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RUNNING ON EMPTY...OR WATER OR GATORADE? *SAFFERO V. ELITE RACING*

Devon Battersby

INTRODUCTION

Millions of people participate successfully in marathons each year. The days are gone where only super fit, workout fanatics run marathons. While more accessible to the average person these days, a marathon is still a grueling 26.2 miles. So grueling, in fact, that the term ‘marathon’ was coined by the ancient Greeks when a messenger ran this distance from Marathon to Athens to announce the Athenians’ victory in the Battle of Marathon against the Persians - he subsequently died of exhaustion. [EN1] All marathon participants enter the race with different goals, training programs and levels of ability. Running a marathon can be immensely rewarding. However, it is clear that any runner who participates in a marathon chooses to do so assuming certain possible health risks. These risks include soreness, permanent muscular injury, dehydration, hyponatremia and in some cases, death. [EN 2] Certain precautions can be made to minimize these risks, such as beginning the race early [EN 3] and providing runners with water and sports beverages like Gatorade or All Sport, which contain electrolytes. [EN 4]

With whom does the duty to minimize the risks associated with a marathon lie? Is it with the runner or the race's organizer? *Saffero v. Elite* racing addressed this issue. In *Saffero*, the California Court of Appeals held that a marathon participant's suit against the organizers of a race alleging negligence for failing to provide water and other fluids was not barred because running a marathon did not fall under primary assumption of risk. [EN 5] While the *Saffero* court was correct in its holding, it provided little guidance for courts addressing future questions regarding assumption of risk in athletic events and the duty of those who organize them. It also provided little or no policy reasons for rendering this decision.

II. BACKGROUND

Richard Saffero sued Elite Racing Incorporated, the organizers of the ‘Suzuki Rock n’ Roll’ marathon, held on June 21, 1998 in San Diego, California. [EN 6] Saffero, who had previously run two marathons, was hospitalized following the race for a condition called hyponatremia, which occurs due to an excess of sodium in the blood. [EN 7] Saffero was in critical condition for several days and suffered permanent memory loss and neurological disorders. [EN 8] His only memory of the marathon was hearing music from the bands playing to support the runners. [EN 9] Saffero submitted evidence that the organizers' failure to provide sufficient amounts of water and other fluids with electrolytes during the race helped cause his condition. [EN 10]

Saffero contended that Elite promised runners there would be at least twenty-three stations providing runners with water and other fluids. [EN 11] Runners commonly expect such provisions since most races include a fee that goes to the organization of the race. Saffero not only presented evidence to substantiate this custom, he also testified that it was his practice to stop at every fluid station in the other marathons he had run. [EN 12] Furthermore, Saffero argued that the race was forty-five minutes late in starting the race, during which time the runners were not allowed out of their ‘chutes’ to re-hydrate before the race. [EN 13] This delay

was critical, as an early start was necessary to avoid dangerous heat conditions, given the location and time of year of the race.

Elite moved for summary judgment, alleging that Saffero's conditions were primary risks inherent in marathons. [EN 14] As a result, Elite argued that Saffero's suit should be barred. The trial court granted this motion. It concluded that plaintiff did not minimize his risk by attempting to get water or sports drinks and barred the testimony of other runners who finished the race in close proximity to Saffero. [EN 15] Saffero subsequently appealed, and the Court of Appeals of California held that Saffero's suit was not barred, as it fell under the doctrine of secondary assumption of risk. [EN 16] Elite, furthermore, had a "duty to produce a reasonably safe event." [EN 17] To define this duty, the court looked to previous cases and surmised that Elite failed to take precautions to "minimize the risks without altering the nature of the sport" as stated in *Knight v. Jewett*. [EN 18] These precautions obviously included providing water and electrolyte replacement drinks as promised to the runners of the race.

III. ANALYSIS

While the *Saffero* court was correct in its holding that Elite owed a reasonable duty to minimize the risks associated with marathons, it failed to enunciate a clear test to differentiate between the duty of athletic event organizers and the risk assumed by participants. A clear test would give event organizers a template for what is expected of them in arranging necessary measures to conduct events with the greatest degree of safety. It also failed to identify public policy reasons for its decision. The most notable reason for finding organizers to owe a duty to athletic participants is that event organization is a business, and companies, like Elite, are earning money from races. In missing this critical policy reason, the *Saffero* court was too lenient on organizers who cut corners to maximize profit. As a result of these failures, courts dealing with this evolving athletic issue in the future have little guidance.

Saffero based its analysis on the differentiation between primary and secondary assumption of risk. [EN 19] The court held that while Saffero assumed a risk by participating in an inherently dangerous activity, Elite still owed him a duty. [EN 20] While the court used a secondary assumption of risk inquiry, it only shallowly described the fact pattern for a finding of secondary assumption of risk. *Saffero* merely repeated what previous California courts had articulated in decisions like *Knight* and did nothing to further shape assumption of risk doctrine as it relates to athletics. In *Knight*, the Supreme Court of California held that the defendant's conduct in a touch football game did not demonstrate a breach of duty of care owed another participant. [EN 21] It further held that the defendant was at most negligent when he knocked over the plaintiff and stepped on her hand. [EN 22]

Saffero, following *Knight*, articulated that courts need to look at the nature of the sport and the defendant's role in the sport when defining the assumption of risk. [EN 23] In regurgitating what the *Knight* court said, businesses sponsoring athletic events needed to take reasonable steps to minimize the risks associated with the sport without altering the nature of the sport. [EN 24] *Saffero* seems to imply that defendants who operate athletic events for profit will be held to a tougher standard than defendants who are participants in the event itself. [EN 25] Although most of the precedent used in the court's holding stresses an increased duty on athletic event operators, the court fails to expressly condone this increased duty in its analysis. [EN 26] In obscuring this tougher standard, the court fails to provide a clear standard to differentiate between those who participate in athletic events and those who produce them for profit.

It is unfortunate that the court does not express this standard from a policy point of view. There is a clear distinction between the defendant in *Knight*, who was simply playing in a recreational football game, [EN 27] and the defendant in *Saffero*, a company specializing in the organization of road races. [EN 28] Richard Jewett, the defendant in *Knight*, neither organized the touch football game in which he played nor did he receive a profit from the game. Elite, conversely, required that participants pay an entrance fee for the ‘Rock n’ Roll’ marathon. Runners typically pay upwards of twenty-five dollars to participate in road races like those organized by Elite. Runners reasonably expect that part of their entrance fee goes to providing refreshments during and after the race. [EN 29] In fact, both Saffero and another witness testified that they continued running the marathon when they encountered water stations that had run out, because they reasonably expected there to be more water. [EN 30] It seems that Elite owed Saffero a greater duty because it stood to profit from his participation in the marathon.

As a matter of policy, it is desirable to hold those who financially profit from participation in or attendance at athletic events to a higher standard than mere contestants. Organizers looking to turn a greater profit could skimp on simple measures that would greatly minimize the risks of their particular sport. Without a doubt, it is more expensive for operators to utilize safety measures at athletic events, such as fixing netting to protect spectators from errant balls, pucks or in auto racing, tires, or providing athletes with special helmets for football and hockey. Obviously, it would have been more costly for Elite to provide more fluids and to make sure that sufficient electrolyte replacement drinks were available. [EN 31] This should not matter, however, since Elite profits off those who assume the risk of running a marathon. In most cases, the costs of minimizing the risks inherent in an athletic event are minimal when balanced with the danger of the risk they diminish. Nets and helmets are inexpensive compared with the cost of one's life or permanent disability that may result from being struck in the head. Likewise, water and sport drinks for marathoners are inexpensive when compared with the effects of failing to provide them. Often manufacturers, such as Gatorade sports drink or Ice Mountain water, will agree to provide beverages for runners in exchange for marketing opportunities. [EN 32] Further, it is inconceivable that runners would refuse to pay a slightly higher entrance fee in order to ensure proper hydration at events. These are all fairly simple and inexpensive solutions to eliminate risks associated with marathons. Elite demonstrated either pure laziness or a desire to cut corners in its administration of the ‘Rock n’ Roll’ marathon. In failing to articulate a higher standard for organizers like Elite and to delineate policy reasons behind this standard, the *Saffero* court did not send a strong enough message to those who receive profit from coordinating athletic events.

IV. CONCLUSION

Marathons are an exhausting, yet rewarding endeavor. Runners push themselves to the limit for 26.2 miles after months, or sometimes years, of training. It is nearly impossible for the human body to push itself to this limit without proper steps to replenish nutrients lost. In reaching this ultimate goal, participants subject themselves to certain risks, such as injury or dehydration. However, as part of running in an organized race, runners have come to expect that their entry fee goes to minimizing some of these risks; runners expect the organizers to provide adequate water and electrolyte replacement drinks to prevent dehydration or hyponatremia. Race organization is a profitable business and in failing to articulate a tougher duty for those who profit off athletic events, the *Saffero* court failed to send an important policy message that negligence

and cost cutting will not be tolerated. Richard Saffero was lucky he survived Elite's failure to minimize the risks inherent in a marathon. Perhaps that poor messenger who died running from the Battle of Marathon to Athens would have fared a little better if provided with water and some Gatorade.

[EN 1] For more on the Battle of Marathon and the origin of marathons, *see* <http://education.yahoo.com/search/be?p=marathon>

[EN 2] For more information on marathon related injuries and strategies to prevent them, *see*: HAL HIGDON, MARATHON: THE ULTIMATE TRAINING GUIDE (Rodale ed. 1999).

[EN 3] HIGDON, *supra* note 2, at 173.

[EN 4] *Id.* at 176.

[EN 5] Saffero v. Elite Racing. 98 Cal. App. 4th 173 (2002).

[EN 6] *Id.*

[EN 7] *Id.*

[EN 8] *Id.* at 176.

[EN 9] *Id.*

[EN 10] *Id.*

[EN 11] *Id.*

[EN 12] *Id.*

[EN 13] Chutes are used in organized races to group runners according to the time in which they anticipate finishing the race.

[EN 14] *Id.* at 177.

[EN 15] *Id.* at 178.

[EN 16] *Id.* at 175.

[EN 17] *Id.*

[EN 18] *Id.* *See* Knight v. Jewett, 834 P.2d 696 (1992).

[EN 19] *Id.* at 178.

[EN 20] *Id.* at 179.

[EN 21] *Knight*, 834 P. 2d at 712.

[EN 22] *Id.*

[EN 23] *Saffero*, 98 Cal. App. 4th at 178.

[EN 24] *Id.* at 178-79; *see also* *Knight*, 834 P. 2d at 709.

[EN 25] *Saffero*, 98 Cal. App. 4th at 179.

[EN 26] *Id.*

[EN 27] *Knight*, 834 P. 2d at 697.

[EN 28] *Saffero*, 98 Cal. App. 4th at 176.

[EN 29] HIGDON, *supra* note, at 195.

[EN 30] *Saffero*, 98 Cal. App. 4th at 177.

[EN 31] In a subsequent letter to race participants, Elite acknowledged that they failed to provide enough water and sport drinks and promised to correct this issue in the following marathon. *Saffero*, 98 Cal. App. 4th at 177.

[EN 32] Two sponsors of the 2003 LaSalle Bank's Chicago Marathon.