THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
The Honorable Alison Renee Lee, Circuit Court Judge

Opinion No. 3650 (S.C. Ct. App. filed 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

v.

South Carolina Electric and Gas, Inc., ... Respondent/Petitioner.

BRIEF OF RESPONDENT/PETITIONER

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TABLE OF AUTHORITIES

Other Authorities

CERTIFICATE OF COUNSEL

The below singed counsel for Petitioner hereby certifies that a Petition for Rehearing was filed before the Court of Appeals and a final ruling by the Court of Appeals denying the Petition was issued on August 21, 2003.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE CHARGE TO THE JURY ON ASSUMPTION OF THE RISK FAILED TO CONVEY A MEANINGFUL BURDEN OF PROOF ELEMENT?

II. DID THE COURT OF APPEALS ERR IN FAILING TO ADDRESS THE DECEDENT'S ASSUMPTION OF THE RISK AS A MATTER OF LAW AND THE FACT THAT THE DECEDENT WAS GREATER THAN FIFTY PERCENT AT FAULT AS A MATTER OF LAW?

III. DID THE COURT OF APPEALS ERR IN FAILING TO ADDRESS THE DIRECT CONFLICT BETWEEN REGULATION 61-50 WHICH REQUIRES AFFIRMATIVE DUTIES TO PROTECT VISITORS TO NATURAL SWIMMING AREAS AND THE RECREATIONAL USE STATUTE WHICH DECLARES A LANDOWNER OWES NO DUTY OF CARE TO VISITORS FOR RECREATIONAL PURPOSES?

STATEMENT OF THE CASE

This case was commenced by the filing of the Summons and Complaint stemming from the drowning death of George Cole. (R. p. 17). The Complaint alleged causes of action for negligence, nuisance, and unreasonably dangerous activity. The Defendant South Carolina Electric and Gas Company (hereinafter SCE&G) answered and asserted defenses of the Recreational Use Statute, assumption of the risk, comparative fault, accident, and others. (R. p. 22). Following amendments to both pleadings, SCE&G moved for summary judgment. Following a hearing before the Honorable G. Thomas Cooper, the lower court ruled that summary judgment was appropriate for the nuisance and unreasonably dangerous activity causes of action as well as holding that the parking fee did not remove the protections of The Recreational Use Statute. (R. p. 2). By Order dated January 11, 2001, Judge Cooper clarified his earlier order regarding the negligence cause of action. Judge Cooper affirmatively ruled that the Recreational Use statute was applicable and that the parking fee charged by SCE&G was not a charge within the meaning of S.C. Code Section 27-3-60(b). (R. p. 10).

This matter was tried before the Honorable Alison Renee Lee and a Richland County Jury from January 29, 2001, to February 1, 2001. The jury returned its verdict in favor of the Defendant. Plaintiff verbally made post trial motions for a judgment not withstanding the verdict or in the alternative a new trial. (R. p. 554). Judge Lee denied those motions and this appeal followed. (R. p. 555-56). In its decision, the Court of Appeals affirmed in part, reversed in part, and remanded the case for a new trial based solely on a finding that the charge to the jury on the burden of proof element of assumption of the risk was inappropriate. Both the Appellant below

and the Respondent/Petitioner filed Petitions for Certiorari with this Court which granted both Petitions in full.

STATEMENT OF FACTS

On August 6, 1997, George Cole arrived at Lake Murray Site #1 with Ms. Patricia Ferguson, Mr. Jonathan Green, and their sons Vincent and Jonathan. (R. p. 357, lines 2-14; p. p. 405, lines 1-2). Though told not to enter the water by Mr. Green, both Vincent and George entered the swimming area. (R. p. 408, lines 10-11; p. 418, lines 22-25; p. 419, lines 1-7; p. 423, lines 2-13). By all accounts, George was a good swimmer. (R. p. 131, lines 9-11; p. 320, lines 1-5; p. 383, lines 18-25). Vincent and George raced up and down the beach area and then decided to swim out to the buoy line. (R. p. 131, lines 12-15; p. 132, lines 4-6). They started to race back to the beach with Vincent catching and passing George. (R. p. 137, lines 8-24; p. 138, lines 6-11). When he got to shore and knew George was in trouble, Vincent ran to get his mother, Patricia Ferguson, then ran to the security officer on site who ran with him back to the beach. (R. p. 118, lines 6-9; p. 118, lines 9-12). Despite the efforts of rescuers, George Cole drowned.

Lake Murray Site #1 had no lifeguard and no lifeguard stand. (R. p. 128, lines 12-14; p. 321, lines 1-3; p. 370, lines 15-23; p. 377, lines 10-12; p. 407, lines 2-17). Signs were posted on the property providing notice that no lifeguard was on duty and that visitors swam at their own risk. (R. p. 345, line 22-p. 348, line 24; pp. 584-86). In addition, handouts were provided to all visitors which included the notice that no lifeguard was on duty and that visitors swam at their own risk. (R. p. 583; p. 326, lines 14-25). All the witnesses testified that they knew no lifeguard

was on duty.(R. p. 128, lines 12-14; p. 321, lines 1-3; p. 370, lines 15-23; p. 377, lines 10-12; p. 407, lines 2-17). George Cole's friend Vincent testified that he knew this meant "what happens is you know is on yourself. Swim at your own risk." (R. p. 130, lines 1-8). George Cole had been to this property before this occasion. (R. p. 320, lines 6-8; p. 370, lines 7-10). George Cole had swam out to the buoy line before this occasion. (R. p. 384, line 1-p. 385, line 6). Since he was a good swimmer, this activity did not disturb his mother. (R. p. 385, lines 1-9). Though a security guard was stationed at the site, the security guards wore uniforms and did not supervise swimming, they simply enforced the printed rules of the site. (R. p. 174, lines 1-21; p. 329, lines 9-25; p. 331, lines 3-17; p. 341, lines 8-11).

Lake Murray Site #1 is a recreational site open to the public for swimmimg, sunbathing, picknicking, reunions, games and other activities. (R. p. 207, lines 3-15). SCE&G charged a parking fee to park a vehicle at Lake Murray Site #1. (R. p. 59, lines 15-22). This was a charge for the vehicle itself and was not related to the number of visitors in each vehicle. (R. p. 59, lines 15-22). People who walked onto the property, rode bicycles onto the property, or swam or used some other means to enter the property were not charged a parking fee or a fee of any kind. (R. p. 59, line 24-p. 60, line 3; p. 40, lines 1-5).

ARGUMENTS

I. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE CHARGE, WHEN VIEWED AS A WHOLE, WAS REASONABLY FREE FROM ERROR AND DID NOT JUSTIFY A REVERSAL AND REMAND OF THE CASE FOR A NEW TRIAL.

A. The charge to the jury, when viewed as a whole, was sufficiently free of error to be sustained on appeal.

The Court of Appeals found reversible error in the lower court's instruction to the jury regarding the defense of assumption of the risk and remanded the case for a new trial based solely on that error. Since this case accrued prior to this Court's decision in Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998), the common law doctrine of assumption of the risk still applied. The trial court must charge the current and correct law. McCourt by and through McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995). As noted by the Court of Appeals, the lower court expressed a belief that no burden of proof was required on assumption of the risk. (R. p. 438). However, this statement, outside the presence of the jury, does not control this issue if it were, in fact, wrong. (See Argument I Part B infra). Instead, when reviewing a jury charge for alleged error, this Court must consider the charge as a whole in light of the evidence and issues presented at trial. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999). "If the charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Id. at 498, 514 S.E.2d at 575.

Respondent/Petitioner believes that, when viewed in its entirety, the charge given by the lower court was sufficient and does not justify reversal and remand for a new trial. Though no

burden of proof charge was given while the defense of assumption of the risk was explained to the jury (R. p. 524, line 8-p. 525, line 13), the lower court did include a charge on the burden of proof for this defense later in her charge. Specifically, the lower court charged the jury that:

> 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. p. 534, lines 13-19). Clearly, this instruction places the burden on "the Defendant" to establish the "defenses which have been put forth." Earlier in the charge, the lower court charged that SCE&G had asserted certain defenses including assumption of the risk. (R. p. 523, lines 1-6; p. 524, lines 8-9; p. 533, lines 9-24). The instruction told the jury to consider whether the Appellant established gross negligence and proximate cause, then consider the "defenses that have been set forth by [SCE&G]." (R. p. 533, lines 8-9). The burden was placed on SCE&G to "establish any of the defenses which have been put forth. . ." (R. p. 534, lines 13-14). Moreover, the portion dealing with assumption of the risk was presented following a general statement by the lower court that if the jury was satisfied that the plaintiff had proven that SCE&G was grossly negligent then the jury was to consider the defenses set forth by SCE&G. (R. p. 522, line 25-p. 523, line 6). As such, the charge had clearly shifted from the portion dealing with the plaintiff and the plaintiff's burden to that of the defendant and the defendant's burden. The clear import of the charge, when taken as a whole, placed the burden on SCE&G to prove the defenses it raised and satisfied the requirement that the charge be reasonably free of error. The Court of Appeals erred in reversing the jury's decision and remanding this case for a new trial on this ground. When viewed as a whole and in the context of what was explained to the jury by the

trial court, the charge as a whole conveyed a meaningful burden of proof on the issue of assumption of the risk and does not warrant a remand for a new trial.

B. No additional charge on burden of proof was required for assumption of the risk since this case presents an example of primary implied assumption of the risk.

Under South Carolina law, the doctrine of primary implied assumption of the risk is simply another way of stating "the conclusion that the plaintiff has failed to establish a prima facie case [of negligence] by failing to establish that a duty exists." Davenport v. Cotton Hope, 333 S.C. 71, 508 S.E.2d 565 (1998) (quoting Perez v. McConkey, 872 S.W.2d 897 (Tenn. 1994)). As such, under the doctrine of primary implied assumption of the risk there is no true burden of proof since it is simply a failure of the Plaintiff to establish a prima facie case of negligence or, in this particular case, gross negligence.

Certain activities carry an inherent risk. As Justice Cardozo wrote in speaking about a patron injured on an amusement ride: "Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home." Murphy v. Steeplechase Amusement Co., 166 N.E. 173 (N.Y. 1929). This acknowledgment of risks inherent in certain activities is often seen in recreational and sporting activities. In golf, one is exposed to errant shots from other players. Gyuriak v. Millice, 775 N.E.2d 391 (Ind. App. 2002). Softball players make errors and being injured by such a throw is a common risk inherent in and arising out of a softball game. Allen v. Dover Co-Recreational Softball League, 807 A.2d 1274 (N.H. 2002). Skiing involves dangers to life and limb that are inherent in the activity.

Knight v. Jewett, 11 Cal. Rptr. 2d 2 (1992). The same is true of football, skating, hockey, and like activities. See Sabey v. Hudson Valley Girl Scout Council, Inc., 230 N.Y.S.2d 39 (N.Y. App. Div. 1962)(roller skating); Vendrell v. School District No. 26C, 376 P.2d 406 (Or. 1962) (football); McKichan v. St. Louis Hockey Club, 967 S.W.2d 209 (Mo. App. 1998) (hockey). The rule extends beyond participants and includes bystanders and spectators. A spectator at a sporting event knows or should know of the possibility that a ball or other object from the field of play may enter the stands. Dalton v. Jones, 581 S.E.2d 360 (Ga. App. 2003)(a baseball); Honohan v. Turrone, 747 N.Y.S.2d 543 (N.Y. App. Div. 2002) (a soccer ball). Likewise, swimming in a natural body of water carries inherent risks. See Smyth v. County of Suffolk, 569 N.Y.S.2d 128 (N.Y. App. Div. 1991).

It can not be said that the defendant has the burden of proof regarding primary implied assumption of the risk since it is simply a failure in the plaintiff's prima facie case regarding establishing a duty on the part of the defendant. See Davenport v. Cotton Hope, 333 S.C. 71, 508 S.E.2d 565 (1998); Gunther v. Charlotte Baseball, Inc., 854 F.Supp. 424 (D.S.C. 1994). There can therefore be no reversible error in any perceived shortfall of the lower court's charge on this issue.

C. Any error regarding the charge on assumption of the risk was harmless.

Under South Carolina law, any alleged error would be harmless if this Court determines, beyond a reasonable doubt, that the alleged error did not contribute to the verdict. State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct.App. 1998). The only question submitted to the court by the jury during its deliberations involved Regulation 61-50 and the distinction between negligence

and gross negligence. (R. p. 546, lines 10-14). The court recharged the law between negligence and gross negligence and was asked by the jury "in order to find for the Plaintiff, is there or can there be any finding other than gross negligence by the Defendant?" (R. p. 548, lines 1-6). Thus, even if a more specific burden of proof charge had been appropriate, any error is harmless in light of the jury's determination of this matter based upon a failure on the part of the Petitioners/Respondents to establish gross negligence. The jury simply did not need to evaluate assumption of the risk or any of the other defenses raised and charged since the verdict was based upon a failure of proof.

II. THE COURT OF APPEALS SHOULD HAVE HELD THAT THE DECEDENT HAD ASSUMED THE RISK OF SWIMMING IN A NATURAL BODY OF WATER AS A MATTER OF LAW AND WAS HIMSELF GREATER THAN FIFTY PERCENT AT FAULT AS A MATTER OF LAW.

In Nelson v. Concrete Supply Company, 303 S.C. 243, 399 S.E.2d 783 (1991), this Court adopted a modified version of comparative negligence. Under this system, "[f]or all causes of action arising on or after July 1, 1991 a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant." Id. at 784. As noted by this Court in Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 71, 508 S.E.2d 565 (1998), assumption of the risk, at least as it existed before the Davenport decision, could operate as a complete bar to a plaintiff's action.

In the present matter, both comparative negligence and assumption of the risk would apply to bar recovery. At the time of this accident, George Cole was 14 years old. (R. p. 114, lines 10-13). The Record clearly establishes that all the witnesses knew no lifeguard was on duty. (R. p. 128, lines 1-3; p. 321, lines 1-3; p. 370, lines 11-14; p. 377, lines 10-12; p. 407, lines 13-

17). George Cole's friend Vincent testified that he knew this meant "what happens is you know is on yourself. Swim at your own risk." (R. p. 130, lines 1-11). George Cole had been to this property before this occasion. (R. p. 320, lines 6-8; p. 370, lines 7-10). George Cole had swam out to the buoy line before this occasion. (R. p. 384, lines 5-7; p. 384, line 21-p. 385, line 6). Since he was a good swimmer, this activity did not disturb his mother. (R. p. 385, lines 1-9). Though told not to enter the water by Mr. Green on the day of the accident, both Vincent and George entered the swimming area. (R. p. 408, lines 22-25; p. 418, line 22-p. 419, line 7; p. 423, lines 9-13). By all accounts, George was a good swimmer. (R. p. 131, lines 9-11; p. 320, lines 1-5; p. 383, lines 15-25). Under these facts, George Cole assumed the risks inherent in swimming in a natural body of water as a matter of law. In addition, his actions on the day in question establish that he was greater than fifty percent at fault as a matter of law. The Court of Appeals erred in remanding this case for a new trial in light of the decedent's assumption of the risk and comparative fault.

III. THE COURT OF APPEALS ERRED IN NOT ADDRESSING THE DIRECT CONFLICT BETWEEN REGULATION 61-50 AND THE SOUTH CAROLINA RECREATIONAL USE STATUTE.

The Court of Appeals held that the lower court's charge on the application of Regulation 61-50 did not constitute reversible error but remanded the case for a new trial based upon other grounds. In so ruling, the Court of Appeals failed to address the question of whether or not the Regulation was properly charged in the first instance. As argued by Respondent/Petitioner before the lower court and the Court of Appeals, Regulation 61-50 (as it existed at the time of this

incident and as charged by the lower court) conflicts with the provisions of The South Carolina Recreational Use Statute and therefore has no application when landowners have made their "land and water areas available to the public for recreational purposes . . ." S.C. Code Section 27-3-10 (1991). Under South Carolina law, although regulations have the force of law, they may not alter or add to the terms of a statute. Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995). In Goodman, this Court reviewed a regulation which added additional requirements to those contained in the statute governing appeals to the Full Commission in workers' compensation settings. The Regulation in question attempted to add to the requirements to file an appeal and this Court acknowledged that the "specifications set forth in the statute must prevail." Id. at 532.

A. The Regulation is in direct conflict with The Recreational Use Statute.

The Recreation Use Statute declares that "[t]he purpose of this chapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." S.C. Code Section 27-3-10. To foster that goal, The Recreational Use Statute specifically provides that the "owner of land owes no duty of care to keep the premises safe for entry or use by persons who have sought and obtained his permission to use it for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to such persons entering for such purposes." S.C. Code Section 27-3-30 (1991). Thus, one who allows another to use his property for recreational purposes does not:

(a) Extend any assurance that the premises are safe for any purpose.

(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
(c) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons.

S.C. Code Section 27-3-40 (1991).

Contrary to the provisions of The Recreational Use Statute, Regulation 61-50, as it existed at the time of George Cole's death, required a duty of care for operators of a "natural swimming area." Petitioners/Respondents argued below and before the Court of Appeals that the provisions of Regulation 61-50 in existence at the time of George Cole's death required, among other things, an elevated station or platform equipped with a life ring and line (61-50A-4) and a minimum of one lifeguard (61-50B-3). (R. pp. 502-503). These requirements are clearly put in place in an attempt to make the premises safe for entry or use as set forth in the very language of Regulation 61-50 itself. See Regulation 61-50(C)(8) (describing the requirement for life saving equipment); Regulation61-50(D)(3)(e) (describing requirements and qualifications for life guards). These are affirmative duties and directly contradict the provisions of S.C. Code Section 27-3-30 (1991) which declares no such duties exists.

As noted, a regulation may not conflict with a statute. Goodman, supra; Brooks v. S.C. State Bd. Of Funeral Ser., 271 S.C. 457, 247 S.E.2d 820 (1978). In the present case, this Court is faced with The Recreational Use Statute which declares that a landowner owes no duty to keep its premises safe for recreational users and owes no duty of care to such users. In contravention of this clear limitation on liability, Regulation 61-50, if applied to a landowner who falls within the scope of the Recreational Use Statute, purports to require that same landowner to have an elevated station or platform equipped with a life ring and line (61-50A-4) and a minimum of one

lifeguard (61-50B-3), among other duties. The heart of Petitioners/Respondents' argument that SCE&G was negligent and grossly negligent was a violation of a duty of care stemming from Regulation 61-50. (R. pp. 502-503). There is simply no way to reconcile such an argument and the charge by the lower court with the express statement in the Recreational Use Statute that no duty of care exists. One can not argue that a statutory provision that clearly states no duty is owed to keep premises safe and that no duty of care exists can be reconciled with a regulation that requires affirmative steps to be taken to enact safety measures, such as the employment of lifeguards, the violation of which are a breach of a duty of care.

Regulation 61-50, at least for those properties which qualify for the protections of The Recreational Use Statute, is void and should not have been charged to the jury. A review of the scope of Regulation 61-50 as it existed at the time of this accident clearly demonstrates the impact any other decision would have on The Recreational Use Statute. Regulation 61-50 covers all "natural swimming areas" which include any streams, lakes, ponds, reservoirs or other bodies of water that are classified as Class A waters. Regulation 61-50(A)(2) (R. p. 570). It also covers "public swimming areas" which includes any swimming area, natural or artificial, that is routinely frequented by the public. Regulation 61-50(A)(4) (R. p. 570). In order to qualify for the protections of The Recreational Use Statute, the land must be made available for use by the public at large. Under Petitioners/Respondents argument, every landowner whose property contains a pond, or abuts a body of water, whether natural or otherwise, who desires to allow free access to the public must hire lifeguards and provide safety devices and equipment. Such a requirement would clearly defeat the stated legislative intent of The Recreational Use Statute to "encourage owners of land to make land and water areas available to the public for recreational

purposes by limiting their liability toward persons entering thereon for such purposes." The Court of Appeals erred in remanding this case for a new trial without addressing this issue.

B. Even if Regulation 61-50 was not void, it is unreasonable to enforce the Regulation in light of the requirements of The Recreational Use Statute.

Even if Regulation 61-50 and The Recreational Use Statute could in some manner be reconciled, the requirements of Regulation 61-50 are unreasonable in light of limitations imposed under The Recreational Use Statute. As set forth in Brooks, supra, a regulation which is unreasonable or impossible is unenforceable. In Brooks, the South Carolina State Board of Funeral Service mandated a minimum number of funeral services as an apprentice as a requirement for a license as a funeral director. This requirement was not in direct conflict with the statutory requirements but was in addition to those requirements. This Court held that the minimum number of funerals imposed by the Regulation was unreasonable and declared that "no administrative rule that requires an impossible act can be reasonable." Brooks at 823. In the present case, Regulation 61-50 requires affirmative acts, including employment of at least one life guard, while The Recreational Use Statute requires the same land to be accessible without a fee. It is clearly not possible or reasonable to expect a landowner to allow public access to its land for recreational purposes without a fee while requiring that same landowner to hire a lifeguard and take other affirmative steps to make the land safer as contemplated by Regulation 61-50. Regulation 61-50 is thus unenforceable as it relates to property protected by The Recreational Use Statute and should not have been charged to the jury.

In light of the remand of the case for a new trial and the direct conflict between the

Regulation and The Recreational Use Statute, the Court of Appeals should have addressed this issue and held that Regulation 61-50 did not apply to property which falls within the protection afforded by the Recreational Use Statute.

CONCLUSION

For the foregoing reasons, Respondent/Petitioner asks the Court to reverse the decision of the Court of Appeals to remand this matter for a new trial on the issue of the sufficiency of the lower court's charge. In addition, Respondent/Petitioner requests that the Court address the question of the application of Regulation 61-50 and The Recreational Use Statute under the facts of this case.

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