THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge
Civil Case No. 07-CP-46-1889

South Carolina Court of Appeals Opinion No.: 4995 (filed on June 27, 2012)

Supreme Court Case Tracking No.: ~~2009-137246~~ 2012-212878

Lawrence Keeter, Ronald Keeter, and Rebecca Keeter..... Respondents,

v.

Alpine Towers International, Inc. and Ashley Sexton.....Defendants,

Of Whom, Alpine Towers International, Inc. is.....Petitioner.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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1. Did the Court of Appeals err in affirming the trial court's denial of Petitioner's motions for directed verdict and JNOV on the question of proximate cause where substantial evidence supports the jury's verdict in favor of the Larry Keeter and his parents?

2. Did the Court of Appeals err in affirming the jury's award of punitive damages where clear and convincing evidence demonstrated Petitioner's reckless, willful, and wanton conduct?

3. Did the Court of Appeals err in affirming the trial court's refusal to apportion fault under S.C. Code Ann. § 15-78-15 where the jury found Petitioner reckless and Fort Mill High School was not a party defendant?

4. Did the Court of Appeals err in interpreting the jury's verdict as a cumulative award of $3,400,500.00 actual damages and $1,110,000.00 punitive damages for Larry Keeter where all evidence indicated the jury's intent to do so?

COUNTERSTATEMENT OF THE CASE

Respondents Larry, Travis and Rebecca Keeter brought this suit on June 4, 2007 in York County, South Carolina alleging tort actions of products liability and personal injury. [R. pp. 117-123] The initial complaint alleged claims against Defendant Ashley Sexton (Sexton) for negligence, gross negligence, and willful, wanton, and reckless conduct. [R. pp. 117-123] Larry Keeter alleged a first cause of action against Defendant Alpine Towers International, Inc. (ATI) for negligence, gross negligence, and willful, wanton, and reckless conduct and a second cause of action against ATI for products liability. [R. pp. 117-123] Travis and Rebecca Keeter, as the parents of Larry Keeter, alleged an additional cause of action against ATI and Sexton for the parents' loss of companionship and services. [R. pp. 117-123] The Keeters filed an offer of judgment, pursuant to Rule 68, SCRCP, in the amount of $525,000 on March 26, 2009. [R. p. 139] Respondents' filed an amended complaint with the court on May 28, 2009, refining its allegations to three claims: products liability (strict liability), products liability (negligence), and general negligence. [R. pp. 142-150] Finally, Respondents dismissed all claims against Defendant Sexton on prior to trial. [R. p. 165, lines 18-19]

This case went to a jury trial on June 15, 2009 before The Honorable John C. Hayes, III. On June 19, 2009, the jury rendered a verdict in favor of the Plaintiff against Defendant ATI in the amount of $500.00 for the strict liability action, $900,000.00 in actual damages and $160,000.00 in punitive damages for the products liability negligence action, $2,500,000.00 in actual damages and $950,000.00 in punitive damages for the general negligence claim, and $240,000 in actual damages for the loss of service claim. [R. pp. 111-116] The jury awarded the Plaintiffs a total amount of $4,750,500.00, but apportioned damages among the various claims. [R. pp. 111-116]

On July 30, 2009, the trial court filed an order denying the Defendant's post-trial motions for Judgment Not Withstanding the Verdict, Motion for a New Trial, Motion to Apportion Damages, and Motion to Strike the Punitive Damages Awards. [R. pp. 80-100] The July 30th order granted Defendant's Motion for Set Off and Motion to Require Plaintiff to Elect Remedies and denied Keeter's motion to enter a general verdict of the cumulative total of the awards granted by the jury. After denying Alpine Towers' Rule 59(e) motion, the trial court entered judgment in this matter on August 17, 2009 in an amount of $3,208,365.74 (a final amount that is inclusive of costs, prejudgment interest under Rule 68, SCRCP, and a $540,000 set off of previous settlements). [R. pp. 101-110]

The Keeters filed a Notice of Appeal on August 26, 2009, appealing the order requiring Larry Keeter elect remedies and denying the entry of a general verdict of cumulative damages. [R. pp. 1-40] Petitioner ATI filed its Notice of Appeal on August 28, 2009, appealing the Judge's Order denying its post-trial motions and motion to allocate damages. [R. pp. 41-79]

The Court of Appeals issued its decision on June 27, 2012, affirming the trial court's denial of Alpine Towers' post-trial motions and motion to allocate damages. However, the Court

of Appeals reversed the trial court's interpretation of the jury verdict, finding the trial court should have entered a cumulative verdict against Alpine Towers in favor of Larry Keeter in the amount of $3,400,500.00 actual damages and $1,110,000.00 punitive damages. Petitioner's motion for rehearing was denied on July 31, 2012.

ARGUMENT

I. Because substantial evidence supports the jury's verdict on all three causes of action, the Court of Appeals correctly affirmed the trial court's denial of Petitioner's motions for directed verdict and JNOV

Petitioner asserts that its motions for directed verdict and JNOV as to the question of liability should have been granted because "Alpine Towers is not liable for Larry's fall ... because Larry's fall was caused by the school's and Ashley's failure to follow the proper procedures." (Petition at 13) In so asserting, however, Petitioner faces a high burden of proof.

> 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. The motions should be denied where either the evidence yields more than one inference or its inference is in doubt. The trial court can only be reversed by this Court when there is no evidence to support the ruling below.

McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006) (internal citations omitted). As shown below, substantial evidence supported each of Respondents' claims. Thus the Court of Appeals correctly affirmed the trial court's denial of the motions for directed verdict and JNOV.

a. Products Liability—Strict Liability

In order to successfully assert a statutory strict liability claim for products liability under South Carolina law, a Plaintiff must prove each of the following elements.

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property, if
>
> (a) The seller is engaged in the business of selling such a product, and
>
> (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

S.C. Code Ann. § 15-73-10 (2005). Petitioner does not dispute that it was "engaged in the business" of selling Alpine Towers or that the tower in this case reached the consumer "without substantial change." Rather Petitioner asserts "[t]he climbing tower was not defective." (Petition at 13)

Keeter demonstrated that the climbing tower was defective due to Petitioner's failure to implement a reasonable alternative design for the tower. Namely, Keeter demonstrated that Petitioner should have incorporated an automatically locking belay device known as a "GriGri" that would have prevented the paralyzing injuries suffered by Keeter. Acknowledging this evidence, the Court of Appeals noted Respondents' expert in biomechanics and sports safety, Dr. Gerald George, "testified that without incorporating a 'fail-safe' belay device such as the GriGri into the design of a climbing tower used for students, the climbing tower is defective and unreasonably dangerous." Keeter v. Alpine Towers Int'l, Inc., 399 S.C. 179, 189-190, 730 S.E.2d 890, 895-896 (Ct. App. 2012).

> Even with a back-up belayer and even with supervision I believe the Grigri should have been used for high school students unaccustomed to this activity, even though she's been through a number of hours of training, this is not a survival tactics military school; this is not boot camp. This was an act—a recreational activity, and the Grigri is a fail-safe. The other one is dependent upon performer competency which apparently failed them in this instance.

[R. p. 230, line 19 – p. 231, line 2] In contrast, George attested that the belay device utilized by Petitioner—the "Trango Jaws"—was inadequate to render the Alpine Tower reasonably safe.

> I believe it's improper under these circumstances, because it requires a user to activate it, and failure to do that, the risk of failure is not—not like shooting a basketball. When you shoot a foul shot and you miss you get to shoot again. In climbing, if the belayer misses using a Trango Jaws, the climber doesn't get to do it again. And for that reason I believe it is inappropriate for high school kids.

[R. p. 222, lines 1-9]

Daniel Hague, the Keeters' artificial climbing wall safety expert who testified that he has trained "thousands upon thousands" of people in belaying techniques [R. p. 305, line 2 – p. 306, line 5], also testified that the incorporation of the "Trango Jaws" device into the tower rendered it defective.

> Q. Okay. Now, tell me why you don't use the Jaws with these kids?
>
> A. For precisely that reason. It doesn't lock up automatically, that it requires the user to perform an action in order to get the rope to lock in the device. I'd rather take that action out, let the device do it, rather than relying on, especially when we're talking about somebody under eighteen, rather than relying on them to perform that action, I'd rather have that action performed by the device itself automatically.

[R. p. 299, line 19 – p. 300, line 3] Hague went on to say that "[i]f the circumstances of the accident were to recur, the only change being a GriGri in the system, the accident would not have occurred." [R. p. 310, lines 5 – 7]

Based upon the foregoing, Keeter presented substantial evidence establishing that the Alpine Tower was "in a defective condition unreasonably dangerous to the user or consumer" and that the defective condition led to Larry Keeter's injuries. As a result, the Court of Appeals

correctly affirmed the trial court's denial of Petitioner's directed verdict and JNOV motions as to this claim.

b. Products Liability—Negligent Design

In addition to strict products liability, Keeter claimed that Petitioner was negligent in designing the Alpine Tower. "A negligence theory imposes the additional burden on a plaintiff 'of demonstrating the defendant ... failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault.'" Keeter at 190, 730 S.E.2d at 896 (internal citation omitted). As with the strict liability cause of action, in order to successfully defeat this claim via directed verdict or JNOV, Petitioner bore the burden of demonstrating that no evidence supported Keeter's theory of negligent design.

Beyond the fundamental question of the defective nature of the Tower operated without an auto-locking belay device, failed to exercise due care when they declined to incorporate such a device into the Tower design despite learning of specific dangers associated with the device's absence. In 1999, several years prior to training the Fort Mill High faculty, Petitioner conducted a "ten year safety study" which concluded that the most frequent accident occurring on the Alpine Tower was "participants being dropped by their belayers and spotters." [R. p. 474] Nevertheless, as indicated by the cross-examination of John Mordhurst, ATI continued to train its customers to utilize student belayers despite the obvious risks associated with relatively inattentive participants.

> Q. ...Why not have the facilitator as the back-up belayer? Why not just have an adult there as the back-up to the kid so that if the kid messes up you got an adult there? Why not?
>
> A. Well, part of it has to do with the educational goals.

Q. What goals?

A. The educational goals of the program to teach trust, responsibility, personal challenge, testing your limits.

...

Q. Why not have an adult as the back-up belayer? How does that diminish any of those goals?

A. Well, if you're fourteen years old or sixteen years old, an adolescent—okay—and you are entrusted with somebody's well-being as they're climbing—okay—that's a pretty potent lesson to be learning...

...

Q. You're an experiential educator. Well, the experiential education you want for a fourteen year old is that they have in their hands the life of another fourteen or fifteen or seventeen year old. Is that right?

A. That's correct.

[R. p. 479, line 18 – p. 480, line 1; p. 480, lines 10-15; p. 482, lines 1-5] Keeter posited to the jury that, once Petitioner learned of the proven risk of "participants being dropped by their belayers," Petitioner owed a duty of reasonable to its customers to incorporate reasonable safety devices (such as the GriGri) into its Tower. Petitioner failed to do so, and thus was negligent in the design of the Tower and its safety apparatus.

Furthermore, Keeter presented evidence that the written warnings and instructions accompanying the Tower were insufficient to advise its users of important safety techniques and known risks. Specifically, The ATI manual was defective because it failed to warn or instruct the adult tower supervisors to remain within reaching distance of active belay ropes. John Mordhurst, Petitioner's longtime employee that trained the Fort Mill High School staff, testified that an adult facilitator should be "in a position to intervene to grab a rope ... so they should be

right next to the belayers and belay monitors." [R. p. 465] Nevertheless, as Gerald George noted, the ATI manual did not prohibit Sprague from leaving the immediate vicinity of climbers.

> Q. ... You've testified that according to both Ashley Sexton and Sergeant Sprague that he left this area where the belaying was going on and walked over ... twenty, thirty yards to where the swing by choice was being set up—anything in the manual that tells him not to do that, to not leave folks strapped in?
>
> A. No, there's nothing that tells him not to do that, and furthermore, there's nothing that warns him that he must—that he or a supervisor or a facilitator must remain present in specific supervision actively engaged, watching what's going on, because you cannot present improper conduct of the activity if you're not looking at it. You can't supervise that which you're not looking at.

[R. p. 214, line 17 – p. 215, line 6] Upon cross-examination, even John Mordhurst admitted that the ATI manuals he supplied to Sprague and the rest of the Fort Mill faculty did not instruct tower facilitators to remain within reaching distance of each rope. [R. pp. 466-467; p. 472]

The trial testimony of Fort Mill High School teacher Steven Sprague revealed that he, while supervising the use of the tower at the time of Keeter's fall, left the immediate vicinity of Larry Keeter and Ashley Sexton to set up another climbing point on the tower at the time of Larry's climbing and fall. [R. pp. 389-393] Sprague, who relied upon the ATI manuals not only to instruct his class but to review his own Tower activities, agreed that the user manuals provided to him by ATI did not instruct him to remain within reaching distance of the belayer. [R. p. 414; pp. 383-385] Thus, even though Sprague relied upon the manuals provide by ATI, his actions in conformity with those manuals placed him in a position where he was unable to prevent the fall of Larry Keeter.

The absence of any instruction to Tower instructors or facilitators to stay within the immediate proximity of a belay rope is particularly notable considering past versions of the ATI manual. The 1997 edition of the tower user manual specifically instructed tower facilitators to

stand within 30 feet of all climbers. [R. pp. 258-259; p. 861] In 2004, however, ATI replaced the 1997 manual with a new edition which omitted the admonition for the adult supervisor to remain within 30 feet of active climbers. [R. p. 260] When questioned about this omission, ATI CEO Joe Lackey could only respond "I'm not sure why it was taken out." [R. p. 260, line 11]

But beyond the absence of clear instructions and warnings within the manual itself, expert Gerald George noted that enduser warnings—in this instance, warnings placed on the Tower itself—are essential on a product with a potential for physical injury.

> Ashley Sexton did not have the benefit of the manual. The manual didn't have it in there anyway, but even if it was in there, she didn't have benefit of the manual. She testified to that. And that's precisely why you need enduser warnings, in other words, a placard on the device that says you need to have (a) back-up monitor (b) a belayer ... (c) you need a supervisor competent.

[R. p. 213, lines 11-18]. Indeed, George noted that the complete lack of end-user warnings on the tower structure prohibited new users—such as Larry Keeter—from obtaining any information about the techniques required for a reasonably safe use of the tower.

> Larry Keeter didn't get a manual. That's the problem with not having proper warnings on the equipment. How about if that had been on the equipment, maybe Larry Keeter could've said "why is there no back-up belayer, when it says do not participate without a back-up belayer." If that had been on there, I think he might've said to Ashley, "hey, look we need to get somebody there, because I don't want—who wants to try and risk their—their life?" Nobody—no reasonable person would want to do that.

[R. p. 228, line 21 – p. 229, line 5] Furthermore, ATI agreed that the visual illustration of the tower's operation contained within its manual did not demonstrate the presence of a supervising staff person at the belay bench. [R. pp. 472-473]

As demonstrated, Keeter presented substantial evidence demonstrating Petitioner's failure to use reasonable care in designing the Tower's safety apparatus, its manuals, and end-

user warnings. As a result, the Court of Appeals correctly affirmed the trial court's denial of Petitioner's motion for directed verdict and JNOV as to this claim.

c. General Negligence—Negligent Training

Throughout the trial of this case, the Keeters contended that ATI was negligent in training High School faculty to utilize student belayers. During cross examination, John Mordhurst was asked directly why he trained Fort Mill High and other similar customers to permit children to belay children. [R. pp. 479-482] Mordhurst, holding himself out as an "experiential educator," defended the use of student belayers by stating that the use of adult belayers would diminish the "educational goals of the program to teach trust, responsibility, personal challenge, [and] testing your limits." [R. p. 479, line 25 – p. 480, line 1]

> Well, if you are a fourteen year old or a forty year old and you belay somebody and you realize that you have their well-being in your hands and in the person behind you, then you know that you've accepted a kind of responsibility that's pretty profound, and indeed I've seen many programs where participants have said, you know, climbing was hard, but belaying and knowing that somebody—I had their well-being, that was even more important. So there's a definite educational aspect there.

[R. p. 481, lines 9-17]. Chris Brock, a Fort Mill High School teacher and student of Mordhurst's, testified that he was uncomfortable with the idea of students belaying one another. [R. pp. 185-187]

> Q. So if, when you're through this process, did it worry you at all that they were expecting kids to belay kids?
>
> A. Yes, it –yes, it did, all of it worried me.
>
> ...
>
> Q. Were you as a facilitator trained by Alpine Towers willing to supervise kids belaying kids?
>
> A. No.
>
> Q. Did it make sense to you?

A. No.

...

Q. Why weren't you willing to do that?

A. Because I know kids. I—kids aren't—kids don't realize the inherent dangers related to that type of thing. ...

[R. p. 193, lines 2-25] The Keeters argued to the jury that ATI breached its duty of due care owed to the end users of the Alpine Tower by training Fort Mill High School to permit students to belay students. In view of the jury's verdict in favor of the Plaintiff's negligence claim, it is apparent that they agreed.

Beyond the application common sense to the circumstances at hand, the Plaintiffs introduced testimony of two experts who established that Alpine Towers' training of the Fort Mill personnel failed to satisfy fundamental standards of the recreational and climbing industries. Gerald George, an expert in biomechanics and recreational and sports safety, opined ATI was negligent in failing to qualify Fort Mill High School faculty as Alpine Tower instructors, rather than merely climbers.

I think the training that Alpine Tower provides in the actual use of the equipment is very good. It's adequate, but what they didn't do is they did not teach the facilitators to be teachers, to be climbing instructors. There was no imparting of any information on how to actually teach belaying knots, everything that's involved here to teenagers.

...

[J]ust because you can do something doesn't make you a teacher. There are nuances to teaching that make that activity different from actually doing.

[R. p. 909, lines 14-25] George's testimony and concerns regarding Alpine Towers' training practices were consistent with that of Chris Brock. Brock testified that, during his training, Alpine Towers failed to inform him that children would be belaying other children. "I was under the impression that I would be belaying students or other people. I was not assuming that I was

being trained to be a trainer, I guess." [R. p. 188, lines 9-12] Brock further explained that during his training no children were introduced into the instruction. [R. p. 189]

> I—I just had concerns. I had concerns about it. I—I just did—don't feel like I'm—I'm not a professional at belaying or repelling anyone. That's not what I do. I'm a teacher.

[R. p. 190, lines 21-24] Alpine Towers agreed that they provide no teaching materials or syllabus to assist Fort Mill personnel in coaching young students on the fundamentals of tower safety. [R. pp. 468-469] According to ATI CEO Joe Lackey, ATI knowingly declines to differentiate its manuals, training, equipment or structure based upon the anticipated age of the end user. [R. p. 267]

In reality, however, ATI always intended the Alpine Tower to be operated by students themselves with mere passive supervision from adult faculty. [R. pp. 480-481] Despite this fact, ATI never trained the Fort Mill High faculty to administer a proficiency test of climbing and belaying skills prior to allowing students on the tower—a fact which only exacerbated the faculty members' complete lack of instructor training. Daniel Hague, an expert qualified in the area of artificial climbing wall safety, emphasized that ATI training was not consistent with the applicable standard of care.

> Such as in a climbing setting you have to be able to assess whether or not the group as a whole is making progress. If—since—since we're talking about life safety here and not about math, if someone is not learning at the same rate as the group, you can't just move to the next topic. You have to slow down. You have to be able to address that one person until everybody's caught up. In addition, at the end of the training, there needs to be some type of discreet competency test.

[R. p. 312, lines 3-11]

ATI's failure to train Fort Mill High School staff as instructors and failure to train staff to conduct proficiency exams had near fatal consequences for Larry Keeter. When Sexton lost

control of the rope, she panicked by releasing the proper angle of the rope. [R. p. 304] Sexton testified that, through her training, she had no idea how to respond to the emergency. [R. pp. 373-374] As a result, she improvised "to the best of my ability." [R. p. 374, line 8] But for ATI's failure to train the Fort Mill faculty on the administration of proficiency exams, Sexton's deficient knowledge would have been discovered and corrected. As Dan Hague observed, ATI did not train the Fort Mill faculty to administer proficiency exams—and thus a deficient belayer was left in responsibility of the safety of Larry Keeter.

d. Intervening Causation

Petitioner argues that "an ultimate unpredictable and unforeseeable chain of events occurred that were not actions by Alpine Towers and were not foreseeable by Alpine Towers as a proximate consequence of any of its actions." (Petition at 16) According to Petitioner, this chain of events was "an intervening force [and] a superseding cause that relieves [ATI] from liability." (Petition at 16)

> It is generally for the jury to determine whether the defendant's negligence was a concurring proximate cause of the plaintiff's injuries. Only when the evidence is susceptible of only one inference does proximate cause become a matter of law for the court.

Bishop v. S. Carolina Dept. of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998). Because the question of intervening cause was susceptible of more than one inference, the trial court correctly denied Petitioner's directed verdict and JNOV motions on this issue.[1]

The lower court noted "Larry presented evidence that Alpine Towers knew Fort Mill would be using high school students to belay climbers, [and] that adolescents are more

[1] It should be noted, however, that the jury was charged with the law of intervening/superseding negligence and misuse. [R. p. 514, lines 10-23] Despite receiving the "intervening causation" charge, however, the jury found in favor of the Keeters.

susceptible to belaying errors than adults...". Id. Keeter's attorney directly asked as much of Gerald George, his sports safety expert.

> Q. ... Is it foreseeable that high school students would not follow the proper policies and procedures that Mr. Salane suggest? Is it foreseeable?
>
> A. Is it foreseeable? It's almost predictable. Yes.

[R. p. 247, line 23 – p. 248, line 2] In this case there is no doubt that Ashley Sexton should not have instructed Larry Keeter to climb the Alpine Tower without a back-up belayer and that she panicked when Larry's belay rope became jammed in her belay device. ATI's failure to consider the foreseeable event of a high school student not obeying instructions to the letter, however, is one of the acts of negligence that gives rise to this case.

> It's a question not only of an improper set-up and an improper supervision, but it's a—it's really—the genesis of this is whether or not the people at Fort Mill High School were aware—were made aware of the importance of this and how to set up a plan so this could not possibly happen.

[R. p. 212, line 25 – p. 213, line 5] In response to questioning about ATI's accounting for potential human error in the high school setting, Gerald George gave the following expert opinion.

> Q. Do you have an opinion as to whether there were reasonably foreseeable risks inherent in the use, the intended use of the Alpine Tower, reasonable foreseeable risks to be anticipated by Alpine Towers?
>
> A. Yes, I have an opinion. Absolutely, they knew or should have known of the—of these risks about which we speak.
>
> Q. And in your opinion, most probably, did they take steps which most probably eliminated or minimized those risks?
>
> A. They did not.

[R. p. 224, lines 11-21] Dan Hague agreed with George's assessment of foreseeability, stating that in his experience "you could easily foresee that adolescents aren't going to follow all the procedures." [R. p. 322, lines 22-23 Finally, as noted above, Petitioner's 1999 "ten year study" indicated that the most frequent accident occurring on the Alpine Tower was "participants being dropped by their belayers and spotters," despite being trained in the same procedures as the Fort Mill staff. [R. p. 474]

In view of this and other evidence, the Court of Appeals affirmed the trial court's denial of Petitioner's motions for directed verdict and JNOV on grounds of intervening negligence because "[t]his is not a 'rare or exceptional' case in which the issue of proximate cause may be decided as a matter of law." Keeter at 194, 730 S.E.2d at 898. Because of the existence of such evidence, the trial court properly submitted the question of proximate cause to the jury and the Court of Appeals properly affirmed the trial court's decision to do so.

II. The Court of Appeals correctly affirmed the trial court's denial of Petitioner's motions for directed verdict and JNOV as to punitive damages because the Keeters presented clear and convincing evidence of ATI's willful, wanton, and reckless conduct

Petitioner contends that the trial court erred in declining to grant its JNOV motion on the issue of punitive damages because "[t]he evidence in the record is insufficient as a matter of law to support an award of punitive damages against Alpine Towers." [Petition at 20] However, "if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton, the issue of punitive damages must also be submitted to the jury." Graham v. Whitaker, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984), citing Gilbert v. Duke Power Co., 255 S.C. 495, 179 S.E.2d 720 (1971); Gibbs v. Atlantic Coast Line R. Co., 221 S.C. 243, 70 S.E.2d 238 (1952). In this case, the Keeters presented clear and convincing evidence of ATI's reckless, willful, and wanton actions. Thus, because a reasonable

inference existed that ATI acted in such a manner, the Court of Appeals correctly affirmed the trial court's denial of Petitioner's JNOV motion.

"An award of punitive damages is left almost entirely to the discretion of the jury and trial judge." Jordan v. Holt, 362 S.C. 201, 207, 608 S.E.2d 129, 132 (2005), citing Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942). As to what evidence gives rise to a jury question of punitive damages, it has been held that "[a] conscious failure to exercise due care constitutes wilfulness." McCourt By & Through McCourt v. Abernathy, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995), citing Scott v. Fruehauf Corporation, 302 S.C. 364, 396 S.E.2d 354 (1990); see also Tinsley v. W. Union Tel. Co., 72 S.C. 350, 51 S.E. 913, 914 (1905). "When evidence exists that suggests a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness." Mishoe v. QHG of Lake City, Inc., 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005), citing McGee v. Bruce Hosp. Sys., 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996). "An inadvertent failure to observe due care indicates mere negligence, but an advertent or conscious failure to observe due care passes beyond mere negligence into wantonness or willfulness." Tinsley at __, 51 S.E. at 914.

In this case, the Keeters presented evidence of ATI's conscious decisions to disregard the risks posed its Alpine Tower users by ATI's training and Alpine Tower design. Both John Mordhurst and Joe Lackey recognized that students generally lack the attention and concentration of adult Alpine Tower users. [R. p. 470] Furthermore, several years prior to training the Fort Mill High faculty, ATI's ten year safety study concluded that the most frequent accident occurring on the Alpine Tower was "participants being dropped by their belayers and spotters." [R. p. 474] Nevertheless, as indicated by the cross-examination of John Mordhurst,

ATI—quite intentionally—continued to train its customers to utilize student belayers despite the obvious risks associated with relatively inattentive participants.

> Q. You're an experiential educator. Well, the experiential education you want for a fourteen year old is that they have in their hands the life of another fourteen or fifteen or seventeen year old. Is that right?
>
> A. That's correct.

[R. p. 482, lines 1-5]

With regard to ATI's failure to implement the Grigri auto-locking belay device, ATI President Joe Lackey initially indicated that the company chose not to integrate the Grigri into its safety design because "[t]he Grigri to me is a scary device." [R. p. 255, line 18] Upon further examination, however, both Lackey and John Mordhurst admitted that ATI sold the Grigri device independently of its Alpine Tower, knew of the use of the Grigri on towers other than that at Fort Mill High School, and specifically approved of the use of the Grigri at those other towers. [R. pp. 261-263; pp. 463-464] As the trial court noted in its Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) analysis, "[a]t the very least, Alpine Tower's testimony revealed a conscious decision to exclude the use of auto-locking belay devices with its towers and exclude mention of the gri-gri in its training or materials." [R. p. 94]

"Punitive damages are allowed even 'when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary prudence would say that it was a reckless disregard of another's rights.'" Camp v. Components, Inc., 285 S.C. 443, 444, 330 S.E.2d 315, 316 (Ct. App. 1985), quoting Hicks v. McCandlish, 221 S.C. 410, 415-16, 70 S.E.2d 629, 631 (1952). In this case, ATI admitted to knowledge that belayer error was the most common cause of accidents on the Alpine Tower and that students typically were more prone to committing such errors. Nevertheless, ATI chose to

train its customers to utilize student belayers and belay devices that relied upon an absence of human error. As the trial court held,

> Based on the record, the jury was provided with ample evidence that Alpine Towers was fully aware of the danger posed by the Alpine Tower yet failed to design instructional materials or to implement training procedures that would lessen that danger. The relatively minimal costs associated with these improved materials and training procedures (if any exists) underscores the seriousness of Alpine's breaches of duty and overall culpability.

[R. p. 93]

Here, because evidence supported the submission of punitive damages to the jury, and because the jury's award of such damages is entitled to deference, the Court of Appeals correctly affirmed the trial court's denial of Petitioner's motions for directed verdict and JNOV on this issue.

III. The Court of Appeals correctly affirmed the trial court's refusal to allocate fault between Petitioner and Fort Mill High School because, under 15-38-15(F), the jury's finding of recklessness precluded allocation

a. Apportionment in the face of a finding of recklessness

In declining to apportion damages, the Court of Appeals noted that "our ruling affirming the jury's award of punitive damages makes it unnecessary to address this issue." Keeter at 197, 730 S.E.2d at 899. In so ruling, the Court of Appeals relied upon the language of Section 15-38-15.

> This section does not apply to a defendant whose conduct is determined to be wilful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.

S.C. Code Ann. 15-38-15(F) (Supp. 2012). In South Carolina, "punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." Mellen v. Lane, 377 S.C.

261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008), citing Taylor v. Medenica, 324 S.C. 200, 220, 479 S.E.2d 35, 46 (1996); Lister v. NationsBank of Delaware, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct. App. 1997). By awarding Respondents punitive damages, the jury necessarily found Petitioner's conduct to be willful, wanton, or reckless. Thus subsection (F) of Section 15-38-15 applies and no apportionment under the remainder of the statute is permitted. As such, the Court of Appeals correctly affirmed the trial court's decision denying apportionment.

b. The parties did not stipulate to allocate fault between ATI and Fort Mill High School

Petitioner alleges that the Keeters' attorneys stipulated, during a pretrial hearing, "the jury could consider and assess the fault of the absent defendants, including the fault of the school." (Petition at 20) The Keeters reply that no such stipulation was ever made.

Pertaining to stipulations of counsel, Rule 43(k), SCRCP, establishes the following.

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.

Rule 43(k), SCRCP. "Rule 43(k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation." Ashfort Corp. v. Palmetto Const. Group, Inc., 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995).

Prior to opening arguments, Plaintiffs' and Defendant's counsel met in chambers to discuss the potential of dismissing Ashley Sexton from the trial of the case. [R. pp. 165-166] The attorney for Alpine Towers noted that "we'd initially objected based on the apportionment issues [within Section 15-38-15(C)]. [R. p. 166, lines 1-2] As a result, attorneys for the Keeters and Alpine Towers agreed that Sexton would be dismissed from the lawsuit, but that she would still

be considered a "defendant" within the meaning of Section 15-38-15(C). [R. p. 166] Trial counsel for ATI reiterated this agreement at the close of the case.

> And to add, your Honor, the issue may also be that where there are multiple defendants and in this case where we have a defendant which by stipulation was going to be submitted to—and I point out to the court, it was stipulated in the dismissal of Ms. Sexton from the case, we withdrew our objection only on the stipulation that we would be doing this.

[R. p. 533, lines 2-8]

Prior to the apportionment issue being submitted to the jury, the court conducted a conference with the attorneys to discuss the logistics of the procedure. [R. pp. 529-533] The attorneys were advised that the "defendants" to be considered were "Alpine Towers and Ashley Sexton." [R. p. 531, line 12] ATI did not raise any contemporaneous objection to this ruling.

The parties did not execute any written stipulation to the consideration of Fort Mill High School's fault during apportionment proceedings. As such, any stipulation to that effect must be "made in open court and noted upon the record...." Rule 43(k), SCRCP. Beyond the references above, the parties did not enter any stipulations on the record pertaining to apportionment. Because the stipulation alleged by ATI does not comply with the mandate of Rule 43(k), SCRCP, Petitioner's argument fails.

c. Statutory interpretation of Section 15-38-15 in the absence of punitive damages

Petitioner argues that, should this Court reverse the award of punitive damages, the actual damages would then be subject to allocation. In so arguing, Petitioner relies upon the text of Section 15-38-15(c)(3).

> [U]pon a motion by at least one defendant, where there is a verdict under items (1) and (2) above for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict under the procedures

> described at subitem (b) below the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct, as determined by item (1) above, that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property.

S.C. Code Ann. § 15-38-15(C)(3) (Supp. 2012). While our appellate courts have not interpreted this subsection of the statute, soon after the statute's enactment the South Carolina Law Review discussed the General Assembly's intent as to non-party tortfeasors.

> The legislature had the opportunity to include the fault of nonparties in subsection (C)(3), which directs the jury on how to allocate fault. In light of previous versions of the bill, the legislature's decision to omit any reference to nonparties demonstrates its intent to exclude nonparties from the fault allocation process. For example, the December 8, 2004 version of House Bill 3008 proposed the following language: "In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged injury . . . regardless of whether the person was, or could have been, named as a party to the suit." The proposed section continued by providing how the defendant was to assert the nonparty defense, which included a notice requirement and an extra statement of the basis for believing the nonparty was at fault. A later version of House Bill 3008, which more closely resembled the adopted section 15-38-15, instructed the jury to consider in its fault allocation process the fault of those parties who had previously settled or been released. **In the end, the legislature declined to adopt either of these versions; instead, it chose an approach to fault allocation that not only failed to mention nonparties, but provided specific instructions that the jury consider only the fault of the plaintiff and the defendants. The implication is that the legislature deliberately determined that the jury should not consider any potential fault of nonparties.**

Joshua D. Shaw, "Limited Joint and Several Liability Under Section 15-38-15: Application of the Rule and the Special Problem Posed by Nonparty Fault," 58 S.C. L. Rev. 627, 633-634 (2007) (emphasis supplied).[2]

"When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." State v. Sweat, 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Ct. App. 2008). Whereas the statutory language of S.C. Code Ann. § 15-38-15 does not provide for the apportionment of fault of non-parties, Petitioner's allegation that it would be entitled to the apportionment of Fort Mill High School's fault in the event of a reversal of punitive damages is without merit.

IV. The Court of Appeals correctly interpreted the jury's verdict as a cumulative award for Larry Keeter because all evidence surrounding the verdict supported that conclusion. Because the cumulative verdict does not threaten double recovery, the Court of Appeals also correctly reversed the trial court's requirement that Larry Keeter elect remedies.

a. Preservation of Verdict Form Interpretation

As the Court of Appeals recognized, the confusion over the election of remedies question stemmed from the verdict form. "The use of the three blanks for damages in the verdict form left the verdict ambiguous as to the amount of damages the jury intended to award." Keeter at 199, 730 S.E.2d at 900. However, the immediate problem facing the parties was an ambiguous verdict, not the style of the verdict form itself. Over 80 years ago, our supreme court set forth the manner in which a party should direct the trial court's attention to an ambiguous verdict.

> If the appellant thought there was confusion in the wording of the verdict, he should have called the attention of the court to the matter at the time the verdict was rendered; and, then any seeming

[2] The District Court of Minnesota, in dicta, also agrees with this summary. "[U]nder South Carolina law, it appears that a jury *cannot* apportion comparative fault to a non-party." Austin v. Nestle USA, Inc., 677 F. Supp. 2d 1134, 1141 (D. Minn. 2009) (emphasis in original), citing S.C. Code Ann. § 15-38-15(C)(3).

> confusion in the language of the verdict could have been easily cleared up.

Howard v. Kirton, 144 S.C. 89, 142 S.E. 39, 43 (1928). Once the party directs the trial court's attention to the verdict, the duty then falls upon the court to resolve the ambiguity.

> It was the duty of the trial judge to decide what the verdict meant, and, in reaching his conclusion thereabout, it was his duty to take into consideration not only the language of the verdict, but all the matters that occurred in the course of the trial.

Id. at __, 142 S.E. at 43.

In this case, the Court of Appeals noted that "after the jury returned the verdicts, Larry made a motion asking the court to inquire of the jury whether it meant for the damages awarded to be cumulative." Keeter at 200, 730 S.E.2d at 901.

> The Court – Bring in the Jury. And you might go ahead and—Mr. Harpootlian, you had made—indicated you were going to make a motion under *Armstrong vs. Collins* regarding—you probably ought to do that before the jury comes in if that's still your intention.
>
> Mr. Harpootlian – Yes, sir, my motion would be to inquire of the jury in the *Armstrong* case, that the—inquiry in the courtroom to the forelady of the jury and she indicated that, or he in that case, indicated it was a—they meant it to be cumulative. Now, you can either inquire of the jury here in the courtroom or you can send them out whatever you're comfortable with.

[R. p. 545, lines 12-23] ATI did not object to this request. [R. p. 546, lines 3-4] The trial court requested the jury forelady clarify the jury's intention in its damages award. The forelady responded "it's cumulative." [R. p. 547, lines 20, 25] In response to the trial court's question as to whether any other matter should be submitted to the jury for consideration, ATI's counsel answered "nothing further." [R. p. 548, line 6]

Despite the above-referenced portions of the trial transcript, Petitioner contends that "Larry was silent on the issue and his failure to object waives any argument that the jury

intended its verdict to be cumulative." [Petition at 24] Recently, however, our supreme court observed that "failure to object ***prior to discharge of the jury*** results in a waiver of the right to challenge the verdict." Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 553, 560 S.E.2d 894, 896 (2002)(emphasis supplied).[3] The logic behind the contemporaneous requirement is self-evident: a request for clarification prior to the dismissal of the jury enables the court to pose the request to the jury. Obviously this was accomplished and the jury answered the court's question.

b. Interpretation of a cumulative verdict and election of remedies

The basic purpose for the election of remedies doctrine is that "there can be no double recovery for a single wrong." Inman v. Imperial Chrysler-Plymouth, Inc., 303 S.C. 10, 15, 397 S.E.2d 774, 777 (Ct. App. 1990). "Since the basic purpose of election of remedies is to prevent double recovery for a single wrong, application of the doctrine should normally be confined to cases where double compensation of the plaintiff is threatened." Harper v. Ethridge, 290, S.C. 112, 121, 348 S.E.2d 374, 379 (Ct. App. 1986).

The Court of Appeals interpreted the jury's verdict as awarding a single, cumulative damages figure to Larry Keeter.

> The jury's verdict in this case is readily reconciled as we have explained. We can discern no other way to interpret the verdict consistent with the applicable law and the facts of this case, nor can we find in the record any reason to believe this interpretation does not reflect the intent of the jury. ... [W]e find that the jury intended the amounts to be added together for a total verdict in

[3] The case of Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995), is inapposite. There the Court of Appeals ruled that the appellant waived any objection to the verdict form by waiting until its JNOV motion to raise its exceptions. Here, the Keeters' request for clarification was made in the jury's presence and the jury was given the opportunity to provide the court with that clarification. [R. pp. 546-548]

> Larry's favor of $3,400,500.00 actual damages and $1,110,000.00 punitive damages.[4]

Keeter at 201-02, 730 S.E.2d at 902. Due to this interpretation, no threat of "double recovery" exists. "Where a plaintiff presents two causes of action because he is uncertain of which he will be able to prove, but seeks a single recovery, he will not be required to elect." Adams v. Grant, 292 S.C. 581, 586, 358 S.E.2d 142, 144 (Ct. App. 1986), citing Robert Harmon and Bore, Inc. v. Jenkins, 282 S.C. 189, 318 S.E.2d 371 (Ct. App. 1984). Accordingly, the Court of Appeals correctly ruled that Larry Keeter should not have been required to elect remedies.

CONCLUSION

For the reasons stated herein, ATI's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

December 5, 2012
Columbia, South Carolina

[4] The Petitioner does not allege that the Court of Appeals erred in its interpretation of the evidence of the jury's intent. However, out of an abundance of caution, Respondents reiterate the reasoning of the Court of Appeals in reaching its interpretation.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge
Civil Case No. 07-CP-46-1889

SC Court of Appeals Opinion No.: 4995 (filed on June 27, 2012)

Case Tracking Number: 2009-137246

Lawrence Keeter, Ronald Keeter, and Rebecca Keeter..... Respondents,

v.

Alpine Towers International, Inc. and Ashley Sexton.....Defendants,

Of Whom, Alpine Towers International, Inc. is.....Petitioner.

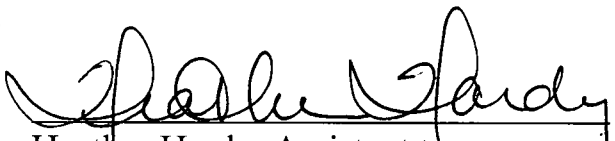
CERTIFICATE OF SERVICE

I, Heather Hardy, Legal Assistant to the attorney for the Respondents, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Columbia, South Carolina 29201, certify that on December 6, 2012, served via U.S. Mail, the following document to the below mentioned person(s):

Documents: **Respondents' Return to Petition for Writ of Certiorari.**

Served: Charles E. Carpenter, Jr., Esquire

Carmen V. Ganjehsani, Esquire
Carpenter Appeals & Trial Support, LLC
1201 Main Street, Suite 900
Columbia, South Carolina 29201



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December 6, 2012
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse, Clerk of
The South Carolina Supreme Court
1231 Gervais Street
Post Office Box 11330
Columbia, South Carolina 29211

In re: Lawrence Keeter, et al. v. Alpine Towers International, Inc.
Case Tracking Number: ~~2009-137246~~ 2012-212878

Dear Mr. Shearouse:

Enclosed please find for filing the original and eight (8) copies of the following:

- *Respondents' Return to Petition for Writ of Certiorari.*

If you would please file the enclosed and return the copies to my courier, I would be most appreciative.

By copy of this letter, I am serving opposing counsel with a copy of the same.

With warm personal regards, I am

Sincerely,

M. David Scott

/hmh
Enclosure(s)
cc: Charles E. Carpenter, Jr., Esq.
Carmen V. Ganjehsani, Esq.