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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS
THE HONORABLE JOHN C. HAYES, III
CIRCUIT COURT JUDGE

CIVIL ACTION NO. 2007-CP-46-1889

Opinion No. 4995 (S.C. Ct. App. filed June 27, 2012)

ORIGINAL

Lawrence Keeter, Ronald Travis Keeter, and
Rebecca Keeter,

APPELLANTS/RESPONDENTS,

versus

Alpine Towers International, Inc. and Ashley Sexton,

Of Whom

Alpine Towers International, Inc. is the

RESPONDENT/APPELLANT.

PETITION FOR REHEARING

The Respondent/Appellant, Alpine Towers International, Inc. ("Alpine Towers"), respectfully petitions the Court for a rehearing of its Opinion No. 4995 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

1. The Court erred in finding sufficient evidence to support each of the three causes of action.

2. This Court erred in failing to reverse the Trial Court's denial of Alpine Tower's motion for judgment as a matter of law on each of the Plaintiff's claims where the proximate cause of Larry Keeter's fall was, as a matter of law, the result of (1) the intervening and superseding negligent acts of Fort Mill High School and Ashley Sexton in failing to follow the warnings, directions, and instructions for proper use of the Tower.; and/or (2) the intervening and superseding negligent actions of Fort Mill High School in failing to undertake its independent duty to properly supervise its students.

Fort Mill High School's (1) departure from the procedures prescribed by Alpine Towers and its failure to adequately supervise Ashley Sexton and (2) Ashley's resulting failure to use a back-up belayer during Larry's climb when she knew a back-up belayer was always required during a climb were unforeseeable, intervening, superseding actions which should bar the Plaintiffs' recovery from Alpine Towers.

In order for Alpine Towers to have foreseen that this specific accident would take place, Alpine Towers would have needed to anticipate:

1. That the climbing tower would not be used in Junior ROTC classes as expected by Alpine Towers, but, instead, for entertainment by the school during Spring Fling [R.pp. 249, 272, 449];

2. That the original plan for Spring Fling would be altered or augmented by the school principal who wanted to add the climbing tower for entertainment [R.pp. 389-390, 422-423];

3. That the sergeant who was the faculty supervisor would be told by the school principal to open both the swing and the climbing activity at the same time so that the sergeant's attention would be diverted [R.pp. 351-352, 355, 390-393];

4. That a trained belayer (Ashley) would go forward without a backup belayer [R.pp. 346, 347];

5. That a trained belayer (Ashley) would go forward without the faculty supervisor present [R.pp. 347, 349];

6. That a trained belayer (Ashley) would try to free the rope without any assistance.

The Plaintiffs' experts conceded at trial that a back-up belayer and proper supervision by Fort Mill High School would have prevented Larry's accident. [R.pp. 209-213, 225-227, 231, 309, 315-321, 324-328.] Alpine Towers had clearly instructed Fort Mill High School to always use a back-up belayer and to properly supervise all activities on the Tower. [R.pp. 169, 191, 195, 199, 200, 201, 231, 292-294, 346, 347, 357, 387, 404-405, 409, 425-426, 448, 452-454, 465, 471-472, 477-478, 655, 689, 711, 727-728, 732.]

Moreover, Fort Mill High School had an independent duty to properly supervise students on school grounds. Grooms v. Marlboro County Sch. Dist., 307, S.C. 310, 313, 414 S.E.2d 802, 804 (Ct. App. 1992).

Alpine Towers provided a product that if used correctly - i.e., use of back-up belayer with school staff supervision – would have prevented Larry's accident from ever occurring. This accident would not have happened if Fort Mill High School had followed the protocols and procedures taught by Alpine Towers and if Ashley Sexton, who clearly knew that she was not to allow a climb without a back-up belayer, had not allowed Larry to climb before a back-up belayer was in place. [R.pp. 202, 223, 226-227, 240-241, 309, 324, 409.] The actions of Fort Mill High School and Ashley Sexton were the proximate cause of the accident. Alpine Towers was not responsible for Larry's accident and only the actions of Fort Mill High School and Ashley Sexton contributed to Larry's fall.

3. This Court erred in finding that Alpine Towers should have incorporated a belay device called a GriGri with the climbing tower where Alpine Towers was not required under the law to provide a different belay device or additional safety features

because the Tower was reasonably safe had Fort Mill High School and Ashley Sexton used it in a proper manner. A product is not deemed to be unreasonably dangerous just because it could possibly be made more safe. Marchant v. Mitchell Distr. Co., 270 S.C. 29, 35-36, 240 S.E.2d 511, 513-14 (1977).

The Court erred in finding that the provision of Trango Jaw, one of many commercially produced competitive belay devices, can be the basis of negligence or strict liability.

4. This Court erred in affirming the Trial Court's decision to deny Alpine Towers' directed verdict and JNOV motions as to punitive damages where the Plaintiffs did not present clear and convincing evidence of willful, wanton, or reckless conduct by Alpine Towers. Alpine Towers spent time developing safety manuals and training school staff members before the Tower was used at the school. Alpine Tower did not leave the climbing tower to be run by students alone without adult supervision. Instead, Alpine Towers left the Tower in the hands of trained adults who had independent experience in supervising students.

Alpine Towers imparted the required knowledge to school staff members. In this case, every trained staff member who testified at trial confirmed they knew the very thing that would have prevented Larry's fall – to have a back-up belayer.

Alpine Towers' decision to design its climbing tower to incorporate the Trango Jaws instead of the GriGri does not warrant the imposition of punitive damages where a climb with the Trango Jaws would not have resulted in the accident either had a back-up belayer been used.

Alpine Towers could not foresee that the school would allow the Tower to be used unsupervised during a recreational field day.

The jury even found that someone else – Ashley Sexton- was at greater fault for the accident happening.

Alpine Towers made every effort to deliver a safe product and if the school would have followed required protocols and procedures, the Tower would have remained safe and Larry's fall would not have happened. Punitive damages are awarded to redress egregious wrongs and punish reprehensible conduct. Alpine Towers did not engage in such conduct warranting punishment and the imposition of punitive damage.

5. This Court's should reconsider its ruling that it is unnecessary to address the apportionment issue under S.C. CODE ANN. § 15-38-15 where the jury's award of punitive damages should not have been affirmed. Under the apportionment statute, the Trial Court should have allowed the jury to consider the fault of Fort Mill High School.

Furthermore, separate from the statute, the Plaintiffs stipulated at trial that the fault of Fort Mill High School could be taken into account in the apportionment aspect of the case. [R.pp. 165-167.] This stipulation by the Plaintiffs applies irrespective of whether punitive damages are or are not assessed against Alpine Towers.

6. The Trial Court correctly required the Plaintiff to elect remedies among his claims of (1) strict liability, (2) products liability – negligence, and (3) general negligence because the Plaintiff suffered a single injury based upon the same set of facts and is therefore entitled to only one recovery. The jury awarded three separate sets of damages on each cause of action; therefore, Larry did seek three different remedies and not just one remedy as this Court held. Cf. Creach v. Sara Lee Corp., 331 S.C. 461, 502

S.E.2d 923 (Ct. App. 1998) (While the complaint stated three different causes of action, only one recovery was sought and only one recovery was awarded; the jury issued only one award of $60,000.00). The instant case is different from Creach because the jury awarded three different damage awards for each separate cause of action.

7. Where this Court found that the error with respect to election of remedies arose from the verdict form, this Court should find that the Plaintiff's failure to object to the verdict form precludes any argument that the verdict was meant to be cumulative. [R.pp. 508, 526-529.]

The verdict form separated the three causes of action of (1) strict liability, (2) products liability – negligence, and (3) general negligence into separate actions and contained a blank under each cause of action for the jury to award damages. The verdict form did not ask the jury to add up the damages, and the verdict form did not contain a space for the jury to add the damages together in a single amount. It is apparent from the face of the verdict form that a cumulative verdict was not intended.

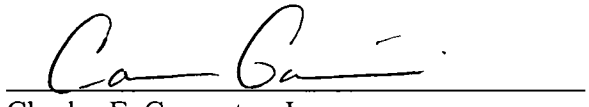
If the verdict form is the source of the problem, that should be held against the Plaintiff who did not object to the verdict form before it was given to the jury and who did not object to the verdict form after the jury came back with its initial verdict (initially finding in favor of the Plaintiff on strict liability but awarding no damages). [R.pp. 508, 526-529.]

8. Likewise, the Plaintiff failed to ask the Trial Court to send the verdict back to be reformed to reflect a cumulative verdict. The Plaintiff has therefore failed to preserve this argument for appellate review.

9. The Plaintiff failed to preserve the issue of whether the Trial Court erred in refusing to enter a cumulative verdict because the Plaintiff did not object to the Trial Court charging the jury "there are three causes of action, and each are to be considered on their own without regard to your verdict on any other . . . .".

10. If the separate verdicts were to be accumulated contrary to the Trial Court's jury charges, contrary to the verdict form, and in violation of the rule against double punishment, the only recognized remedy is a new trial, not giving the Plaintiff the combined total of inappropriate components.

Respectfully submitted,



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July 12, 2012.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC, attorneys for Respondent/Appellant, Alpine International Towers, Inc. do hereby certify that I have this date served the foregoing Petition for Rehearing, dated July 12, 2012, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

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Dated: July 12, 2012.