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.

REPLY BRIEF OF RESPONDENT/PETITIONER

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INDEX

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITIES

Pursuant to the provisions of Rule 226(d)(I), SCACR, Respondent/Petitioner hereby submits this Brief in Reply.

I. PETITIONERS/RESPONDENTS RELIANCE ON ISOLATED PORTIONS OF THE CHARGE AND ON MATTERS ARGUED OUTSIDE THE PRESENCE OF THE JURY DOES NOT CREATE A REVERSIBLE ERROR WHEN THE CHARGE WHEN READ AS A WHOLE IS REASONABLY CLEAR OF ERROR.

Petitioners/Respondents Cole cites portions of the Record and comments from the trial judge made outside the presence of the jury in arguing that the charge on assumption of the risk was fatally defective. Though the lower court expressed a belief that no burden of proof was required on assumption of the risk, those rulings whether right or wrong, made outside the presence of the jury, do not control this issue. (R. p. 438). See State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999) (holding that comments made by trial judge outside the presence of the jury did not constitute reversible error). 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). Thus, when objecting to the charge on appeal, it is the charge that is actually given the jury that controls, not the trial court's rulings outside the presence of the jury. "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.

Petitioners/Respondents concentration on the comments and discussions between the trial judge and counsel ignores a fair and complete reading of the charge. As discussed in Respondent/Petitioner's Brief, the charge, when read as a whole, is neither misleading nor in error. The charge clearly acknowledges that the Respondent/Petitioner had the responsibility of

establishing its defenses, including assumption of the risk. (R. p. 533, lines 8-9; p. 534, lines 13-19). The lack of the magic words "burden of proof" does not create a per se error in the charge. The substitution of the terms "consider the defenses set forth by the defendant" (R. p. 523, lines 4-6) and "if the defendant has not established any of the defenses which have been put forth" (R. p. 534, lines 13-15) clearly convey a proper burden of proof to the jury.

Petitioners/Respondents correctly quote a portion of the charge for comparative fault, but fail to demonstrate how the more specific recitation of the Respondent/Petitioner's burden of proof under comparative fault eliminated the clear shift in the charge to those areas in which the Respondent/Petitioner had the burden to "establish." Moreover, the Court's charge on the general denial clearly stated that it simply placed the burden of proof on the Petitioner/Respondent to prove each element of the cause of action. (R. p. 523, lines 6-13). Petitioners/Respondents did not object to and have not appealed either this portion of the charge or the charge on unavoidable accident. The impact of all of these areas of the charge are not to be read in isolation but as a whole. As a whole, the charge is reasonably free of error.

II. SINCE THIS CASE IS AN EXAMPLE OF PRIMARY IMPLIED ASSUMPTION OF THE RISK, NO SPECIFIC CHARGE REGARDING THE BURDEN OF PROOF WAS REQUIRED.

Petitioners/Respondents appear to assert that the issue of whether or not swimming in a natural body of water falls within the scope of primary implied assumption of the risk is not properly before this Court. This reflects an improper view of the status of this case on appeal. Under South Carolina law, an appellate court may affirm the decision of the lower court on any ground appearing in the Record on Appeal. Rule 208(b)(2), SCACR; Rule 220(c), SCACR. This

issue was briefed by Respondent before the Court of Appeals (Respondent's Final Brief p. 22) and was an argument submitted by Respondent/Petitioner in its Petition for Rehearing. (Appendix p. 18). This is not the "first time" this issue has been presented to the appellate court and has been argued and presented from the outset of the present appeal and is an appropriate additional sustaining ground pursuant to Rule 208(b)(2), SCACR; Rule 220(c), SCACR.

Contrary to the argument asserted by Petitioners/Respondents, the proper analysis for primary implied assumption of the risk concerns the inherent nature of the activity. Thus, primary implied assumption of the risk "occurs when an individual, by voluntarily engaging in an activity, consents to those risks that are inherent in and arise by virtue of the nature of the activity itself." Gyuriak v. Millice, 775 N.E.2d 391, 394 (Ind. App. 2002). Instead of addressing the inherent dangers of swimming, Petitioners/Respondents cite to alleged failures on the part of SCE&G in failing to make its site safer by employing lifeguards or placing the rope line closer to shore. Had SCE&G owed a duty to the decedent, these asserted defects may have created a question of secondary implied assumption of the risk. See Davenport v. Cotton Hope, 333 S.C. 71, 508 S.E.2d 565 (1998). In the present matter, the Recreational Use Statute addresses the question of the duty of care owed to the decedent. 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). Since Respondent/Petitioner owed no duty of care to keep the site safe for use, those visitors swimming in the natural body of water located at the site assumed the risk inherent in such an activity,

including the risk of drowning. This case, based upon its specific facts, is properly seen as a case of primary implied assumption of the risk to which no charge on the burden of proof is required.

III. REGULATION 61-50 SIMPLY CANNOT BE RECONCILED WITH THE RECREATIONAL USE STATUTE.

The proper question before this Court regarding Regulation 61-50 is whether or not it applied to the present case in light of the Recreational Use Statute. Since there is a clear contradiction between Regulation 61-50 as it existed when this accident occurred and the provisions of the Recreation Use Statute, the lower court and the Court of Appeals ruled improperly that Regulation 61-50 should be charged to the jury.

Petitioners/Respondents first appear to assert that the manner of the charge given by the lower court was prejudicial and grounds for reversal. This assertion does not address the issue before the Court and is more appropriately set in Petitioners/Respondents own Brief in support of their request for Certiorari. Nonetheless, the alleged error is clearly harmless in light of the impropriety of charging Regulation 61-50 in the first instance and would not be ground for reversal as discussed below.

A. The Regulation conflicts with the Recreational Use Statute.

Petitioners/Respondents point to specific portions of Regulation 61-50 which were allegedly violated without acknowledging a fundamental of the Recreational Use Statute – that a landowner 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, a landowner 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).

The clear meaning of the Recreational Use Statute is that a landowner owes no duty to the public to affirmatively provide safety precautions on its land. An elevated station or platform equipped with a life ring and line (61-50A-4) and a minimum of one lifeguard (61-50B-3) are certainly safety precautions. See Regulation 61-50(C)(8) (describing the requirement for life saving equipment); Regulation 61-50(D)(3)(e) (describing requirements and qualifications for life guards). There is no way to reconcile the statutory acknowledgment that no duty exists with a duty to provide life guards, life saving equipment, and other material under the Regulation.

The exception in the Recreational Use Statute for acts of gross negligence does not cure this inconsistency. The Recreation Use Statute removes its protection for actions that constitute "grossly negligent, willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." Petitioners/Respondents argue that this language allows evidence of a landowner's failure to comply with Regulation 61-50 as not simply being evidence of negligence (or negligence per se), but also of the landowner's gross negligence. Though this assertion certainly applies generally to an allegation that a party has violated a statute or regulation (such a violation being evidence of gross negligence), this argument ignores the provisions of the Recreational Use Statute which specifically declare no duty exists.

Either a duty exists under Regulation 61-50 to provide a lifeguard and other safety devices or the Recreational Use Statute applies and a landowner owes no duty of care to provide such safety devices. Since the law cannot be in favor of an affirmative duty to provide such safety devices and against such a duty at the same time, there is a clear conflict between the Regulation and the Recreational Use Statute and it is equally clear that the statute must control. Brooks v. S.C. State Bd. Of Funeral Ser., 271 S.C. 457, 247 S.E.2d 820 (1978). Regulation 61-50 does not apply to this action and was not properly charged by the lower court.

B. Compliance with Regulation 61-50 would be unreasonable when the Recreational Use Statute also applies.

Petitioners/Respondents fail to appreciate the scope and extent of a ruling that enforces a regulation which incorporates significant cost elements while at the same time requiring those to whom the regulation is to be applied to do so without a charge. In asserting the "parking fee" could have generated the economic requirements for paying a lifeguard and other safety equipment, Petitioners/Respondents fail to account for the impact such a decision would have on all landowners in a like setting. The farmer who allows the public to swim and fish in a large pond on his land will be forced to pay for a lifeguard. Every property owner who owns property on the coast and allows the general public to use such property for recreational purposes will need to employ a lifeguard. Of course, employing a single lifeguard will not be enough, as other safety requirements must also be met. Despite the financial drain and expense of these requirements, the land itself must still be open to the public free of charge under the Recreational Use Statute.

As in Brooks v. S.C. State Bd. Of Funeral Ser., 271 S.C. 457, 247 S.E.2d 820 (1978), this places an unreasonable burden on the public in connection with Regulation 61-50 when it is applied to property protected by the Recreational Use Statute. In such a narrow setting, Regulation 61-50 is unenforceable and should not have been charged.

CONCLUSION

Based upon the foregoing and the arguments set forth in Respondent/Petitioner's Brief to this Court, Respondent/Petitioner requests that this Court review the decision of the Court of Appeals, reverse the order granting a new trial, and rule that the Recreational Use Statute applies to the facts of this case and controls over Regulation 61-50.

October 5, 2004

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