THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison Renee Lee, Circuit Court Judge

Case No. 2012-CP-40-5356

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SC Court of Appeals

Jeremy Cantrell, Appellant,

v.

Plex Indoor Sports, LLC, Respondent.

FINAL BRIEF OF APPELLANT

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I. STATEMENT OF THE ISSUE ON APPEAL

1. Whether the Circuit Court erred by concluding that, based upon the doctrine of implied assumption of risk, the owner and operator of an indoor skateboard park has no duty to warn a minor child or his parents of the dangers of skateboarding in an advanced area of the park.

II. STATEMENT OF THE CASE

Appellant filed this action on August 7, 2012, alleging that Respondent was negligent in failing to warn, train, and supervise Appellant, a 15 year-old minor child, who was using the advanced section of the skate park. (R. pp. 12-17) Following discovery, Respondent filed a Motion for Summary Judgment, asserting that Respondent was entitled to Summary Judgment because, among other claims, it had no duty to protect Plaintiff from the inherent dangers of skateboarding. (R. pp. 25-26)

Following oral argument, the Circuit Court, Honorable, granted Respondent's motion for summary judgment on December 11, 2013. Specifically, the Court held that, based upon the implied assumption of risk, Respondent did not owe Appellant a duty of care. (R. p. 111, lines 25-31). Appellant filed a Motion to Alter or Amend, based upon the Circuit Court's failure to consider Appellant's status as a minor child. (R. pp. 92-94.) In a written Order, date stamped January 6, 2014, and mailed to Appellant on January 14, 2014, the Circuit Court denied Plaintiff's Motion to Alter or Amend. (R. p. 8) Appellant timely filed a Notice of Appeal on February 11, 2014. (R. p. 101.)

III. STATEMENT OF THE FACTS

This action stems from a catastrophic ankle injury Plaintiff sustained on July 30, 2009, while he was on Defendant's premises. Plaintiff was fifteen years old at the time. It is undisputed that although Defendant's employees were required to secure written waivers from participants or a minor's parent or legal guardian, Defendant failed to do so in this case. In fact, Defendant's memorandum concedes that Plaintiff signed his own waiver at the age of 15. Moreover, there is no evidence that Plaintiff or his parents ever read the waiver and no evidence Plaintiff's parents gave him permission to skate board at the Plex in their advanced skating section, which included the skate bowl.

Chris Reed, the skate park attendant employed by Defendant and on duty at the time of the accident, testified that Plaintiff "was a shorter, bigger kid, probably 14, 15." (R. at 180) Reed explained that "I remember the kid was really nervous, and when the kid fell he didn't – basically when you drop in you have to lean forward and if you stutter or if you second guess or lean back, and I do remember his leg going back because he slipped off and I saw his legs flail back." (R. p. 181, line 20 –p. 182, line 1).

Reed, an experienced skate boarder himself, explained that Plaintiff was hurt as a result of "[u]ndercommitment. He just was not prepared. He tried something and it was beyond what he possibly – probably could do. . . .On the size of that wall it's fairly hard for him to do." (R. p. 195, line 25- p. 196, line 6). Reed confirmed that it was not the policy of Defendant to test the skill level of a participant or skater. (R. p. 213, lines 12-22). Chuck Davis, the Rule 30(b)(6) deponent identified to testify as to Defendant's policies and procedures, confirmed that Defendant does not determine the skill level of

participants before permitting them to used advanced skating equipment like the large skate bowl where Plaintiff suffered his injuries. (R. p. 267, lines 23- p. 268, line 2).

With respect to warnings given to minors and their parents, Davis testified that the only warning provided was the warning on the waiver form. (R. p. 245) Davis further stated that Defendant did not require parents to sign in front of an employee or notary, notwithstanding that Defendant's "Plex Indoor Sports Skatepark Conduct and Safety Rules" required execution of the waiver by a parent or guardian in person or before a notary public. (R. p. 260) Davis also explained that no employee of Defendant is required to point out the warning encompassed in the waiver. (R. p. 254, line 11 – p. 255, line 4) Instead, the policy was to explain the safety equipment required to a participant's parent if the parent was present. (R. p. 259, lines 3- 22).

Davis also testified that it was Defendant's policy for skate park attendant's to help participants if they need it and to instruct them at times. (R. p. 268, lines 3-18). Moreover, Davis explained in his deposition that if a participant was attempting something beyond his skill level, the policy was to give the minor assistance and offer a training session, which would come at an additional cost. (R. p. 273, line 20 – p. 274, line 21).

Here, it is uncontroverted that Plaintiff did not read the waiver and was not warned of the dangers of skateboarding in the skate bowl. Plaintiff explained that he was 15 years old at the time and that while he skated for several years, he had only attempted drop-ins four to six times at community skate parks in Georgia years earlier. (R. p. 370, lines 8-20). Additionally, Plaintiff testified that he did not understand the risk of injury at the time of the accident and just wanted to skate. Plaintiff stated, "I knew I could get

hurt. I didn't know I could get injured. There's a difference between knowing that you are going to get hurt and knowing you are going to mess the rest of your life up." (R. p. 342, lines 19-25). In making his attempt to drop-in, Plaintiff shattered his ankle. He still has not recovered after numerous surgeries and could potentially require additional surgeries or an ankle fusion. (R.p. 380, line 5- p. 382, line 22).

In its order, the Circuit Court concluded that "[i]n the context of sporting activities, a defendant has no duty to protect an invitee from the inherent dangers of the sport because of the doctrine of primarily implied assumption of the risk." (R. p. 5, lines 25-31). The Circuit Court further found that "[f]alling is an inherent, common, expected, and frequent risk of skateboarding." Additionally, in responding to Appellant's argument that Respondent should have assessed Appellant's skill before allowing him in the advanced section of the skate park, the Circuit Court concluded that "Defendant has no duty to assess the skill because of the inherent risks which are impliedly assumed when a person participates in that activity." (R. p. 6, lines 16-28).

IV. ARGUMENT

The Circuit Court erred by concluding that the implied assumption of risk shields the owner and operator of an indoor skateboard park from any duty to warn a minor child or his parents of the dangers of skateboarding in an advanced area of the park.

A. Standard of Review

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard of review applied by the trial court. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 332 (2003). When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. In re Estate of Boynton, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct.App.2003); WDW Props. v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court owes no particular deference to the trial court's legal conclusions. Boynton, 355 S.C. at 301–02, 584 S.E.2d at 155; J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Hamiter v. Retirement Division of South Carolina, 326 S.C. 93, 96, 484 S.E 2d 586, 587 (1997); Café Assocs., Ltd. V. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). The Court may grant summary judgment to a party when, after a reasonable time for discovery, the evidence demonstrates that the nonmovant has failed to establish an essential element of his case. The party moving for summary judgment bears the initial burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970). In determining whether any triable issue of fact exists which will

preclude summary judgment, the evidence, and all inferences that can be reasonably drawn, must be viewed in the light most favorable to the non-moving party. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E 2d 369, 371 (2000).

B. Argument

An invitee, "is a person who enters onto the property of another at the express or implied invitation of the property owner." Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 441, 494 S.E.2d 827, 831 (Ct.App. 1997). "The visitor is considered an invitee especially when he is upon a matter of mutual interest or advantage to the property owner." Sims v. Giles, 343 S.C. 708, 716, 541 S.E.2d 857, 862 (Ct. App. 2001). "The owner of property owes to 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." Sims, 342 S.C. at 718, 541 S.E.2d at 863. "The property owner has a duty to warn an invitee only of latent or hidden dangers of which the property owner has or should have knowledge." Sides v. Greenville Hosp. Sys., 362 S.C. 250, 256, 607 S.E.2d 362, 365 (Ct. App. 2004).

"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 should have anticipated the resulting harm." Id. In this regard, the degree of care must be commensurate with the particular circumstances involved, including the age and capacity of the invitee. Meadows v. Heritage Village Church and Missionary Fellowship, Inc., 305 S.C. 375, 377, 409 S.E.2d 349, 351 (1991).

"This degree of care must be commensurate with the particular circumstances involved, including the age and capacity of the invitee. This duty is an active or

affirmative duty. It includes refraining from any act which may make the invitee's use of the premises dangerous or result in injury to him." Hughes v. Children's Clinic, P. A.; 269 S.C. 389, 397, 237 S.E.2d 753, 756 (1977). In Bradley v. Welch, 94 Ark. App. 171, 179, 228 S.W.3d 559, 565 (2006), the Arkansas Court of Appeals explained that a landowner or occupier "owes a duty of reasonable care to provide supervision to the child if the defendant has been entrusted with and accepted responsibility for supervising the child." Likewise, Michigan courts apply the same rule that "that defendant landowners have an affirmative duty to supervise minor guests only when a minor guest is *unaccompanied* by a parent and the defendant has voluntarily assumed a duty to supervise the child." Wheeler v. Central Michigan Inns, Inc., 292 Mich. App. 300, 306, 807 N.W.2d 909, 913 (Mich. App. 2011)(citations omitted). The Circuit Court erred by failing to consider Appellant's status as a minor. Likewise, Appellant's status as a minor negates the argument that he impliedly assumed the risk in skateboarding in the advanced bowl of the skate park. Additionally, the Circuit Court erred in failing to delineate between risks inherent in skateboarding and the risks in skateboarding in the advanced area of the skate park.

Absent a waiver and permission from Plaintiff's parent, Defendant was a *de facto* supervisor of Plaintiff and owed a duty to protect Plaintiff, even from inherent risk. Defendant failed to properly train Plaintiff to use the facilities and failed to intervene when it knew Plaintiff was attempting activities beyond his skill set. The Circuit Court's failure to take Appellant's status as a minor into account in view of the facts and circumstances of this case constitutes reversible error.

In this case, Defendant knew that "activities at the PLEX complex involve risks and dangers of serious bodily injury, including permanent disability, paralysis and death." (R. p. 245) Defendant also knew that the premises should only be used by qualified individuals and sought acknowledgment of that skill level from participants at the PLEX, or, in the event a participant had not reached the age of majority, from their parent or guardian. (R. p. 245)

Respondent made no warnings to Appellant other than to tell him he needed to sign the Plex Indoor Sports Individual Player Release and Waiver Form. Respondent then failed to ensure that Plaintiff, a minor child, actually read the form or had a parent or guardian execute the form on his behalf. Furthermore, Respondent failed to present the small print warnings on the bottom of the waiver to Appellant, a 15 year old child, in a manner that he could understand. Thus Respondent entirely failed to provide Appellant with any warning of the risk involved in activities in the advanced skate park. Moreover, Appellant never secured any representation from Appellant that Appellant was qualified to use Respondent's advanced skate park.

In a case where a minor hockey player was injured in a hockey game, the Pennsylvania Superior Court upheld a lower court's ruling that the minor was incapable of contributory negligence. Berman by Berman v. Philadelphia Bd. of Educ., 310 Pa. Super. 153, 456 A.2d 245 (1983). The Berman decision reaffirms the concept that minors require greater warnings of the risk of injury when participating in a sport. That Court explained, "we find no evidence in the record that portrays Brad as a young boy who possessed of superior intelligence thereby giving him exceptional perceptions of the risks and dangers of hockey." Id. at 161, 456 A.2d 245, 549-50 (1983). Likewise, here

there is no evidence to demonstrate that Appellant, a 15 year old minor, was aware of the risks of serious bodily injury involved in the activities upon Respondent's premises. Therefore, Respondent had a duty to warn Appellant and his parents of such risks.

V. CONCLUSION

For the above reasons, the Circuit Court's Order granting Summary Judgment should be reversed, and this case should be remanded for further proceedings in the Court of Common Pleas.

RESPECTFULLY SUBMITTED, this 30 day October, 2014.

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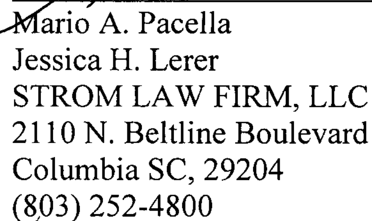
Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the South Carolina Appellate Court Rules, as well as all other applicable rules, orders, etc.

11/24, 2014



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CERTIFICATE OF SERVICE

I certify that I have served Appellant's final brief upon counsel for the Respondent, Lee Dixon, via United States Mail, postage prepaid, to the following address:

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