TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUES ON APPEAL

I) Whether, because the alleged injuries are an inherent risk of playing softball, Appellants' negligence claims are barred by the doctrine of primary implied assumption of the risk recognized in Davenport and applied in Hurst by the South Carolina Supreme Court.

II) Whether summary judgment was properly granted in the absence of evidence of recklessness and when the law does not recognize a duty owed to Cole by Wagner.

III) Whether summary judgment was properly granted when the risk of collision is inherent to the game of softball.

STATEMENT OF THE CASE

Appellants David Cole and Karen Cole instituted this personal injury action against Respondent Jeff Wagner after David Cole incurred injuries engaging in a pick-up game of softball with his son's Boy Scout troop. Specifically, Appellants contend Wagner was negligent in colliding with Cole at home plate in the course of the game. Appellant Karen Cole also brought a claim for loss of consortium. In a separate action, Karen Cole brought an action for negligent infliction of emotional distress on behalf of the couple's minor son, David Cole, Jr., who allegedly witnessed his father's injury. On June 11, 2009, the trial court entered a consent order consolidating the two cases.

Relying upon the South Carolina Supreme Court's decision in Hurst v. East Coast Hockey League, 371 S.C. 33, 637 S.E.2d 560 (2006), the trial court applied the doctrine of primary implied assumption of the risk and granted summary to judgment to Wagner. (R.pp.2-4.) Appellants' Motion to Alter or Amend and for Reconsideration was denied. (R.p.5.) Appellants filed their Notice of Appeal on February 10, 2010.

STATEMENT OF THE FACTS

The collision between Wagner and Cole which forms the basis of Appellants' complaints took place on March 13, 2004, while the two men were playing a pick-up softball game at a Boy Scout outing. (R.pp.79-80, 125-26.) Both men had sons in the Boy Scouts. Wagner was invited to join the pick-up softball game which was already in progress when he returned from an errand to gather supplies for the outing. (R.pp.79-80, 100.) Cole, a willing participant in the softball game, played catcher for the opposing team. (R.pp.85, 179-80.)

Wagner reached second base during his turn at bat. When the next teammate drove the ball hard past him, Wagner ran to third base, rounded third, and headed for home. (R.pp.79-80, 101.) A fielder threw the ball in toward home plate. (Id.) Due to suffering a serious injury to his leg during a prior term of service in the U.S. Navy, Wagner's run to home plate was slowed. (R.pp.79-80, 116.) As Wagner was miming at this impaired speed, Cole stepped into Wagner's path and attempted to tag him. (R.pp.81-86.) Cole followed the ball and apparently trying to catch it and tag Wagner, crouched and lunged for the ball, moving squarely into Wagner's path. (R.pp.79-80, 126.) Seeing no way to stop or change course with so little space left between them and fearing to re-injure his leg, Wagner tried to avoid a collision by jumping over Cole, spreading his legs so Cole might pass between them. He failed to clear Cole, and the two hit each other. (R.pp.79-80, 83-88; 102-03, 126.) Wagner, hit low, flipped in the air and landed hard on a bat someone had left near home, breaking a rib. (R.pp.79-80, 102.) Cole was also injured.

There is no evidence that Wagner intentionally tried to injure Cole. (R.p.240.) Instead, the injuries of which Appellants complain occurred directly as a result of Wagner running for home, trying to score, and Cole sprawling in his path, trying to catch an errant throw home and to prevent Wagner from scoring. Neither party was attempting to hit the other. It appeared to Wagner and all onlookers that the collision was accidental in nature and caused by the risks inherent in the game of baseball or softball. (R.pp.79-80, 132.) Although Cole does not have any memory of how the accident occurred, he was familiar with the rules of softball, having played softball for four years while in the Navy and having played baseball in his youth. (R.pp.171, 242.) He had suffered injuries while

playing softball prior to this incident and was aware that injuries were an essential risk of playing the game. (R.pp.172-73.)

Following a December 8, 2009 hearing, the Honorable G. Thomas Cooper entered an Order on December 21, 2009, granting Wagner summary judgment. Relying on the doctrine of primary implied assumption of the risk recognized by the South Carolina Supreme Court in Hurst, the trial court held that "the injuries complained of occurred entirely as a result of an accident in the course of the parties' willing participation in a contact sport." (R.pp.2-4.) The trial court held that there is no evidence of anyone acting with intent to harm the other or acting outside the course of the game and, therefore, Appellants' claims are barred based on Cole's assumption of the risk of injury inherent to the sport.

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The granting of summary judgment by the circuit court should be upheld when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Con., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). A court considering summary judgment neither makes factual

determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. David, 367 S.C. at 250, 626 S.E.2d at 5.

ARGUMENTS

I) BECAUSE THE ALLEGED INJURIES ARE AN INHERENT RISK OF PLAYING SOFTBALL, APPELLANTS' NEGLIGENCE CLAIMS ARE BARRED BY THE DOCTRINE OF PRIMARY IMPLIED ASSUMPTION OF THE RISK RECOGNIZED IN DAVENPORT AND APPLIED IN HURST BY THE SOUTH CAROLINA SUPREME COURT.

There is no dispute that the legal issue involved in this case is the doctrine of primary implied assumption of the risk which, according to the South Carolina Supreme Court, applies when one participates in or becomes a spectator at an active sporting contest and assumes the risk of injury inherent in the sport. Hurst, 371 S.C. at 38, 637 S.E.2d at 562-63 (claim of spectator hit by errant hockey puck barred by primary implied assumption of the risk); Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 281 S.E.2d 223 (1981) (as separate sustaining ground for summary judgment, participant in car race assumed risk of injury from wreck). Despite Appellants' best efforts at characterizing this case as involving issues of fact, the Supreme Court has made it abundantly clear that implied assumption of the risk "is simply a part of the initial negligence analysis" which is determined as a matter of law. Hurst, 371 S.C. at 37, 637 S.E.2d at 562. In granting summary judgment to Respondent, the trial court correctly noted, "the issue is the nature of the sport itself and the risks inherent to it, which is decided as a matter of law from the bench." (R.p.4.) Contrary to Appellants' contention, there is no need to weigh the evidence or determine issues of fact. Therefore, summary

judgment is entirely appropriate and should be affirmed based on the following arguments.

Appellants' claims are barred outright by the doctrine of primary implied assumption of the risk which curbs the legal duty players owe to each other or to spectators without resorting to a comparative negligence analysis. Hurst, 371 S.C. at 37, 637 S.E.2d at 562 (distinguishing primary assumption of risk in sports settings, which was not subsumed by comparative negligence doctrine, from secondary assumption of risk); Knight v. Jewett, 834 P.2d 696, 703-04, 710-11 (Cal. 1992) (selective assent of plaintiff injured in pick-up touch football game was irrelevant; issue was defendant's duty, given inherent risks of game). The evolution of the doctrine of primary implied assumption of the risk was recognized by the South Carolina Supreme Court in Davenport v. Cotton Hope Plantation Horizontal Property Regime, when it discussed the doctrine's initial application in the employment context and eventual extension to cases outside the traditional master-servant context. 333 S.C. 71, 77-79, 508 S.E.2d 565, 56869 (1998). Eight years after the Davenport decision, the Supreme Court further extended the doctrine to the sports context when it held that a hockey spectator's negligence claims were barred by the doctrine because the spectator assumed the risk of being struck in the face by a flying puck. Hurst, 371 S.C. 33, 637 S.E.2d 560. Contrary to Appellants' contention, Hurst is the controlling authority because it not only addresses the doctrine of primary implied assumption of the risk in the sports context, but it also represents the latest development of the doctrine recognized in Davenport, the case Appellants urge this Court to follow.

The facts of Hurst are quite simple in that it involved a negligence claim for

injuries sustained by a spectator when he was struck by a puck durin$_g$ warm-ups of a professional hockey game. The Hurst Court first determined, as a matter of law, whether the law reco$_g$nizes a particular duty as re$_q$uired to prove a negligence claim. Hurst, 371 S.C. at 37, 637 S.E.2d 560. The Court relied on Davenport and recognized that "primary implied assumption of the risk is simply a part of the initial ne$_g$li$_g$ence analysis." Id. In other words, "primary implied assumption of the risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case [of ne$_g$li$_g$ence] by failing to establish that a duty exists." Id. (citing Perez v. McConkey, 872 S.W.2d 897, 902 (Tenn. 1994)). Relyin$_g$ on cases involving injuries to baseball spectators and noting the similarities between flying baseballs and flying hockey pucks, the Court found that "[t]he risk of bein$_g$ struck by a flying puck is inherent to the game of hockey and is also a common, expected, and frequent risk of hockey." Id. at 38, 637 S.E.2d at 562-63. The Court affirmed summary judgment for defendants because plaintiff's claim failed as a matter of law when, under the doctrine of primary implied assumption of the risk, defendants' duty of care did not encompass the risk involved. Id. at 38-39, 637 S.E.2d at 562-63.

Appellants' attempt to distinguish Hurst as controllin$_g$ authority is based on two arguments which have no merit. First, Appellants ar$_g$ue that there is a greater risk of being injured as a passive spectator at sportin$_g$ event than as an active participant in a softball game. This line of reasonin$_g$ is confounding. There is no conceivable way that passively watching hockey players warm-up in a large arena carries more risk than actively participating in a softball game. This is true even though a softball game is less competitive than a professional hockey game. Picking up a glove, swinging a bat,

catching a pitch, running the bases, and getting an out for your team arguably involve a *greater* risk than merely observing hockey players warm up in a plexi-glass encircled arena. Thus, Appellants' second argument that watching a professional hockey game carries more risk than playing an amateur softball game — is similarly unpersuasive.

The application of the doctrine of primary implied assumption of the risk to the instant case and consequent finding that Respondent's duty of care did not encompass the risk involved is mandated not only by the Hurst decision, but also by authority from other jurisdictions addressing nearly identical facts. In Knight v. Jewett, the seminal California case, a young woman suffered a crippling injury to her hand when she was knocked down by an allegedly over-the-top male defender in what was supposed to be a friendly, pickup game of touch football. 834 P.2d at 697-98. According to the plaintiff in Knight, the players had agreed to scale back aggressive play. Id. at 698. At most, she thought she risked only a few bruises in a friendly game. Id. at 698-99. She said the defendant bumped her hard on the previous play and that she warned him she would quit if he continued. Id. at 697. On the next play, the defendant, moving past her to block a pass being thrown to someone else, knocked her down and stepped on her hand, permanently crippling it. Id. at 697-98. According to the plaintiff, she never consented to the defendant's rough level of play. Id. at 698-99. The Knight court, applying the doctrine of primary implied assumption of the risk, held that a game participant's subjective state of mind in assuming the risks of playing a contact sport was irrelevant. Tel. at 708-09. Nor did it matter that the defendant might have used poor judgment or gamesmanship in causing her injury, provided that his conduct was in the course of playing his role in the game. Id. at 710 (holding that careless conduct of a player in course of play is not

actionable, absent intent to injure or reckless conduct wholly outside the nature of the sport, but is part of the risk of playing). The plaintiff's claim was barred, the court held, because the risk of violent, injury-causing humps in the course of a play is inherent in the game of football. Id. at 712 (upholding trial court's grant of summary judgment).

The Illinois Court of Appeals addressed the doctrine of primary implied assumption of the risk in Landrum v. Gonzales, a case with nearly identical facts to the case before the Court. 629 N.E.2d 710, 714-15 (Ill. Ct. App. 1994). The plaintiff in Landrum was a base player in an informal company softball game, injured in a collision with a base runner. Id. at 712. Because some of the participants in the game were coworkers' spouses and children, the injured baseman argued that the defendant base runner owed her a duty to scale back his play and not collide with her. Id. at 714. The court held that, because softball involves an inherent risk of collision between base runners and defensive players trying to field balls, the plaintiff's negligence claim was barred. Id. at 715 (upholding trial court's grant of summary judgment as to negligence). Apparently, the trial court ruled that some dispute of material fact barred summary judgment on the plaintiff's claim that the defendant had acted recklessly. However, the appellate court upheld the trial court's grant of a directed verdict on the remaining counts, where the proof showed the slide in question had merely been incidental to the runner's effort to reach base. Id. at 715.

Both Knight and Landrum are analogous to the case at hand. Appellants allege that, given the players were a mixture of adults and children, Wagner should not have been playing so hard when he and Cole collided. However, the record is devoid of any evidence that Wagner was playing hard or in any way aggressively. In fact, the evidence

is that his leg was injured, and such injury prevented him from running fast. (R.pp.79-80.) Both parties to the collision were adults. No child was injured or even standing in the area where the injury occurred. (R.pp.81-84, 87-88.) More importantly, the doctrine of primary implied assumption of the risk does not involve fine distinctions about whether a player's judgment is within the vague parameters of reduced intensity play. Knight, 834 P.2d at 698-99, 709. This avoids splitting hairs over whether one player, running at half speed, would be faster than another running at full tilt. Again, the issue is not to what level of risk the plaintiff subjectively assented. Id. at 709. The issue is whether, as a matter of law, the conduct causing the injury was within the risks inherent in the sport itself. Hurst, 371 S.C. at 38, 637 S.E.2d at 562-63; Knight, 834 P.2d at 709-12.

In the instant case, Cole's injury was caused by him colliding with Wagner while he crouched or sprawled to field a throw and Wagner ran towards home to score. This is an inherent risk of playing softball. Landrum, 629 N.E.2d at 715. It does not matter if Wagner could have avoided the impact by jumping better or executing some other move within his impaired range of athletic ability. A participant's poor athleticism and poor judgment in interpreting rules and executing maneuvers are part of the inherent risks of playing an active sport. Knight, 834 P.2d at 710 (normal careless conduct in course of play not actionable); see also Bushnell v. Japanese-American Relig. & Cult. Ctr., 50 Cal.Rptr.2d 671, 675 (Cal. Ct. App. 1996) (judo training inherently involved risk that instructor, trying to increase student's speed, would eventually execute move faster than student could react); Marchetti v. Kalsh, 559 N.E.2d 699, 702-04 (Ohio 1990) (whether child participant properly interpreted rules for "kick the can" while causing collision was

irrelevant absent showing of intent or recklessness outside normal course of game); Avila v. Citrus Comm. College Dist, 131 P.3d 383, 393 (Cal. 2006) (alleged inside pitching, or "chin music," resulting in hit batter was inherent risk of baseball as traditionally played, barring claim).

The uncontested facts show that the injury complained of occurred entirely as a result of an accident in the course of the parties' willing participation in a contact sport. The collision injured both parties. It was unfortunate. But in an active sport, injuries do happen. There is no evidence of anyone acting with intent to harm the other or acting outside the course of the game. Thus, there is no genuine issue as to any material fact that Appellants' claims are barred by the doctrine of primary implied assumption of the risk. Hurst, 371 S.C.at 38, 637 S.E.2d at 562-63.

II) SUMMARY JUDGMENT WAS PROPERLY GRANTED IN THE ABSENCE OF EVIDENCE OF RECKLESSNESS AND WHEN THE LAW DOES NOT RECOGNIZE A DUTY OWED TO COLE BY WAGNER.

As noted above, the trial court's determination that Appellants' claims are barred by the doctrine of primary implied assumption of the risk did not involve weighing the facts of the case because the issue is whether, as a matter of law, there exists a particular duty. Because there is no legal duty for players to refrain from the competitive, game-related contact that causes the injury, there is no negligence. Hurst, 371 S.C. at 38, 637 S.E.2d at 562-63 (team and other defendants had no duty to protect spectator, since being hit hard by flying pucks was an inherent risk of hockey); Knight, 834 P.2d at 710-11 (defender in touch football game had no duty to avoid knocking fellow player down and stepping on her hand in the course of play).

In applying the doctrine of primary implied assumption of the risk, the court does not need to consider nuances of what distinguishes one friendly softball game from another. Landrum, 629 N.E.2d at 714-15 (contact sports rule applied to company softball game in which baseman was injured by runner's slide, supporting summary judgment on negligence claim and directed verdict on recklessness claim, where slide was incidental to runner's effort to reach base). The issue is the nature of the sport itself and the risks inherent to it, which is decided as a matter of law from the bench. Hurst, 371 S.C. at 38, 637 S.E.2d at 562-63; see also Staten v. Superior Court, 53 Cal.Rptr.2d 657, 661-62 (Cal. Ct. App. 1996) (trial court erred in admitting expert testimony on whether skating injury was caused by inherent risk of sport; duty in such cases is always determined from the bench).

Appellants' continued efforts at characterizing this case as involving questions of fact are without merit, especially when Appellants fail to cite any evidence that Wagner was reckless besides the fact that both Cole and Wagner were injured. The only way to hold Wagner liable for Cole's injuries is to find that Wagner intentionally injured Cole or engaged in "conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." Knight, 834 P.2d at 711. The evidence in the record is that Wagner was not "engaging in any rough or aggressive play." (R.pp.81-84, 87-88.) It is undisputed that Wagner was slowed by a leg injury he sustained while serving in the Navy and that he intentionally did everything he could to avoid the collision. (R.pp.79- 80.) Therefore, Appellants' claims are barred by the doctrine of primary implied assumption of the risk and summary judgment was properly granted.

III) SUMMARY JUDGMENT WAS PROPERLY GRANTED WHEN THE RISK OF COLLISION IS INHERENT TO THE GAME OF SOFTBALL.

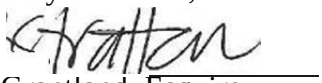
Under the doctrine of primary implied assumption of the risk, this Court must determine whether Wagner owed a duty of care to Cole based on the inherent nature of the game of softball. Although it is assumed that the Court is familiar with America's pastime, reference to the general rules is necessary in light of Appellants' contention that these rules were violated. Baseball and the related game of softball include the risk of collision, often between base runners and defensive players. The rules of baseball and softball, and the common procedures for playing it, are widely known in the American experience and in popular culture. In order to score on a hit to the outfield, base runners have to move quickly to home plate or a base before a defensive player fields the ball and throws it to the catcher, whose role is to tag the runner (or the base itself if the bases were loaded and the runner in question had been on third base) and prevent the score. Collisions are common in baseball and softball games, especially near home. As the history of baseball and related games show, catchers are the players most often injured by collisions during play. This is in part because the rules allow catchers waiting on a throw to block home plate or base, and runners are allowed to knock them out of the way in their effort to score. (However, there is no evidence the collision was intentional in this case.) Baseball and softball are active, contact sports. In mixed games involving a risk of contact, adults often defer to children. But players run fast, in the spirit of fun, while other players react fast, in the spirit of fun, and collisions often happen, entirely within the course of the game.

Even if the rules of softball were violated, as Appellants allege, then the doctrine of primary implied assumption of the risk would still bar Appellants' claims. By voluntarily participating in the softball game, Cole assumed all risks inherent to the game, including the risk of another player violating a safety rule. See, e.g., Landrum, 629 N.E.2d at 169 (citing Oswald v. Township High School, 406 N.E.2d 157 (1980)) (finding that "rule infractions, deliberate or unintentional, are virtually inevitable in contact games"). Imagine, for instance, Cole had been knocked unconscious by an errant throw. Although hitting a batter with an errant throw might be against the rules, it is not outside the risks inherent to the game. See, e.g., Allen v. Dover Co-Recreational Softball League, 807 A.2d 1274, 1286 (N.H. 2002) (applying assumption of the risk and finding that "[b]ecause reasonable fielders commonly make errant throws, being injured by an errant throw is a common risk inherent in and arising out of a softball game.") Similarly, it may be against the rules to commit an intentional foul in basketball or a chop block in football, but these risks are inherent in the nature of contact sports and do not give rise to liability unless they are "so reckless as to be totally outside the range of the ordinary activity involved in the sport." Knight, 834 P.2d at 711. The "game of softball necessarily involves runners being 'tagged' by opposing players; fielders inevitably collide; players are occasionally struck with an errantly thrown ball." Landrum, 629 N.E.2d at 715. The risk of base runners and catchers colliding is inherent to the game of softball and was voluntarily assumed by Cole. Therefore, Appellants' claims are barred by the doctrine of primary implied assumption of the risk.

CONCLUSION

The Court should affirm the trial court's granting of Respondent's motion for summary judgment because there is no dispute of material fact as to the applicability of the doctrine of primary implied assumption of the risk to the facts of this case. The accident was the result of a collision between the parties, both of whom were willing participants in a contact sport. Therefore, Wagner owed no duty to Cole as a matter of law, and summary judgment was properly granted.

Respectfully Submi ed,



Jo t M. Grantland, Esquire
Alice P. Adams, Esquire
Ashley B. Stratton, Esquire
MURPHY & GRANTLAND, P.A.
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

2009-CP-40-00415

Karen Cole, as Guardian ad litem for David C., ... Appellant,

v.

Boy Scouts of America, Indian Waters Council, Pack 48,
Faith Presbyterian Church and Jeff Wagner, Defendants

Of whom Jeff Wagner is ..... Respondent.

2009-CP-40-00416

David Cole and Karen Cole, ... Appellants,

v.

Boy Scouts of America, Indian Waters Council, Pack 48,
Faith Presbyterian Church and Jeff Wagner, Defendants,

Of whom Jeff Wagner is ..... Respondent.

CERTIFICATE

I, Ashley B. Stratton, Esquire, attorney for Respondent, certify that the Respondent's Brief complies with Rule 211(b) of the South Caroli a Court Rules.

~~John M. Gran~~tland, Essquire Alice P. Adams, Esquire Ashley B. Stratton, Esquire

September 7, 2010

MURPHY & GRANTLAND,
P.A. 4406-B Forest Drive Post
Office Box 6648 Columbia,
South Carolina 29260 (803)
782-4100
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

2009-CP-40-00415

Karen Cole, as Guardian ad litem for David C., ... Appellant,

v.

Boy Scouts of America, Indian Waters Council, Pack 48,
Faith Presbyterian Church and Jeff Wagner, Defendants

Of whom Jeff Wagner is ..... Respondent.

2009-CP-40-00416

David Cole and Karen Cole, ... Appellants,

v.

Boy Scouts of America, Indian Waters Council, Pack 48,
Faith Presbyterian Church and Jeff Wagner, Defendants,

Of whom Jeff Wagner is ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Brief of Respondent, Jeff Wagner, by depositing a copy of it in the United States Mail, postage prepaid, on September 8, 2010, addressed to their attorney of record, Arthur K. Aiken, Esquire, 2231 Devine Street, Suite 201, Columbia, South Carolina 29205.

September 8, 2010

[Signature on following page]

John M. Grantland, Esquire
Alice P. Adams, Esquire
Ashley B. Stratton, Esquire
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Respondent