THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2015-001178

Corey Ross, ... Appellant,

v.

Carolina Adventure World, LLC, ...Respondent.

FINAL BRIEF OF APPELLANT

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I. **The Trial Court erred in Ruling that the Appellant failed to show a Duty by statue or general business.**

II. **The Trial Court erred in Ruling that the Waiver of Liability barred Appellant's Claim.**

STATEMENT OF THE CASE

Appellant Corey Ross brought this action against Respondent Carolina Adventure World, LLC (Complaint. R. p. 3). Appellant's Complaint sought actual and punitive damages. (Complaint; R. p. 3). Respondent Carolina Adventure World answered Appellant's Complaint and the parties subsequently engaged in discovery

The Honorable Benjamin H. Culbertson, Presiding Judge of the Sixth Judicial Circuit heard the trial on May 27, 2015 (Transcript of Hearing, R. p. 9). Respondent Carolina Adventure World, LLC made a Motion for Directed Verdict at the conclusion of Appellant Cory Ross' case (Transcript of Hearing, R. p. 258). Judge Culbertson issued his Order granting Respondent Carolina Adventure World, LLC's Motion on May 28, 2015. (Order of the Honorable Benjamin H. Culbertson; R. p. 1). Appellant's appeal timely followed on May 29, 2015. (Notice of Appeal; R. p. 290).

STATEMENT OF THE FACTS

Appellant Cory Ross is a resident of Lexington County, South Carolina. (Complaint; R. p. 6). On or about December 27, 2008, Appellant traveled to Respondent Carolina Adventure World, LLC's property in rural Fairfield County for the purpose of utilizing Respondent's off-road trails. (Transcript of Hearing, pg. 59; R. p. 67). Respondent owns two thousand six hundred acres that contain multiple trails and tracks for riding all-terrain vehicles and off-road motorbikes. (Transcript of Hearing, pg. 99; R. p. 107). Appellant had never visited Respondent's facility prior to December 27. (Transcript of Hearing, pg. 187; R. p. 198). Appellant and his friend drove to Respondent's facility, pulling their own all-terrain vehicles with them on a trailer. (Transcript of Hearing, pg. 188; R. p. 199).

Upon arrival, Appellant and his friend were handed a waiver to sign before they could enter the park. (Transcript of Hearing, pg. 188-89; R. p. 198-99). After signing the waiver and paying the entry fee of twenty ($20.00) dollars, Appellant was given a trail map and a typed overview of Respondent's facility policies (Transcript of Hearing, pg. 189-90; R. p. 200-01). Appellant and his friend off-loaded their all-terrain vehicles and began to ride some of the trails. (Transcript of Hearing, pg. 190; R. p. 201).

During this period of riding, Appellant encountered muddy trails that he handled with ease (Transcript of Hearing, pg. 190; R. p. 201). As Appellant continued his ride, he encountered a large boulder set into the trail in the middle of the hill (Transcript of Hearing, pg. 191-92; R. p. 202-03). Appellant was driving cautiously, and yet had no more than fifteen feet of vision to see what lay ahead (Transcript of Hearing, pg. 192-93; R. 203-04). Appellant's all-terrain vehicle rode up on the imbedded boulder, and the vehicle rolled backwards onto Appellant (Transcript of Hearing, pg. 195; R. p. 206). The right handle bar of the all-terrain vehicle struck Appellant in his right eye, gouging it out (Transcript of Hearing, pg. 195; R. p. 206).

Appellant's friend rolled the ATV off of Appellant, administered slight first aid, and went to get help (Transcript of Hearing, pg. 195-96; R. p. 206-07). Appellant was finally rescued and carried out of the woods on another all-terrain vehicle (Transcript of Hearing, pg. 199; R. p. 210). Appellant was carried by ambulance to the trauma center at Palmetto Health Richland, where he received further medical care (Transcript of Hearing, pg. 199; R. p. 210).

Appellant was admitted to Palmetto Richland, and he stayed in the hospital for over a week (Transcript of Hearing, pg. 199; R. p. 210). During the course of his stay, Appellant

underwent many surgeries to reconstruct his face and to remove the crushed right eyeball (Transcript of Hearing, pg. 199-200; R. p. 210-11). Appellant was fitted for, and now wears, a prosthetic eye made of glass (Transcript of Hearing, pg. 202; R. p. 213).

Appellant testified that he incurred large medical expenses due to the accident suffered on December 27 (Transcript of Hearing, pg. 205-7; R. p. 216-18). Furthermore, Appellant testified that he lost his job due to harassment at his workplace (Transcript of Hearing, pg. 207-8; R. p. 218-19).

According to testimony by Respondent's officer at trial, no person employed at the facility was trained to operate and maintain such a facility. (Transcript of Hearing, pg. 100; R. p. 108). The only regular maintenance of any trail at Respondent's facility was the removal of fallen trees. (Transcript of Hearing, pg. 109; R. p. 117). No regular inspections of the trails were made; Respondent expected patrons to simply avoid obstacles they could not handle. (Transcript of Hearing, pg. 109; R. p. 117). Respondent has not even removed the boulder which caused Appellant's injury, under the belief that its visitors are fully responsible for their own safety. (Transcript of Hearing, pg. 103-4, 112; R. pp. 111-12, 120).

STANDARD OF REVIEW

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Strange v. S.C. Dep't of Highways & Pub. Trans.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994) (citing *Vacation Time of Hilton Head Inc. v. Lighthouse Realty, Inc.*, 286 S.C. 261, 332 S.E.2d 781 (Ct. App. 1985)). "The trial

court can only be reversed by this Court when there is no evidence to support the ruling below." *Id.*

ARGUMENT

I. The Trial Court erred in Ruling that the Appellant failed to show a Duty by statue or general business.

The Trial Court held, even though Appellant was a clear business invitee, Appellant failed to show any duty owed to him by Respondent in the course of the business engaged in providing facilities to all terrain vehicles. This interpretation of law is erroneous. Respondent is subject to clear duty of care under the common law as an occupier of the premises.

A. Respondent classifies as an owner/occupier and is subject to the ensuing liability.

An owner/occupier is one who occupies and controls the land. F.P. Hubbard & R.L. Felix, THE SOUTH CAROLINA LAW OF TORTS (1990) (citing 62 **Am. Jur.2d** Premises Liability § 6). There are five factors that typically define control of real estate for the purposes of premises liability: (1) management of daily operations; (2) right to admit or exclude company; (3) responsibility for maintenance and repair; (4) liability for bills, taxes, and wages; and (5) responsibilities of parties under lease. 62 **Am. Jur.2d** Premises Liability § 6.

Respondent is responsible for the oversight of daily operations at the property in question. Respondent controls the admission of business patrons to the park through its pay-to-use system. Respondent is in charge of the maintenance and repair of park facilities. Respondent pays all bills, taxes, and wages associated with the operation of the facility. The fifth factor is not relevant as the property in question is not subject to a lease.

Respondent is clearly the occupier of the land, and as such, is charged with liability for any defects and risks presented to patrons. South Carolina common law has a well-established system of variable care standards for an owner/occupier of land. As the owner/occupier of the premises that it conducts business on, Respondent is subject to that system dependent on the classification of the person on the premises.

B. Appellant classifies as a Business Visitor and is thus afforded the highest level of care.

In South Carolina, there are four classifications of persons who come on premises: adult trespassers, licensees, invitees and children. *Sims v. Giles,* 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). Each classification is owed a different standard of care by the owner or occupier.

i. Trespasser

The adult trespasser classification is given to a person who enters the premises without permission or legal privilege. *Kershaw Motor Co. v. Southern Ry.*, 136 S.C. 377, 382, 134 S.E. 377, 378 (1926). In other words, a trespasser is one whose "presence is neither invited nor suffered." *Sims,* 343 S.C. at 715, 541 S.E.2d at 861. This definition leads to the logical conclusion that a trespasser is one who is not meant to be on the premises.

South Carolina law is clear on the duty of care owed by an owner/occupier to a trespasser. "[T]he owner of property or the person in lawful possession thereof owes no duty to a trespasser thereon except to do him no willful or wanton injury." *Nettles v. Your Ice Co.*, 191 S.C. 429, 436, 4 S.E.2d 797, 799 (1939). This standard of care is the lowest promulgated by the South Carolina courts.

ii. Licensee

A licensee is one who enters the premises with the consent of the owner/occupier. *Neil v. Byrum,* 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986). The licensee enters the land to benefit himself, rather than for the benefit of the owner/occupier. *Hoover v. Broome,* 324 S.C. 531, 535, 479 S.E.2d 62, 64 (Ct. App. 1996). Examples of licensees include social guests and persons who have permission to cross the land for their own benefit. F.P. Hubbard & R.L. Felix, THE SOUTH CAROLINA LAW OF TORTS (1990).

Since a licensee has permission to enter the land and is not committing a wrong by entering, he is afforded a higher standard of care by the owner/occupier. A possessor is not required to exercise care to make the premises safe for the licensee, but is required (a) to use reasonable care to discover him and avoid injury to him in carrying on activities and (b) to use reasonable care to warn the licensee of any concealed dangerous conditions or activities known to the possessor. *Neil,* 288 S.C. at 473, 343 S.E.2d at 616 (quoting *Frankel v. Kurtz,* 239 F. Supp. 713, 717 (W.D.S.C. 1965)).

iii. Invitee

An invitee is classified in South Carolina as someone who comes on the premises with express/implied permission and for the purpose of benefitting the owner. *Parker v. Stevenson Oil Co.,* 245 S.C. 275, 280, 140 S.E.2d 177, 179 (1965). In other words, "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) (quoting *Hoover v. Broome,* 324 S.C. 531, 479 S.E.2d 62, (Ct. App. 1996)).

There are two generally recognized classes of invitee: the public invitee and the business visitor. *Id.*

a. Public Invitee

The public invitee is "one who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public." *Goode* at 441, 494 S.E.2d at 831. This status does not apply to Appellant as Respondent's land was not being held open to the public for a use by the public.

b. Business Visitor

In comparison, the business visitor is an invitee on the premises whose purpose there is either directly or indirectly connected with the business dealings of the owner. *Goode* at 441, 494 S.E.2d at 831. Moreover,

> [T]he class of persons qualifying as business visitors is not limited to those coming upon the land for a purpose directly or indirectly connected with the business conducted thereon by the possessor, but includes as well those coming upon the land for a purpose connected with their own business, which itself is directly or indirectly connected with a purpose for which the possessor uses the land."

Singleton v. Sherer, 377 S.C. 186, 199, 659 S.E.2d 196, 203-4 (Ct. App. 2008) (quoting 62 **Am. Jur.2d** Premises Liability § 88 (1990)).

Appellant is undeniably a business visitor to Respondent's facility, and he classifies as an invitee for purposes of premises liability.

iv. Duty Owed to an Invitee

There is a duty to an invitee to "...exercise due care to keep the premises to which the invitation extends in a reasonably safe condition for [the invitee's] use." *Parker*, 245 S.C at 280-

81, 140 S.E.2d at 179. This standard was reiterated in *Graham v. Whitaker,* where the court stated that, "A person owes an invitee the duty of exercising reasonable or ordinary care for his safety and is liable for any injury resulting from the breach of this duty." 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984).

The law in South Carolina is manifest. A person classified as a business invitee is afforded a standard of due care by the possessor of the land they are on, regardless of the type of business being operated. This duty extends to "...the affirmative duty to use reasonable care to discover unreasonably dangerous conditions of the premises and either put the premises in a reasonably safe condition for use in a manner consistent with the purpose of invitation or warn him of the danger." *Hughes v. Children's Clinic,* 269 S.C. 389, 400, 237 S.E.2d 753, 759 (1977). South Carolina law also does not require that the exact injuries or manner of injuries in the case at bar be foreseen or even foreseeable. *Id.* at 397-98, at 756-57.

C. Respondent failed to properly exercise the duty of due care afforded to Appellant.

Based on the precedent set in South Carolina, Appellant is a business invitee. This classification afforded him the due care of Respondent to ensure that the premises where in a reasonable, safe condition for use, or for Respondent to warn him of any unreasonable dangers that existed. Respondent failed to fulfill any aspect of its duty.

An invitee in South Carolina "...enters the premises with the implied assurance of preparation and reasonable care for his protection and safety while he is there." *Singleton* at 202, 659 S.E.2d at 205 (citing *Landry v. Hilton Head Plantation Prop. Owners Ass'n,* 317 S.C. 200, 452 S.E.2d 619 (Ct. App. 1994)). By the admission of its own officer, Respondent did not

employ anyone trained or skilled in the maintenance and operation of an off-road recreational facility (Transcript of Hearing, pg. 100-1; R. p. 108-9). Respondent's officer further testified that inspections of the trails were not made regularly (Transcript of Hearing, pg. 109-10; R. p. 117-18). Respondent owes its business invitees the duty of providing reasonably safe premises, and did nothing to ensure the safety of its patrons. It made zero effort to protect against unreasonable dangers, and it failed even to warn that the dangers might exist.

South Carolina law requires that the premises be made reasonably safe for a manner consistent with the purpose of use. The Trial Court used an incorrect interpretation of the "manner consistent with the purpose of use" to rule that Appellant failed to prove a breach of duty, or even the existence of a duty. This ruling applied this legal theorem incorrectly. A duty is not created dependent on what the "purpose of use" is. The duty exists under the common law regardless of what type of business is operated. While the type of actions which constitute the owed duty may certainly be adapted according to the "purpose of use," this duty of care exists separate from the use.

The law is clear. A business operator owes a standard, due duty of care under the law, regardless of what type of business is being operated. Even analyzed under the terms of an off-road recreational facility, to say that Respondent fulfilled its duty under the law by doing nothing is unconscionable. Appellant is an unequivocal business visitor under South Carolina law, and he is therefore afforded the duty of due care by the Respondent. Respondent's own officer testified that absolutely nothing was done to fulfill the duty it owed to its patrons. The Trial Court presented clear error by holding that Appellant was a business invitee, yet was afforded no duty of care by Respondent.

II. The Trial Court erred in Ruling that the Waiver of Liability barred Appellant's Claim

The Trial Court also held that, regardless of the issue of duty or breach thereof, Appellant had signed an Assumption of Risk Release. According to the Court, this released all claims that Appellant may have had against Respondent. This ruling is erroneous under South Carolina law.

Respondent requires all patrons to sign a Waiver of Liability upon entrance of its facility (Transcript of Hearing, pg. 126-27; R. p. 134-35). Patrons are not allowed entrance if the waiver is not signed. (Transcript of Hearing, pg. 127; R. p. 135). The legality of these waivers has been taken up by South Carolina Courts. In *Pride v. Southern Bell Tel. & Tel. Co.*, the court held that:

> "...a contractual provision seeking to relieve a party to a contract from liability for his own negligence may or may not be enforceable, depending on whether it is violative of public policy. Since such provisions tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon."

244 S.C. 615, 619, 138 S.E.2d 155, 156-57 (1964) (internal citations omitted).

In *Fisher v. Stevens*, the Court of Appeals addressed the issue of a liability waiver that had been signed by a person working a wreck crew at a speedway. 355 S.C. 290, 584 S.E.2d 149 (Ct. App. 2003). In its analysis, the Court determined that this waiver was overly broad and violative of public policy, as it sought to absolve the defendant from any injury for any reason. *Id.* at 297, at 153. Thus, in South Carolina, a waiver violates public policy if it seeks to indemnify the owner of the business against any claim at all.

Furthermore, "Contracts that seek to exculpate a party from liability for the party's own negligence are not favored by the law." *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (citing *Pride v. Southern Bell Tel. &*

Tel. Co., 244 S.C. 615, 138 S.E.2d 155 (1964)). While the court in *McCune* held that the waiver at issue was valid, it was not intended to "...be construed as creating an indefensible position for all injuries sustained during inherently dangerous recreational activities." 364 S.C. at 251, 612 S.E.2d at 467. In fact, Appellant's case is distinguishable from *McCune* for the very reason the Court intended it not to bar all claims. The *McCune* release did not waive claims for gross negligence, while the waiver in *Fisher* did. 364 S.C. at 251, 612 S.E.2d at 467. Respondent's release seeks to do just that.

Appellant's claim is also distinguishable from *Huckaby v. Confederate Speedway, Inc.*. In this case, a racecar driver signed a release form, absolving the speedway from any liability, and that release was held to be valid. *Huckaby v. Confederate Speedway, Inc.*, 276 S.C. 629, 281 S.E.2d 223 (1981). The Court's reasoning provided that if "...a prospective participant wishes to place himself in the competition sufficiently to voluntarily agree that he will not hold the organizer...liable for his injuries, the courts should enforce such an agreement." *Huckaby* at 631, 281 S.E.2d at 224 (quoting *Gore v. Tri-County Raceway, Inc.*, 407 F. Supp. 489, 492 (M.D. Ala. 1974)). *Huckaby* is distinguishable for two reasons. One, the court never entered into a discussion of a waiver that waived liability for gross negligence, as Respondent's seeks to do. Two, the driver involved in *Huckaby* had raced at this particular track multiple times. *Huckaby* at 629, 281 S.E.2d at 223. This would imply a far greater knowledge of what risks the driver would encounter, giving the driver a far better understanding of the implications of the release. Appellant had never before been to Respondent's facility. He could not fully understand the implications of the release, and these implications were not explained to him by Respondent's officers or employees.

Respondent's waiver is clearly violative of Soth Carolina law concerning liability waivers. It seeks to release Respondent from "all liabilities, strict liability, claims, damages, punitive damages, property damage, actions or causes of action" caused in part or in whole by any negligence of the released parties, or any hidden, obvious, or latent defects at the facility (Carolina Adventure World Release, R. p. 287-89). The release document further requires the signor to "indemnify, hold harmless, and defend" Respondent against any claims arising out of the same manner (Carolina Adventure World Release, R. p. 287-89).

The provisions of this release seek to deny any sort of recourse for business patrons of Respondent. This absolute release is overly broad, and clearly violative of public policy. Respondent utilizes this release to absolve itself of all liability, and then, based upon testimony by its own officer, does nothing to protect its patrons from danger. The public has a clear interest in not allowing a business owner to fully exculpate itself from liability under the law. Notwithstanding the freedom to contract, this contract creates a situation that is unconscionable by placing the burden of ensuring a safe business premises on the patron of that very business.

Under South Carolina precedent, this release does not bar Appellant's claim. Thus, the Trial Court presented reversible error in ruling that it was a bar.

CONCLUSION

Viewing the evidence presented in the light most favorable to Appellant, the non-moving party, Appellant clearly classifies as a Business Visitor and thus is afforded the duty of due care by Respondent. There is a genuine issue of material fact as whether Respondent complied with that duty, and it was an abuse of discretion and an error of law for the court to find otherwise. Furthermore, there is a genuine issue of material fact as to whether the release signed by

Appellant is violative of public policy, and holding it applicable on its face was erroneous. Appellant respectfully requests that the Directed Verdict be overturned, and the case be remanded for a new trial.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant certifies that the Final Brief of Appellant Complies with Rule 211(b) SCAR.

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September 22, 2016

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PROOF OF SERVICE

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