

SOUTH CAROLINA PLAYGROUND SUBJECT TO INDUSTRY STANDARDS

ELLEGE v. RICHLAND/LEXINGTON SCHOOL DISTRICT FIVE 352 S.C. 179; 573 S.E.2d 789 (S.C. 2002) SUPREME COURT OF SOUTH CAROLINA November 25, 2002

KEYWORDS: South Carolina, school, playground, standard of care, evidence, industry standards.

[Note: Attached opinion of the court has been edited and citations omitted.]

On December 9, 1994, nine-year-old Ginger Sierra (Ginger) slipped and fell on a piece of playground equipment at Irmo Elementary School where she attended fourth grade. The playground equipment was a metal monkey bar device which the children walked upon; it extended above the ground approximately two feet. As a result of the fall, Ginger broke her right leg. The growth plate in that leg was significantly damaged, and Ginger eventually underwent surgery in both legs to remove the growth plates. Removing the growth plates in both legs prevents uneven growth, but also retards growth in the legs. Ginger's doctor testified that this procedure would have the effect of making Ginger shorter than she would have been.

Ginger and her mother, Christine Elledge (collectively respondents), sued petitioner Richland/Lexington School District Five (the District) for negligence. A jury returned a verdict for the District. On appeal, the Court of Appeals reversed and remanded for a new trial.

At trial, James Shirley, the principal at Irmo Elementary since 1990, testified that shortly after he arrived at the school, he had concerns about the school's playground. He was especially concerned by the lack of a fall surface and by the height of some of the playground equipment. As to the monkey bar which Ginger fell on, Shirley stated that children had been walking on it and this was also a concern. In 1991, Shirley contacted Jim Mosteller who redesigned the playground. As part of the playground renovations, the monkey bar which Ginger fell on was modified by Mosteller. Originally, the monkey bar was higher and had a bench underneath it. As part of the modifications performed in 1991, the height was lowered from about four feet to two feet, and the bench was removed. On the modified monkey bar, students would walk or crawl across it, although there were no hand-held supports on the side. Shirley testified that he knew the children were walking across the apparatus after the modification.

Both of respondents' playground safety experts testified that the monkey bar was, in its original form, designed to develop children's upper body strength. Archibald Hardy stated that this piece of equipment was known as a "pull and slide" and the children were supposed to lie back on the bench underneath the bars and pull themselves along the apparatus. According to Hardy, the original design "definitely wasn't for walking" because the metal rungs were small enough for children's hands and were "fairly slick." "The modification to the equipment encouraged children to "run up and jump on top of it;" however, Hardy stated that children "shouldn't have been playing on top of it at all." Hardy, who sold to and installed playground equipment for Irmo Elementary, had visited the playground on several occasions since 1992, and had recommended to Shirley that all the older equipment on the playground be "bulldozed."

Steven Bernheim, respondents' other expert, similarly testified about the equipment and stated that it "was not meant as a climber." According to Bernheim, the equipment was safe as originally designed, but in its modified form, it was unsafe because the narrow bars were originally designed for hands, not feet, and no grit had been placed on the metal bars to prevent slipping.

Bernheim stated generally that the playground at Irmo Elementary did not meet the proper safety standards in the industry. Respondents sought, however, to introduce specific evidence regarding the Consumer Product Safety Commission (CPSC) guidelines for playground safety and the American Society for Testing and Materials (ASTM) standards for playground equipment. The trial court granted the District's motion to exclude this evidence. At trial, respondents argued that this evidence was relevant to establishing the District's common law duty of care. The trial court found the evidence inadmissible because the guidelines were not "binding" on the District and the District had not "adopted" them in any way.

Respondents proffered the following evidence. Bernheim would have testified that in 1994, when Ginger fell, the CPSC guidelines and ASTM standards were in effect and would have applied to "any group . . . utilizing the playground equipment for public use," including a school district. He stated that these guidelines are industry standards and are distributed to schools via superintendents' or principals' meetings. Significantly, Bernheim opined that the District should have had policies and procedures in place for retrofitting existing equipment so that it complied with the guidelines. Furthermore, Bernheim believed the modified monkey bar did not comply with the national guidelines because there were no handrails and no grit on the walking surface. According to Bernheim, because Ginger's injury involved getting caught in an entrapment between the ladder areas, it was the type of injury the guidelines are designed to prevent. While Bernheim acknowledged that the industry standards were guidelines only, he stated they are what the playground equipment industry "stands by."

Respondents also proffered testimony from the District's purchasing coordinator, Joe Tommie. According to Tommie, the District would specify in its bids for purchasing new playground equipment that the equipment must meet the CPSC guidelines and ASTM standards. He stated: "That's normally the standard we use to ensure that we purchase safe equipment."

On appeal, respondents argued the exclusion of this evidence was prejudicial error. The Court of Appeals agreed. Stating that "evidence of industry standards, customs, and practices is 'often highly probative when defining a standard of care,'" the Court of Appeals held the trial court erred by excluding evidence of the CPSC guidelines and ASTM standards. The Court of Appeals found the trial court was under "the mistaken belief that the District must have adopted these national protocols before such evidence was admissible. . . . While such proof might be necessary in attempting to establish negligence *per se*, it is not required when the evidence is offered to demonstrate an applicable standard of care." As to the District's argument there was no prejudice from any error, the Court of Appeals stated that the "exclusion of this testimony was clearly prejudicial since such evidence would tend to show the District's compliance with industry standards, which directly conflicts with the District's assertion that such standards were never recognized."

ISSUE

Did the Court of Appeals correctly decide that the trial court's exclusion of the CPSC guidelines and

ASTM standards evidence was reversible error?

DISCUSSION

The District argues that the trial court correctly excluded the CPSC guidelines and ASTM standards evidence. Specifically, the District maintains respondents failed to establish that these guidelines were accepted and used by school districts in South Carolina to determine the safety of existing playground equipment. In addition, the District contends that even if the trial court erred, the error was not prejudicial. We disagree.

To establish a cause of action in negligence, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty...

In our opinion, respondents' proffered evidence was relevant to, and admissible on, the first required element of negligence - the District's duty of care to respondents...

As recognized by the Court of Appeals, the general rule is that evidence of industry safety standards is relevant to establishing the standard of care in a negligence case. This kind of evidence is admitted not because it has "the force of law," but rather as "illustrative evidence of safety practices or rules generally prevailing in the industry."

Indeed, the District even acknowledges this is the general rule. Respondents' expert, Bernheim, laid an adequate foundation for the admission of these safety standards when he stated they: (1) were in effect at the time of Ginger's accident, and (2) would have applied to any group using playground equipment for public use, including a school district. Bernheim would have testified that the CPSC guidelines were first published in 1981 and that ASTM standards applied to schools since at least 1993. Thus, the Court of Appeals correctly held that the trial court erred by excluding evidence of the CPSC guidelines and ASTM standards.

The District, however, argues this evidence was inadmissible because respondents did not show that school districts generally accepted or followed the guidelines with regard to existing playground equipment.

We find this argument completely unavailing. Since the evidence showed the District followed the CPSC guidelines when purchasing new playground equipment, and the guidelines are intended for general playground safety which logically includes the maintenance of existing playground equipment, the District's contention that the safety standards somehow did not apply to it on existing equipment is simply untenable. It is clear to us that a public school is exactly the type of entity to which the public playground safety guidelines should, and do, apply. Simply because the District did not utilize the guidelines in 1994 with regard to existing equipment does not mean that it should not have. Indeed, since July 1997, the District has utilized the CPSC guidelines in conjunction with the inspection and maintenance of its playgrounds.

We find this evidence is highly probative on the issue of defining the District's duty of care... Evidence of objective safety standards is generally offered in connection with expert testimony which identifies it

as illustrative evidence of safety practices or rules generally prevailing in the industry, and as such it provides support for the opinion of the expert concerning the proper standard of care.

Respondents sought to introduce evidence of industry standards to identify and establish the duty of care owed by the District to respondents. According to respondents' expert, the modified monkey bar did not comply with the guidelines. According to the District's purchasing coordinator, the District utilized the guidelines to ensure the safety of new equipment purchases. The import of the expert's evidence is clear. Respondents sought to show that the same standards that were used to purchase safe new equipment, should have been used to safely modify and/or maintain the existing equipment.

Furthermore, this type of evidence constitutes an objective standard and as such would have greatly enhanced the opinions offered by respondents' experts... One of the main purposes of industry standard evidence is to provide support for an expert's opinion on what the applicable standard of care is... Accordingly, we hold the trial court's error in excluding this evidence prejudiced respondents' case.

CONCLUSION

The general rule is that evidence of industry safety standards is admissible to establish the standard of care in a negligence case. The evidence of CPSC guidelines and ASTM standards which respondents sought to have admitted in the instant case is exactly the type of evidence contemplated by this general rule. The Court of Appeals correctly held the trial court committed reversible error in excluding the evidence. Therefore, the Court of Appeals' opinion is AFFIRMED.