THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

James E. Lockemy, Circuit Court Judge

Case No. 2003-CP-21-1890

Craig A. Hurst, ...Appellant,

East Coast Hockey League, Inc.; Knoxville Cherokees
Hockey, Inc., d/b/a Pee Dee Pride Hockey, and d/b/a
Florence Pride Hockey; Florence City-County Civic
Center Commission d/b/a Florence City-County Civic
Center; City of Florence; and County of Florence, ... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN FINDING PLAINTIFF ASSUMED THE RISK OF ERRANT PUCKS BY VOLUNTARILY ATTENDING THE GAME AS A SPECTATOR? (I.E. DID THE COURT ERR IN FINDING THIS ACTION BARRED BY THE DOCTRINE OF SECONDARY IMPLIED ASSUMPTION OF RISK?)

II. DID THE CIRCUIT COURT ERR IN FINDING THAT PLAINTIFF'S ACTION WAS BARRED BY PLAINTIFF'S CONSENT? (I.E., EXPRESS ASSUMPTION OF RISK)

III. DID THE CIRCUIT COURT ERR IN FINDING THAT DEFENDANT HAD NO DUTY TO PROTECT PLAINTIFF FROM ERRANT PUCKS? (I.E., DID THE COURT ERR IN FINDING ACTION BARRED BY THE DOCTRINE OF PRIMARY IMPLIED ASSUMPTION OF RISK?)

IV. DID THE CIRCUIT COURT ERR IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE DEFENDANTS SATISFIED THEIR DUTY TO PROVIDE A REASONABLY SAFE PREMISES FOR THE PLAINTIFF?

V. DID THE CIRCUIT COURT ERR IN FINDING THAT THE SOUTH CAROLINA TORT CLAIMS ACT IMMUNIZED THE DEFENDANTS, CITY OF FLORENCE AND COUNTY OF FLORENCE, FROM LIABILITY?

STATEMENT OF THE CASE

Appellant alleges that, while a spectator at a hockey game standing in the stands behind the goal, he was struck in the face by an errant hockey puck. (R. p. 000015).

The Complaint alleges, in sum, that Defendants, Hockey Team, League, Civic Center, City and County, breached their duty to exercise reasonable care for his safety and to take precautions to eliminate unreasonable risks to the Plaintiff. (R. pp. 000015-000017). In particular, Plaintiff contends that the Defendants failed to exercise reasonable care to protect Plaintiff against the risk of the hockey puck leaving the rink and striking him. (Id.).

On July 27, 2005, the Circuit Court granted Defendant's Motion for Summary Judgment; finding, in sum, (1) that all Defendants are entitled to summary judgment on the grounds that Plaintiff assumed the risk of injury, (R. p. 000005); (2) that all the Defendants are entitled to summary judgment in that no breach of duty was the proximate cause of Plaintiff's injuries, (R. p. 000009); (3) that the City of Florence and County of Florence are immune from suit pursuant to the Tort Claims Act, (R. p. 000009). This appeal followed.

STATEMENT OF FACTS

The Defendant, Knoxville Cherokees Hockey, Inc., d/b/a Pee Dee Pride Hockey, (hereinafter "Pee Dee Pride"), is a hockey team. (R. p. 000014; R. p. 000020). The team is a member of the East Coast Hockey League. (R. pp. 000085-000086). Membership entails signing an affiliation agreement with the league and agreeing to abide by the rules and by-laws of the league. (Id.). Pee Dee Pride plays hockey under lease of the Florence

City-County Civic Center. (Id.). The Civic Center is governed by the Florence City-County Civic Center Commission, a governmental entity created by the City of Florence and County of Florence. (Id.).

The hockey rink contains an ice playing surface, and is equipped with 43 inch high dasher boards which encircle the rink. (R. pp. 000051-000052; R. p. 000008). The rink is also equipped with a protective Plexiglas wall, which is eight feet high behind the goals and six feet high on the sides. (Id.).

The rink now has 25-foot high nets behind the goals to protect spectators; although on the date of the accident it did not. (R. pp. 000056-000058; R. p. 000104; R. p. 000107).

On January 11, 2002, the Plaintiff was a patron visiting the Florence City-County Civic Center in order to watch a Pee Dee Pride hockey game. (R. pp. 000030-000035). While returning to his seat after visiting the concession stand, Plaintiff while standing in the seating area behind the goal, was struck in the head by a hockey puck that left the hockey rink at a high rate of speed after having been struck by a player for the Defendant hockey team during warm ups. Id.; (R. p. 000015; R. p. 000020[1]). Plaintiff suffered

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[1] The Circuit Court found "Neither the Plaintiff nor his wife ever saw what struck the Plaintiff, although the Plaintiff now alleges that it was a hockey puck which came from the ice." (R. p. 000005). The Court went on to indicate, "The Plaintiff avers that an unknown individual informed him that it was a hockey puck which struck him," and to cite the legal proposition that hearsay cannot be used to refute a Motion for Summary Judgment.

It does not appear that the Court's decision turned on the admissibility of the unknown individual's statement. However, the Appellant believes that the unknown individual's statement was admissible and that even without it the Plaintiff offered sufficient evidence to go to the jury on the issue of whether Plaintiff was stricken by a puck.

First, Defendants admitted "upon information and belief only that the Plaintiff was struck by a hockey puck which had left the playing surface and exited the rink …" (R. p. 000020). Also, Pee Dee Pride manager testified that "the only thing I recall was that, that, that Mr. Hurst was hit with a puck." (R. p. 000059). Further, the Plaintiff testified that he was struck in the face suddenly, blood ran down his face, and "a little boy ran up and he said, 'Sir, this is what hit you.' And it was a warm up puck." (R. pp. 000040-000041).

injuries and damages as a result and subsequently filed this action against the Hockey Team, the Hockey League, the Civic Center Commission and the City and County.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING PLAINTIFF ASSUMED THE RISK OF ERRANT PUCKS BY VOLUNTARILY ATTENDING THE GAME AS A SPECTATOR. (I.E. THE COURT ERRED IN FINDING THIS ACTION BARRED BY THE DOCTRINE OF SECONDARY IMPLIED ASSUMPTION OF RISK).

The Circuit Court erred in finding that the instant action was barred because "the Plaintiff assumed the risk of injury from errant pucks by voluntarily attending the game as a spectator." (R. p. 000005).

In the case of Davenport v. Cotton Hope, 333 S.C. 71, 508 S.E.2d 565, (S.C. 1998), the Supreme Court held that the doctrine of assumption of risk is no longer a complete bar to recovery. Instead, it is subsumed into the doctrine of comparative negligence. That is, assumption of risk is to be treated as another facet of comparative negligence, "a plaintiff is not barred from recovery by the doctrine of assumption of risk unless the degree of fault arising therefrom is greater than the negligence of the defendant." Davenport, at 87.

The Davenport Court went on to distinguish assumption of risk, which it labeled "secondary implied assumption of risk", from consent (i.e. "express assumption of risk"); and absence of duty (i.e. "primary implied assumption of risk).

Certainly, this statement is admissible as a present sense impression, or excited utterance under Rule 803(1),(2) of the South Carolina Rules of Evidence. Moreover, even if the Defendants' admission and the child's statement are insufficient, the circumstances described by Plaintiff (a sudden strike in the face, followed by seeing a hockey puck) present a genuine issue of fact with regard to what hit the Plaintiff.

The Davenport Court held that secondary implied assumption of risk "arises when the Plaintiff knowingly encounters a risk created by the defendant's negligence." Davenport, at 82. The Supreme Court explained that secondary implied assumption of risk was subsumed into comparative fault; whereas, express assumption of risk, (i.e. "consent"), and primary implied assumption of risk, (i.e. "absence of duty"), were compatible with comparative negligence and unaffected by the Davenport decision.

Pursuant to Davenport, the instant action cannot be barred based on the Circuit Court's finding that "the Plaintiff assumed the risk of injury from errant pucks by voluntarily attending the game as a spectator." (R. p. 000005). Knowingly encountering a risk, (secondary implied assumption of risk), has been abrogated by comparative negligence. If the action is barred at all, it must be on the theory of consent, or because of a total absence of duty on Defendants' part.

II. THE CIRCUIT COURT ERRED IN FINDING THAT PLAINTIFF'S ACTION WAS BARRED BY PLAINTIFF'S CONSENT. (I.E., EXPRESS ASSUMPTION OF RISK).

The Defendants did not argue consent, and the Circuit Court never directly addressed consent. However, in support of its decision, the Court implicitly relied on the concept of consent; finding "warnings about the danger of hockey pucks leaving the playing surface and entering the stands are and were printed on Pride admission tickets." (R. p. 000007).

Therefore, Appellant challenges consent as a foundation for the Circuit Court's decision.

The Davenport Court explained that, "Express assumption of the risk applies when the parties expressly agree in advance, either in writing or orally, that the plaintiff

will relieve the defendant of his or her legal duties toward the plaintiff". Davenport, at 79, (citing Restatement (Second) of Torts §496B (1965). The logic is that when the plaintiff has released the defendant from its legal duties the defendant cannot be charged with negligence. See Id. The Davenport Court noted that even where assumption of risk was abrogated by comparative fault "the rule remains that express assumption of risk continues as an absolute defense in an action for negligence. The reason for this is that express assumption of risk sounds in contract, not tort, and is based upon an express manifestation of consent" Davenport, 570, (emphasis added).

The Restatement (Second) of Torts goes on to indicate "In order for an express agreement assuming the risk to be effective, it must appear that the plaintiff has given his assent to the terms of the agreement. Particularly where the agreement is drawn by the defendant, and the plaintiff's conduct with respect to it is merely that of a recipient, it must appear that the terms were in fact brought home to him and understood by him, before it can be found that he has accepted them." Restatement (Second) of Torts §496B, cmt. c.

The Court's decision implies that the disclaimer of liability on the Plaintiff's ticket stub constitutes an express assumption of risk and relieves the Defendants of any duties toward the Plaintiff. However, as the Restatement specifically indicates, for such a disclaimer to be effective the Plaintiff must give his assent to the terms of the agreement. There is no evidence that the Plaintiff understood or agreed to contractually release the Defendants from their duties of due care.

The effect of a disclaimer printed on the back of a ticket, although never considered by the South Carolina Supreme Court, was directly addressed by the

Appellate Court of Illinois in Yates v. Chicago National League Ball Club, 230 Ill. App. 3d 472, 595 N.E.2d 570 (Ill. App. 1992). (reversed by statute on other grounds).

In Yates, Plaintiff was struck by a foul ball at a baseball game and Defendants claimed a contractual assumption of the risk by virtue of the disclaimer printed on the back of the Plaintiff's ticket. The Court cited the Restatement (Second) of Torts §496B, cmt. c, and held "Plaintiff's acceptance of a ticket containing a disclaimer in fine print on the back is not binding for the purpose of asserting express assumption of the risk." Yates, 595 N.E.2d 570 at 581, Id. The Court went on to distinguish ticket disclaimers from signed agreements which may be effective.

In addition, South Carolina Courts have long held that exculpatory contracts are not favored as they usually produce a want of care. See Huckaby v. Confederate Motor Speedway, 276 S.C. 629 (S.C. 1981); Pride v. Southern Bell Telephone, 244 S.C. 615 (S.C. 1964). South Carolina has always strictly construed exculpatory contracts against the parties relying thereon, Id, and our courts have held that such agreements are invalid as contrary to public policy where a party protects itself by contracting away liability for negligence in the performance of public duties or when the parties are not on roughly equal bargaining terms. See Pride at 621. See also Restatement (Second) of Torts §496B, cmt. j.

The Restatement of Torts specifically describes disparity of bargaining power as a basis upon which to invalidate an exculpatory contract. Id. The Restatement indicates "An express agreement for the assumption of risk will not, in general, be enforced where there is such disparity of bargaining power between the parties that the agreement does not represent a free choice on the part of the plaintiff. … The disparity in bargaining

power may arise from the defendant's monopoly of a particular field of service, from the generality of use of contract clauses insisting upon assumption of risk by all those engaged in such a field, so that the plaintiff has no alternative possibility of obtaining the service without the clause." Restatement (Second) of Torts §496B, cmt. j.

Therefore, even assuming the Defendants could show that the Plaintiff manifested his assent to the terms of the disclaimer, the disclaimer is invalid as contrary to public policy because the Defendants sought to contract away public duty of care and because the Plaintiff and Defendants were not on equal bargaining terms.

The ticket disclaimer does not represent consent on the part of the Plaintiff.

III. THE CIRCUIT COURT ERRED IN FINDING THAT DEFENDANT HAD NO DUTY TO PROTECT PLAINTIFF FROM ERRANT PUCKS. (I.E., THE COURT ERRED IN FINDING ACTION BARRED BY THE DOCTRINE OF PRIMARY IMPLIED ASSUMPTION OF RISK).

The Circuit Court found that "under the Doctrine of Primary Implied Assumption of the Risk, the Defendants owed the Plaintiff no legal duty to protect him from an open, obvious, and inherent risk of injury from errant hockey pucks while he attended a hockey game." (R. p. 000009).

This is the central holding of the Circuit Court, and the essential issue on appeal.

In so holding, the Circuit Court relied on Davenport v. Cotton Hope, 333 S.C. 71 (S.C. 1998). In Davenport, the Supreme Court described primary implied assumption of risk as focusing "not on the plaintiff's conduct in assuming the risk but on the defendant's general duty of care … primary implied assumption of risk is but another way of stating the conclusion that a Plaintiff has failed to establish … that a duty exists." Davenport at 81.

By way of example, the Supreme Court in Davenport cited the South Carolina District Court case of Gunther v. Charlotte Baseball, Inc.. The Davenport Court noted:

> In South Carolina, there are no cases that apply the term "primary implied" assumption of risk. However, in Gunther v. Charlotte Baseball, Inc., 854 F.Supp. 424 (D.S.C. 1994), the Federal District Court was faced with the question of whether a spectator at a baseball game was barred, under South Carolina law, from suing the stadium owner for injuries sustained after being struck by a foul ball. The court noted that the issue was one of first impression in South Carolina. The court proceeded to bar the plaintiff's suit, stating, "the vast majority of jurisdictions recognize this hazard [being struck by a foul ball] to be a risk that is assumed by the spectators **because it remains after due care has been exercised (erecting a screen),** and it is not the result of negligence by the ball club." Gunther, 854 F.Supp. at 428, (citing Anderson v. Kansas City Baseball Club, 231 S.W.2d 170 (Mo. 1950). The court's statement, in this regard, was an implicit application of the doctrine of primary implied assumption of risk -- the defendant's duty of care did not encompass the risk involved, and as such, there was no prima facie case of negligence.
>
> Davenport at 81, fn 3 (emphasis added).

The rule that Gunther set out, and which the Supreme Court implicitly adopted in Davenport, has become commonly known as the “limited duty” rule and has become the prevailing rule in most jurisdictions in baseball and hockey spectator injury cases.[2]

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[2] Courts have consistently found that owners and occupiers of hockey rinks owe a limited duty to exercise ordinary care for the safety of spectators at hockey games. Many have found breaches of that duty and allowed injured hockey spectators to recover for injuries sustained as the result of being stricken by errant pucks. See, e.g., Riley v. Chicago Cougars Hockey Club,Inc., 427 N.E. 2d 290 (Ill. Ct. App. 1981)(collecting cases); Uline Ice, Inc. v. Sullivan, 187 F.2d 82 (D.C. Cir. 1950); Parsons v. Nat'l Dairy, 277 N.W.2d 620 (Ia. 1979); Tite v. Omaha Coliseum Corp., 12 N.W.2d 90 (Neb. 1943); Schwilm v. Penn. Sports, 84 Pa. D. & C. 603 (Pa. 1952); Morris v. Cleveland Hockey Club, Inc., 105 N.E.2d 419 (Oh. 1952)(superceded by comparative negligence statute); Lemoine v. Springfield Hockey Assoc., 29 N.E.2d 716 (Mass. 1940).

Some Courts, while applying a “no duty rule” in name, actually, on examination, agree that an owner or occupier of a hockey rink owes a duty of ordinary care, but find that the duty has been met (often by the installation of nets behind the goals). See, e.g., Modec v. City of Eveleth, 29 N.W.2d 453 (Minn. 1947)(finding that, where wire nets created protected area behind goals, Plaintiff could have taken seat in protected area behind goal and that proprietors of hockey rink, like proprietors of baseball parks, “are not obliged to screen all seats . . .” (quoting Hammel v. Madison Square Garden Corp., 279 N.Y.S. 815 (N.Y.

This limited duty rule was spelled out most explicitly by the New Jersey Appellate Court in the case of Schneider v. American Hockey and Ice Skating Center, Inc., 777 A.2d 380 (N.J. Super. Ct. App. Div. 2001). The Schneider Court found "We conclude that a hockey rink operator has a limited duty to provide a protected area for spectators who choose not to be exposed to the risk posed by flying pucks and to screen any spectator area that is subject to a high risk of injury from flying pucks." (Schneider at 382). It went on to indicate that:

> …what has come to be recognized as the prevailing rule is that a sports facility operator's limited duty of care has two components: first, the operator must provide protected seating 'sufficient for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion,' and second, **the operator must provide protection for spectators in 'the most dangerous section' of the stands**. Akins v. Glens Falls City Sch. Dist., [424 N.E.2d 531, 533 (N.J. 1981)]; accord Bellezzo v. State, [851 P.2d 847, 852-853 (Ct. App. Ariz. 1992)]; Maytnier v. Rush, 80 Ill. App.2d 336, 225 N.E.2d 83, 87 (Ill. App. Ct. 1967); Arnold v. City of Cedar Rapids, 443 N.W.2d 332, 333 (Iowa 1989); Anderson v. Kansas City Baseball Club, 231 S.W.2d 170, 173 (Mo. 1950); Erickson v. Lexington Baseball Club, Inc., 901 P.2d 1013, 1015-16 (Utah 1995). **The second component of this limited duty ordinarily may be satisfied by the operator**

1935)(emphasis added)). See also Ingersoll v. Onondaga Hockey Club, Inc., 245 A.2d 137, 140 (N.Y.1935)(noting that there were screened areas behind the goals and that had the plaintiff "desired to protect herself from [the risk of errant pucks], she could have done so by selecting a seat in the screened area . . .";cited by Modec in accord); Pestalozzi v. Philadelphia Flyers, Ltd., 576 A.2d 72 (Pa. 1990)(citing Modec in accord).

In fact, commentators and courts have found that the "no duty" label recited by some courts is a misnomer. See 38 Tulsa L. Rev. 445, 454-455 (2003)(citing Modec, Ingersoll, and others and noting "It is frequently stated that a small number of jurisdictions subscribe to a more literal reading of the limited duty rule and hold that sports facilities owe no duty to spectators in projectile cases. In fact, this is not an accurate analysis. Examination of these apparent "no duty" cases reveals a judicial sentiment to deny a duty regarding inherent risks. Similarly, under the limited duty rule, a defendant has no legal duty to eliminate risks inherent in the sport itself. These so-called no duty jurisdictions, therefore, are applying nothing more draconian than the limited duty rule.") See also Riley v. Chicago Cougars Hockey Club,Inc., 427 N.E. 2d 290, 293 (Ill. Ct. App. 1981)(citing so-called "no duty" cases Modec, and Ingersoll, and noting that "In each of these cases, the court agreed that an owner or proprietor of a hockey arena owed a duty of ordinary care to spectators at hockey games.").

> **providing screened seats behind home plate in baseball and behind the goals in hockey.** See Akins v. Glens Falls City Sch. Dist., 424 N.E.2d at 533; Gilchrist v. City of Troy, [495 N.Y.S.2d 781, 783 (N.Y. App. Div. 1985)]; Lawson v. Salt Lake Trappers, Inc., [901 P.2d 1013, 1015-16 (UT 1995)].
>
> Schneider at 384. (emphasis added).

In support of this rule, both the Schneider court and the District Court in Gunther cited Anderson v. Kansas City Baseball Club, 231 S.W.2d 170 (Mo. 1950), a baseball foul ball case in which the Missouri Supreme Court found "where a baseball game is conducted under the usual conditions customarily prevailing in baseball parks, it is not necessary that all seats be screened against the hazards of driven balls. The obligation to exercise ordinary care to provide a place reasonably safe for spectators is fulfilled when those patrons of the stands which are most frequently subject to the hazard of how foul balls are screened …". Anderson, at 172-173. (emphasis added).

Accordingly, the limited duty rule requiring operators to provide screened seats behind home plate at baseball games was the rule adopted by Gunther and the Supreme Court in Davenport in baseball foul ball cases, and is the prevailing rule in hockey cases as well.[1]

There can be no justification for applying a more limited rule for hockey than the Gunther Court applied for baseball. In fact, many courts have held that operators of hockey facilities should be held to a higher standard than those of baseball facilities. See 38 Tulsa L. Rev. 445, 465-468 (2003). (noting baseball, the "national pastime", is easy to follow in its various trajectories; whereas, hockey is less popular and more difficult to follow given the constant movement and unpredictable trajectory of the puck and given

that the object is for the puck to slide along the ice, leading spectators to be less on guard for airborne objects.).

In Gunther the District Court held that the Defendant ball club had met their duty of due care by erecting a screen behind home plate, where the foul ball hazard was the greatest and, therefore, a Defendant struck by a ball in an unscreened area had no claim.

In the case at bar, the Defendants did not meet their duty of due care by screening the area behind the goals, where the hazard of errant pucks is the greatest. This failure of due care caused Plaintiff's injuries.

IV. THE CIRCUIT COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE DEFENDANTS SATISFIED THEIR DUTY TO PROVIDE A REASONABLY SAFE PREMISES FOR THE PLAINTIFF.

The Defendants, were owners and/or operators of the hockey rink.

The team, Pee Dee Pride, leased the Civic Center for the purpose of operating its games (R. pp. 000085-000086).

The League was responsible for the safety of games conducted by its member franchises. (R. p. 000053, lines 22-25; R. pp. 000066, line 11 - 00067, line 22). The League had the power and control to, and ultimately did, mandate nets behind the goals at its member team rinks. (R. pp. 000061, line 19 – 000062, line 14; R. pp. 000072, line 23 – 000073, line 14).

The Civic Center Commission operated the Civic Center on behalf of the City and County and leased the Center to the team. (R. pp. 000085-000086; R. pp. 000087-000094; R. pp. 000099-000100).

The City and County own the Civic Center, and through the Commission operate the Center. (See infra Argument V).

A property owner or occupier owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty. Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000). The property owner or occupier has a duty to warn an invitee only of latent or hidden dangers of which the property owner or occupier has or should have knowledge. Id. at 445, 531 S.E.2d at 538. A property owner generally does not have a duty to warn others of open and obvious conditions, but a landowner may be liable if the landowner or occupier should have anticipated the resulting harm. Id. at 445-46, 531 S.E.2d at 539. (emphasis added).

Each Defendant had an obligation to the Plaintiff as an invitee to keep the premises in a reasonably safe condition and take reasonable care to protect the invitee from the danger of errant pucks in the area behind the goal. (see supra and Argument III).

Plaintiff was struck by a hockey puck while he was standing in the stands in an area behind the goal. (R. p. 000040, lines 1-25). At the time of the Plaintiff's injury, there was no netting behind the goal to prevent spectators from being struck by hockey pucks. (R. pp. 000056-000058; R. p. 000104; R. p. 000107). This was the case although the team was aware that hockey pucks could leave the rink and go into the stands. (R. pp. 000057, line 20 – 000059, line 8; R. p. 71, lines 10-18).

The Court found that "at the time in question the prevailing standard in the industry was to provide protection via dasherboards … and plexiglass walls …" and that

the absence of netting behind the goals was reasonable and customary in the industry. (R. p. 000010).[3]

On the contrary, in the case of Uline v. Sullivan, 187 F.2d 82 (D.C. Cir. 1950), the D.C. Circuit in 1950 found wire mesh installed directly behind the goal line at the end of the playing area insufficient, and noted that forty (40%) percent of the arenas in 1950 contained a greater screened area than in the Defendants' arena.

With regard to the defense of industry standards, the Uline Court went on to point out that "what is customary may very well be improvident. It is true that the exhibitor of a sports event is not an absolute insurer of the safety of the patron. But the mere fact that exhibitors generally provide a certain measure of protection to spectators does not preclude the possibility that reasonable men would have provided a greater measure. 'What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.'" Uline, at 84 (quoting Texas & Pacific Ry. Co. v. Behyner, 189 U.S. 468, 470 (1903), emphasis added).

Of course, the concept of industry standards has been addressed before by South Carolina. In particular, in analyzing the adequacy of warnings in products liability cases, the Court of Appeals in Allen v. Long, 505 S.E.2d 354 (Ct. App. 1998), held "We do not interpret [Bragg v. Hi-Ranger, 462 S.E.2d 321 (Ct. App. 1995)] to establish a warning meeting industry standards is, as a matter of law, adequate. We reject this principle as

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[3] See ESPN article, 06/20/02, indicating "safety netting has long been in place at European hockey arenas and some North American junior and college hockey rinks. American West Arena in Phoenix previously was the only NHL venue with netting to protect spectators …" (R. pp. 000105-000106). In addition, nets behind the goals are noted in a variety of old cases. See Modec v. City of Eveleth, 29 N.W.2d 453 (Minn. 1947) (nets created protected area behind goals); Ingersoll v. Onondaga, 245 A.2d 137 (N.Y. 1935) (screened areas behind goals protected spectators from risk of errant pucks); Thurman v. Ice Palace, 97 P.2d 999 (Cal. App. 1939) (finding "duty imposed by law is performed when screened seats are provided").

unsound since it would allow the industry to set its own standard of safety…" Allen, at 358. See also 63 Am. Jur. 2d Products Liability §228 (1997) (while established industry custom may influence applicable standard of care, it does not conclusively determine this issue; trade usage or custom does not justify negligence, nor does the fact that a practice is in strict compliance with usage establish as a matter of law that the practice is non-negligent).

The Defendants were capable of placing netting at the ends of the hockey rink and, in fact, many months after this accident they did so after it was mandated by the National Hockey League, the American Hockey League, and ultimately the Defendant, East Coast Hockey League. (R. pp. 000056-000057; pp. 000072-000073). The current 25-foot high nets behind the goals were installed in July of 2002 after the Plaintiff's injury in January. (R. p. 000060).[4]

Mr. Capuano, Pee Dee Pride Manager, and the Rule 30(b)(6) representative of the hockey team, testified that he did not know whether the nets were necessary for safety or not, (R. p. 000063, lines 10-12), and he further testified that he did not know whether it was dangerous not to have nets. (R. p. 000063, lines 17-19). He did testify that he thought the netting would help, and did not recall anyone being struck since the netting

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[4] Assuming that the Defendants stipulate that the nets that they erected at the Civic Center after the accident were feasible before, and would have made the accident less likely to happen; evidence that the Defendants erected the nets after the accident would be inadmissible under Rule 407 of the South Carolina Rules of Evidence as a subsequent remedial measure. See Webb v. CSX, 364 S.C. 639, 653; 615 S.E.2d 440, 448 (S.C. June 20, 2005).

Nevertheless, the post-accident installation of nets by the National Hockey League and the American Hockey League would be admissible under Rule 407, as those entities are not defendants, and installation of nets at facilities under their jurisdiction would not have prevented Plaintiff's accident.

(The Court should note that in his First [Initial] Brief, Plaintiff argued, citing Reiland v. Southland, 330 S.C. 617 (Ct. App. 1998), that the installation of nets by the Defendants after the accident was admissible under Rule 407 on the theory that they were not installed in response to the accident and were, therefore, not "remedial". After filing Appellant's First [Initial] Brief, however, the undersigned discovered that Reiland had been overruled by the Supreme Court in June, 2005, in the case of Webb v. CSX, 364 S.C. 639 (S.C. June 20, 2005). The undersigned regrets this error.)

was installed. (R. p. 000064, lines 16-19). He testified that the cost of installing the netting was about seven to eight thousand dollars and that the team split the cost with the Civic Center. (R. p. 000064, lines 20-23). Mr. Capuano further testified that he did not know why they had not installed the netting before then. (R. p. 000065, lines 3-4).

In summary, the testimony to date reveals that Defendants knew, or should have known, there was a risk to spectators presented by hockey pucks leaving the rink at a high rate of speed, particularly in the area behind the goal.[5] The Defendants had the capability of eliminating or at least significantly reducing that risk and did not do so before Plaintiff's injuries.

Whether a defendant has provided a reasonably safe premise is a question for a jury. Henderson vs. St. Francis Comm. Hosp., 303 S.C. 177 (1990). A jury could reasonably find that the Defendants had a duty to make the facility reasonably safe by installing netting behind the goals and that the absence of netting presented an unreasonable danger that was the proximate cause of the Plaintiff's injuries.

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[5] The Circuit Court indicated that the Plaintiff "has not produced any expert testimony that the design of the Civic Center in January of 2002 violated any standard of care or was unreasonable." (R. p. 000012). The Circuit Court found, citing Griffin v. Jordan, 351 S.C. 459 (Ct. App. 2002), that expert testimony was required to establish a standard of care in a negligent design case. On the contrary, Griffin v. Jordan, was a case in which a plumber entered into a contract with the City to construct a water project and brought an action against the project's design engineer complaining of damage relating to the engineer's administration of the contract. The Court of Appeals in Griffin noted that in professional malpractice actions and in actions for breach of implied warranty, expert testimony was required to establish the standard of care unless proof of the claims fell within the common knowledge exception. Griffin, 351 S.C. 459, 472-473. This negligence action is neither a professional malpractice claim nor a claim for breach of implied warranty. (R. pp. 000015-000017). Thus, no expert testimony is required. Moreover, the fact that netting would prevent pucks from entering the spectator area is well within common knowledge, and the standard of care requiring hockey rink owners to meet the limited duty of providing zones of protection behind the goals is well established in the law. See supra Argument III.

V. THE CIRCUIT COURT ERRED IN FINDING THAT THE SOUTH CAROLINA TORT CLAIMS ACT IMMUNIZED THE DEFENDANTS, CITY OF FLORENCE AND COUNTY OF FLORENCE, FROM LIABILITY.

The City and County own and operate the Civic Center. In 1990 the City and County entered into an agreement with the intention "to work cooperatively and to jointly design, construct, own, operate, and maintain the Civic Center …" (emphasis added). (R. p. 000087). To this end, the City and County obtained financing for the construction of the Civic Center and agreed to be equally responsible for paying the debt thereby created. Id. The City and County also passed ordinances, (R. pp. 000095-000098; R. pp. 000099-000103), creating a Civic Center Commission to deal with the Center's day-to-day operation. The Commission is made up of eleven members, Id, four picked by the City, four by the County, the Mayor and Chair of County Council, (or their representatives), and an eleventh, (the Director of the Commission), nominated by the ten members. (Id.). Thus, the Commission is made up entirely of members selected by the City and County to operate, for the City and County, a facility owned and operated by the City and County.

The South Carolina Tort Claims Act provides that political subdivisions "are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann., §15-78-40 (1976). The owner or occupier of property owes an invitee a duty to use reasonable care to protect the invitee from suffering bodily injury and a duty to make their premises

reasonably safe from unreasonable risks. See Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977).

Nothing in the Tort Claims Act relieved the City or County of that duty. It is the failure of the City and the County to meet that duty which is precisely the crux of the action against them. Of course, the question as to whether the City and County, in fact, meet that duty is generally a question for the jury. See Henderson v. St. Francis Community Hosp., 303 S.C. 177, 399 S.E.2d 767 (1990).

CONCLUSION

In summary, pursuant to Davenport, assumption of the risk is no longer a complete bar in South Carolina. Instead, the Plaintiff's negligence, if any, is to be weighed by the jury against the negligence of the Defendants in the comparative fault system.

The Court erred in finding that the Defendants had no duty to protect the Plaintiff from the danger of being struck by a hockey puck. Unlike the defendants in the case of Gunther, cited by the Supreme Court in Davenport, the Defendants did not exercise the due care of erecting a screen behind the goals, the area most vulnerable to errant hockey pucks. The defendants in Gunther exercised due care by erecting a screen behind home plate, but the Defendants here did not exercise due care by erecting a screen or net behind the goal. Had they done so, the Plaintiff would not have been injured.

For the foregoing reasons, this Court should reverse the judgment of the Circuit Court.

Respectfully submitted,

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