STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT THROUGH THE USE OF HURST V EAST COAST HOCKEY LEAGUE, INC., 371 S.C. 33, 637 S.E. 2d 560 (2006) RATHER THAN DAVENPORT V COTTON HOPE PLANTATION HORIZONTAL PROPERTY REGIME, 333 S.C. 71, 508 S.E.2d 565 (1998) AS CONTROLLING AUTHORITY?

II. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT IN THE FACE OF EVIDENCE THAT WAGNER RECKLESSLY RAN OVER DAVID COLE?

III. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT IN THE FACE OF EVIDENCE THAT WAGNER VIOLATED THE RULES OF SOFTBALL BY RUNNING OVER DAVID COLE?

STATEMENT OF THE CASE

These are personal injury cases in which the Plaintiff/Appellant, David Cole, alleges a recklessness claim; the Plaintiff/Appellant, Karen Cole individually, alleges a consortium claim; and the Plaintiff/Appellant, Karen Cole as Guardian ad litem for David Cole, Jr., alleges a negligent infliction of emotional distress (bystander) claim. (R. pp. 6-11, R. pp. 12-16) The Defendant/Respondent, Jeffrey Wagner (Wagner), made a Motion for Summary Judgment.[1] (R. pp. 22-23) By order signed December 18, 2009, the trial court granted Wagner's Motion for Summary Judgment. (R. pp. 2-4)

David Cole, Karen Cole individually and Karen Cole as Guardian ad litem for David Cole, Jr. received written notice of the December 18, 2009 Order on December 24, 2009. The Coles filed and served a Motion to Alter or Amend under Rule 59(e) SCRCP on January 4, 2010. (R. pp. 24-28) The trial court denied this Motion by Order signed on January 7, 2010. (R. p. 5) The Coles received written notice of the January 7, 2010 Order on January 13, 2010. The Coles filed and served their Notices of Appeal on February 10, 2010. The Coles perfected their appeal within the deadlines established by Rule 203(b)(1) SCACR.

[1] Wagner is the only remaining Defendant. The Coles have settled their claims against the remaining Defendants.

STANDARD OF REVIEW

In reviewing a trial court's decision granting summary judgment, this Court applies the same standard as the trial court applies under Rule 56(c) SCRCP. Brockbank v. Best Capitol Corp., 341 S.C. 372, 378-379, 534 S.E.2d 688, 692 (2000). The contours of the summary judgment standard are well established. Summary judgment is appropriate only where it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Calvert v. House Beautiful Paint and Decorating Center, Inc., 313 S.C. 494, 443 S.E.2d 398 (1994); Rule 56(c) SCRCP. In deciding whether there are any genuine issues of material fact, the court must construe all inferences arising from the evidence against the moving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corporation, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).

Even when there is no dispute as to evidentiary facts, but only as to the conclusions to be drawn from them, summary judgment should be denied. Redwend Limited Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). Moreover, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Middleborough Horizontal Property Regime Council of Co-owners v. Montedison, S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).

In cases in which the burden of proof is the preponderance of the evidence, "the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment." Hancock v Mid-South Management Co., Inc., 381 S.C. 326, 331 673 S.E.2d 326, 327 (2009). The scintilla of evidence standard is met "if there is

any evidence at all in a case … tending to support a material issue ….” Henry C. Black Black’s Law Dictionary 1207 (5th ed. 1979) (emphasis added).

Summary judgment is a drastic remedy. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003). Summary judgment should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. 352 S.C. at 391, 575 S.E.2d at 552.

STATEMENT OF THE FACTS

David Cole and Karen Cole are husband and wife. Karen Cole serves as the duly appointed Guardian ad litem for David C., who is the minor son of David Cole and Karen Cole.

David C. participated in Cub Scouts in early 2004. David Cole, Jr. was a member of Cub Scout Pack 48 (Pack 48). In March of 2004, Pack 48 held a family camping trip at Mill Creek County Park in Sumter County, South Carolina. (R. pp. 61-63, Affidavit of Keith Corley, ¶¶ 3-5)

During the March 2004 family camping trip, the leaders of Pack 48 organized a father-son, pick up softball game. (R. pp. 61-63, Affidavit of Keith Corley ¶¶ 3-5) David Cole and Wagner played on opposing teams, and David Cole played catcher for his team. (R. pp. 61-63, Affidavit of Keith Corley, ¶ 6)

Because some of the fathers were playing aggressively by, for example, taking full swings at the softball, one of the Pack 48 Cub Scout leaders, Keith Corley (Corley), had to stop the game and ask the fathers to play more safely. (R. pp. 61-63, Affidavit of Keith Corley, ¶ 7) Despite this request, Wagner continued to play aggressively. (R. pp. 61-63, Affidavit of Keith Corley, ¶¶ 8, 9)

After play resumed, Wagner took a full swing, hit a hard line drive and reached second base. (R. pp. 61-63, Affidavit of Keith Corley, ¶ 9) Then, another father hit a ball into the

outfield, and Wagner took off full speed for third base. (R. pp. 61-63, Affidavit of Keith Corley, ¶ 11)

Wagner rounded third base and took off full speed for home plate. As catcher, David Cole was waiting at home plate for the throw from the outfield. Wagner then simply ran over David Cole at home plate. (R. pp. 61-63, Affidavit of Keith Corley, ¶¶ 11-15). According to Corley, who has experience as both a player and coach of softball, running over the catcher violates the rules of softball. (R. pp. 61-63, Affidavit of Keith Corley ¶ 20).

While Wagner claims that he was running slowly, he admits that he was running too fast to avoid running over David Cole. (R. pp. 79-80, Affidavit of Jeff Wagner, ¶ 12) Wagner also admits that after he ran over David Cole, he turned a flip in the air and broke some of his ribs, facts that belie his claim that he was running slowly. (R. pp. 79-80, Affidavit of Jeff Wagner, ¶ 14)

When Wagner ran over him, David Cole suffered a closed head injury. (R. pp. 64-66, Affidavit of Karen Cole, ¶ 5) At the scene of his injury, David Cole was left semiconscious, was bleeding from his ear and was having convulsions. (R. pp. 61-63, Affidavit of Keith Corley, ¶ 16, R. pp. 64-66, Affidavit of Karen Cole, ¶ 9) David Cole's injuries were so severe that he was airlifted to Palmetto Richland Hospital where he spent two days in intensive care. (R. pp. 64-66, Affidavit of Karen Cole, ¶ 5)

Tragically, David C. witnessed his father being injured by being run over by Wagner and witnessed his father lying on the ground semiconscious, bleeding from his ear and having convulsions. (R. pp. 64-66, Affidavit of Karen Cole, ¶¶ 8-9) David C. was left in shock and asked Corley if his father was going to die. (R. pp. 61-63, Affidavit of Keith Corley, ¶¶ 17-18)

David Cole, Jr. has seen a counselor to help him cope with the memory of this horrible event. (R. pp. 64-66, Affidavit of Karen Cole, ¶ 10) In fact, the memory of the event so

traumatized David C. that he was unable to play baseball until almost six years after his father's injury. (R. pp. 64-66, Affidavit of Karen Cole, ¶ 6)

Since his injury, David Cole has suffered intermittent, disabling headaches and significantly impaired memory. (R. pp. 64-66, Affidavit of Karen Cole, ¶¶ 11-12) David Cole's memory impairment is so profound that he has to write things down so that he can remember them. (R. pp. 64-66, Affidavit of Karen Cole, ¶ 12)

David Cole's injury has also severely affected Karen Cole. By all accounts, Karen Cole is a devoted wife, but she has been left with the difficult task of helping her husband cope with his headaches and his memory loss. (R. pp. 64-66, Affidavit of Karen Cole, ¶ 14)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING WAGNER SUMMARY JUDGMENT THROUGH THE USE OF HURST V EAST COAST HOCKEY LEAGUE, INC., 371 S.C. 33, 637 S.E.2d 560 (2000) RATHER THAN DAVENPORT V COTTON HOPE PLANTATION HORIZONTAL PROPERTY REGIME, 371 S.C. 33, 637 S.E.2d 560 (2000) AS CONTROLLING AUTHORITY.

A. There are material distinctions between Hurst and these cases that make it inapplicable here.

As a general rule, people have a duty to use reasonable care to avoid injury to others caused by their actions. Bass v. Farr, 315 S.C. 400, 434 S.E.2d 274 (1993). In granting summary judgment to Wagner, the trial judge treated the decision of our Supreme Court in Hurst v East Coast Hockey League, Inc., 371 S.C. 33, 637 S.E.2d 560 (2006) as controlling authority and found in Hurst an exception to the general rule stated in Bass. The trial judge erred in treating Hurst as controlling authority.

In Hurst , the plaintiff was injured by a flying puck at a professional hockey game that he was attending as a spectator. Hurst, 371 S.C. at 34, 637 S.E.2d at 561. The court

upheld a grant of summary judgment based on the holding that "[T]he risk of a spectator being hit by a flying puck … is … a common, expected and frequent risk of hockey." Hurst, 371 S.C. at 565, 637 S.E. 2d at 562-563.

The facts of Hurst present two distinctions that make it inapplicable to these cases. First, Hurst involved a professional hockey game as opposed to a father-son, pick up softball game. Second, Hurst was a spectator/plaintiff as opposed to a participant/plaintiff. These distinctions counsel against applying the Hurst holding to these facts.

Professional hockey games obviously generate inherent risks that are not present in a father-son pick up softball game played during a Cub Scout camping trip. In general, professional sports events create greater risks because they are hypercompetitive with the professional players expected to and even paid to play their game as aggressively as possible.

The risk of a spectator being hit by a hockey puck at a professional hockey game is, indeed, a common, expected and frequent risk of hockey. The expectations of a spectator at a professional hockey game should include this risk of being hit by a puck flying off of the stick of a professional hockey player acting in the hypercompetitive and aggressive realm of professional sports.

The father-son pick up softball game involved here could not be any further removed from a professional hockey game. No competition was involved in the game being played here; no one was even keeping score. (R. p. 109, lines 11-12, Deposition of Jeff Wagner, p. 21, lines 11-12) Since the game involved fathers and sons of Cub Scott age, competitive play should have been furthest from the participants' minds.

Unlike a spectator at a professional hockey game, a person involved in a father-son pick up softball game played during a Cub Scout camping trip has no reason to expect aggressive play. Certainly, aggressive play increased the risk of injury to the Cub Scout aged boys participating in the softball game. Moreover, aggressive play increased the risk to the adults because they had no reason to expect and to protect themselves from the risks associated with aggressive play.

Hurst has another fact that distinguishes it from these cases. Hurst involved injury to a spectator, whereas this case involves injury to a participant. At first blush, this may seem to increase the inherent risk such that the case here is stronger for the defense than Hurst. However, this first blush is deceiving, and a closer analysis of the spectator versus participant distinction reveals cogent reasons why, in this case, Hurst does not apply.

The first reason why the spectator versus participant distinction makes Hurst inapplicable has to do with the mechanism of injury. In Hurst the mechanism of injury was an inanimate object, the puck. In contrast, the mechanism of injury in this case was a human being, with volition and free will, who simply ran over David Cole. (R. pp. 61-63, Affidavit of Keith Corley, ¶ 14-¶ 16)

Second, this case is participant versus participant, and Hurst is spectator versus professional sports team and owners of the arena where the professional sports team played its games. The result in Hurst would certainly be different if a hockey player recklessly struck another hockey player over the head with his stick and left the beaten player semiconscious on the ice with blood pouring from his ear and with his body racked by convulsions. In that case, no one could dispute that the beaten hockey player had a claim against the hockey player that beat him.

In finding Hurst applicable, the trial court overlooked the fundamental differences between injuries suffered by a spectator as a result of the ordinary course of a professional hockey game and injuries suffered by a participant as a result of reckless conduct during a father-son, pick up softball game played during a Cub Scout camping trip. The trial court erred in treating Hurst as controlling authority.

B. With Hurst inapplicable, the trial court should have returned to first principles and should have decided the Motion for Summary Judgment using the general rule of implied primary assumption of the risk stated in Cotton Hope.

In Davenport v Cotton Hope Horizontal Property Regime, 371 S.C. 33, 637 S.E.2d 560 (2000), our Supreme Court held that there is no duty to protect participants from "risks that are inherent in a particular activity." Cotton Hope, 33 S.C. at 81, 508 S.E.2d at 569 (emphasis in original). Under the rule in Cotton Hope, the question in this case is whether being simply run over by a reckless base runner in violation of the rules of softball is a risk inherent in participation in a father-son, pick up softball game played during a Cub Scout family camping trip. Clearly it is not. (R. pp. 67-68, Affidavit of David Cole, ¶ 3) The trial court erred in failing to apply the Cotton Hope implied primary assumption of the risk rule. The proper application of that rule leads to the conclusion that the trial court should have denied Wagner's Motion for Summary Judgment.

II. THE TRIAL COURT ERRED IN GRANTING WAGNER SUMMARY JUDGMENT IN THE FACE OF EVIDENCE THAT WAGNER RECKLESSLY RAN OVER DAVID COLE.

On this point, the trial court made a fundamental error. The trial court found that "the injuries complained of occurred entirely as a result of an accident . . . ." (R. p. 4,

December 18, 2009 Order, p.3) The Coles presented at least a scintilla of evidence that David Cole's injuries were not caused by an accident but rather by Wagner's recklessly running over David Cole. To make its finding of an accident, the trial court had to weigh the evidence presented by the parties. Reaching findings of fact by weighing evidence is prohibited in the summary judgment process. Numerous South Carolina appellate court cases admonish trial courts not to weigh evidence in determining facts relevant to their summary judgment decisions. See, e.g. S.C. Prop. Cas. Guar. Ass'n v Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct.App. 2001)

The authorities support a finding of at least a scintilla of evidence that Wagner acted recklessly when he simply ran over David Cole. Our appellate courts have defined recklessness as "conduct where the actor is in fact consciously aware that he is acting negligently." F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts (3d Ed. 2004), p.66. It could not have escaped Wagner that running over David Cole posed an unreasonable risk of serious harm to David Cole. The fact that both David Cole and Wagner were seriously injured simply reinforces this conclusion. (R. pp. 114, lines 13-17, Deposition of Jeff Wagner p. 26, lines13-17)

The conclusion of this argument turns on the meaning of inherent as it is used in the implied primary assumption of the risk rule stated in Cotton Hope. Inherent means "involved in the constitution or essential character of something." Webster's 7th New Collegiate Dictionary (1970), p. 424. The risk of being recklessly run over by a base runner is not a risk involved in the constitution or essential character of a father-son, pick up softball game played during a Cub Scout family camping trip. The trial court should

have denied Wagner's Motion for Summary Judgment because of the evidence of Wagner's recklessness.

III. THE TRIAL COURT ERRED IN GRANTING WAGNER SUMMARY JUDGMENT IN THE FACE OF EVIDENCE THAT WAGNER VIOLATED THE RULES OF SOFTBALL BY RUNNING OVER DAVID COLE.

On this point, the trial court also impermissibly weighed the evidence. The trial court found that there was "no evidence of … anyone acting outside the course of the game." (R. pp. 2-4 December 18, 2009 Order, p.3) This finding must be based on weighing the evidence, because the Coles presented evidence that Wagner violated the rules of softball by simply running over David Cole. In his Affidavit, Corley, who has both played and coached softball, clearly states that the rules of softball prohibit a base runner from running over the catcher during a play at home plate. (R. pp. 61-63, Affidavit of Keith Corley, ¶ 20)

The softball rule prohibiting base runners from running over the catcher is not just any rule; it is a safety rule. The obvious purpose of this rule is to avoid the risk of injury created by base runners running over the catcher at home plate. In light of the safety rule, it cannot be said that the risk of being run over by a base runner is inherent in the game of softball. This risk is simply not involved in the constitution or essential character of a pickup, father-son softball game played during a Cub Scout family camping trip. The trial court should have denied Wagner's Motion for Summary Judgment because of the evidence that Wagner violated a softball safety rule by simply running over David Cole.

CONCLUSION

For the reasons stated above, the trial court erred in granting summary judgment to Wagner. This Court should reverse and remand this case for a trial on the merits.

Respectfully Submitted,

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BY:_____

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