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. 03-CP-21-1890

CRAIG A. HURST ..... Appellant,

v.

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 RESPONDENTS

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STATEMENT OF THE CASE

The Appellant, Craig A. Hurst, filed this negligence action against the defendants East Coast Hockey League, Inc. ("ECHL"), Knoxville Cherokees Hockey, Inc., d/b/a Pee Dee Pride Hockey, and d/b/a Florence Pride Hockey (the "Pride"), Florence City-County Civic Center Commission d/b/a Florence City-County Civic Center (the "Commission"), the City of Florence (the "City"), and the County of Florence (the "County") for injuries sustained when he was allegedly struck by a hockey puck while a spectator at a Pride hockey game on January 11, 2002. (See R. p. 15 ¶¶ 12-13.)

At the relevant time, the Pride was professional hockey team located in Florence, South Carolina, and was a member of the ECHL, a professional hockey league with 32 member-teams. (R. p. 49, line 17 - p. 50, line 13; R. p. 74, line 20-p. 76, line 14.) The Pride played home games at the Florence City-County Civic Center ("Civic Center").

The Commission is a governmental entity established by both the City and the County tasked with the responsibility for maintaining and operating the Civic Center. (R. pp. 112-115.)

On January 11, 2005, the Defendants moved the circuit court for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. On April 11, 2005, a hearing on that motion was held, and the circuit court took the matter under advisement. By order filed July 26, 2005, the circuit court granted the Defendants' motion, determining, first, that Hurst's claims were barred by the doctrine of primary implied assumption of the risk (see R. pp. 7-8), and, second, that Hurst failed to present sufficient evidence that the Defendants breached any legal duty owed (see R. pp. 9-11). Judgment was entered that same date. On August 12, 2005, Hurst noticed this appeal.

STATEMENT OF THE FACTS

On January 11, 2002, Hurst attended a Pride home hockey game at the Civic Center. (R. p. 15 ¶ 12.) Hurst was an avid hockey fan whose interest in the sport was piqued following the United States national hockey team's stunning victory over the Soviet Union in the 1980 Winter Olympics. (R. p. 28, line 10-p. 29, line 12.) He and his wife were regular attendees at Pride home hockey games. (R. p. 24, line 16-p. 29, line 12.) He had even traveled to Columbia and Charleston to watch the Pride play road games in those venues. (R. p. 27, line 21-p. 29, line 9.) Given his regular attendance at Pride home games, Hurst was very familiar with the layout and features of the rink and seating areas of the Civic Center. (See R. p. 29, line 19-p. 34, line 10; R. p. 40, lines 13-17; R. p. 48.)

On the occasion in question, Hurst and his wife went into the Civic Center prior to the beginning of the game while hockey players were out on the ice doing pre-game warm-ups. (R. p. 35, line 17-p. 36, line 17; R. p. 37, line 10-p. 38, line 14.) He was aware that during the warm-ups, players on the ice were taking shots on goal. (Id.) Hurst entered into the seating area through a concourse entrance behind one of the goals. (R. p. 36, lines 13-17.) As they entered the seating area, Hurst felt a blow to his cheek. (R. p. 39, line 4-p.40, line 23.) Neither Hurst nor his wife ever saw what struck him, although he now alleges that it was a puck which came from the ice.[1] (R. p. 39, line 4-p.44, line 14.)

Hurst sought care from emergency medical personnel at the Civic Center (R. p. 44, lines 19-23) and stayed for the remainder of the game (R. p. 45, lines 11-22). He did not seek any follow up medical care until four or five weeks later. (R. p. 46, line 11-p. 47, line 7.)

The ice rink at the Civic Center was in compliance with all requirements set forth by the ECHL, and was, in all pertinent respects, identical or comparable to the rinks used by other ECHL teams (and other professional hockey teams in the United States). (See R. p. 54, line 8-p.57, line 9; R. p. 68, line 6-p.72, line 6; see also R. p. 80, line 11-p.82, line 3.) The playing surface was equipped with 43 inch high dasher boards which completely encircled the rink. (R. p. 51, line 8-p. 52, line 8.) (Dasher boards are another name for the wood or fiberglass walls surrounding the playing surface. (R. pp. 108-110; R. p. 51, lines 8-22.)) The 2001-02 ECHL rules dictated that the dasher boards be no less

[1] Hurst avers that an unknown child informed him that it was a hockey puck which struck him. (R. p. 41, lines 8-10; R. p. 43, lines 9-22.) Even assuming that the offending puck came from the ice, Hurst admits that he has absolutely no knowledge of how the puck came to strike him. (R. p. 43, line 5-p. 44, line 14.)

than 40 inches and no more than 48 inches, and suggested that 42 inch dasher boards were ideal. (R. pp. 108-110.) In addition, a protective plexiglass wall, which was eight feet high behind the goals and six feet high on the sides, was attached to the top of the dasher boards and completely encircled the Civic Center rink. (R. p. 51, line 8-p. 52, line 3; R. p. 104.) The Civic Center provided seating areas where spectators could view the on-ice action from behind the plexiglass wall. (R. p. 40, line 17; R. p. 82, lines 18-24.)

Tickets to Pride home games at the Civic Center contained language warning attendees that hockey pucks could leave the playing surface and enter the spectator seating areas. (R. p. 111; R. p. 60, lines 17-20.) Moreover, the Pride made no fewer than four public address announcements prior to and during every home game warning spectators about the risk of pucks leaving the playing surface and entering the seating areas. (R. p. 60, line 17-p. 61, line 5.)

ARGUMENT

I. THE DOCTRINE OF PRIMARY IMPLIED ASSUMPTION OF THE RISK BARS THE PLAINTIFF'S CLAIMS OF INJURY FROM AN ERRANT HOCKEY PUCK WHILE A SPECTATOR AT A PROFESSIONAL HOCKEY GAME.

"The timorous may stay at home." Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929) (Cardozo, J.).

The law of liability to spectators who are injured at sporting events is well-established: "[t]he general rule in these cases is that by voluntarily entering into the sport as a spectator [plaintiff] knowingly accepts the reasonable risks and hazard in and incident to the game." Gunther v. Charlotte Baseball, Inc., 854 F. Supp. 424, 428 (D.S.C. 1994) (*internal quotes omitted*). Thus, the overwhelming majority of the courts which

have addressed the issue have held that spectators at sporting events, including hockey games, assume the risk of injury from being struck by errant pucks and balls.[2] *See, e.g.*, Gunther, 854 F. Supp. at 428-30 (spectator at baseball game assumed risk of being struck by foul ball); Modec v. City of Eveleth, 29 N.W.2d 453, 456-57 (Minn. 1947) (spectators at hockey games assume known, inherent risk of being struck by flying hockey puck); Nemarnik v. Los Angeles Kings Hockey Club, L.P., 127 Cal. Rptr. 2d 10, 18 (Cal. App. 2002) (stadium owners owe no duty to "eliminate the inherent risk of injury from flying pucks" at hockey games); Pestalozzi v. Philadelphia Flyers, Ltd., 576 A.2d 72, 74-75 (Pa. 1990) (no duty owed to protect hockey game spectator from common and reasonably foreseeable risk of injury from errant puck); Ingersoll v. Onondaga Hockey Club, Inc., 281 N.Y.S. 505, 508 (N.Y. App. Div. 1935) (hockey game spectator assumes risk of injury from errant puck); Moulas v. PBC Productions, Inc., 570 N.W.2d 739, 744-45

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[2] This State's appellate courts have never addressed directly a case involving liability to a spectator injured while watching a sporting event. The Supreme Court, however, has indicated that the use of the phrase "assumption of the risk" is somewhat of a misnomer when applied to spectator-injury and similar cases because it is not a true, express assumption of the risk. *See* Davenport v. Cotton Hope Plantation Hor. Prop'y Regime, 333 S.C. 71, 508 S.E.2d 565, 570 (1998). The Court noted, in discussing the district court's order in Gunther, *supra*, that a spectator's assumption of the inherent risk of injury at a sporting event is known as "primary implied assumption of the risk," which "arises when the plaintiff impliedly assumes those risks that are *inherent* in a particular activity." Davenport, 508 S.E.2d at 570 & n.3 (*emphasis in original*). As the Court explained, the doctrine of primary implied assumption of the risk "goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff." *Id.*, 508 S.E.2d at 570. Thus, the Court recognized that the essential holding of Gunther is that since the risk of being struck by a foul ball is inherent in attending baseball games, the stadium owner's "duty of care did not encompass the risk involved, and as such, there was no *prima facie* case of negligence." *Id.*, 508 S.E.2d at 570 n.3.

Since the doctrine of primary implied assumption of the risk is actually "a part of the initial negligence analysis," it does not appear that the Court intended for it to be subsumed by the doctrine of comparative negligence. *See id.*, 508 S.E.2d at 570. Hurst does not seem to argue otherwise. (See Br. of Appellant pp. 8-9.)

(Wis. App. 1997) (errant puck is inherent risk which is assumed); Kennedy v. Providence Hockey Club, Inc., 376 A.2d 329, 333 (R.I. 1977) (spectator at hockey game assumes risk of injury from flying hockey puck); Dalton v. Jones, 581 S.E.2d 360, 362 (Ga. App. 2003) (spectator at baseball game assumed risk of being hit by ball, even when player intentionally threw ball into stands); Costa v. Boston Red Sox Baseball Club, 809 N.E.2d 1090, 1092-93 (Mass. App. Ct. 2004) (no duty to warn or protect baseball game spectators from inherent risk of injury by foul balls); Grissom v. Tape Mark Charity Pro-Am Golf Tournament, 415 N.W.2d 874, 875 (Minn. 1987) (spectator at golf tournament assumes risk of errantly struck golf balls); Honohan v. Turrone, 747 N.Y.S.2d 543, 544 (N.Y. Sup. Ct. App. Div. 2002) (spectator assumed risk of being hit by soccer ball during pre-game warm-ups). It matters not whether the spectator is injured during pre-game activities or during the course of a game. *See* Nemarnik, *supra*, 127 Cal. Rptr. 2d at 18 (spectator injured by hockey puck during pre-game warm-ups); Honohan, *supra*, 747 N.Y.S.2d at 544 (spectator injured by soccer ball during pre-game warm-ups).

The risk of hockey pucks leaving the playing surface and entering the spectator areas is well-known, obvious, and inherent to the sport. As the Modec, *supra*, court noted, "[a]ny person of ordinary intelligence cannot watch a game of hockey for any length of time without realizing the risks involved to players and spectators alike." 29 N.W.2d at 455. Thus, the risk of a spectator being struck "is incidental to the entertainment and is assumed by the spectator." Pestalozzi, 576 A.2d at 75; *see also* Nemarnik, 127 Cal. Rptr. 2d at 16 ("flying pucks are an integral and unavoidable part of the sport"). Since the dangers posed by flying or errant pucks are obvious and inherent, hockey arena owners and operators "owe no duty to eliminate the inherent risk of injury

from flying pucks." Nemarnik, 127 Cal. Rptr. 2d at 18; *see also* Ingersoll, 281 N.Y.S. at 508 (no obligation to protect "against a danger incident to the entertainment which any reasonable spectator could foresee and of which [the plaintiff] took the risk"); Pestalozzi, 576 A.2d at 74-75 (no duty to protect against risk which is "common, inherent and expected").

Even though never addressed directly by the South Carolina appellate courts, the Davenport Court's discussion of primary implied assumption of the risk seems to suggest that in spectator-injury and similar cases, a sporting facility owner/operator would owe *no* duty to protect spectators from the "risks inherent in a particular activity." *See* 508 S.E.2d at 570. First, the Court cited favorably Perez v. McConkey, 872 S.W.2d 897 (Tenn. 1994), wherein the Tennessee Supreme Court held that "primary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case by failing to establish that a duty exists." *See* Davenport, 508 S.E.2d at 570. Second, in discussing Gunther, *supra*, the Court stated that the essential thrust of the doctrine of primary implied assumption of the risk is that "the defendant's duty of care did not encompass the risk involved." *Id.*, 508 S.E.2d at 570 n.3. Thus, it appears that in light of Davenport's pronouncements on the underlying nature of the doctrine of primary implied assumption of the risk, a sports facility owner/operator owes no duty to protect a spectator from risks which are inherent and expected in viewing sporting events.

Here, Hurst was an avid hockey fan, was a regular attendee at Pride hockey games, and had even traveled to other arenas to attend the Pride's away games. Prior to the incident in question, Hurst was aware that hockey players were on the ice doing pre-

game warm-ups, which included, among other things, players taking shots on goal. He was even aware that one particular player's shots were often off-target. (R. p. 38, lines 10-14.) Moreover, Hurst, as a regular attendee at Pride home games, was or should have been fully aware of the particular configuration and features of the ice rink and associated facilities at the Civic Center, and knew which areas of the Civic Center were protected by the plexiglass shield around the rink (see R. p. 40, lines 14-17).

Given that the danger posed by hockey pucks leaving the ice surface and entering the seating areas is and was known and inherent to the sport of hockey, and was an easily observable phenomenon, Hurst, by attending the hockey game as a spectator, assumed the risk of being struck by an errant hockey puck. As such, the Defendants owed no duty to protect Hurst from such a "common, inherent and expected" risk. Thus, the circuit court's conclusion that Hurst's claims are barred by the doctrine of primary implied assumption of the risk (i.e., that Hurst is unable to prove, as a matter of law, that the Defendants' legal duties encompassed the risk at issue) should be affirmed.[3]

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[3] In his appellate brief, Hurst argues that the circuit court erred in finding that his claims were barred by the doctrine of secondary assumption of the risk (i.e., voluntarily encountering a risk created by the Defendants' negligence). (See Br. of Appellant pp. 4-5.) Contrary to Hurst's assertions, the circuit court never held, and the Defendants never argued, that his claims were barred by the doctrine of secondary assumption of the risk; rather, the circuit court found Hurst's claims to be barred by the doctrine of primary implied assumption of the risk, as discussed. (See R. pp. 5-8.)

Hurst also argues that the circuit court erred in finding that his claims were barred by an express assumption of the risk (i.e., consent) because of the warnings printed on Pride admission tickets. (See Br. of Appellant pp. 5-7.) Again, the circuit court never found, and the Defendants never argued, that the tickets amounted to an exculpatory contract which barred Hurst's claims; instead, the circuit court's consideration of the tickets related to its analysis of the obviousness of the risk and the standard of care. (See R. pp. 7-8.) Moreover, Hurst asserted a claim for an alleged negligent failure to warn (see, e.g., R. p. 15 ¶ 14(f)). And even though Hurst appears to have now abandoned that claim, the warnings printed on the admission tickets would be relevant to a failure to warn inquiry.

The circuit court's order should, therefore, be affirmed.

II. THE PLAINTIFF FAILED TO PRODUCE SUFFICIENT EVIDENCE THAT THE DEFENDANTS BREACHED A LEGAL DUTY OWED TO THE PLAINTIFF.

Were this Court to determine that the doctrine of primary implied assumption of the risk is inapplicable or of only limited application such that the Defendants (all or some) owed a limited duty to provide protected areas in which spectators could sit in relative safety, the circuit court correctly concluded that Hurst failed to produce sufficient evidence that the Defendants breached any such duty owed. (See R. pp. 9-12.) The circuit court also correctly concluded that the evidence in the record established that the Defendants affirmatively satisfied any duty owed. (See id.)

In order to maintain a claim for negligence, a plaintiff must prove: "(1) a duty of care owed by the defendant to the plaintiff; (2) a defendant's breach of that duty by a negligent act or omission, i.e., failure to exercise the care of a reasonable man in the circumstances; and (3) damage proximately resulting from the breach of duty." Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797, 803 (Ct. App. 1991). The Plaintiff bears the burden of affirmatively proving each and every element of his claim, including the alleged failure of a defendant to exercise due care. *Id.* Duty "is the obligation to conform to a particular standard of conduct toward another." Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167, 168 (1977). The touchstone is ordinary, reasonableness. *See* Winterstein v. Food Lion, Inc., 344 S.C. 32, 542 S.E.2d 728, 730 (2001) (landowner owes "duty of exercising reasonable or ordinary care").

In the hockey facility context, certain courts have determined that facility owners/operators owe a limited duty of care to spectators which is discharged by

providing protected or screened areas behind the goals where spectators can watch games from a spot of relative safety. *See, e.g.,* Gilchrist v. City of Troy, 495 N.Y.S.2d 781, 783 (N.Y. App. Div. 1985) (limited duty to provide "screening" behind goals); Schneider v. Amer. Hockey and Ice Skating Ctr., Inc., 777 A.2d 380, 384 (N.J. Super. Ct. App. Div. 2001) (limited duty to provide protected area behind goals for spectators to sit).

For example, in Gilchrist, *supra*, the court found that the defendant satisfied its limited duty to provide protected seating where the rink was encircled by dasher boards and had a plexiglass barrier attached atop the dasher boards at the ends behind the goals only (but not on the sides). 495 A.2d at 782-83. Similarly, in Schneider, *supra*, the court found that the defendant satisfied its limited duty where the rink was encircled by three foot dasher boards atop of which was attached a three-to-four foot plexiglass shield in the spectator areas. 777 A.2d at 382-84.

Here, the protective features of the Civic Center rink equaled or exceeded those presented in most if not all other hockey spectator cases, and the Civic Center rink was identical or substantially similar in pertinent respects to most, if not all, other ECHL rinks (and National Hockey League and other professional hockey rinks, for that matter).[4] The Civic Center rink was completely surrounded by a 43 inch (3'7") high dasher board, on top of which was attached a plexiglass wall eight feet high on the ends behind the goals and six feet high on the sides. Thus, the protective barrier surrounding the Civic Center

[4] Other courts have discussed the particular features of the allegedly offending hockey rinks, even though those courts applied an assumption of the risk (or similar variation) analysis, rather than a limited duty analysis, to resolve the claims. For example, in Kennedy, *supra*, the court noted that the rink at issue was surrounded by a dasher board with a five foot sheet of plexiglass attached. 376 A.2d at 331. And in Moulas, *supra*, the court described the rink as being surrounded by a plastic shield which was 12 feet high behind the goals and eight feet high on the sides. 570 N.W.2d at 740. The Civic Center rink's protective screen roughly equaled or exceeded these.

rink was nearly 12 feet high on the ends behind the goals, and nearly 10 feet high on the sides of the rink. There was a seating area, of which Hurst was aware (i.e., the "teal" seats (see R. p. 40, line 17)), both behind the goals and on the sides of the rink for spectators to watch the game behind the protective plexiglass wall.

The rinks at issue in Gilchrist, *supra*, and Schneider, *supra*, and similar cases, where the courts found that defendants to have satisfied their limited duty as a matter of law, actually provided *less* protection to spectators than was provided at the Civic Center's rink. As such, the only evidence in the record is that the Defendants satisfied any duty, as espoused by Gilchrist, Schneider and similar cases, to provide protected seating areas for spectators, and judgment as a matter of law was appropriate even if this Court accepts a limited duty standard.[5]

Hurst argues that the Civic Center violated its duty of care because it failed to erect, in essence, floor-to-ceiling nets in the areas behind the goals prior to January 2002. (See Br. of Appellant pp. 12-15.) In other words, Hurst contends that the rink was negligently designed and maintained because it lacked such a net in January 2002. (See

[5] In arguing that the Defendants violated their limited duty to provide protective areas behind the goals, Hurst latches on to the use of the terms "screen" or "wire mesh," referenced in certain cases, to suggest that rinks of old afforded more protection to spectators than the Civic Center's rink. (See Br. of Appellant p. 12 & n.3.) A reading of these cases make it clear that the use of wire mesh or screen in the hockey rinks of the 1930s, 1940s, and 1950s served the same function as, and gave way to the use of, modernized plastics and plexiglass used in hockey rinks of current times. *See* Modec, 29 N.W.2d at 454 (noting use of wooden boards and wire nets behind goals); Ingersoll, 281 A.2d at 508 (screened areas behind goals with no protection on sides). There is no evidence or suggestion that the screens referenced in these and similar cases provided more protection than that provided by the Civic Center rink. Simply because the Civic Center used plexiglass, as opposed to wire mesh or wire screen, is inapposite because the fact remains that in January 2002, at the time of this incident, the Civic Center provided spectators with areas in which to watch the sport in relative safety, and there is no evidence in the record that plexiglass is an inferior material.

R. pp. 15-16 ¶¶ 14(b), 16(b).) As the circuit court found, Hurst's claims in this regard suffer from several fatal flaws. (See R. pp. 10-12.)

First, the primary issue is not whether the Defendants could have made the hockey rink safer. *See* Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638, 640 (Ct. App. 1990) (mere fact that utility company could have designed a safer utility pole is not evidence of negligence); *cf.* Marchant v. Mitchell Distr. Co., 270 S.C. 29, 240 S.E.2d 511, 513 (1977) (mere fact that product could have been made safer does not establish defect). Rather, the question is whether the measures taken were reasonable. *See* Winterstein, 542 S.E.2d at 730 (reasonable or ordinary care).

As discussed, the Civic Center's rink was comparable to other professional hockey rinks across the nation, was in compliance with all ECHL requirements, and afforded more than ample protected areas for spectators to view the sport from a relatively safe vantage point. Simply because the Civic Center could have, ostensibly, been made safer by the presence of floor-to-ceiling nets is not evidence that the Civic Center, in its condition in January 2002, was negligently or unreasonably designed or maintained.

Second, Hurst has presented absolutely no evidence that the design of the Civic Center hockey rink violated the applicable standards in the industry or was otherwise unreasonably deficient. In response to a properly supported motion for summary judgment, a plaintiff must come forward with specific facts, admissible in evidence, establishing that there exists a genuine issue for trial. Rife v. Hitachi Constr. Machinery Co., Ltd., 363 S.C. 209, 609 S.E.2d 565, 568 (Ct. App. 2005); Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654, 657 (Ct. App. 2002) (proof in opposition to summary judgment

motion must be admissible in evidence). A plaintiff may not rest on the allegations of his pleadings to defeat summary judgment. Rife, 609 S.E.2d at 568.

Here, the only evidence in the record is that in January 2002, industry standards were that professional hockey rinks were designed to provide spectator protection via dasher boards and plexiglass walls – as was the case with the Civic Center rink – and that fans were alerted to the potential dangers of flying pucks via warnings printed on tickets and public announcements at games – as was done for all Pride games. Prior to June of 2002 (following a National Hockey League memorandum directing all member teams to install nets behind the goals), it was not the standard in the industry of hockey rink design and maintenance to provide floor-to-ceiling nets behind the goals. (R. p. 77, lines 20-25; R. p. 78, line 22-p. 79, line 21; R. p. 81, line 4-p.82, line 12.) And Hurst presented no evidence to the contrary: he presented no evidence on the applicable standard of care or how the Civic Center rink was in violation of that standard of care. He has, instead, baldly proclaimed that without the floor-to-ceiling nets behind the goals, the rink was unsafe. Such proclamations, however, are not proof.

Hurst points only to his injury and the nets' installation in July 2002, after the incident in question, as "proof" of his contentions. Neither, however, are sufficient to avoid summary judgment. To begin with, the fact of an injury is not evidence of negligence. Snow, 409 S.E.2d at 803. And a subsequent remedial measure is neither evidence of negligent design at the relevant time, nor admissible in evidence under Rule 407 of the South Carolina Rules of Evidence. Hurst asserts that, under Reiland v. Southland Equip. Serv., Inc., 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998), the installation of the nets is not a subsequent remedial measure inadmissible under Rule 407,

SCRE, since that act was not undertaken in response to the accident at issue. (Br. of Appellant p. 14 & n.4.) The Supreme Court, however, subsequently overruled Reiland, and held that "Rule 407 bars introduction of any change, repair, or precaution that under the plaintiff's theory would have made the accident less likely to happen, unless the evidence is offered for another purpose." Webb v. CSX Transp., Inc., 364 S.C. 639, 625 S.E.2d 440, 448 (2005). It is Hurst's express theory that the presence of the nets would have made the Civic Center safer for spectators, and would have made his injury less likely to occur.[6] (See Br. of Appellant p. 15.) As such, evidence of the installation of the nets subsequent to the accident in question is not admissible, and cannot be used to defeat summary judgment.

The circuit court, therefore, correctly concluded that the only specific, admissible evidence in the record is that the design of the Civic Center rink complied with what was reasonable and customary in the industry, and otherwise satisfied the standard of care, at all relevant times. (See R. pp. 10-12.)

Finally, and on a somewhat related note, in order to establish that the design and/or maintenance of the Civic Center rink failed to comply with the applicable standard of care, Hurst is required to present expert testimony establishing (a) what the applicable standard of care was at the time, and (b) in what manner the Defendants deviated from that standard of care. *See* Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 570 S.E.2d 197, 203-04 (Ct. App. 2002) (expert testimony

[6] The Defendants have not raised any issue that the nets were not feasible or that they lacked control such that they could not have been installed, such that the evidence would be otherwise admissible under Rule 407. The Defendants have merely challenged that the nets were not customary in the industry at the relevant time and that the absence of the nets was not negligence.

required to establish standard of care and breach of standard of care in negligent design case); Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577, 580 (1990) (expert testimony required to establish standard of care in design of construction project); Trojahn v. O'Neill, 773 N.Y.S. 2d 99, 100 (N.Y. App. Div. 2004) (plaintiff failed to carry burden of proving, through appropriate expert testimony, that property owner violated applicable industry standard of care in parking lot design and maintenance). Hurst never identified any expert, much less present expert testimony by way of deposition or affidavit in opposition to the Defendants' motion for summary judgment, who would establish the applicable standard of care in hockey rink design and maintenance, and how the Civic Center rink's design and maintenance deviated from that standard.

Hurst now asserts that it is not beyond the ken of the average juror to conclude that the presence of the nets would aid in the prevention of pucks from entering the spectator areas of the Civic Center. (Br. of Appellant p. 15 n.5.) While it may very well be that an average juror could conclude that nets may make errant pucks less likely to enter the stands, the average juror would not know, and a lay person could not testify to, the prevailing standards in hockey rink design and maintenance at the relevant time, how or whether the Defendants breached those standards in any respect, and whether the presence or absence of nets was in any way a violation of the standard of care. In this respect, too, Hurst failed to present any specific evidence showing a genuine issue for trial, and the circuit court correctly concluded that the only evidence in the record is that the Defendants did not breach any applicable standard of care.

For these reasons, too, the order of the circuit court should be affirmed.

III. THE CITY OF FLORENCE AND THE COUNTY OF FLORENCE ARE IMPROPER PARTIES TO THIS ACTION UNDER THE *SOUTH CAROLINA TORT CLAIMS ACT*

Hurst's claims against the City and the County are subject to the exclusive terms and conditions of the *South Carolina Tort Claims Act* (the "Act"). S.C. Code Ann. § 15-78-70(a); S.C. Code Ann. § 15-78-200. In enacting the Act, the legislature partially waived the common law defense of sovereign immunity, and opened up the State and its political subdivisions to liability for its tortious actions. Summers v. Harrison Constr. Co., 298 S.C. 451, 381 S.E.2d 493, 495 (Ct. App. 1989). The waiver of sovereign immunity, however, is effective only if expressly provided in the Act. *Id.*; S.C. Code Ann. § 15-78-20(b). And the Act expressly provides that "[t]he provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity." S.C. Code Ann. § 15-78-200; *see also* S.C. Code Ann. § 15-78-20(f).

Under the terms of the Act, a governmental entity may be held liable only for the acts of its own employees who are acting in the scope of their official duties. S.C. Code Ann. § 15-78-70(c); *see also* S.C. Code Ann. § 15-78-20(b) (Act provides for "liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein").

Here, the evidence in the record establishes that neither the City nor the County employed any person working for or at the Civic Center, the Pride, the Florence City-County Civic Center Commission ("Commission"), or the ECHL. The City and the County established the Commission as a separate entity tasked with the responsibility for running and maintaining the Civic Center. (See R. pp. 112-115.) While the City and the

County were both general funding sources for the Civic Center, neither had any authority or control over the Commission, the employees at the Civic Center, or the operations of the Civic Center. (Id.) Similarly, neither the City nor the County had any control, authority, or responsibility over or for the Pride or the ECHL. (Id.)

Under the express terms of the Act, the City and the County may be held liable only for the torts of its own employees. Here, there is no evidence that any City or County employee committed any tort or caused any injury to Hurst. The City and the County are, therefore, immune from suit and are the circuit court properly concluded that they are entitled to judgment as a matter of law.

CONCLUSION

Based on the foregoing, the circuit court's order should be affirmed.

Respectfully Submitted,

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