THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County Common Pleas Court
Hon. Alison Renee Lee, Circuit Court Judge
Opinion Number: 365 (June 9, 2003)

Gloria Cole and George Dewalt, Jr.,)
in their capacities as Personal Representatives)
of the Estate of George Ernest Cole, deceased,)
)
Petitioners/Respondents,)
)
vs.)
)
South Carolina Electric and Gas, Inc.)
)
Respondent/Petitioner.)

BRIEF OF PETITIONERS/RESPONDENTS

F. Xavier Starkes
William T. Toal
Johnson, Toal & Battiste, P.A.
P. O. Box 1431
Columbia, SC 29202
(803) 252-9700

Attorneys for Petitioners-Respondents

TABLE OF CONTENTS

Table of Contents i

Table of Cases, Statutes and Other Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 2

Arguments 4

I. Failure to charge that defendant had the burden of proof on the issue of assumption of the risk was prejudicial error . . . 4

I. A. The trial Judge did not intent to charge and did not charge that Defendant had the burden of proof on the issue of assumption of this risk 4

I. B. Defendant could reduce the risk of injury and death by reasonable means. This was not a question of primary implied/assumption of the risk 6

II. The failure to assign defendant the burden of proof on assumption of the risk was not harmless 7

III The failure to charge that a Department of Health and Environmental Control Regulations applied to defendant was prejudicial . . . 8

IV. A. The Recreational Use Statute does not conflict with the Department of Health and Environmental Control Regulation 10

IV. B. Regulation 61-50 is not unreasonable 11

Conclusion 12

Certification 13

Certificate of Service 14

TABLE OF AUTHORITIES

CASES **PAGE**

Baker v. Clark, 233 S.C. 20, 103 S.E.2d 395 (1958). 4

Brooks v. South Carolina State Board of Funeral Services, 271 S.C. 457, 247 S.E. 2d 820 11

Davenport v. Colton Hope Plantation Horizontal Property Regime, 333 S.C. 71, 508 S.E.2d 565 (S. Ct. 1998). 7

OTHER AUTHORITIES

Rule 220(c) SCACR. 8

S.C. Code of Laws Section 27-3-60. 10

STATEMENT OF ISSUES ON APPEAL

I.

Did the trial judge err in failing to charge that defendant had the burden of proof in establishing assumption of the risk?

II.

Did the court err in failing to direct a verdict on assumption of the risk or comparative negligence?

III.

Was the failure to charge that a Department of Health and Environmental Control Regulation applied to defendant prejudicial?

IV.

Does the Department of Health Environmental Control Regulation conflict with the Recreational Use Statute?

STATEMENT OF THE CASE

This action was commenced by the filing of a Summons and Complaint on January 5, 1999, alleging causes of action for negligence and gross negligence, nuisance and unreasonably dangerous activity (R-17). Defendant answered alleging a general denial, the Recreational Use Statute, assumption of the risk, comparative fault, accident and others (R-22). On October 24, 2000, Honorable G. Thomas Cooper heard defendant's motion for summary judgment and by order dated December 21, 2000, granted summary judgment as to the nuisance and unreasonably dangerous causes of action and denied the motion as to the negligence and gross negligence cause of action. By Order dated January 11, 2001, filed January 12, 2001, Judge Cooper amended the Order on December 21, 2000, granting summary judgment, ruling that the Recreational Use Statute was to be applied under the facts of this case. (R-10-14). The matter was tried in the Court of Common Pleas before Honorable Alison Renee Lee and a jury from January 29, 2001, to February 1, 2001. At the trial of the case, plaintiff's expert in aquatic safety, (R-227), Stanley Shulman, testified that there was no lifesaving equipment at the site, that the warnings were improper in that they didn't tell people what the problems were and that the safety line was improperly placed. (R-229). He testified that there were no lifeguards and that if a lifeguard had been present, George Cole would not have drowned. (R-230-236). He testified that it was more likely than not that if the safety line were properly placed, George Cole would not have drowned. (R-242-243). He testified that the warning signs were inadequate to apprise swimmers of the dangers present. At trial Judge Lee did not charge that defendant has the burden of proving

assumption of the risk (R-524-525). She failed to charge that DHEC Regulation 61-60 applied and charged that the regulation may or may not apply. (R-518). The jury returned a verdict for the defendant. (R-554). Judge Lee denied motions for judgment notwithstanding the verdict and for a new trial. (R-554). Plaintiff filed timely notice of intention to appeal. By decision dated June 9, 2003, the Court of Appeals held that the Recreational Use Statute applied to the facts of this case, held that the trial judge was in error in failing to charge whether the DHEC regulation applied but that the failure did not prejudice plaintiff, that the trial judge erred in failing to assign the burden of proof to defendant on the question of assumption of this risk (J.A. 1-13). Both parties timely petitioned for a rehearing which was denied (R-26). Both parties timely filed petitions for writs of certiorari. This court granted both petitions.

ARGUMENT

I.

FAILURE TO CHARGE THAT THE PLAINTIFF HAD THE BURDENT OF PROOF ON THE ISSUE OF ASSUMPTION OF THE RISK WAS PREJUDICIAL ERROR.

A.

THE TRIAL JUDGE DID NOT INTEND TO CHARGE AND DID NOT CHARGE THAT DEFENDANT HAD THE BURDEN OF PROOF ON THE ISSUE OF ASSUMPTION OF THE RISK

Judge Lee said "I think I'll do assumption of the risk first because it's not, it's not, an affirmative defense so it doesn't shift the burden to the Defendant to have to prove all of the elements of assumption of the risk, but that it is an element, that it is a defense that the jury should consider . . . . " (R-437). Counsel for South Carolina Electric and Gas voiced his understanding that assumption of the risk is an affirmative defense (R-438). Judge Lee insisted, "it may be an affirmative defense that has to be plead, but there's no requirement that defendant prove the elements by preponderance of the evidence unlike comparative negligence where you would have to establish by preponderance of the evidence that the Plaintiff is negligent (R-438). Judge Lee was mistaken. Assumption of the risk is an affirmative defense, see, e.g. Baker vs. Clark, 233 S.C. 20, 1035 E.21 395 (1958).

An examination of the charge given reflects that she conveyed to the jury precisely what she announced she would do. The charge on assumption of the risk follows:

> The second defense which has been set forth is that of assumption of the risk. Assumption of the risk means that a Plaintiff may not recover for any injury received when he voluntarily exposes himself to a known and appreciated danger. The requirement for this defense are first that the Plaintiff has knowledge of the facts constituting a dangerous condition. Second, that he knows the condition is dangerous.
>
> Third, that he appreciates the nature and the extent of the danger, and four, that he voluntarily exposes himself to the danger. A Plaintiff who voluntarily assumes the risk of injury arising from the negligent conduct of the defendant cannot recover for the injury. The doctrine of assumption of the risk involves an intelligent and deliberate choice between a course known to be dangerous and one that is not dangerous. It involves the taking of a calculated risk.
>
> Assumption of risk is a matter of knowledge of a danger and the intelligent acquiescence in it. And the doctrine is based on the factual situation of the, of a Defendant's act alone creating the danger and causing the accident with the Plaintiff's act being that of voluntarily exposing himself to such an obvious danger with an appreciation thereof which resulted in the injury. If you find from the evidence that the defendant was grossly negligent as alleged in the complaint but that the plaintiff could've reasonably foreseen, expected or anticipated such negligence, then the Plaintiff will be held to have assumed the risk and your verdict must be for the defendant. (R-524-525)

This charge contrasts with the charge on contributing negligence which specifically assigns the burden to defendant.

> Ladies and Gentlemen, one of the other defenses that has been set forth by the Defendant is that of comparative negligence. Now you will recall that I have defined the word negligence as the lack of due care or ordinary care. Now comparative negligence is negligence on the part of the Plaintiff which is greater in degree of fault than that of the Defendant and which combines and concurs with the negligence of the Defendant to act as the proximate cause of the accident and without which the accident would not have occurred.
>
> The Defendant by this defense is saying even if you the jury should find that I was at fault, the Plaintiff was more at fault than I was and the fault of each of us combined and concurred without the other to act as the proximate cause of the accident and without which the accident would not have happened. In other words, it required the fault of each of us for the accident to have happened but that the Plaintiff was more at fault than I, the defendant, was.

> Now as I've stated, the Plaintiff has the burden of proving negligence and the fault, if any, of the defendant while under comparative negligence, the defendant has the burden of proving the negligence or fault, if any, of the plaintiff and the degree of that fault. And you should keep this in mind that he has to prove the degree of fault because it's important on the issue of comparative negligence and in apportioning the damages, it becomes necessary for you all to determine that. (R-525-526)

South Carolina Electric and Gas contends that the intended error by the trial judge was cured by the instruction,

> If you find that the defendant has not established any of the defenses which have been put forth and you find that the plaintiff has established gross negligence under the Recreational Use Statute and proximate cause, then you will determine all of the damages and write that amount on the line for actual damages. (R-534).

This supposed cure at a minimum describes no burden for "establishing any of the defenses" More importantly, learned counsel for the defense did not consider the charge to apply to all matters labeled as defenses because a general denial, and unavoidable accident were labeled as "defenses" (R-522-528). Counsel for South Carolina Electric and Gas interposed no objection that an unfair burden was placed on defendant. Each counsel perceived that the trial judge had done exactly what she intended. The jury would have had the same perception.

B.

DEFENDANT COULD REDUCE THE RISK OF INJURY AND DEATH BY RESONABLE MEANS. THIS WAS NOT A QUESTION OF PRIMARY IMPLIED ASSUMPTION OF THE RISK.

Defendant argues for the first time that this case presents a case of primarily implied assumption of the risk. Defendant did not request a directed

verdict on the basis that it owed no duty to plaintiffs. It characterizes the primary implied assumption of the risk doctrine as applying to activities which "carry an inherent risk." (Brief of Respondent/Petitioner, 7) This definition is obviously too broad. Riding in a car, crossing a street and even being a couch potato carry inherent risks. It is only where the risk cannot be eliminated by reasonable means that the doctrine applies. For example, baseball parks have screens to protect fans sitting behind home plate and for some distance on each side. These are the fans in greatest danger of being struck because of the lack of time to react and the frequency of balls entering the stands. It is only risks that remain after due care is exercised that qualify for the primary implied assumption of the risk doctrine. See Davenport vs. Colter Hope Plantation/Horizontal Property Regime 333 S.C. 71, 5085.E 2d 565, fn3 (S. Ct. 1998). There is ample evidence that the risk of drowning could be reduced by having a properly placed life line, safety equipment and a lifeguard.

II.

THE FAILURE TO ASSIGN DEFENDANT THE BURDEN OF PROOF ON ASSUMPTION OF THE RISK WAS NOT HARMLESS.

South Carolina Electric and Gas argues that the failure to assign a burden of proof to defendant on the issue of assumption of the risk is harmless error because the jury asked for a recharge on the difference between negligence and gross negligence. (Brief of Respondent/Petitioner, p 8-9). This argument, the sole one made, speculates that the jury decided the case based on the absence of gross

negligence. The jury could easily have decided that gross negligence had been proved after receiving a re-charge and then decided that plaintiff had not established a lack of assumption of the risk. Neither party has any inkling of what happened in the jury room and, absent impropriety, couldn't use it if it had.

III.

The failure to charge that a Department of Health and Environmental Control Regulation applied to defendant was prejudicial

This Court has the authority under Rule 220(c) SCACR to affirm the order remanding the case for a new trial on any ground appearing in the record. The Court Appeal stated properly held that "[t]he trial court must charge the current and correct law." (J.A.-7). Judge Lee refused to charge that the regulation regarding life guards, safety equipment and life lines was applicable because the decision "would be based on whether or not they feel that order (R-580-582) provided them as exemption . . . ." (Cite to Order added) (R-433).

South Carolina Electric and Gas had a dispute with DHEC about whether the regulation in effect prior to the effective date of George Cole's drowning applied to it. As a result an administrative action was begun. South Carolina Electric and Gas took the position that the regulation was ineffective because it had not been authorized by the legislature prior to enactment, because it did not operate a "supervised swimming area" and because the regulation conflicted with the recreational use statute. The DHEC order held that the regulation was properly in force. It then held that South Carolina Electric

and Gas Company did not operate a supervised swimming area. It declined to rule on the question of whether the regulation conflicted with the Recreational Use Statue (R-582). The Order was issued on June 13, 1978.

On April 10, 1979, the Board of Health and Environmental Control executed a new regulation. (R-567-579). The new regulation was in force at the time of George Cole's drowning. It, unlike the previous regulation, it made no mention of "supervised" before beaches or swimming area. The title of the Regulation was changed from "Supervised Natural Bathing Beaches" to "Natural Public Swimming Area". The word "supervised" does not appear in the new regulation. (R-567-579). The reason for South Carolina Electric and Gas Company 's exemption disappeared with the enactment of the new regulation. The company had no reason to continue to rely on an exemption based on non-existent language.

Nevertheless Thomas Boozer, the supervisor of lake management programs at South Carolina Electric and Gas, testified that the new regulation did not apply to the company because of the old administrative hearing (R-161). Counsel for SCE&G argued that "DHEC said you're exempt." (R-495)

The trial judge charged that "I'm going to instruct you as to other regulations which may or may not apply in this particular case" (R-518). If the trial judge had declared the law as required, the credibility of South Carolina Electric and Gas's witness in charge of the site and its counsel's argument would have been discredited. Obviously counsel would not have made the argument had he been informed that the judge would declare the law. But the discrediting of the witness would have been assured.

The Court of Appeal found that the instruction that "[y]ou and you alone are the judge of the facts and will determine whether or not these regulations have been violated, and if you determine from the facts that they have been violated, then you will apply the law as I give it to you". (J.A.-8), made the error harmless. This in no way instructs the jury that it must apply the regulation to the conduct of SCE & G. One of the hotly disputed facts was whether the administrative order exempted the company. If the jury found as a fact SCE & G did not have to comply with the regulation, it would find as a fact that there was no violation. All of the other instructions are premised on the finding of a violation. The regulation was violated and the trial judge had the duty to say so. Her failure so to do prejudiced plaintiffs.

IV.
A.
The Recreational Use Statute does not conflict with the Department of Health and Environmental Control Regulation

South Carolina Electric and Gas contends that Department of Health and Environmental Control Regulation 61-50 as it then existed is in direct conflict with the Recreational Use Statute. (Brief of Respondent/Petitioner, 10-15) It is not. South Carolina Electric and Gas claims that it has no duty under the Recreational Use Statute. Section 27-3-60 of the South Carolina Code of Laws. It provides "Nothing in [the Recreational Use Statute] limits in any way liability which otherwise exists: (a) for grossly negligent willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity. . . ."The misplaced safety line, the failure to have safety equipment, the failure to have a life guard are dangerous conditions against which

the company failed to guard. The misplaced safety line was a dangerous structure against which defendant failed to warn or guard. The jury was instructed that for plaintiff to obtain an award from the defendant, defendant had to be grossly negligent, willful or malicious. The statute and the Regulation, which requires among other things, lifeguards, a properly placed lifeline and life saving equipment (R-576-577), are in harmony. If the jury finds that the failure to have these items is gross negligence, an award is proper. If it is merely negligent, no award is permitted if the Recreational Use Statue applies. Of course, if Petitioner/Respondents are correct that the Recreational Use Statue is inapplicable, the purported conflict disappears.

B.

Regulation 61-50 is not unreasonable

South Carolina Electric and Gas argues that it is impossible for South Carolina Electric and Gas to hire lifeguards. (Brief of Respondent/Petitioner, 14) It says that the absence of a fee makes it unreasonable to enforce Regulation 61-50. South Carolina Electric and Gas can reasonably take its non-fee "parking fee" (Brief of Respondent, 3 in the Court of Appeals) to pay for the lifeguards and safety equipment. The presence of a lifeguard can prevent drownings. There is nothing unreasonable about requiring a lifeguard. It was reasonable on the day George Cole drowned. He would not have done so if a lifeguard were on duty. It is still reasonable today.

Brooks v. South Carolina State Board of Funeral Service, 271 S.C. 457, 247 S.E.2nd 820 (1978) does not support the company's position. There, a statue permitted an apprenticeship of one year with a licensed director at a home that had twenty-four

funerals in the year. The regulation required attendance at forty funerals. The court held that it was impossible attend forty funerals if there were only twenty-four per year. Nothing in the Regulation 61-50 is contrary to the Recreational Use Statue for the grossly negligent failure to warn or guard against dangerous conditions, uses or structures. South Carolina Electric and Gas admits that swimming in natural waters has its inherent risks, i.e., it is dangerous. It can guard against those risks and failed to do so.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioner/Respondents other brief, the case should be remanded for a new trial with the Recreational Use Statue being inapplicable, with the burden on default to prove assumption of the risk, and with direction to charge that SCE&G was required to comply with the DHEC regulation.

Respectfully submitted,

JOHNSON, TOAL & BATTISTE, P.A.

BY:

F. Xavier Starkes
William T. Toal
Attorneys for Petitioners/Respondents
P. O. Box 1431
Columbia, SC 29202
(803) 252-9700

Columbia, South Carolina
September 13, 2004

CERTIFICATION

I certify that this Final Brief complies with Rule 211(b) SCACR.

JOHNSON, TOAL & BATTISTE, P.A.

F. Xavier Starkes
William T. Toal

Columbia, South Carolina
June 14, 2004

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County Common Pleas Court
Hon. Alison Renee Lee, Circuit Court Judge
Opinion Number: 365 (June 9, 2003)

Gloria Cole and George Dewalt, Jr.,)
in their capacities as Personal Representatives)
of the Estate of George Ernest Cole, deceased,)
)
Petitioners/Respondents,)
)
vs.)
)
South Carolina Electric and Gas, Inc.)
)
Respondent/Petitioner.)

CERTIFICATE OF SERVICE

I, Melisa Y. McClurkin, employee of Johnson, Toal & Battiste, P.A., Attorneys for the Petitioners-Respondents, in the above-captioned case, hereby certify that I have served the **Brief of Petitioners-Respondents** on Robert A. McKenzie, Esquire, and Gary H. Johnson, Esquire, Counsel for Respondent-Petitioner, by mailing three copies postage prepaid and return address clearly indicated on said envelope on September 13, 2004, at the following address:

Robert A. McKenzie, Esquire
Gary H. Johnson, II, Esquire
P. O. Box 58
Columbia, SC 29202

JOHNSON, TOAL & BATTISTE, P.A.

BY: ______________________
Melisa Y. McClurkin

Columbia, South Carolina