THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison Renee Lee, Circuit Court Judge

Appellate Case No. 2014-000263
Case No. 2012-CP-40-5356

Jeremy Cantrell, ...Appellant,

v.

Plex Indoor Sports..Respondent.

INITIAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES PRESENTED

I. WHETHER THE CIRCUIT COURT ERRED BY HOLDING A PERMISES OWNER HAS NO DUTY TO WARN A PARTICIPANT IN A SPORTING ACTIVITY AGAINST THE INHERENT DANGERS OF THAT SPORT?

STATEMENT OF THE CASE

This is a personal injury case arising out of a skateboarding accident that occurred on July 30, 2009 at Respondent's indoor sports recreational facility located in Columbia, South Carolina. Appellant, a 15 year old at the time of the accident, filed suit against Respondent on August 7, 2012 alleging causes of action for negligence and gross negligence. On July 18, 2012, Claimant amended his Complaint to state causes of action for negligence and premises liability. Following discovery, Respondent moved for summary judgment on several grounds, including that Appellant had failed to show any evidence that Respondent had a duty to warn or protect Appellant from the inherent dangers of skateboarding.

Respondent's motion was heard before the Honorable Allison Renee Lee on September 4, 2013. On December 11, 2013, Judge Lee issued an order granting Respondent summary judgment and finding that Respondent owed no duty to Appellant under the doctrine of implied assumption of the risk. Appellant subsequently filed a Motion to Alter or Amend that was denied by Judge Lee in an order entered on January 3, 2014. This appeal followed.

STATEMENT OF FACTS

On July 30, 2009, Appellant "severely fractured his ankle while engaged in skateboarding activities in a building owned and maintained by Defendant." Amended Complaint, ¶ 1. The undisputed facts show that Appellant came to Plex on July 28, 2009 to look over the Plex facility. He was accompanied by a friend, Kyle Blankeship. At Plex, Appellant was provided a copy of the "Plex Indoor Sports Individual Player Release and Waiver Form" ("Release") by the front desk attendant. Plaintiff admits that he

signed the Release, but maintains that he did not read it. See Memorandum in Support of Summary Judgment, Exhibit 2, ¶ 1, 3. Two days later, Plaintiff returned to Plex with Mr. Blankenship to skateboard at Plex's indoor skate park ("Skate Park"). Upon entry to the facility, Appellant was informed that he needed to wear safety equipment and admits that he was wearing a helmet at the time of his accident. See Memorandum in Support of Summary Judgment, Exhibit 2, ¶ 12. Sometime after entering the Skate Park, Plaintiff was attempting to "drop in" to the "bowl" and fell from his skateboard. See Amended Complaint, ¶ 14. Plaintiff admits that his fall was not caused by any defect in the Skate Park. See Memorandum in Support of Summary Judgment, Exhibit 2, ¶11. As a result of the fall, Plaintiff sustained a serious ankle injury.

The Release, by its terms, is a general release and waiver of liability agreement. The Release contains express warnings that participation in activities at Plex involves risks and dangers of serious bodily injury. The Release includes language expressly releasing Plex from "all liability, claims, demands, losses, or damages on my account caused or alleged to be caused in whole or in part by the negligence of [of Plex] or otherwise..." At the bottom of the Release is an additional provision related to the release of claims by the parent or legal guardian of a minor. It is undisputed that Appellant was the only person to sign the Release.

Appellant's fall was witnessed by Chris Reed, an employee of Plex and a SkatePark attendant on duty that day. According to Mr. Reed, he did not see Appellant skate at any time prior to the moment of the accident. He testified that Appellant was hesitant and did not properly "commit" to the maneuver he was attempting. (Reed Depo, p. 37-38) Mr. Reed testified that Appellant leaned back instead of forward while

dropping-in and his board got away from him. (Reed Depo, p. 27) Mr. Reed further testified that he had never seen Appellant skate before that moment and he had no basis for determining whether he was capable or qualified to do that particular maneuver. (Reed Depo. P. 59)

Appellant testified that, at the time of his accident, he had been skateboarding for at least five years. (Cantrell Depo, p. 19) He testified that he normally skateboarded on the road and around his neighborhood but had skated in at least one other skate park bowl. (Cantrell Depo, pp. 20-22) Appellant testified that he had owned at least four skateboards in his life, including one that had been a present from his parents and the one he owned the day of his accident that was a present from his sister. (Cantrell Depo, pp. 33-35) Claimant testified that he considered himself an intermediate skater and liked to do aerial tricks and flips with his board. (Cantrell Depo, pp. 40-41) He testified that he had successfully completed drop-ins six times in his life. (Cantrell Depo, p. 66) Appellant admits that he knew there was a risk of falling associated with the activity of skateboarding. See Memorandum in Support of Summary Judgment, Exhibit 2, ¶ 6.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See S.C. R.

Civ. P. 56(c); Pittman v. Grand Strand Entertainment, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). Summary Judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c); Helms Realty, Inc. v. Gibson-Wall, Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).

ARGUMENT

The Circuit Court properly concluded that Plex had no duty to Appellant to warn or protect him from the inherent risks associated with skateboarding.

In a negligence action, a plaintiff is required to plead and prove: (1) the defendant owed him a duty of care; (2) the defendant breached that duty of care; and (3) the defendant's breach proximately caused him damage. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998). The same elements are required to plead and prove a premises liability action. See Hurst v. East Coast Hockey League, Inc., 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006). Whether the law recognizes a particular duty is an issue of law to be determined by the court. Ellis v. Niles, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). In a negligence case, "no inference of negligence arises from the mere fact of injury and that the plaintiff has the burden of producing evidence tending to show some breach of duty." Mack v. West, 275 S.C. 453, 455, 272 S.E.2d 631, 631 (1980).

As properly determined by the Circuit Court, Appellant failed to prove an essential element of his causes of action: duty. Failure to prove that a duty existed is fatal to his causes of action and the determination of the Circuit Court should be affirmed.

I. Respondent was under no duty to protect Appellant from the inherent dangers of skateboarding.

It is well established law in South Carolina that a defendant has no legal duty to protect an invitee from the inherent dangers associated with participation in sporting activities. This is an established exception to the general rule that the owner of property owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from the breach of such duty. This exception to the general rule is referred to as the doctrine of primary implied assumption of risk. As stated by our Supreme Court, "[p]rimary implied assumption of risk arises when the plaintiff *impliedly assumes those risks that are inherent in a particular activity.*" Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 81, 508 S.E.2d 565, 570 (1998) (emphasis added). According to the Court:

> [I]mplied assumption of risk focuses not on the plaintiffs conduct in assuming the risk, but on the defendant's general duty of care.... Clearly, primary implied assumption of risk is but another way of stating the conclusion that a *plaintiff has failed to establish a prima facie case [of negligence] by failing to establish that a duty exists.*

Id. (quoting Perez v. McConkey, 872 S.W.2d 897 (Tenn. 1994)) (emphasis added). As explained by the Court, "[i]n this sense, primary assumption of risk is simply a part of the initial negligence analysis." Id.

The rule in Davenport was relied upon and further explained by the Supreme Court in Hurst, 371 S.C. 33, 637 S.E.2d 560. In that case, the Court found no duty to protect a spectator from being hit by a flying puck in a hockey game because that risk

was a "common, expected, and frequent risk of hockey." Hurst, 371 S.C. at 38, 637 S.E.2d at 562-63. Most recently, the Supreme Court applied the doctrine of primary implied assumption of risk to affirm summary judgment against a plaintiff who was injured while participating in a recreational father-son softball game. In that case, the Court held that "[w]here a person chooses to participate in a contact sport, whatever the level of play, he assumes the risks inherent in that sport." Cole v. Boy Scouts of America, 397 S.C. 247, 253, 725 S.E.2d 476, 479 (2011). The Court held this result was proper even though the actions of the other player were in violation of the rules of the game and arguably reckless. Id, 397 S.C. at 254, 725 S.E.2d at 480 ("we hold some recklessness by coparticipants in a contact sport must be assumed as part of the game.").

In this case, Appellant's injury occurred solely as result of his own conduct while engaged in skateboarding activities. While Plaintiff himself admits that he knew skateboarding could result in a fall and injury, it is nevertheless the purview of the court to make a determination that the risk of falling and injury is a "common, expected, and frequent risk" of skateboarding. See Cole, 397 S.C. at 253, 725 S.E.2d at 479 ("the relative inquiry into the standard of care is whether the sport is a contact sport, which should be determined 'by examining the objective factors surrounding the game itself, not on the subjective expectations of the parties'") (citing Landrum v. Gonzalez, 629 N.E.2d 710, 714 (1994)). As our Supreme Court has stated, "[a]lmost all contact sports, especially ones that require protective gear as part of their equipment, involve conduct that a reasonably prudent person would recognize may result in injury." Cole, 725 S.E.2d at 254, 397 S.C. at 480. In this case, Plaintiff admits that he was required to and was wearing a helmet while he was skateboarding at Plex so there is no genuine issue as to

whether or not skateboarding is a contact sport and carries with it the inherent risk of injury.

The undisputed facts of this case are that Plaintiff came to Plex for the sole purpose of skateboarding and, while doing so, he fell and sustained a serious injury. Under the doctrine of primary implied assumption of the risk, Respondent owed no duty to protect Appellant from those risks that are inherent in skateboarding. In this case, Plaintiff has admitted that his fall was not caused by any defect in the Skate Park and there are no allegations of any latent or hidden hazard that caused or contributed to the accident. In fact, the only allegations in the Complaint related to any danger or hazard refer solely to the inherent dangers of skateboarding. See, Amended Complaint, ¶¶ 11, 13, 15 , 16, 22(c), 22(d), 29, 30(c), 30(d). Claimant in this case was unfortunately injured when he fell off his skateboard; a common, expected and frequent occurrence in the sport of skateboarding. Under the doctrine of primary implied assumption of risk, Respondent is under no duty to protect Claimant from such inherent dangers.

For the foregoing reasons, the decision of the Circuit Court in granting summary judgment to Respondent should be affirmed.

II. Appellant's status as a minor does not alter the application of the doctrine of primary implied assumption of risk.

Appellant argues that the Davenport rule, and its subsequent cases, should not apply in his case because he was a minor at the time of his accident. Appellant's argument, however, is contrary to the longstanding rule in South Carolina requiring that Appellant's conduct, and the conduct of Respondent in dealing with him, be judged by an adult standard of care.

Historically, South Carolina utilized certain presumptions regarding the conduct of minors in negligence actions. See Standard v. Shine, 278 S.C. 337, 338, 295 S.E.2d 786, 787 (1982) (discussing historical application of age presumptions). Children under the age of seven were conclusively presumed to be incapable of contributory negligence while children between seven and fourteen were subject to the same presumption but it was rebuttable. Id. In Shine, the Supreme Court abrogated these arbitrary presumptions in favor of a rule that holds minors to the standard of behavior to be expected of a child of like age, intelligence, and experience under like circumstances. Shine, 278 S.C. at 339, 295 S.E.2d at 787. This change in the law, while significant, did not alter the rule that minors fourteen years and over were to judged by an adult standard of care. In McCormick v. Campbell by Campbell, 285 S.C. 272, 329 S.E.2d 752 (1985), the Supreme Court granted the fourteen year old plaintiff a new trial based on the trial court's jury charge that the standard for the plaintiff and the sixteen year old defendant's conduct was that of a minor of like age under like circumstances. According to the Court, "since both parties were fourteen years old or above at the time of the accident, the adult standard of care should have been charged." McCormick, 285 S.C. at 273, 329 S.E.2d at 753.

Appellant erroneously argues that his status as a 15 year old minor negates the application of the doctrine of primary implied assumption of the risk. Notwithstanding that his conduct is required to be judged by an adult standard of care, the application of this doctrine has been expressly held to apply in the case of minors as young as nine years old. See Rudzinski v. BB, 2010 WL 2723105 (D.S.C. 2010) (Applying South

Carolina law, Judge Anderson held an 11 year old defendant had no duty to protect a nine year old plaintiff from being struck by a golf club as such was an inherent risk in golf).

In this case, Appellant was fifteen years old at the time of accident and his minority status has no bearing on the duties or standards of conduct applicable to his causes of action. For these reasons, the trial court's order granting summary judgment should be affirmed.

III. Appellant has failed to allege or prove any voluntary assumption of a duty on the part of Respondent.

In addition to arguing that the doctrine of primary implied assumption of the risk does not apply to him, Appellant also argues that Respondent owed certain other duties to him. Namely, Appellant argues that Respondent owed him a duty to supervise and a duty to properly train him in the use of its facilities. Appellant cites to no South Carolina case law supporting these arguments and there is no evidence that such duties existed or were assumed by Respondent.

As our courts have held, there is no general duty to control the conduct of another or to warn a third person of potential danger. See Madison v. Babcock, Inc., 371, S.C. 123, 136, 638 S.E.2d 650, 656 (2006). This general rule has a number of exceptions: (1) where the defendant has a special relationship with the victim or injurer; (2) where the defendant voluntarily undertakes a duty; (3) where the defendant negligently or intentionally creates the risk; and (4) where a statute imposes a duty. Id. In this case there is no evidence of any special relationship, no evidence of any voluntary undertaking, no evidence that Defendant created the risk, and no statute imposing a duty under these facts. Appellant has failed to cite to any controlling or even persuasive authority for his contention that the Court should deviate from this established law.

To the extent Appellant's argument alleges that Respondent's Release form created a duty to warn, supervise or train, such argument is without merit. The law in South Carolina is well established as to what sort of conduct can be deemed a voluntary undertaking that would create additional duties:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Madison, 371 S.C. at 136, 638 S.E.2d at 657. On its face, the Release provides express warnings as the inherent dangers and risks of injury, as well as a clear an unequivocal disclaimer of liability for the protection of Plex. There is nothing in the Release evidencing any services rendered, gratuitously or otherwise, that are necessary for the protection of Appellant. Our courts have held that internal company policies, by themselves, are insufficient to constitute a voluntarily undertaken duty. See Doe v. Wal-Mart, 393 S.C. 240, 248, 711 S.E.2d 908, 912 (2011) ("However, this internal policy cannot be said to constitute the voluntary undertaking of a duty."); Staples v. Duell, 329 S.C. 503, 511, 494 S.E.2d 639, 643 (Ct. App. 1997) ("[W]e hold that Duell did not create a legal duty by instituting a policy of searching for dead trees along the highway.") Moreover, there is no evidence whatsoever that Respondent's actions (1) increased the risk of harm to Appellant, or (2) that Appellant relied upon such actions. By his own testimony, Appellant admits he signed the Release but did not read it. He can't now allege reliance on a policy he admits having no knowledge of. Similarly, a waiver required for the express purpose of releasing one party from all claims for liability to

another, can hardly be interpreted as voluntarily undertaking a duty to protect the other party from harm.

Appellant's cites to dicta in cases from other jurisdictions to support his contention that Responded owed a duty to supervise Appellant that are inapposite to the issues in this case. Plaintiff argues that Bradley v. Welch, 228 S.W.3d 559 (Ark. Ct. App. 2006) stands for the proposition that a defendant owes a duty to "provide supervision to a child if the defendant has been entrusted with and accepted responsibility for supervising the child." Appellant's Initial Brief, p. 8. However, as stated by the court Bradley, "[t]his envisions an *actual transference* of supervisory responsibility from one parent to another." Bradley, 807 S.W.3d at 565 (emphasis added). Assuming without conceding that this rule is even applicable in South Carolina, such a transference requires a "conscious and deliberate shifting of responsibility from the parent to the purported caretaker." Id. In this case, there is no evidence whatsoever of any conscious and deliberate shifting of responsibility from Appellant's parents to Respondent. On the contrary, Respondent expressly disclaimed any responsibility for the supervision and care of Appellant under the terms of the Release. The case of Wheeler v. Central Michigan Inns, Inc., 807 N.W.2d 909 (Mich. Ct. App. 2011) is similarly unavailing. In that case, the court actually held that the defendant was not responsible for the drowning death of a five year-old where the defendant "did nothing to indicate that it had voluntarily assumed a duty to protect [the minor]." Wheeler, 807 N.W.2d at 913.

As set forth above, there is no evidence in this case of any special relationship, voluntary undertaking, risk created the Respondent, and no statute imposing a duty to warn, supervise or train Appellant in the use of his skateboard. Consequently, the order

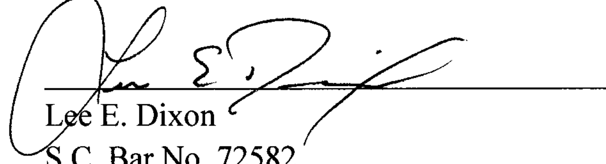
of the Circuit Court granting summary judgment on the absence of any duty should be affirmed.

IV. Conclusion

For the foregoing reasons, the order of the Circuit Court granting summary judgment to Respondent should be affirmed. As Plaintiff was willingly and knowingly engaged in a sport that carried with it an inherent risk of injury, Respondent owed him no duty to warn or protect him from those dangers. Additionally, Plaintiff has failed to show that Respondent was under any duty to assess his skill level, provide him training or obtain parental consent before allowing him to skate in the Skate Park. As such, Respondent respectfully requests this Court affirm the order of the Circuit Court in its entirety.

Respectfully submitted,

Hedrick Gardner Kincheloe & Garofalo, LLP



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Certificate of Service

This is to certify that a copy of the foregoing **Initial Brief of Respondent and Designation of Matter** have been served upon the following by placing the same in the United States mail, postage pre-paid, addressed as shown below this 12th day of September, 2014.

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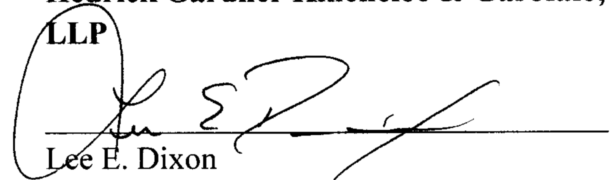

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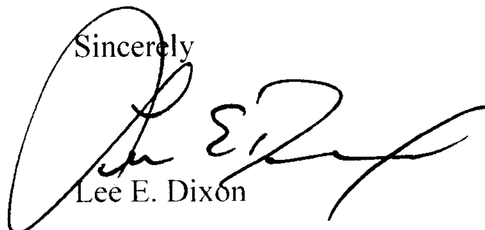
Civil Action No: Appellat Case No. 2014-000263
Claim No: C8502AH02K2652
Our File No: 00214L.00006

Dear Ms. Kitchings:

Please find enclosed the original and one copy of the Initial Brief of Respondent, Designation of Matter to be Included in the Record on Appeal and Certificate of Service in the above-referenced matter.

By copy of this letter, I am herewith serving a copy of the enclosed on counsel for the Plaintiff.

Sincerely



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Enclosure
cc: Mario A. Pacella

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