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via mail

United States Court of Appeals
Fifth Circuit
600 S. Maestri Place
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Re: No - 30864 John Doe v. Deray McKesson, et al, USDC No. 3:16-CV-742

Dear Judges:

The Professional Rescuer's Doctrine "per se" does not apply to this case, because the Louisiana Supreme Court through Murray¹ explained, on a previous certified question from this Court, that legislative changes to La. C.C. art. 2323 abolished the assumption of the risk doctrine, which is the foundation for the PRD.

Although a near identical question was previously certified to the Louisiana Supreme Court in Murray, and the answer may appear obvious, out of deference to a higher court (SCOTUS), this Court should certify the following question to the Louisiana Supreme Court, "Did the Professional Rescuer's Doctrine survive Murray? If so, what are its elements under Louisiana law?"

This Court should not apply the PRD to this case, because the PRD does not apply, and, even if it did, it would not be a complete bar to liability. See Murray.

¹ Referencing, Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1124 (La. 1988)("Today we are called upon to resolve the role, if any, which the assumption of risk defense continues to play in Louisiana tort law, given the Legislature's adoption of a comparative fault system. The issue has presented itself in a case certified to us by the United States Court of Appeals for the Fifth Circuit, Murray v. Ramada Inn, Inc., 821 F.2d 272 (1987). The certified question is as follows: Does assumption of risk serve as a total bar to recovery by a plaintiff in a negligence case, or does it only result in a reduction of recovery under the Louisiana comparative negligence statute? We accepted certification, 514 So.2d 21 (La.1987), and now answer that assumption of risk does not serve as a total bar to a plaintiff's recovery in a negligence case.").

The Professional Rescuer's Doctrine, announced in Gann, is an affirmative defense not well founded in, or applicable to Louisiana tort cases, because it is a common law doctrine that relies upon "assumption of the risk."² Assumption of the risk was rejected by the Louisiana Supreme Court and the PRD was not adopted by the Louisiana Legislature. For example, as recently as 2013, through Broussard v. State ex rel. Office of State Bldgs., 2012-1238 (La. 4/5/13), 113 So. 3d 175, (see also foot note 8) which was a defective elevator/building case, the Supreme Court, 113 So. 3d at 188, discussed the application of jurisprudential doctrines of immunity and assumption of the risk writing:

Our "open and obvious to all" principle is not a hollow maxim. Rather, it serves an invaluable function, **preventing concepts such as assumption of the risk from infiltrating our jurisprudence.** Over 25 years ago in Murray, we recognized that defining a defendant's initial duty in terms of a plaintiff's, versus everyone's, **knowledge of a dangerous condition would preserve assumption of the risk as a defense and undermine Louisiana's pure comparative fault regime:**

If accepted, defendants' argument would inject the assumption of risk doctrine into duty/risk analysis "through the back door." By that, we mean that the argument attempts to define the defendant's initial duty in terms of the plaintiff's actual knowledge, and thereby seeks to achieve the same result which would be reached if assumption of risk were retained as a defense, i.e., a total bar to the plaintiff's recovery. **A defendant's duty should not turn on a particular plaintiff's state of mind, but instead should be determined by the standard of care which the defendant owes to all potential plaintiffs.** [Emphasis added]

The Louisiana Supreme Court went on to discuss the fact that Louisiana is a codal state, Broussard, 2012-1238 (La. 4/5/13), 113 So. 3d 175, 191, that utilizes a "pure comparative fault regime." See footnote 8, and writing at footnote 9:

Professor Maraist opines that Dauzat potentially creates a professional exception to the "open and obvious to all" rule. Maraist, et. al., *Answering a Fool*, 70 LA. L.REV. at 1127, 1130. In his view, Dauzat arguably stands for the proposition that if the **plaintiff is a member of a class of people who, because of their profession or experience, have knowledge of a risk**

² See Gann v. Matthews, 2003-0640 (La. App. 1 Cir. 2/23/04), 873 So. 2d 701, 705, writ denied, 2004-0761 (La. 6/18/04), 876 So. 2d 804 ("a jurisprudential rule that essentially states that a professional rescuer, such as a fireman or a policeman, who is injured in the performance of his duties, 'assumes the risk' of such an injury and is not entitled to damages.").

that should be open and obvious to all members of the class, then the defendant may owe no duty to the members of that class “because of the obviousness of the risk vis-à-vis the group.” Id. Although Professor Maraist's exegesis is a cogent attempt to reconcile Dauzat in light of our sometimes divergent open and obvious case law, **we decline to adopt this “open and obvious to all (members of a class)” principle. We find that doing so would implicitly sanction what we fervently cautioned against in Murray, i.e., reintroducing “through the back door” the subjective knowledge of the plaintiff and his or her assumption of the risk based on that knowledge.** 521 So.2d at 1136. [Emphasis added]

With regard to Brooks, a 2010 decision, that Court explored the application of the “Louisiana Rescuer’s Doctrine” to admiralty cases after writing, “Instead, those jurisdictions apply a comparative fault analysis, taking into account the risks inherent in performing a particular rescue.” 873 So.2d at 935. This was an odd statement considering Louisiana codified comparative fault in La. C.C. art. 2323 years earlier.

In Henry v. Barlow, 2004-1657 (La. App. 3 Cir. 5/4/05), 901 So. 2d 1207, 1213, (statutory duty to submit peaceably to a lawful arrest), that court discussed the impact of Murray on Langlois on the PRD. In Henry v. Barlow, 2004-1657 (La. App. 3 Cir. 5/4/05), 901 So. 2d 1207, 1213–14, finding material facts precluded summary judgment on the PRD defense to the claim of a police officer injured while attending a single vehicle crashed into a power pole, that court wrote:

Before considering whether the risks to which the plaintiff was exposed in this case were dependant or independent of his duty as a police officer, or the level of **“blameworthiness” in the defendant’s conduct**, we note the second circuit’s treatment of the issue in Worley v. Winston, 550 So.2d 694 (La. App. 2 Cir.), writ denied, 551 So.2d 1342 (La. 1989). In Worley, the trial court awarded a police officer damages for a broken finger joint, an injury which he **sustained during the course of a lawful arrest**. The defendant asserted that the plaintiff was not entitled to such damages due to the Professional Rescuer's Doctrine. Although the second circuit noted that an officer “could expect a criminal to resist arrest[,]” and therefore “the risk of being injured while effecting an arrest is a dependant risk,” the court also stated the following:

While the professional rescuers rule, similar to the “fireman's rule,” has traditionally been discussed in terms of assumption of risk, **under current Louisiana tort theory the rule should, perhaps, be couched in terms of comparative fault or duty/risk.** See Murray v. Ramada Inns, Inc., 521 So.2d 1123 (La.1988). More precisely, the rule comes into play in determining the **risks included within the scope of the**

defendant's duty and to whom the duty is owed. It might be said that a defendant's ordinary negligence or breach of duty does not encompass the risk of injury to a police officer or fireman responding in the line of duty to a situation created by such negligence or breach of duty. **A defendant's particularly blameworthy conduct, especially intentional criminal conduct, does encompass the risk of injury to a policeman or fireman responding in the line of duty.** Further, in the case of injury to an officer by someone resisting arrest, we have stated above that the duty is intended, at least in part, to protect the officer from injury while effecting the arrest in the line of duty. Where a duty is owed, as in this case, to a certain class of persons, recovery cannot be denied to a person of this class because of the very factor that makes the person a member of the class. *Id.* at 697. [Emphasis added]

Because the second circuit had already noted a statutory duty on the part of the defendant to submit peaceably to a lawful arrest, the court awarded the officer damages.

Here, in this case, the only reason Officer Doe was on the highway with the protestors was because McKesson organized the situs of the protest to be on the highway in front of the police station blocking a major thoroughfare, while a public park was just one block away. McKesson disregarded his statutory duty not to protest while and organize a protest to illegally block a public highway. La. R.S. 14:97. The police would not have been out in riot gear making arrests if Black Lives Matter protestors did not have a history of violence and the protestors were not in violation of the law necessitating their arrests. Officer John Doe was not wearing riot gear. He was behind the line seemingly protected from the violent onslaught by lawless rioters throwing objects at police, who were making arrests of violators. It is self-evident that McKesson had a duty to refrain from violating the law, including traffic laws. He not only violated the law, but he planned the protest so that the out-of-state and local protestors would be in violation of law drawing the police into confrontation. It was completely foreseeable to McKesson that police would be injured.

In Mayeux v. Charlet, 2016-1463 (La. 10/28/16), 203 So. 3d 1030, 1033–34, the Louisiana Supreme Court explained that there is a legal question of whether in general a duty is owed writing:

Whether this particular priest owed this particular duty to the plaintiffs in this particular factual context is **a mixed question of law and fact**. See Kenney v. Cox, 95–0126, p. 1 (La. 3/30/95), 652 So.2d 992 (Dennis, J., concurring)(noting there is a “distinction between the existence of a general duty of care (a legal question) and the ‘legal cause’ or ‘duty/risk’ question of the particular duty owed in a particular factual context (**a mixed question of**

law and fact”); see also Pitre v. Louisiana Tech University, 95–1466, 95–1487, p. 22 (La. 5/10/96), 673 So.2d 585, 596 (Lemmon, J., concurring; joined by Kimball, J.)(noting “[i]n the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of ‘no liability’ or ‘no breach of duty.’”). Therefore, we find the appellate court erred in dismissing plaintiffs' claims with prejudice as **the question of duty/risk should be resolved by the factfinder at trial, particularly herein where there exists material issues of fact . . . [Emphasis added]**

Similarly, in Broussard, 113 So. 3d at 185 , the Louisiana Supreme Court wrote:

It is axiomatic that the issue of whether a duty is owed is a question of law, and the issue of whether a defendant has breached a duty owed is a question of fact. E.g., Brewer v. J.B. Hunt Transp., Inc., 09–1408, p. 14 (La.3/16/10), 35 So.3d 230, 240 (citing Mundy v. Dep't of Health and Human Res., 620 So.2d 811, 813 (La.1993)). The judge decides the former, and the fact-finder—judge or jury—decides the latter. “In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of ‘no liability’ or ‘no breach of duty.’ ” Pitre, 95–1466 at p. 22, 673 So.2d at 596.³

Observing deference to a higher court is always both a professional and ethical practice. Despite Murray, Louisiana circuit courts continue to grapple with how to apply the common law PRD. The Louisiana Supreme Court has not directly addressed the question of whether the PRD survived Murray (La. C.C. art. 2323) and, if so, is the PRD a complete bar. Some courts, e.g. Gant, continue applying the PRD as though it were a source of statutory immunity and complete bar, even though its foundation arises from the assumption of the risk doctrine disavowed as non-existent in Louisiana law.

If the Professional Rescuer's Doctrine survived the enactment of article 2323, the questions of fact as to whether the risk was dependent or independent is a jury question, which would preclude dismissal of this case on a no cause of action. Returning to Gann, in an unpublished opinion, the Louisiana First Circuit affirmed allowing the question of immunity to go to a jury, writing, “Here, unlike the Gann court, the jury made a factual finding that Mr. Rayburn's conduct was either so blameworthy or the risk was so extraordinary as to impose liability.” Brooks v. Shaw Constructors, Inc., 2008-0804 (La. App. 1 Cir. 10/31/08), 2008 WL 4764333.

In Langlois v. Allied Chem. Corp., 258 La. 1067, 1087–88, 249 So. 2d 133, 141 (1971), which predates the amendment to article 2323, the Louisiana Supreme Court

³ Referencing, Pitre v. Louisiana Tech. Univ., 95–1466, pp. 12–16 (La.5/10/96), 673 So.2d 585.

discussed the “Firefighter’s Rule;” however, it must again be noted that the application of assumption of the risk was superceded by the enactment of the comparative fault statute as recognized by the Murray Court, 521 So. 2d at 1126. Nevertheless, in Langlois, the Louisiana Supreme Court addressed the claim of a firefighter who sued for injuries he sustained while acting as a firefighter after being exposed to chemicals escaping from a chemical plant and for which he was allowed recovery despite the “Firefighter’s Rule.” The Louisiana Supreme Court explained, “Any voluntariness on the part of Langlois **could only be found if we assume a waiver because he became a fireman**. Firemen, police officers, and others who in their professions of protecting life and property necessarily endanger their safety **do not assume the risk of all injury without recourse against others**. Briley v. Mitchell, 238 La. 551, 115 So.2d 851 (1959).”

Although Langlois as a fireman possessed more knowledge than many about the nature of gases and the consequences of exposure to gases, he did not here knowingly and voluntarily encounter the risk which caused him harm. He acted in response to duty, and his exposure to the risk in line with that duty was minimal. **Langlois did not embrace a known danger with that consent required by law to bar his recovery for defendant's fault**. The defendants must establish by a preponderance of evidence their affirmative defense. They have failed to discharge this burden.⁴

With regard to the duty to follow the law and the reasonable expectation of being held responsible for the harms caused by violations of law, the Louisiana Supreme Court, Langlois, 249 So. 2d at 137, wrote, “**Just as we have found in the Code many standards of conduct, many statutes and local ordinances also detail standards of conduct which courts may apply per se, impliedly or by analogy. Criminal laws, traffic regulations, zoning laws, health laws, and others may and often do set the standard for lawful conduct in personal relationships, although they are designed for societal protection and incorporate penalties and specific consequences for their mere breach**. Pierre v. Allstate Ins. Co., 257 La. 471, 242 So.2d 821 (1971).” Emphasis added.

May this submission be deemed proper in the premise.

Sincerely,



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⁴ Langlois, 249 So. 2d at 141.