear centered at the bottom of each page. A cover page should identify "Brief for Petitioner" or "Brief for Respondent" and list the participants' names, school, address, telephone numbers, and email addresses.
3. Pursuant to Rule 2, briefs may not include any case law beyond what is presented in the packet and may not include any manufactured or researched facts beyond what is found in the moot court packet specifically.
4. Legal citation is not required, but is encouraged. Information on legal citations can be found in the appendices of the packet.

E. Rule 5: The Oral Argument

1. Two students must participate for a team per round. Both students must speak and address one of the two questions in each round.
2. Each team is given 20 minutes to present their case, as outlined below:

Speaker	Time Limit
<i>Petitioner</i>	<i>15 minutes</i>
Attorney - Question 1	7 minutes 30 seconds
Attorney - Question 2	7 minutes 30 seconds
<i>Respondent</i>	<i>20 minutes</i>
Attorney - Question 1	10 minutes
Attorney - Question 2	10 minutes
<i>Petitioner - Rebuttal</i>	<i>5 minutes</i>

3. Rounds will start on time. If a team, or a portion of the team, fails to appear within ten minutes of the time indicated, the team will compete with an incomplete team. If no student from a team appears within that time limit, the team will be judged to have forfeited the round, and bye round scoring will apply to the other team.
4. Two students will present during any one round of competition. Each student will address one of the two questions presented in the brief. Both students must speak during the oral argument. If the second student does not speak during the course of the oral argument, that student will receive a score of zero (0).
5. No communication should occur between students participating in the round and other team members, coaches, or anyone else in the audience outside the bar. Any communication with anyone outside of the partner student during that round will constitute a rules violation.
6. Students should display dignity and respect to the judges, staff, and other competition personnel.

Additionally, teams should respect each other. By the time of competition, everyone will have worked very hard to get into competition. Respect should extend to all competitors.

7. Dress should be professional, courtroom attire.
8. During oral arguments, students will be scored based on the criteria found on the score sheet in the packet.
9. Scores and winners will not be disclosed after a round, but verbal critiques will be given.

F. Rule 6: Videotaping/Photography

1. Cameras and recording devices are permitted in certain courtrooms; however, the use of such equipment may not be disruptive **and must be approved in advance of the competition by The Florida Law Related Education Association, Inc.**
2. When one team requests to videotape during a trial, the opposing team must be consulted and their permission granted prior to taping.

G. Rule 7: Viewing an Argument

1. Team members, alternates, attorney coaches, teacher coaches, and any other persons directly associated with a team, except those authorized by the State Advisory Committee, are not allowed to view other teams in competition so long as their team remains in the competition.
2. Judges should maintain order in the courtroom. If observers are disorderly, they will be asked to vacate the premises.

H. Rule 8: Decisions

1. All decisions of the judges are final.

I. Rule 9: Team Advancement

1. Teams will be scored on their written briefs and their oral argument presentations.
2. During the scoring of the written briefs, the panel of evaluators will give each brief a numerical score consistent with the score sheet located on the website. The scores from each of the judges in the panel will be added together to determine the top two to four briefs. The top two to four teams in each district will be given the opportunity to compete in the district competition.
3. During the oral argument competition, a panel of judges will score student performances in each round. The team that receives the higher score from that panel will be awarded that panel's ballot.
4. At the end of the competition, all the ballots will be calculated and the team with the highest number of ballots will advance to the state competition.
5. In the event of a tie, all teams' point scores will be calculated with the highest cumulative points winning. If that results in a tie, the teams' point averages will be found.
6. Briefs will be scored and a Best Brief awarded consistent with the practices outlined herein.

7. The state finals will incorporate one preliminary round and one final round of competition. The top two teams will be determined by the panel of DCA judges evaluating the preliminary rounds. These top two teams will meet in the final round of competition. The team receiving the most ballots in the final round will win the competition.

J. Rule 10: Effect of a Bye Round

1. A “bye” becomes necessary when an odd number of teams are present for the tournament. For the purpose of advancement and seeding, when a team draws a bye or wins by default, the winning team for that round will be given a win and the number of ballots and points equal to the average of all winning team’s ballots and points of that same round.

K. Rule 11: Eligibility

1. All students on a team must be enrolled in the same public or private school in the district for which they are competing.
2. Students must be enrolled in a Florida high school in order to be eligible.

Note: All questions should be submitted in writing to ABPflreaED@aol.com

Sources of Legal Research

The cases you will be using as your source of research and for purposes of citing to the Court as authority are included in the case materials.

You may also read articles and cases from other jurisdictions to get ideas and arguments for your brief, but any other cases may only be used to get ideas or to enhance your understanding of the legal issues. They may not be cited as authority in this contest. Your Attorney Coach may wish to suggest reading material. While you are encouraged to explore other sources, there is no requirement that you do so.

Information on research using primary and secondary sources is enclosed in the Appendices for your review.

Additionally, you can utilize on-line research through a variety of sources. You should be able to find most of the cited cases at www.findlaw.com, under Laws: Cases and Codes. From the Findlaw "Cases and Codes" page, scroll down and click on the U.S. Supreme Court link and pull all cases with (i.e. 123 U.S. 456). For all Circuit Court cases a ___ F.2d, F.3d or F.Supp., click on the applicable Circuit Court link. For example, *Doe v. Dept. of Pub. Safety*, 271 F.3d 38, 60 (2d Cir. 2001) would be found under the **Second Circuit**.

Remember that in preparing your brief, you can only use the cases cited in these materials. You can research other cases but you should only use cases cited in these materials in preparing your briefs and arguments.

Relevant Case Authority

State

Blackburn v. Dorta, 348 So. 2d 287, 290 (Fla.1977)

Kuehner v. Green, 436 So. 2d 78 (Fla. 1983)

Ashcroft v. Calder Race Course, Inc., 492 So. 2d 1309 (Fla.1986)

Mazzeo v. City of Sebastian, 550 So. 2d 1113, 1116-17 (Fla.1989)

Kendrick v. Ed's Beach Service, Inc., 577 So. 2d 936, 938 (Fla.1991)

De La Rosa v. Zequeira, 659 So. 2d 239 (Fla. 1995)

Roberts v. Tejada, 814 So. 2d 234 (Fla. 2002)

Carvajal v. Alvarez, 462 So. 2d 1156 (Fla. 3d DCA 1984)

Leahy v. School Bd. of Hernando Co., 450 So. 2d 883 (Fla. 5th DCA 1984)

Van Tuyn v. Zurich American Insurance Co., 447 So. 2d 318 (Fla. 4th DCA 1984)

Nova Univ., Inc. v. Katz, 636 So. 2d 729 (Fla. 4th DCA 1993), *review denied*, 639 So. 2d 979 (Fla.1994)

Lenoble v. City of Fort Lauderdale, 663 So. 2d 1351 (Fla. 4th DCA 1995)

Donaldson v. Cenac, 675 So. 2d 228 (Fla. 1st DCA 1996)

McGraw v. R And R Investments, Ltd., 877 So. 2d 886 (Fla. 1st DCA 2004)

Krathen v. School Bd. of Monroe County, 972 So. 2d 887 (Fla. 3d DCA 2007)

Applegate v. Cable Water Ski, L.C., 974 So. 2d 1112 (Fla. 5th DCA 2008)

Any other cases cited in these materials

Format of the Brief

Each brief should follow the format of the enclosed brief outline. Failure to adhere to the format may lead to disqualification. The entire brief must be no longer than 15 pages, letter-sized 8 ½" x 11." Format the text by allowing one-inch margins. All briefs must be typed and double-spaced. The type style should be Times New Roman 12 point font and each paragraph should be indented. Page numbers should appear centered at the bottom of each page. A cover page should identify "Brief for Petitioner" or "Brief for Respondent" and list the participants' names, school, addresses, telephone numbers, and email addresses.

Do not be overly concerned with legal citation; mistakes will not hurt your score. You may even choose not to use legal citation, so long as you make it clear what case you are referencing.

If you do try to use legal citation, here are some pointers – you may want to use the *Blue Book, a Uniform System of Citation*, (18th ed., 2005), which should be available at any local law library for reference. However, you may simply follow the form of citation used in the sample brief.

When first citing a U.S. Supreme Court case, you should cite to the U.S. Reporter. For example, on page 6 of the sample brief, the petitioner cites to "*Jones v. United States*, 463 U.S. 354, 364 (1983)." The number 463 is the volume number, "U.S." stands for the U.S. Reporter, the books in which the Supreme Court cases are published, 354 is the first page of the cited case, and 364 is the exact page in the case upon which either the quoted language or the referenced portion of the case appears. *All subsequent cites* to the same case, immediately following that full cite, should be "*See id.*" cites. However, if the referenced portion of the case is on a different page, your cite should appear as "*See id.* at ____" (that specific page on which the quote or reference is located).

If a case has been previously cited but not immediately previously cited, then a shortened cite form should be used. For example, in the sample brief, *Jones v. United States*, is cited on page 6, followed by a "*See id.*" cite. Then on page 7, the *United States v. Ward* case is cited in its entirety. The petitioner then must again cite to *Jones v. United States*. If the petition were to use a "*See id.*" cite there would be confusion because the reader would assume that the petitioner was referring to the *Ward* case, the immediately preceding case. Therefore, the petitioner abbreviated the case name and simply lists the volume number of the U.S. Reporter, 463 and only the specific page in the case on which the reference appears after the word "at." If the petitioner went on to cite to the *Jones* case again, he or she could once again use a simple "*See id.* at ____" cite.

Again, it is not necessary that you follow the exact legal citation form used in the sample brief. Do the best you can. We are more concerned with the arguments you choose to make.

You will note that on the cover page of the sample brief, in the lower right hand corner, the petitioner's attorney has only identified himself or herself as counsel for petitioner. **You should include your full name, followed by the names and address of your high**

school, telephone numbers, and email addresses where you can be reached both at school and home.

Brief should conform to the following outline:

I. Cover Page

II. Table of Authorities

III. Opinion Below

IV. Constitutional and Policy Provisions Involved

V. Questions Presented

VI. Statement of the Case

VII. Summary of the Arguments

VIII. Argument

a. Question I

b. Question II

IX. Conclusion

Sections of the Brief

Cover Page

Follow the guidelines and see sample cover page.

Table of Authorities

- List cases you used in your arguments to support your position.
- List relevant constitutional and policy provisions.

Opinion Below

Include a short statement of the proceedings in the lower court/court below and the ruling or judgment of the trial court which is being appealed from.

Constitutional and Policy Provisions Involved

Spell out the relevant provisions in the U.S. Constitution and policy provisions involved in the case from either the perspective of the petitioner or respondent.

Questions Presented

Recite the two constitutional questions or issues on appeal before this Court.

Statement of the Case

This will encompass a statement of the important issues and facts before the Court from either Petitioner's or Respondent's perspective. This section should incorporate (1) a concise (one or two sentences if possible) introductory explanation of the general nature of the case as a lead-in to the brief; (2) a short statement of the proceedings in the court below and the ruling or judgment of the trial court which is being appealed from; (3) a concise statement of the issues before the Court on appeal from the Petitioner's or Respondent's perspective; and (4) a concise statement of the important facts. This section should be presented in a light favorable to your side and contentions in your case.

Summary of Argument

Include three or four paragraphs highlighting a summary of your arguments supporting either the Petitioner's or Respondent's position. Essentially this is a short synopsis of your arguments which will follow. See below.

Arguments

This portion of the brief should discuss your position on the facts, arguments, and legal authorities (statutes and case law) which support your position on the questions presented. If the case law is favorable to your side, show how the prior cases are applicable to the facts or analysis of that case from the present case. You may wish to select the cases which most strongly support your arguments.

Conclusion

This part is a short summary of your answers to the issues on appeal (the questions presented) and should consist of only a few sentences. It is a very concise statement of why you want the appellate court to agree with you. The conclusion should also state what specific relief is being requested.

Submitting a Brief

Briefs should be submitted in the required format to The Florida Law Related Education Association, Inc. and should be **received by March 30, 2009**. The winning brief writers will be notified for dates of the local oral arguments.

Submit all briefs to the following address.

The Florida Law Related Education Association, Inc.
2874 Remington Green Circle, Suite A
Tallahassee, Florida 32308
850-386-8223
Fax 850-386-8292

**IN THE CIRCUIT COURT OF
CRIST COUNTY, STATE OF
FLORIDA**

**GENERAL JURISDICTION
DIVISION**

Case No. 01-111-99

CAMERON DUNCAN,)
)
 Plaintiff)
)
 v.)
)
 ROBIN HIGHTOWER,)
)
 Defendant.)

ORDER DENYING DEFENDANT’S MOTION FOR NEW TRIAL

THIS CAUSE came before the Court to consider the Motion for New Trial or, in the Alternative, Motion for a Judgment in Accordance with the Previous Motion for Directed Verdict filed by the Defendant, Robin Hightower.

I. FINDINGS OF FACT

On February 9, 2008, Douglas High School and Crist High School competed in the 2008 Florida High School Basketball Championship game. Plaintiff Cameron Duncan played for the Douglas squad, and Defendant Robin Hightower played for the Crist squad. Both were star players for their respective teams.

During the fourth quarter of the game, Plaintiff elbowed Defendant in the nose causing it to bleed profusely. Defendant’s nose bleed was treated by the team doctor, and he returned to the game in relatively satisfactory condition. The Plaintiff consequently was charged with a personal foul. Two minutes before the conclusion of the game, with Douglas High School in the lead, the Defendant collided with the Plaintiff, while he was attempting a lay-up. Plaintiff fell to the ground, tumbling over the ball rack and bleachers. Due to his injuries, Plaintiff was unable to return to the game, and was rushed by ambulance to a nearby hospital. The referees charged the Defendant with a personal foul, and Douglas High School ultimately won the game due to the resulting foul shots.

Plaintiff was diagnosed with a spinal cord fracture. Following months of physical therapy, Plaintiff is now able to walk again. However, Plaintiff’s doctor concluded that Plaintiff should avoid playing sports for the rest of his life as a subsequent injury in the same area could aggravate the healed fracture and possibly lead to paralysis.

Plaintiff sued the Defendant, alleging that Defendant was negligent and that he intentionally collided with Plaintiff causing him to fall and severely injure himself. In his answer, Defendant denied the charges claiming that he slipped on a wet spot on the court and accidentally fell into Plaintiff. Defendant also raised the affirmative defense of assumption of risk.

During the discovery phase, Defendant learned that Plaintiff had been injured twice before in competition games during the 2006-2007 school year. Prior to the trial, Plaintiff filed a motion in limine to prevent the admission of this evidence during trial as irrelevant. Plaintiff argued that the injuries were not related to the injury sustained during the February 9, 2008, basketball game and could not be used to show that Plaintiff appreciated the risk that he could be knocked down during that game, particularly because it involved a totally different sport, football.

Defendant responded that the injuries went directly to the question of whether Plaintiff knew of the existence of the danger complained of, realized and appreciated the possibility of injury as a result of such danger, but nevertheless voluntarily and deliberately exposed himself to such danger. Defendant proffered evidence that the Plaintiff had previously suffered a sprained ankle during a high school football game, and a second injury involving a broken nose sustained when Plaintiff was hit in the face by another football player. In response to specific questioning, Plaintiff reiterated his deposition testimony, as follows:

“Yeah, I’ve also been shoved to the ground before and even cut during a football game....Yeah, I bled, but the doc on the sidelines patched me up and I kept right on playing. I thought nothing of it.”

“I’m sure there are players that have been injured during basketball games.”

“We practice falling during team work outs to learn how to fall on our behind and not brace with our hands so that we avoid a sprained or broken wrist during a game.”

Agreeing with the Plaintiff, the trial court granted the motion to exclude evidence of Plaintiff’s prior injuries.

During trial, Plaintiff submitted expert medical evidence of the severity of his injuries, two witnesses who testified to seeing the Defendant bump into the Plaintiff during the basketball game. At the conclusion of the Plaintiff’s case-in-chief, the Defendant moved for a directed verdict on the grounds that Plaintiff expressly assumed the risk of injuries contemplated during the sport of basketball, including the actual injury he sustained. The trial court deferred ruling on the motion to allow the jury to decide the issue. Defendant moved for a directed verdict once again at the close of all of the evidence, and the trial court denied the motion. Within hours, the jury returned a \$50,000 verdict for Plaintiff.

After the verdict was announced, Defendant hired an investigator to do a background check on the jurors solely based on the adverse verdict. The investigation revealed that juror #2 was a spectator at the February 9, 2008, basketball game but did not disclose such fact in the juror questionnaires or during voir dire. Juror #2 admitted that he left five minutes prior to the end of the game and did not witness the actual collision between Plaintiff and Defendant. However, he did pass an ambulance headed to the gym as he was leaving.

During voir dire, defense attorneys asked the panel of jurors the following series of questions: whether the prospective juror had a friend or relative who was a student at either Douglas High School or at Crist High School; whether the prospective juror otherwise knew a student at either of those schools or knew of someone whose child was a student at either one of those schools; and whether the prospective juror knew someone on either of the basketball teams, including coaches, trainers, scouts, or any other persons that would be affiliated with either basketball team. One of the prospective jurors stated that she had been to a state high school basketball championship game a few years ago when her son was on one of the teams. She stated that it was a charged atmosphere where emotions ran high.

Defendant timely filed the instant motion for new trial, together with a supporting affidavit, on the basis of newly discovered evidence of juror misconduct, and simultaneously, Defendant renews his directed verdict argument on the assumption of risk defense.

II. DISCUSSION

A. Juror Misconduct

On the issue of the juror misconduct, Defendant alleges that the juror concealed the fact that he was present at the game, that such fact was material to the case, and that the nondisclosure was not caused by the Defendant's lack of due diligence. Defendant argues that because the juror was present at the game and saw first-hand the circumstances surrounding Plaintiff's injury, Defendant was precluded from presenting his case to a fair and impartial jury.

According to *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995), the Defendant must satisfy the following three-prong test: (1) the non-disclosed information is relevant and material to jury service in the case; (2) the juror concealed the information during questioning; and (3) the failure to disclose the information is not attributable to the complaining party's lack of diligence. I conclude that the failure to disclose this information did not meet the test set forth in *De La Rosa* because the evidence supports that the fact that juror #2 was present at the game was not material, that the juror did not conceal any information, and that Defendant was lacking in due diligence during voir dire by not asking directly whether any of the jurors were present at the game.

In this case, juror #2's non-disclosure did not preclude the defense from making an informed judgment concerning the jury. As to the first prong, the fact that juror #2 was present at the basketball game in question is irrelevant because, as he stated, juror #2 did not witness the actual incident that gave rise to this legal action. Even assuming juror #2

was present for most of the championship game, there is no evidence to suggest that he had any first-hand knowledge of the falling incident preceding this action.

With regard to the second and third prongs, the juror questionnaire presented to Juror #2 did not ask him to disclose whether he had attended the basketball game in question. Furthermore, defense counsel did not ask a single question regarding the jurors' attendance at the basketball game in question or whether they had any first-hand knowledge of the incident at play. Obviously, this was a grave oversight by defense counsel, but his oversight should neither be viewed as misconduct on the part of juror #2 nor as grounds for a new trial.

B. Express Assumption of Risk

Defendant further argues that his inability to present his case was compounded by the fact that Defendant was not allowed to introduce evidence of Plaintiff's prior injuries, which went directly to the issue of whether Plaintiff expressly assumed the risk. Defendant maintains that because of these two issues, the jury's verdict cannot be relied upon and asks that the trial court order a new trial.

The Florida Supreme Court first considered the viability of express assumption of risk in the context of contact sports in *Kuehner v. Green*, 436 So. 2d 78 (Fla. 1983). *Kuehner* involved a karate match wherein one partner took down the other partner with a "leg sweep" resulting in injury. It is important to note that the defense of express assumption of risk in *Kuehner* was a factual issue within the province of the jury. The Court expressed the important public policy for preserving a narrow defense in contact sports as follows: "If 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." *Id.* at 79. *Kuehner* also established that, in a contact sport situation, the jury's function is to initially determine whether the plaintiff subjectively appreciated the risk giving rise to the injury. The Court held:

Actual knowledge is essential to voluntary assumption of risk. If the plaintiff is found not to have subjectively appreciated the risk, the trier of fact must determine, after reviewing all evidence, whether the plaintiff should have reasonably anticipated the risk involved. If it is found that a reasonable man would not have anticipated this risk, the "unsuspecting plaintiff" cannot be said to have consented to such danger and he therefore should be allowed to recover in full.

Id. In analyzing the rationale of the express assumption of the risk of contact sports the court went on to state: "From the outset we find that a participant in a contact sport does not automatically assume all risks except those resulting from deliberate attempts to injure." *Id.* Like any other participant in a sport or recreational activity, a student athlete will not be deemed to have assumed unreasonably increased risks.

Plaintiff argues that the jury was correct in determining that his injuries were the result of Defendant's negligent or intentional conduct and therefore express assumption of risk does not apply as a bar to Plaintiff's recovery. Plaintiff relies on *Ashcroft v. Calder Race Course*, 492 So. 2d 1309 (Fla. 1986), where the Court considered a suit by a jockey who was injured in a fall that occurred when his horse veered across the racetrack toward an exit gap. The jury found that the negligent placement of the exit gap by the racetrack owner caused the accident and that the jockey was not negligent. However, the jury also found that the jockey had assumed the risk because he had unsuccessfully sought to get the exit gap moved after an earlier accident. In quashing the judgment against the jockey, the Court stated that even assuming express assumption of the risk applied to horse racing, the doctrine waived only risks inherent in the sport itself. The Court observed that riding on a track with a negligently placed exit gap was not an inherent risk in the sport of horse racing.

Arguably, the Plaintiff in this case assumed the risk that he might fall to the floor during the basketball game, either on his own or as a result of colliding into another player. Yet while getting knocked down during a game of basketball is a risk inherent in the game, it is apparent to me from the record that the jury could have rightfully found that Defendant intentionally knocked the Plaintiff down, thus, rendering the doctrine of express assumption of risk useless in this action. It is quite plausible that the Plaintiff, in fact, was unaware of the particular risk the Defendant presented in his angry disposition, and therefore, could not knowingly encounter the risk. While Plaintiff testified to being injured in the past during a high school athletic game of football, that is not the same as him being injured in a competitive basketball game, as is the case here.

CONCLUSION

For the above reasons, this Court holds that the Plaintiff did not expressly assume the risk of being injured as he was in the February 2008 basketball game, and that the Defendant's defense was not compromised by juror misconduct. Therefore, the motion for new trial is DENIED.

IT IS SO ORDERED.

Dated: November 30, 2008

SMART, Lindsay B.
Circuit Court Judge

IN THE DISTRICT COURT OF APPEAL SIXTH DISTRICT,
STATE OF FLORIDA

ROBIN HIGHTOWER,)	
)	
Appellant,)	CASE NO. :
)	6D08-3137
v.)	Lower Case
)	No. : 01-
CAMERON DUNCAN,)	111-99
)	
Appellee.)	
_____	/	

Opinion filed December 10, 2008.
An appeal from the Circuit Court for Crist County.
Lindsay B. Smart, Judge.

McCANE, Judge.

Cameron Duncan, plaintiff below, was injured while playing in his high school's championship basketball game. He brought this negligence action against a fellow student athlete, Robin Hightower, and the jury decided in favor of the plaintiff. The trial court ordered that judgment be entered accordingly, and Hightower appeals. His appeal raises issues concerning jury misconduct and a pre-trial ruling on Plaintiff's motion in limine. For the reasons stated below, we find that the trial court erred in denying Defendant's motion for new trial on both issues raised. We, therefore, reverse and remand the case to the trial court for a new trial and direct the trial court to allow introduction of the evidence involving Plaintiff's prior injuries.

I. Background Facts

The Findings of Fact are set forth in Judge Smart's lower court opinion. We need not repeat them here.

II. Juror Misconduct

Defendant argues on appeal that the trial court erred in denying his motion for new trial because he was prejudiced by the fact that juror #2 failed to disclose that he was a spectator at the state championship basketball game central to the case at bar. Defendant further alleges that such failure prejudiced Defendant's ability to present his case to a panel of fair and impartial jurors.

An order on a motion for new trial is subject to review by the abuse of discretion standard. See *Brown v. Estate of Stuckey*, 749 So. 2d 490 (Fla. 1999). A three-part test applies to determine whether a juror's nondisclosure of information during voir dire warrants a new trial. See *Roberts v. Tejada*, 814 So. 2d 234 (Fla. 2002); *De La Rosa v.*

Zequeira, 659 So. 2d 239 (Fla. 1995). The complaining party must establish first, that the information is relevant and material to jury service in the case; second, that the juror concealed the information during questioning; and lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence. *Id.* at 241.

As to the first element, we conclude that the presence of juror #2 at the basketball game was material to the issues of the case. Juror #2 had a pre-established opinion as to what happened during the game, whether he first-handedly witnessed the injury occur or heard from other spectators about the incident. This knowledge could have led to certain assumptions on the part of juror #2 as to the players' mindset and behavior toward each other during the game. The fact that juror #2 saw an ambulance as he was leaving could also create a pre-formed opinion as to the magnitude of the Plaintiff's injuries, even without any medical evidence to establish Plaintiff's actual injuries. Thus, any evidence relating to the Defendant's conduct or Plaintiff's injuries was overshadowed by juror #2's impressions during and immediately after the game.

As to the second and third elements, we find that a reasonable prospective juror would have disclosed that she saw the game, even though defense counsel did not specifically ask whether the prospective jurors were in attendance at the game. During voir dire, defense counsel asked several questions regarding the prospective jurors' familiarity with the game of basketball, and their relationship with student athletes enrolled at either of the schools in question. One of the prospective jurors willingly disclosed that she had attended a state high school basketball championship game a few years ago when her son played on one of the teams. She stated that the atmosphere was significantly charged and emotions ran high. The fact that she disclosed this information despite not being asked directly "Have you been to a state high school basketball championship game?" suggests that a reasonable person would conclude that experience at such a game, and in this case, the specific game at the center of this lawsuit, was an important fact to be disclosed. Moreover, the fact that juror #2 was aware of this exchange but still did not disclose the fact that he attended the championship game in question suggests that juror #2 intentionally concealed the fact.

In *De La Rosa*, the Defendant-physician appealed from an order of the trial court granting plaintiff a new trial. The District Court of Appeal reversed. The Florida Supreme Court overturned the appellate court's decision holding that the Plaintiff was entitled to a new trial on the ground that the juror, who eventually became the foreperson, failed to disclose his involvement in six prior lawsuits despite being asked during voir dire whether he had any such involvement. The court, adopting the appellate court's dissent, concluded that the juror's involvement in those lawsuits was material and that he failed to respond truthfully to counsel's questions. Similarly, in this case, the undisclosed facts were critical to the case at bar, and even though juror #2 was not specifically asked about his attendance at the basketball game, there is sufficient support for the conclusion that he intentionally concealed that fact.

For the reasons set forth above, we find that the trial court erred in denying the Defendant's motion for new trial based on misconduct by juror #2, as such misconduct prejudiced Defendant's ability to present his case to a panel of fair and impartial jurors.

III. Express Assumption of Risk

Defendant argues that the trial court erred in excluding evidence of Plaintiff's prior injuries sustained during competition basketball games. We note first that this argument was properly preserved for appeal. *See Horne v. Hudson*, 772 So. 2d 556 (Fla. 1st DCA 2000) (stating that a previous motion in limine does not preserve an issue for review unless it is renewed when the evidence is actually offered at trial). Defendant alleges that the trial court should have allowed such evidence on the question of assumption of risk because it is relevant to determine whether the Plaintiff expressly assumed the risk of the danger complained of. The Defendant further argues that it did not owe a duty of care to Plaintiff to prevent his injury, and that even if such a duty existed, that Plaintiff had assumed the risk of this injury by voluntarily participating in the basketball game.

In Florida, "express assumption of risk is a viable defense to negligence actions spawned by contact sports." *Kuehner v. Green*, 436 So. 2d 78, 78 (Fla. 1983). Generally, the elements of the defense of express assumption of risk are: (1) the plaintiff voluntarily consented to take certain chances; (2) if injured, the plaintiff should have anticipated a particular risk; and (3) the plaintiff should have subjectively recognized the particular danger. *Id.* at 78. Instances where express assumption of risk arise as a viable bar to the plaintiff's recovery tend to come in the arena of actual consent, where one voluntarily participates in a contact sport, and in express contracts not to sue for injury or loss which may thereafter be occasioned by the defendant's negligence. We conclude that this is a classic case of express assumption of the risk.

By electing to participate in a sport or activity, a participant manifests a willingness to submit to such bodily contacts as are permitted by the rules or usages of a contact sport. In other words, a voluntary participant generally assumes all risks incident to the contest or sport that are obvious, though not necessarily the risk of injuries inflicted intentionally or recklessly. The plaintiff in *Kuehner*, sued for injuries he received as a result of a karate takedown maneuver executed by the defendant during a sparring exercise at the defendant's home. It was determined in *Kuehner* that the plaintiff knew the existence of the danger complained of, realized and appreciated the possibility of an injury as a result of such danger, and having a reasonable opportunity to avoid it voluntarily and deliberately exposed himself to the danger. The *Kuehner* court stated: "if 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 by these activities." *Id.* at 80. In short, the Florida Supreme Court held that the voluntary participation in a contact sport with full knowledge and appreciation of the danger constituted express assumption of the risk which barred the plaintiff's recovery. *Id.*

Literally taken, as was the case in *Kuehner*, Plaintiff's injury in the instant action was spawned by a contact sport. In the case at bar, this court is confronted with a factual scenario squarely falling within the ambit of express assumption of risk. Plaintiff had actual knowledge and conscious appreciation of the dangers involved in his participation in high school athletic sports, and that such participation may result in injuries, from minor to severe, including paralysis, serious permanent disability or death. Further, a reasonable person would have understood that these types of injury may result from

his/her own actions, the actions or inactions of others, or a combination of both. Therefore, we conclude that evidence of Plaintiff's prior injuries was necessary for the jury to determine the scope of Plaintiff's knowledge of the risks posed by and inherent in the game of basketball. Plaintiff's experiences of getting injured during previous games constitute conclusive proof that he understood and appreciated the risk of injury.

With the full appreciation that he could be injured while participating in the contact sport of basketball, the Plaintiff opted to participate nonetheless. The Plaintiff was injured as a result of his active participation in the game of basketball. Accordingly, the Plaintiff's recovery should have been barred as a result of his active participation in a contact sport. As to the precluded evidence, we presume that the jury would have found differently had it been presented with the evidence of the Plaintiff's prior ankle injury and broken nose under similar circumstances. This evidence goes directly to the question of whether Plaintiff was aware that basketball was a full contact sport; that injuries could stem from playing during a competition game; and that despite this knowledge, Plaintiff proceeded to play in the state championship game. Had the jury found that Plaintiff assumed the risk of physical contact with Defendant, the verdict should have been returned for the Defendant.

For the reasons stated above, we conclude that the trial court's order granting Plaintiff's motion in limine was in error, and such error was not harmless. Therefore, this case is REVERSED and REMANDED for a new trial with instructions to the trial court to allow the admission of evidence regarding Plaintiff's prior injuries.

GOURGE and BARAMA, JJ., CONCUR.

Supreme Court of Florida

Case No.: SC09-301
Lower Tribunal No.: 6D08-3137

CAMERON DUNCAN,
Petitioner,

vs.

ROBIN HIGHTOWER,
Respondent.

ON CONSIDERATION of the PETITION FOR A WRIT OF CERTIORARI herein to the Supreme Court of Florida, No. 6D08-3137.

IT IS SO ORDERED by this Court that the said Petition be, and the same is hereby granted, in order that this Court may consider the following questions raised by the parties:

1. Whether the Defendant was prejudiced by the fact that juror #2 was a spectator at the state championship game at issue in this case but failed to disclose such fact during voir dire.
2. Whether the trial court erred as a matter of law in granting Plaintiff's motion in limine and excluding evidence of Plaintiff's prior injuries as irrelevant to the issue of express assumption of the risk.

Dated: December ____, 2008.

_____/s/
Timothy Hall
Clerk, Supreme Court