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Assumption of Risk: Appellate Division Gives Expansive Reading of Danger Invites Rescue.

It is well settled in New York that an injured party may not seek compensation for injuries sustained on account of a risk or danger usually associated with the pursuit of an activity voluntarily undertaken. The doctrine of “danger invites rescue” may be invoked to overcome assumption of risk and comparative fault where there is a risk of “imminent, life threatening peril.”

In *O'Connor v. Syracuse University*, the Appellate Division, Third Department recently found that plaintiff's attempts to separate a fan from a hockey player during a post-game altercation raised questions of fact under this doctrine precluding summary judgment in favor of the defendants.

Plaintiff Cornelius O'Connor alleged that he sustained personal injuries during an altercation between Defendants Brian McNeil and Matthew DiSanti that occurred at Defendant Syracuse University's Tenny Ice Pavilion following a Men's Club hockey game between Syracuse University and Slippery Rock University of Pennsylvania. Following the game, O'Connor (the father of a Syracuse University player) was talking to some of the Slippery Rock players as they exited the ice. DiSanti (a Slippery Rock player) and McNeil (a Syracuse University Student who had attended the game) became involved in a verbal and then physical altercation. O'Connor intervened, grabbing McNeil around the waist in an attempt to stop DiSanti from pulling him across a portable barrier into a group of Slippery Rock players who had exited the ice. O'Connor and McNeil ended up on the floor amidst the Slippery Rock players who continued to strike McNeil. The altercation was soon quelled by Syracuse University personnel, but O'Connor had already suffered a fractured leg.

The lower court granted the summary judgment motions of all defendants, finding that O'Connor had assumed the risk of his own actions and that the doctrine of danger invites rescue did not apply because the risk of life threatening peril was not present. The lower court also found that Syracuse University met its duty to maintain safe conditions at the hockey game and, therefore, did not breach any duty to O'Connor.

On appeal, the Third Department affirmed the lower court order to the extent it granted Syracuse University's summary judgment motion finding that the University had met its duty to keep Tenny reasonably safe during the event. However, the Appellate Division reversed the portion of the order granting the summary judgment motions of Defendants McNeil and DiSanti finding a question of fact as to whether danger invites rescue applied.

McNeil and DiSanti had argued that they owed no duty to O'Connor because he assumed the risk by voluntarily entering the fracas. O'Connor, in turn, argued that the doctrine of danger invites rescue overcomes assumption of risk.

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The Appellate Division rejected the lower court's reasoning that there was no imminent peril present that justified invoking the doctrine. Instead, the Third Department found that O'Connor's testimony supported the inference that he was trying to prevent serious injury to McNeil by extricating him from a physical confrontation with up to fifteen hockey players, "fresh off the ice from an emotionally packed defeat and fully suited with protective gear, skates and hockey sticks."

The Third Department noted that the fact that a life threatening injury did not occur does not mean that the doctrine can not be applied. The Third Department also distinguished this incident from the "schoolhouse fight" in *Ha-Sidi v. South Country Central School District*, 148 A.D.2d 580, 539 N.Y.S.2d 47 (2d Dep't 1989), in which the Appellate Division determined that danger invites rescue did not apply. In *Ha-Sidi*, the Second Department found that a fistfight between two eighth graders "did not rise to the level of a perilous situation which invited rescue."

Ultimately, the Third Department concluded that a jury must determine whether the plaintiff acted reasonably under the circumstances. ■

The Danger of Inadvertent Admissions and the Importance of Careful Pleading

The Appellate Division, Third Department recently considered the effect of facts admitted in an original answer and subsequently denied in an amended answer in a medical malpractice action.

In *Kwiecinski v. Hwang*, the plaintiff alleged she was given the wrong drug in preparation for surgery. Defendants moved to amend their initial answer asserting that they inadvertently admitted to facts contained in two sentences of paragraph 23 of Plaintiff's Complaint when drafting their original answer. Specifically, in the beginning of paragraph 23, Plaintiff alleged (1) she "was supposed to receive Versed prior to surgery" and (2) "[i]nstead due to the gross negligence and recklessness of defendant[s], plaintiff was given a paralytic agent." In their answer, Defendants responded that "as to the allegations as contained in paragraph numbered 23 of the [c]omplaint, admit the first two sentences and deny knowledge or information sufficient to form a belief as to the remaining allegations."

The lower court allowed Defendants to amend their answer and precluded the Plaintiff from using the admission in Defendants' initial answer at any stage of the litigation. On appeal, the Third Department held that the lower court erred in precluding the use of the admissions contained in the original answer.

The Appellate Division concluded that admissions in an original pleading superseded by an amended pleading remain as evidence of facts admitted. In other words, a fact admitted in the original pleading does not lose its effect as an admission simply because the pleading has been amended. As a result, the Defendant is left to explain the circumstances surrounding the inadvertent original admission at trial and the fact finder will then determine the weight to be afforded to the original admission.

This case underscores the importance of exercising great care in drafting pleadings. ■

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