THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2015-001178

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SEP 22 2016
SC Court of Appeals

Corey Ross, ... Appellant,

v.

Carolina Adventure World, LLC, ...Respondent.

FINAL REPLY BRIEF OF APPELLANT

S. Jahue Moore
Moore Taylor Law Firm, P.A.
P.O. Box 5709
West Columbia, SC 20171
803-796-9160
803-791-8410 (Fax)
Attorney for Appellant

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DISCUSSION OF LAW

Respondent Carolina Adventure World takes the position the Appellant failed to prove Respondent owed a duty to Appellant, and the waiver of liability and implied assumption of risk barred Appellant's claim.

I. The Trial Court Applied an Erroneous Interpretation of Law.

Contrary to the argument of Respondent Carolina Adventure World, the relevant case law does not support the granting of a directed verdict. Appellant's case for negligence was proven by the Respondent's own testimony.

A. The Respondent Did Not Fulfill Its Affirmative Duty Under the Law

The Respondent Carolina Adventure World argues Appellant failed to prove any sort of duty owed to Appellant through a statute or general course of business. Respondent does not dispute Appellant was an invitee and afforded the highest level of care under the common law. "Where the entrant is deemed to be an invitee...the occupier of premises owes him...the affirmative duty to use reasonable care to discover unreasonable dangerous conditions of the premises...." *Hughes v. Children's Clinic, P.A.*, 269 S.C. 389, 400, 237 S.E.2d 753, 758 (1977). Furthermore, any occupant of land owes "a duty to an invitee to exercise due care to keep the premises to which the invitation extends in a reasonably safe condition..." *Parker v. Stevenson Oil Co.*, 245 S.C. 275, 280-81, 140 S.E.2d 177, 179 (1965).

Respondent utilizes this precedent to claim it fulfilled its affirmative duty based upon the purpose of use standard. Respondent also claims that Appellant failed to present evidence proving the duty of care for the purpose of use was violated. This assertion is categorically incorrect. Through the testimony at trial of Respondent's own officer, Appellant proved Respondent did nothing to fulfill its affirmative duty towards Appellant. 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).

Appellant acknowledges purpose of use determines what types of acts might fulfill the affirmative duty of an occupier to an invitee. In the case at hand, Respondent seeks to assert Appellant failed to provide any standard which Respondent should have adhered to. This interpretation of law was used by the Trial Court in granting the Motion for Directed Verdict. (Order of the Honorable Benjamin H. Culbertson; R. p. 1). However, Appellant had already elicited the aforementioned testimony from Respondent's officer. Whatever the purpose of use might be, the affirmative duty required by *Hughes* and *Parker* cannot be satisfied by doing absolutely nothing.

II. Appellant's Claim Is Not Barred By The Waiver of Liability Nor The Doctrine Of Implied Assumption of Risk

A. The Waiver of Liability is Overly Broad and Violative of Public Policy

Respondent asserts as a matter of law that the waiver signed by Appellant fully bars his claim of negligence. This assertion is incorrect. These waivers are not per se valid under South Carolina jurisprudence.

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).

"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.

Respondent postulates that the law created in the cases above bars Appellant's claim because he voluntarily signed the waiver. However, in nearly every case that deals with similar documents, the signor signed voluntarily and later sought to have the document declared invalid. The waiver at issue relieves and indemnifies Respondent from any action at all, no matter the injury or the cause. This result is surely violative of public policy. In combination with the lack of due care showed by Respondent, Respondent operates a recreational park for profit while expending nearly zero resources on protection of its patrons and hides behind an overly broad release.

B. Implied Assumption of Risk does not bar Appellant's claim.

Respondent proffers that the doctrine of primary implied assumption of risk supported the grant of Directed Verdict. Primary Implied Assumption of Risk is simply a doctrine that says when one chooses to participate in an activity that may carry an inherent risk of injury, he should not be allowed to sue the occupier who provides the facility to engage in the activity. *Cole v. Boy Scouts of Am.*, 397 S.C. 247, 252, 725 S.E.2d 476, 478 (2011). This is clearly an objective standard, meaning that the Court should look at the activity itself, not the expectations of the parties. *Id.*

Appellant acknowledges that riding ATVs on an off-road course is an inherently dangerous activity. Appellant further acknowledges that different terrains may produce various levels of challenge to the riders. However, the risks presented at Respondent's facility are not clear. There was a factual dispute at trial as to how well the trails are marked, and how the different difficulty levels of the trails are separated from each other. Appellant could not assume a risk he was unaware of. There is no evidence that Appellant was "pushing the limits," as Respondent seeks to assert. (Initial Brief of Respondent, pg. 25.) The evidence at trial was that Respondent did nothing to maintain or inspect the trails. (Transcript of Hearing, pg. 100-1, pg. 109-10; R. p. 108-9, 117-18).

CONCLUSION

Viewing the evidence presented in the light most favorable to Appellant, the non-moving party, Appellant 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,

S. Jahue Moore
Moore Taylor Law Firm, P.A.
P.O. Box 5709
West Columbia, SC 20171
803-796-9160
803-791-8410 (Fax)
Attorney for Appellant

West Columbia, South Carolina
September 20, 2016

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CERTIFICATE OF COUNSEL

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

Respectfully submitted,

S. Jahue Moore
MOORE TAYLOR LAW FIRM, P.A.
P.O. Box 5709
West Columbia, South Carolina 29171
Telephone: 803-796-9160
Attorney for Appellant Corey Ross

West Columbia, South Carolina

September 22, 2016

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PROOF OF SERVICE

I, Martin A. Ebert, an employee of Moore Taylor Law Firm, PA certify that I have served the Final Reply Brief of Appellant on counsel of record for Respondents in this action by depositing a copy of same in the US Mail, postage prepaid, on September 22, 2016 to:

Christian Stegmaier, Esq.
Kelsey Brudvig, Esq.
COLLINS AND LACY, P.C.
P.O. Box 12487
Columbia, SC 29201

Kenneth R. Raynor, Esquire
RAYNOR LAW FIRM, PLLC
231 East Worthington Avenue
Charlotte, NC 28203

Martin A. Ebert

West Columbia, South Carolina
September 22, 2016