ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas
Kristi L. Harrington, Circuit Court Judge

Civil Action No. 2011-CP-10-09543
Appellate Case No. 2013-001837

Joseph Barilotti,

Appellant,

v.

Ocean Course Golf Club, LLC,

Respondent.

FINAL BRIEF OF RESPONDENT OCEAN COURSE GOLF CLUB, LLC

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STATEMENT OF THE ISSUES ON APPEAL

Respondent would restate the issues on appeal as:

As to the Directed Verdict on Liability

I. Did the Trial Court properly grant a directed verdict for the Defendant Ocean Course in this slip and fall action where the only reasonable conclusion that could be reached is that the dewfall and sand on the bridge were open and obvious conditions about which the course had no duty to warn?

II. Is there any evidence that would reasonably support a conclusion that the Ocean Course created a dangerous condition of sand on the bridge and should have anticipated the Plaintiff's injury?

III Is there any evidence that would reasonably support a conclusion that the Ocean Course breached a duty to blow sand from the bridges?

IV. Is there any evidence that would reasonably support a conclusion that the Ocean Course had a duty to place a mat on the bridge?

As to the Evidentiary Issues:

V. Did the Trial Court properly exercise its discretion in allowing the Defendant Ocean Course to present photographs of the golf course as demonstrative evidence to orient the jury to the location of the relevant holes and bridges?

VI. Did the Trial Court properly exercise its discretion in limiting the Plaintiff's redirect of his witness regarding a slip and fall at another bridge on the golf course that was not substantially similar?

STATEMENT OF THE CASE

This slip and fall case arises from an accident that occurred on the morning of October 31, 2010, on the Ocean Course at Kiawah Island, when the Plaintiff, Joseph Barilotti, slipped and fell while crossing a bridge at Hole No. 4. The Plaintiff filed a complaint on December 28, 2011, alleging that he was wearing golf spikes and that the bridge was unsafe and dangerous to persons wearing such footwear. [ROA 10; Complaint.]

The Defendant filed and served its answer and a Rule 12(b)(6) motion to dismiss on March 9, 2012. [ROA 15, 23; Answer, Motion to Dismiss.] The Defendant denied the allegations of neligence and asserted that the slip and fall was due to no fault on the part of the Defendant but to a natural condition, over which the Defendant had no control. The Defendant also asserted that even if the Defendant was negligent, the condition on the bridge was open and obvious which could have been avoided by the Plaintiff, and the Plaintiff's own comparative negligence bars his recovery. The Court denid the motion to dismiss by order, filed July 3, 2012. [ROA 8; Form 4 Order.]

Upon completion of discovery, the Defendant moved for summary judgment based on the Plaintiff's own deposition testimony that the bridge was slippery from the morning dew. [ROA 25; Motion, filed April 2, 2013, with supporting memorandum.] The Defendant sought summary judgment on the grounds that (1) the naturally occurring dewfall imposed no duty on the Defendant; and (2) the dewfall was an open and obvious condition about which the Defendnt had no duty to warn. The motion for summary judgment was not heard before the case came for trial on June 3, 2013, and at that time, the Trial Judge deferred ruling on the motion for summary judgment. [ROA 55; Tr. 24, lines 18-20.]

At the conclusion of the Plaintiff's case, he withdrew his claim for punitive damages[1], [ROA 337; Tr. 306, lines 9-14], and the Defendant moved for a directed verdict. [ROA 335-37; Tr. 304-06.] The Trial Court granted the motion for directed verdict on the basis that: "Naturally occurring dew fall imposed no duty on defendant, and the dew fall and sand were open and obvious conditions that the defendant had no duty to warn about." [ROA 345; Tr. 314, line 9-12.] The Plaintiff filed a new trial motion on June 12, 2013, which was denied by order, filed August 16, 2013. [ROA 19, 1; Motion, Order.]

STATEMENT OF THE FACTS

The Ocean Course, designed by Pete Dye, is ranked as the No. 1 golf course in South Carolina by Golf Digest. It has hosted a number of big events, including the 2012 PGA Championship. [ROA 170, 262; Tr. 139, 231.] The Ocean Course is built on a beach and the cart paths and foot paths are composed of sand and shell (coquina). [ROA 108; Tr. 77.] The bridge at Hole No. 4 is 12 feet wide and 50 feet long[2] and built of unfinished, pressure-treated wood. [ROA 157; Tr. 126.] It is completely flat. [ROA 253; Tr. 222, lines 10-11.] The bridge is used for carts and pedestrian travel. [ROA 109; Tr. 78.]

The Plaintiff is an experienced golfer with a 2-handicap, who had been playing golf 80-100 times a year for 15 years. [ROA 229-30; Tr. 198-99.] At the time of the accident, the Plaintiff was visiting Kiawah Island with his boss and several business customers. [ROA 211, 228; Tr. 180, 197.] They had played two other courses earlier that weekend, and they teed off at the Ocean Course between 7:30 am and 8:00 am that

[1] The Plaintiff also withdrew any claim for lost wages or loss of earning capacity. [ROA 61; Tr. 30, lines 13-16.]

[2] ROA 181; Tr. 150, line 1.

Sunday morning. [ROA 212; Tr. 181, line 2.] The Plaintiff fell on the bridge at Hole No. 4 sometime between 8:00 am and 9:00 am. [ROA 212-13; Tr. 181-182, Tr. 66.]

Based on the testimony at trial, the material facts are virtually undisputed. The entire golf course, including the bridge at Hole No. 4, was wet from morning dew, and there was sand on the bridge – both of which were open and obvious conditions.

The bridge was wet and sandy – open and obvious conditions which required no warning.

There is no dispute that the bridge was wet from morning dew, a naturally occurring condition. As established by the Plaintiff's own testimony, the bridge was wet: "It was the morning dew. It was very foggy that morning. There was a lot of dew on the grass and the bridge." [ROA 213; Tr. 182, lines 15-17.]

Similarly, there is no dispute that the Plaintiff was fully aware of the wet conditions. Again, as proven by the Plaintiff's own testimony, from the time that they teed off on the first hole, he knew the ground was wet and that his shoes were wet and sandy from walking around on the wet ground and sandy paths. [ROA 231, 239; Tr. 200, 208.]

In his brief, the Plaintiff complains that there were no sign at the bridge to warn him that it would be slippery and his caddy did not warn him that the bridge would be slippery. [Appellant's Brief p. 4.] However, the Plaintiff testified that his own common sense told him that something wet would be slippery, and he did not need a warning to tell him that the bridges would be slippery. [ROA 232-33; Tr. 201-202.] In fact, by the time he reached Hole No. 4, the Plaintiff had already walked across several wet, slippery bridges. [ROA 232; Tr. 201.]

The Plaintiff unequivocally testified that he saw that the bridge at Hole No. 4 was wet as he walked up to it:

Q. To be clear, before you stepped foot on the bridge, you knew that it was wet?

A. Yes. [ROA 238; 207, lines 15-17. See also ROA 233; Tr. 202.]

The Plaintiff expressly admitted that the wet condition was obvious:

Q. The wet condition of the bridge was obvious. The whole golf course was wet, right?

A. Yes. [ROA 239; Tr. 208, lines 23-25.]

The Plaintiff also knew that there was sand on the bottom of his shoes from walking on the sandy cart path. [ROA 239; Tr. 208, lines 11-22.]

In addition, beyond the Plaintiff's own admission that the wet condition was obvious to him and his common sense told him that the bridge would be slippery, the Plaintiff's caddie testified that he warned the group that the bridges were slippery when they approached the first bridge on the course that morning. [ROA 250; Tr. 219-, lines 1-9. ROA 252-3, Tr. 221, line 18 -222, line 5.] Another caddie in the group testified that he warned the group as they approached the bridge at Hole No. 4 that it might be wet and slippery. [ROA 329; Tr. 298, lines 7-12.] Knowing full well that the bridge would be slippery, the Plaintiff did not ask for any assistance from his caddie and proceeded to cross the bridge. [ROA 233-34; Tr. 202-203.]

The sand on the bridge at Hole No. 4 was not a dangerous condition.

It is undisputed that there was sand on the bridge. Because the paths at either end of the bridge are sand, so sand is tracked on those bridges on a daily basis by golf carts and pedestrians. [ROA 255; Tr. 224.] According to the Plaintiff's caddie, when he inspected the bridge immediately when the Plaintiff fell, he found that it was "a little wet from dew and some sand on there, which was totally normal." [ROA 255; Tr. 224, lines 10-12. See also ROA 346; Ex. 19 – Incident Report.] In addition to the caddie's

testimony that the dew and sand were normal conditions, the Ocean Course golf pro and the Kiawah Island Golf Resort Director of Safety both testified that sand is part of the natural landscape. [ROA 106, 140; Tr. 75, lines 22-24, Tr. 109, line 4-6.] Most significantly, the Plaintiff himself also acknowledged that the sand as well as the dew both were natural conditions and part of the golfing environment. [ROA 240; Tr. 209, lines 22-24.]

However, there is no evidence that sand on that bridge created a dangerous condition. There was testimony that 23,500 people played on the Ocean Course during 2010 and not a single other person fell on the bridge at Hole No. 4. [ROA 263-64; Tr. 232-33.] The Ocean Course superintendent testified that there had never been an accident caused by dew and sand during the 20 years he had been working there, and they had never had any problem on the bridge at Hole No. 4. [ROA 167, 209; Tr. 136, 178.] Similarly, the Director of Golf testified that he could not recall that any one had ever fallen on that bridge at Hole No. 4 in the past 20 years. [ROA 255, 262-3; Tr. 224, 231-32.] The Ocean Course golf pro also testified that he was not aware of any reports of falls at Hole No. 4 other than the Plaintiff's. [ROA 111; Tr. 80.]

The bridge at Hole No. 4 was properly and safely maintained.

The Plaintiff sought to prove that that the Ocean Course should be held liable for his injuries because it "did not follow the rules." [ROA 76; Tr. 45, lines 1-2.] However, the Plaintiff did not call any expert witnesses to give opinions as to any deviation from any identifiable standard of care in design or maintenance of golf courses. Rather, the Plaintiff attempted to build his negligence case by calling the Defendant's employees to testify about the maintenance procedures and schedule for blowing debris from the

bridges. That testimony establishes that they complied with their routine by blowing the bridge that morning.

The Kiawah Island Golf Resort Golf Operations Policy and Procedure manual provides that: "All interior and exterior should be blown and flown free of debris, trash receptacles should be emptied daily and washed as necessary, bridges and walkways blown and free of debris." [ROA 138; Tr. 107, lines 6-9.] Various Ocean Course staff testified that the daily maintenance on the Ocean Course includes blowing ***debris*** from the bridges before play begins each day and that they had blown the bridges that morning. [ROA 94-95, 161, ; Tr. 63-64, 130.]

Beyond the testimony that they had blown the course that morning, all the witnesses testified that sand on the golf course is not considered debris -- debris would be branches and rock or grass clipping and leaves. [ROA 169-70, 255, 271; Tr. 138-39, 224, 240.] The Plaintiff asserts that the Defendant considered sand to be debris, relying on the deposition testimony of the assistant safety and security manager[3]:

> Q. ... If there is debris on a structure or on a floor or on a walking surface, that debris needs to be removed, correct? And your answer was yes?
>
> A. Yes.
>
> Q. And then continuing on to page 56, line 1, I asked you the question, And that debris comes in many forms, it includes spills, includes liquids, paper, and even sand, correct? And your response was yes. [ROA 273; Tr. 242, lines 3-11.]

However, the witness clarified that while sand could be considered debris if found on the floor in one of the buildings at the Course, [ROA 273; Tr. 242, lines15-19], he was very

[3] Notably, the assistant safety and security manager has no responsibility for the safety and security of the golf courses and he has no training in how to identify hazards for golfers on the course. [ROA 277-78; Tr. 246-47.]

clear in his testimony that he did not consider sand on the course to be debris: "I don't consider sand to be debris." [ROA 271; Tr. 240, lines 22-23.]

The Ocean Course's golf pro testified that walking surfaces should be kept in a proper state of repair and maintained free from hazardous conditions, [ROA 103; Tr. 72, lines 15-21], and that the bridges should be blown free of ***debris*** prior to the start of play each day. [ROA 94-5; Tr. 63-64.] However, the golf pro also testified that there were no problems of disrepair or hazardous conditions on the bridge at Hole No. 4 on the date of the accident, and that he did not consider sand to be debris. [ROA 104-5, 108; Tr. 73-74, 77.] Rather, he testified: "Sand is an integral part of the golf course itself. The golf course is built on a beach, essentially, so sand is everywhere on the golf course. It would be next to impossible to have the bridge completely clear of sand...." [ROA 108; Tr. 77, line 11-15. See also ROA 281; Tr. 250 – cannot remedy sand on a golf course on the ocean.]

The Plaintiff also had the Golf Course Superintendent, who is responsible for maintenance of the Ocean Course, testify about the routine preparations taken to ready the Ocean Course for play each day. [ROA 156; Tr. 125.] The superintendant explained that the procedure of blowing the bridges and walkways serves the purposes of both safety and aesthetics. [ROA 158; Tr. 127, lines 7-14.] Someone is assigned to blow the bridges each day which begins at 6:00 am., [ROA 168; Tr. 137.] The superintendent does not maintain any records of who is assigned to that task or conduct inspections to document the blowing each day. [ROA 163-4; Tr. 132-33.] However, the superintendent or his assistant does follow behind the crew to make sure the assigned jobs are being completed. [ROA 168; Tr. 137, lines 14-17.] The assistant golf pro testified that when

he was called to the scene of the accident that morning, he could tell from the condition of the course, that the daily maintenance had been performed. [ROA 285; Tr. 254.]

The golf course superintendent testified that the couse has seven miles of cart paths made of sand and coquina, and sand is tracked onto the bridge from golfers and golf carts crossing over it throughout the day. [ROA 185, 161-62, 169; Tr. 127, 130-31, 138.] In fact, just as soon as bridges are blown, the staff is out tracking sand on those bridges as they go around filling the water coolers and emptying trash cans on the course before the golfers ever begin play. [ROA 192-93; Tr. 161-62.] The only way to completely prevent sand on the bridges would be to position someone out there fulltime at each bridge with the sole job to clean the bridges. [ROA 201; Tr. 170, line 15-21.]

The bridge at Hole No. 4 did not need a mat.

As noted above, the Plaintiff tried to build his case, in part, on the argument that the bridge at Hole No. 4 should have had a mat because there is a mat on a bridge at Hole No. 2. However, the bridge at Hole No. 2 is different from the one at Hole No. 4. One of the primary differences is that bridge at Hole No. 2 is a footbridge – it is only 2-3 feet wide so it is only used by people walking, it is not wide enough to be used by the carts. [ROA 109-10; Tr. 78-79.] In contrast, the bridge at Hole No. 4 is 15 feet wide and used by the golf carts. Also, the other bridge at Hole No. 2, is a step-down bridge and it is not flat. [ROA 92; Tr. 61.]

There was testimony that putting a mat on the bridge at Hole No. 4 was feasible, [ROA 257-58; Tr. 226-27], but the President of the Kiawah Island Golf Resort, the Director of Golf, and the Ocean Course superintendent, all three testified that it was not necessary based on the safety record that they had had no incidents at the bridge since 1991. [ROA 226, 263, 303; Tr. 195, 232, 272.] The President of the Resort testified that

he was not familiar with any code or regulation that requires placement of mats or any adhesive on bridges like the one at No. 4. [ROA 308-9; Tr. 277, line 2 – 278, line 2.]

In addition to being unecessary, the Director Golf and the Ocean Course golf pro testified that installing such a mat on the bridge at No. 4 might create potential safety hazards. [ROA 110; Tr. 79.] As the golf pro explained, if you put a mat on the bridge at No. 4, it would get worn out from the golf cart traffic and create a potential safety problem, such as the possibility of people snagging/catching their feet. [ROA 110; Tr. 79.]

ARGUMENT

As to the Directed Verdict on Liability

I. The Trial Court properly granted a directed verdict for the Defendant Ocean Course in this slip and fall action where the only reasonable conclusion that could be reached is that the dewfall and sand on the bridge where the Plaintiff golfer slipped and fell were open and obvious conditions about which the Ocean Course had no duty to warn.

Applicable Law -- Directed Verdict Standard

In ruling on a motion for directed verdict, the trial judge must view the evidence and the inferences which can reasonably be drawn from the evidence in the light most favorable to the party opposing the motion. The trial judge only should only be concerned with the existence or non-existence of evidence without weighing the evidence or judging the credibility of witnesses A directed verdict motion is properly granted if the evidence as a whole is susceptible of only one reasonable inference. Smith v. Wal-Mart Stores, Inc., 314 S.C. 248, 250, 442 S.E.2d 606, 607 (1994); Chakrabarti v. City of Orangeburg, 403 S.C. 308, 313, 743 S.E.2d 109, 112 (Ct. App. 2013).

On appeal from a trial court ruling granting a directed verdict, the appellate court applies the same standard as the trial court by viewing the evidence and all reasonable

inferences in the light most favorable to the nonmoving party. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (2004); Richardson v. Piggly Wiggly Cent., Inc., 404 S.C. 231, 233-34, 743 S.E.2d 858, 859 (Ct. App. 2013)

Applicable Law – Duty to Business Invitee

A business owner is not an insurer of the safety of its customers and does not owe a duty to protect its customers from any and all harm. Garvin v. Bi-Lo, Inc., 343 S.C. 625, 629, 541 S.E.2d 831, 833 (2001) ("A merchant is not required to maintain the premises in such condition that no accident could happen to a patron using them.").

Rather, the business owner's duty is to exercise ordinary care to keep its premises in a reasonably safe condition. Shipes v. Piggly Wiggly, 269 S.C. 479, 238 S.E.2d 167 (1977); Young v. Meeting Street Piggly Wiggly, 288 S.C. 508, 343 S.E.2d 636 (Ct.App.1986).

To recover damages for injuries caused by a dangerous or defective condition on a business premises, the plaintiff must show either (1) that the injury was caused by a specific act of the business which created the dangerous condition; or (2) that the business had actual or constructive knowledge of the dangerous condition and failed to remedy it. Garvin v. Bi-Lo, Inc., supra; Cook v. Food Lion, Inc., 328 S.C. 324, 491 S.E.2d 690 (Ct.App.1998).

However, a business owner will not be held liable to its customer for physical harm caused to him by any activity or condition on the land whose danger is known or obvious to the customer, unless the business owner should anticipate the harm despite such knowledge or obviousness. Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 331, 673 S.E.2d 801, 803 (2009) (citing Callander v. Charleston Doughnut Corp., 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991)). In Callander, the Supreme Court expressly

adopted Section 343A of the Restatement (Second) of Torts (1965) as it relates to known or obvious dangers, which provides in pertinent part:

> § 343A. Known or Obvious Dangers
>
> > (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

See also Creech v. S. Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 30-31, 491 S.E.2d 571, 574 (1997).

There do not appear to be any reported South Carolina appellate decisions specifically addressing premises liability for slip and falls on golf courses. However, in Denton v. Winn-Dixie Greenville, Inc., 312 S.C. 119, 122, 439 S.E.2d 292, 294 (Ct. App. 1993), the Court relied upon a decision in Panoz v. Gulf & Bay Corp. of Sarasota, 208 So. 2d 297, 301 (Fla. Dist. Ct. App. 1968), in which the Florida appellate court stated:

> As to golf courses, it has been held that: "[A]n operator of a public golf course ... is not to be considered an insurer of the physical safety of the patrons using the course facilities nor is he required to maintain the course or the facilities in such condition that no accident could possibly happen to a patron, but he does have a legal duty to maintain the course and facilities in a reasonably safe condition commensurate with the attendant facts and circumstances such as an ordinarily prudent person would generally exercise." [Citations omitted.]

While the Plaintiff would have the Ocean Course be an insured of the physical safety of the golfers that use its course, he did not present any evidence that the Ocean Course breached the actual legal duty imposed to maintain the course in a reasonably safe condition. Rather, by his own testimony the Plaintiff proved that the slippery condition on the bridge at Hole No. 4 was open and obvious and he needed no warning to appreciate his need to exercise caution in walking across the bridge.

A. The Trial Court applied the correct standard in granting a directed verdict.

The Plaintiff argues that the Trial Court applied the wrong standard because it cited only testimony of select witnesses that were favorable to Ocean Course, and that the Trial Court committed error by weighing the evidence rather than looking for the existence of evidence in favor of the Plaintiff. First, as to the Plaintiff's complaint that the Trial Court noted certain testimony from 9 of the 11 witnesses called by the Plaintiff, the court is not required to give a comprehensive review of every point of testimony or evidence in ruling on a motion for directed verdict. However, this Trial Court's bench ruling was a laudable effort to note the important key points upon which he based his decision. Of two witnesses not mentioned, Dwight Lane was a security guard who reported to the site after the accident and he offered no substantive testimony about the accident or the condition of the bridge. [ROA 267-68; Tr. 236-37.] The other witness was Brandon Woods, the caddie manager, who provided only duplicative testimony that the black mat placed on the bridge at Hole No. 2 was to provide traction, and that it would have been feasible to place on the bridge at Hole No. 4. [ROA 290; Tr. 259.] The Trial Court's choice not to specifically discuss their testimony does not amount to a failure to follow the applicable directed verdict standard.

The Plaintiff further argues that the Trial Court failed to consider the testimony of certain other witnesss regarding his claims that the wet and sandy surface was an unsafe condition, the sand was not blown off the bridge, and there should have been a black mat on the bridge at Hole No. 4. As discussed below, the Trial Court properly considered all the evidence and directed verdict because the only reasonable conclusion that could be reached is that the dewfall and sand on the bridge where the Plaintiff golfer slipped and

fell were open and obvious conditions about which the Ocean Course had no duty to warn.

B. There is no evidence that would reasonably support a conclusion other than that the dew and sand were open and obvious conditions.

The Trial Court found that the "naturally occurring dewfall imposed no duty on defendant, and the dewfall and sand were open and obvious conditions that the defendant had no duty to warn about." [ROA 345; Tr. 314, line 6-12.] The Plaintiff does not challenge the finding that the dewfall and sand were open and obvious conditions. Rather, he argues that the Trial Court failed to consider the testimony of the Director of Safety and Security (Johnstone) that a wet and sandy surface could contribute to an unsafe condition and that the sand was not naturally occurring because the paths were constructed with sand and coquina and that golf carts tracked sand from the paths to the bridge.

First, as to the argument of whether the sand was naturally occurring, it is irrelevant. In Rogers v. Professional Golfers Ass'n of America, 28 S.W.3d 869 (Ky. App. 2000), a spectator at a golf tournament who slipped and fell on a wet, grassy hillside argued that the open and obvious rule should not apply because the hillside was not a *natural* outdoor hazard because the natural terrain had been altered. The Court stated: "We believe it is irrelevant as to whether the hillside may be considered a natural or unnatural condition. Even if the condition is man-made, the open and obvious rule would apply." *Id.* at 873. Likewise, here, the sand was open and obvious.

Second, as to the Security Director's testimony that a wet and sandy surface "could" contribute to an unsafe condition, there was no dispute that that the bridge was

slippery from the dewfall and sand.[4] But, more importantly, the key evidence justifiying the directed verdict is the Plaintiff's own testimony that he was aware of the slippery condition of the bridge and that he did not need any warning:

> Q. Okay. And you mentioned earlier your testimony I think that you had walked across a few other slippery bridges; is that what you're alluding to?
>
> A. Yes.
>
> Q. And when you walked across those bridges, did you think they were slippery?
>
> A. Yes.
>
> Q. Did common sense tell you if something is wet it's slippery?
>
> A. Right.
>
> Q. There is no doubt that any surface that is wet is going to be a slipperier than a dry surface?
>
> A. Yes.
>
> Q. Common sense tells you that, right?
>
> A. Absolutely.
>
> Q. You don't knee [sic] a warning sign to tell you that?
>
> A. I know they are slippery before I get to that.
>
> Q. So you don't need a warning sign to tell you that, correct?
>
> A. Not necessarily.
>
> Q. So as you approached the bridge at number four, you noticed that it was wet, right?
>
> A. Yes.
>
> Q. And you walked across the bridge, right?
>
> A. Yes.

[4] The Security Director had no training in identifying unsafe situations and conditions in and around the golf course. [ROA 149; Tr. 118.]

[ROA 232-3; Tr. 201, line 10 – 202, line 9.]

In addition to the Plaintiff's admission that he did not need any warning, the Trial Court found that the caddies had testified that they consistently warn golfers that the bridges can become slippery when dew is present. [ROA 5; New trial order, p. 3.] While the Plaintiff testified that he did not think he had been warned of the bridge being slippery, [ROA 213; Tr. 182, lines 22-24], he did not directly contradict the caddies' testimony that they warned him. And irrespective of any arguable conflicting evidence on that point, the controlling point still is that the Plaintiff himself testified that he did not need any warning that the bridge on Hole No. 4 was slippery.

Under the Restatement §343A as adopted by the Supreme Court in Callander v. Charleston Doughnut Corp., the Ocean Course cannot be liable for the slippery condition that was not only open and obvious, but actually known and appreciated by the Plaintiff who had experienced such slipperiness on the six bridges he had already crossed that morning. As the Court of Appeals discussed in Singleton v. Sherer, 377 S.C. 185, 202-03, 659 S.E.2d 196, 205 (Ct. App. 2008), Comment e to Restatement § 343A provides:

> In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

The Court of Appeals simiarly stated in Padgett v. Colleton Cnty., 383 S.C. 431, 436, 679 S.E.2d 533, 536 (Ct. App. 2009), "[r]easonable care on the part of [a] possessor [of

land] ... does not ordinarily require precautions, or even warning, against dangers which are known to [a] visitor, or so obvious to him that he may be expected to discover them." Here, the slippery condition on the bridges was known by the Plaintiff, and thus, the Ocean Course's duty of reasonable care did not require any precaution or warning.

The facts of this case are similar to the case of Dynowski v. Solon, 183 Ohio App.3d 364, 917 N.E.2d 286 (2009), in which a golfer filed a negligence action against a city for injuries he allegedly sustained in a slip and fall on a municipal golf course while walking down a ramp constructed of railroad ties. The Court held that the City was entitled to summary judgment under the open and obvious rule where the slope of the ramp, the lack of a handrail, and the slip-resistant material on only one side of the ramp were conditions readily apparent to anyone. "As such, they cannot amount to a defect or hazard. .... Because of the open and obvious nature of these alleged hazards, appellant owed no duty to warn appellee." *Id.* at 293. Likewise, in this case, the lack of a handrail, the lack of a mat, and the slippery condition of the bridge at Hole No. 4 were readily apparent and they cannot amount to a defect or hazard of which the Ocean Course owed a duty to warn. Accordingly, the Trial Court properly granted a directed verdict which should be affirmed.

II There is no evidence that would reasonably support a conclusion that the Ocean Course created a dangerous condition of sand on the bridge and should have anticipated the Plaintiff's injury.

A. No Dangerous Condition

Unable to avoid his own admission that he knew the bridge was splippery and he did not need any warning, the Plaintiff nevertheless seeks to impose liability on the Ocean Course based on arguments that (1) it created a hazardous condition by constructing the paths with sand and tracking the sand on the bridge, and (2) it should

have anticipated his injury. In support of his argument that Ocean Course could be held liable because it created a dangerous condition, the Plaintiff cites to Cook v. Food Lion, supra, a case in which the plaintiff customer had tripped on a wrinkled mat at the entrance to the store. The trial judge directed a verdict for Food Lion on the ground that there was no evidence that the Food Lion had either actual or constructive notice that the mat was wrinkled at that time. However, the Appellate Court reversed because there was evidence that the floor mat had been placed there by the store, the mats had a tendancy to wrinkle creating a dangerous condition, and the store was aware of the tendency. 491 S.E.2d at 692.

Neither the ruling nor the reasoning in Cook support the Plaintiff's argument here because he presented no testimony that sand on the bridge at Hole No. 4 created a dangerous condition of which the Ocean Course was aware. To the contrary, the only testimony was that while sand was a normal condition, there had never been a fall at that bridge. Ironically, a Ocean Course witness testified that one of the reasons that they did not place a mat on the bridge at Hole No. 4 was because a mat could create a hazard. [ROA 110; Tr. 79. See also ROA 263; Tr. 232.] Cook v. Food Lion as well as several cases from other jurisdictions evidence the potential liability the Course might have faced from placing a mat. No doubt if there had been a mat and the Plaintiff fell, the Ocean Course would be facing accusations of negligence for placing the mat there in the first place.

The inapplicability of the Plaintiff's argument that the Ocean Course created a dangerous condition by constructing the paths with sand, perhaps, might best be appreciated by considering the Court's decision in Henderson v. St. Francis Cmty. Hosp., 303 S.C. 177, 180, 399 S.E.2d 767, 769 (1990). In that case, a hospital visitor tripped

and fell on sweet gum balls that had accumulated in the parking lot. The trial court granted a JNOV for the defendant hospital, but the Court reversed, holding that the jury might reasonably have inferred that the hospital was negligent in failing to provide reasonably safe conditions for its visitors and patients by not removing the trees or employing an adequate maintenance program when it had actual and constructive knowledge of the dangerous condition created by the sweet gum trees. The Court's holding was based on a record that included expert testimony that the gum balls were dangerous to pedestrians; evidence that the hospital had been advised to remove the trees because the gum balls debris created a nuisance, and evidence that the hospital had no regular maintenance program for dealing with the debris from the trees. Here, in striking contrast, there is no expert testimony that the sand presented a danger or that the Ocean Course had been advised to not use sand on the pathways, and there was considerable evidence that the Ocean Course had a regular routine for blowing the pathways and bridges.

In Shain v. Leiserv, Inc., 328 S.C. 574, 576, 493 S.E.2d 111, 112 (Ct. App. 1997), the Court discussed that where the business creates a condition at issue – such as a slippery surface – the key question is whether the plaintiff presents evidence that the condition was hazardous:

> Here, because Leiserv or its agents created the condition at issue, namely the slippery surface of the bowling lane in the area beyond the foul line, the key question is whether Shain presented sufficient evidence to create an issue of fact as to whether this condition was indeed hazardous. Such evidence must show Leiserv was negligent either in using the materials to condition the floor or in the manner of application. *Howard v. K-Mart Discount Stores,* 293 S.C. 134, 359 S.E.2d 81 (Ct.App.1987).

In that case, the slippery surface was a bowling lane, and the Court held that the defendant was entitled to summary judgment because there was no evidence supporting

any concludion that the bowling alley improperly applied the conditoner to the lane. Comparatively, even accepting for the sake of argument that the Ocean Course created the condition by using sand on the paths or tracking sand on the bridge during its morning preparation of the course, the Plaintiff did not present any requisite evidence that the condition was hazardous.

B. No Reason to Anticipate Harm

The Plaintiff also attempts to impose liability on Ocean Course for the open and obvious slippery condition on the bridge based on that component of the Restatement §343A which states "unless the possessor should anticipate the harm despite such knowledge or obviousness," citing to Hancock v. Mid-South, supra, and Creech v. S.C. Wildlife, supra. Neither case supports the Plaintiff's contentions.

In Creech, the plaintiff fell off a public dock built by Charleston County with a railing on only one side. The County argued that it was entitled to a directed verdict because the lack of a railing on one side was open and obvious under Restatement §343A, However, the Court held that the County was not entitled to a directed verdict based on the open and obvious condition because the County should have "anticipate[d] the harm despite such knowledge or obviousness" where there was evidence that it had been warned the lack of safety rails could present a danger to people fishing from the dock and could expose County to potential liability. 491 S.E.2d at 575.

The Plaintiff argues that the Ocean Course should have anticipated harm from the slippery condition on the bridges based on evidence of a single, prior fall on the bridge at Hole No. 2. As discussed below, the Trial Court actually sustained the Defendant's objection to questions about the incident at Hole No. 2. However, for the sake of this

issue, based on the proffer made to the Trial Court, that single incident on another bridge that is critically different from the bridge at Hole No. 4 does not create a jury issue.

The bridge at Hole No. 2 is constructed of the same materials, but it is narrower, with a step down, and it is not flat. [ROA 109-10; Tr. 78-79.] Moreover, the incident upon which the Plaintiff bases his argument did not involve sand – as the Plaintiff proffered, the incident at Hole No. 2 allegedly involved dew. [ROA 315, 317; Tr. 284, 286.] And, most significantly, while an action was filed relating to the incident at Hole No. 2, it was concluded with a directed verdict in favor of the defendant based on the fact that dew was a naturally occurring condition. [ROA 318; Tr. 287.]

****

It is appareant from the Plaintiff's opening statement and the repeated line of questioning posed by the Plaintiff that he is seeking to make the Ocean Course an insurer of the golfers' safety. In his opening statement, Plaintiff's counsel proffered that: "The bottom line with respect to that standard is that it is never permissible at any time to jeopardize the safety and wellbeing of a guest on a golf course, and that's what the employees will tell you." [ROA 75; Tr. 44, lines 14-17] He posed the questions to the golf pro:

> "[A]s the head golf pro at the Ocean Course, you would agree it's never permissible to jeopardize of safety of a guest at the Ocean Course? [ROA 86; Tr. 55, lines 22-24]
>
> So you would agree that the golf professionals at all levels at the Ocean Course, the maintenance personnel and all others who work at the Ocean Course, that they have a duty and responsibility to make sure there is a safe environment for golfers on the golf course,... [ROA 87; Tr. 56, lines 9-13.]

The Plaintiff asked virtually the same question of other witnesses. [ROA 122; Tr. 91, lines 23-25 (director of safety and security). ROA 156-57; Tr. 125, line 24-126, line 1 (golf course superintendent) . ROA 256; Tr. 225, lines 18-23 (director of golf).]

In Larimore v. Carolina Power & Light, 340 S.C. 438, 447, 531 S.E.2d 535, 539 (Ct. App. 2000), the Court stated:

> We do not read section 343A of the Restatement to require landowners to anticipate harm from an open and obvious condition from the moment of the condition's creation. To impose liability under such a theory would make landowners insurers of their invitees' safety; it is well-established in South Carolina that they are not.

Under South Carolina law, Ocean Course is not the insurer of the safety of the golfers who play on its course, and there was no basis for it to anticipate that the Plaintiff would be harmed from the open and obvious condition presented by the dewfall and sand on the bridge at Hole No. 4. Accordingly, the Trial Court properly granted a directed verdict and it should be affirmed.

III. There is no evidence that would reasonably support a conclusion that the Ocean Course breached a duty to blow sand from the bridges.

The Plaintiff argues that the Trial Court failed to take into consideration that the Ocean Course employees testified they were required to blow off the bridges each day as a safety measure before the start of play. First, the Trial Court specifically noted the testimony that the Ocean Course daily routine procedure was to blow debris off the bridges, but the Trial Court also noted the testimony that sand is not debris. The Trial Court also noted the testimony that the the bridge had been blown off that morning. Although the Plaintiff can point to no evidence to contradict that the bridge was blown that morning, he argues that it was reasonable to infer that the bridge was not properly blown off on the day in question because there was sand on the bridge when he fell. Such argument ignores the basic proposition that this state does not recognize res ipsa

loquitur. Hunter v. Dixie Home Stores, 232 S.C. 139, 144, 101 S.E.2d 262, 265 (1957); see also Anderson, S.C. Requests to Charge - Civil, § 31-21 (2009) ("The mere slip and fall on a floor does not constitute evidence of negligence.").

The golf pro testified that: "It would be next to impossible to have the bridge completely clear of sand...." [ROA 108; Tr. 77, line 11-15. See also ROA 281; Tr. 250 – cannot remedy sand on a golf course on the ocean.] And, the golf course superintendent testified that the only way to prevent sand on the bridges would be to position someone out there fulltime at each bridge with the sole job to clean the bridges. [ROA 201; Tr. 170, line 15-21.] The law does not impose such a duty.

"A merchant is not required to maintain the premises in such condition that no accident could happen to a patron using them." Garvin v. Bi-Lo, Inc., 541 S.E.2d at 833. More specifically, "[t]he proprietor or owner of a golf course cannot be reasonably expected to police the entire area of the course at all times .... Panoz v. Gulf & Bay Corp. of Sarasota, 208 So. 2d at 300, cited in Denton v. Winn-Dixie Greenville, Inc., 439 S.E.2d at 294.

IV. There is no evidence that would reasonably support a conclusion that the Ocean Course had a duty to place a mat on the bridge.

The Plaintiff argues that the Trial Court failed to take into consideration testimony that a black mat was placed on another bridge at Hole No. 2 to provide traction and that it would have been feasible to place a mat on the bridge at Hole No. 4. In fact, the Trial Court did note testimony that the Ocean Course had placed rubber matting to increase traction at another location, but further noted the accompanying testimony that such a black mat would not be appropriate on the bridge at Hole No. 4. [ROA 342-3; Tr. 311, line 24 – 312, line 4.] The Trial Court also noted that the Plaintiff presented no evidence

that the Ocean Course was required to construct the bridge with a non-slip surface or use a rubber mat. [ROA 5; New trial order, p. 3.]

Testimony about the mat is set forth above in the Statement of the Facts and discussed in more detail below, but the undisputed testimony is that a black mat had been installed on one of the two bridges at Hole No. 2 to provide traction, and that it would be feasible to place such a mat on the bridge at Hole No. 4. However, the testimony is also undisputed that such a black mat was deemed not necessary at bridge at Hole No. 4 due to different configuration of the bridge and lack of any history of falls on the bridge at Hole No. 4. Accordingly, the placement of a mat on the bridge at Hole No. 2 would not support any reasonable infrerence that a mat was required at No. 4.

There was also testimony that the decision not be place a mat on the bridge at Hole No. 4 included consideration that such matting might create a hazard. [ROA 110; Tr. 79.] As noted above in the discussion of Cook v. Food Lion, premise owners have faced liability for using mats. A discussion about the risk of using mats at golf course where spiked shoes are worn can be found in Beauchamp v. Los Gatos Golf Course, 273 Cal. App. 2d 20, 29-30, 77 Cal. Rptr. 914, 921 (Cal. Ct. App. 1969):

> A floor mat catching a spike could itself be held dangerous. Rubber matting is not necessarily the answer. When spiked shoes are used, the chances of tripping are present. A carpet penetrated by spikes is apt to throw the wearer, or slip with him, with resulting liability. (Citations omitted).

Ultimately, while a mat may have been feasible there is no evidentiary or legal basis to impose liablility on the Ocean Course for not placing a mat on the bridge at Hole No. 4.

ARGUMENT

As to the Evidentiary Issues:

Standard of Review – Evidentiary Issues Generally

The trial court has broad discretion in the admission or rejection of evidence and will not be overturned unless it abuses that discretion. Gibson v. Wright, 403 S.C. 32, 37-38, 742 S.E.2d 49, 52 (Ct. App. 2013); Davis v. Traylor, 340 S.C. 150, 530 S.E.2d 385, 388 (Ct. App. 2000). To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005); Conway v. Charleston Lincoln Mercury Inc., 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct.App.2005).

Here, the case did not go to the jury and there is no jury verdict, so the question is whether the trial judge affirmatively relied on incompetent evidence, or whether the trial judge could not have reached the same result without relying on incompetent evidence. *See* Brown v. Allstate Ins. Co., 344 S.C. 21, 25, 542 S.E.2d 723, 725 (2001) ("We find there was not a sufficient showing the trial judge either affirmatively relied on the incompetent evidence, or could not have reached the same result without relying on the incompetent evidence.")

The Ocean Course submits that the Trial Court did not abuse its discretion in allowing the use of Google Earth photographs for demonstrative purposes to visually orient the listener to the verbal testimony of the witnesses. The Ocean Course further submits that the Trial Court did not abuse its discretion in limiting the Plaintiff's redirect examination of the President of Kiawah Island Golf Resort about the slip and fall incident

on the bridge at Hole No. 2 because that bridge and the incidents were not sufficiently similar to be probative on the issues presented in this case. Ultimately, the verdict directed by the Trial Court can be sustained based on the proffer of the circumstances of the prior incident on the bridge at Hole No. 2 and without any consideration of those Google Earth photographs as discussed above on the liability issues.

V. The Trial Court properly exercised its discretion in allowing the Ocean Course to present photographs of the golf course as demonstrative evidence to orient the jury to the location of the relevant holes and bridges even though they were not produced prior to trial.

"Demonstrative evidence includes items such as a photograph, chart, diagram, or video animation that explains or summarizes other evidence and testimony. Such evidence has secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance. Demonstrative evidence is distinguishable from exhibits that comprise "real" or substantive evidence, such as the actual murder weapon or a written document containing allegedly defamatory statements." Gibson v. Wright, 742 S.E.2d at 51-52 (citing *Clark v. Cantrell,* 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000). Our Appellate Courts have upheld the use of such demonstrative evidence as diagrams used by medical witness to point out injuries, State v. Williams, 405 S.C. 263, 282, 747 S.E.2d 194, 204 (Ct. App. 2013) (no error in admitting diagrams used by nurse to point out injuries); and other courts have upheld the use of Google Earth photographs "to illuminate" testimony about locations. State ex rel. J.B., A-2228-08T4, 2010 WL 3836755 (N.J. Super. Ct. App. Div. Sept. 27, 2010).

In this case, the Defendant presented several photographs for demonstrative purposes the Friday before trial and the morning of trial. The photographs were Google Earth images to give the jury an orientation as to the location of Hole No. 4. The Plaintiff noted his objection at the beginning of the trial. He did not challenge the authenticity or

accuracy of the photographs; rather, he objected on the ground that they had not been produced earlier in response to discovery requests. The Trial Court advised the Plaintiff to raise the issue if/when the photos were presented. [ROA 57-58; Tr. 26-27.]

The Defendant proffered several of those photographs – Ex. 5 was an aerial photograph of the eastern end of Kiawah Island where the Ocean Course is located, and Ex. 3 was an aerial view of the Hole No. 4 on the Ocean Course used during the cross examination of the Resort Director of Safety. [ROA 140-41; Tr. 109-110.] At that time, the Plaintiff again objected to use of the photographs because they had not been produced in discovery. [ROA 141; Tr. 110.] Defendant Counsel explained that he only decided, during his trial preparation the weekend immediately before trial, that he wanted photographs to orient the jury as to the bridge and the golf course more generally. [ROA 187; Tr. 156.] Notably, the parties were still conducting discovery up until the Friday before trial – including taking the deposition of Roger Warren. [See ROA 314; Tr. 283.]

The Court overruled the objection and allowed the photographs [marked as 3-8 for identification] to be used for demonstrative purposes. [ROA 189; Tr. 158, lines 4-10.] The Defendant also requested permission to use a photograph of the bridge at Hole No. 2 – Ex. 15 – for demonstrative purposes in addressing the issue raised by the Plaintiff as to the use of a mat at that bridge. [ROA 190-91; Tr. 159-60.] The Plaintiff again objected that the photograph had not been presented in discovery prior to trial, but the Trial Court also overruled the objection and allowed the use of the photograph, Ex. 15, to be used as demonstrative evidence to aid the jury in understanding. [ROA 191; Tr. 160, line 6-10. ROA 200; Tr. 169.]

Pursuant to Rule 37(b)(2)(C), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may "make such orders in regard to the failure as

are just," including an order dismissing the action or proceeding, or any part thereof. Temple v. Tec-Fab, Inc., 370 S.C. 383, 390, 635 S.E.2d 541, 544-45 (Ct. App. 2006) aff'd in part, rev'd in part, 381 S.C. 597, 675 S.E.2d 414 (2009). "In deciding what sanction to impose for failure to disclose evidence during the discovery process under Rule 37, SCRCP, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009).

"The imposition of sanctions for discovery violations is generally entrusted to the sound discretion of the Circuit Court." Downey v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct.App.1987). A trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the Appellate Court only if an abuse of discretion has occurred. Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (Ct.App.1985). Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 542, 489 S.E.2d 679, 681-82 (Ct. App. 1997). There was no abuse of discretion to justify a new trial in this case.

First, it is significant to note that (1) there was no order compelling production of specific discovery materials and (2) the photographs were only demonstrative. In addition, there was no wilful delay or withholding of direct evidence; rather, the photographs were pulled from a public internet site during final weekend trial preparation for the limited purpose of aiding the witnesses' testimony in explaining the location of the bridge and providing the fact-finders with pictures to elucidate the verbal testimony. Most compelling is the absence of any showing of prejudice.

The Plaintiff contends that he was unfairly prejudiced because he was only able to use five small photographs to question the witnesses during their depositions. However,

the photographs were not in the exclusive possession or control of the Ocean Course. The Plaintiff's own counsel could have pulled the same Google Earth photographs from the internet. Further, the Plaintiff does not point to any testimony that he was not able to elicit because he did not have the photographs earlier. And, the Record will show that the Plaintiff himself used several of these photographs during questioning at trial. [See ROA 205; Tr. 174 - #6. ROA 204; Tr. 173, lines 18-23 - # 15.]

In Holmes v. Black River Elec. Co-op., Inc., 274 S.C. 252, 258, 262 S.E.2d 875, 878 (1980), the defendant objected to use of photographs of the plaintiff's injuries, but made no contention that the pictures were not accurate. The Court stated:

> There can be no doubt but that they prejudiced the defendant's case in the sense that they were detrimental, but they showed a condition which Holmes was entitled to either describe to the jury in words or by pictures, or a combination of the two. This demonstrative evidence aided the jury in its evaluation of the injuries and pain suffered. It cannot be said that they were introduced in evidence for the sole purpose of inflaming the minds of the jury; they served the proper purpose of bringing vividly to the jurors the details of tremendous injuries. The pictures were certainly admissible as a matter of discretion by the trial judge, if not as a matter of right.

Id. at 878. Here, there is no showing that the photographs were detrimental such as to even prejudice the Plaintiff's case, and the timing of the production of the photographs alone does not merit revering the directed verdict to grant the Plaintiff a new trial.

VI. The Trial Court properly exercised its discretion in limiting the Plaintiff's redirect of his witness regarding a slip and fall at another bridge on the golf course that was not substantially similar.

Prior to trial, the Defendant had filed a motion in limine to preclude the Plaintiff from presenting evidence regarding bridges at other golf courses. [ROA 46; Motion in Limine.] During the deposition of Roger Warren, the President of Kiawah Island Golf Resort, just the Friday before trial, Plaintiff elicited testimony about a slip and fall on the footbridge at Hole No. 2. Mr. Warren testified that the fall involved dew on that bridge

and led to a lawsuit. That case had been resolved by a directed verdict in favor of the Defendant on the ground that the dew was a naturally occurring condition for which the Defendant was not legally responsible. [See ROA 318; Tr. 287.]

On the first day of trial, during a colloquy on preliminary matters, the Plaintiff consented to the motion in limine as to bridges at other courses. [ROA 56; Tr. 25.] However, the Plaintiff argued, in opposition to the motion for summary judgment, that the incident on the bridge at Hole No. 2 put the Defendant on notice of a dangerous condition. [See ROA 56-57; Tr. 25-26.] The Plaintiff's Counsel stated that he did not plan to mention the prior incident at Hole No. 2 during his opening statement and agreed to bring the matter up with the Court if he wanted to ask questions of the witnesses. [ROA 57; Tr. 26.]

The Plaintiff called Mr. Warren as one of his last witnesses and he did not pose any question during his direct examination about that incident at Hole No. 2. However, after the Defendant had completed cross examination, the Plaintiff attempted to question Mr. Warren on redirect about whether the incident that had occurred at the bridge on No. 2 spurred the Ocean Course to place a mat on that bridge – without raising the issue with the Trial Court as he had agreed at the beginning of trial. [ROA 312; Tr. 281, lines 7-12.] The Defendant immediately objected and the Trial Court sustained the objection. When the Plaintiff again asked about the incident at Hole No. 2, the Defendant objected and requested a sidebar. [ROA 313; Tr. 282.] Plaintiff argued that the Defendant had opened the door through Mr. Warren's testimony on cross examination that the mat was not necessary because there had been "no incidents on those bridges." [ROA 314-15; Tr. 283-84.] Upon review of the transcript provided by the court reporter over the lunch break, the Trial Court sustained the objection, ruling the question put to the witness on

cross examination was addressed to the tee box and cart bridge on No. 4 which did not open the door to the incident on No. 2. [ROA 321; Tr. 290, lines 6-11.]

The arguments posed by the Plaintiff jumbles the concepts of opening the door and impeachment with prior inconsistent statements. On those subjects, the Court has held that:

- "Where the defendant's counsel opens the door to a certain line of inquiry, he cannot object to the inquiry when pursued by the plaintiff's counsel." Cent. of Georgia Ry. v. Walker Truck Contractors, 270 S.C. 533, 243 S.E.2d 923, 925 (1978).[5]
- Considerable latitude is allowed in the cross-examination of a witness, but the scope of cross-examination is largely within the discretion of the trial judge will not be reversed except upon a showing of prejudice. McMillan v. Ridges, 229 S.C. 76, 80, 91 S.E.2d 883, 885 (1956)

Also of importance on this issue are the propositions that:

- "The scope of redirect rests in the discretion of the trial court. State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984).
- Courts require a plaintiff to establish a factual foundation to show substantial similarity because evidence of similar incidents may be extremely prejudicial. Watson v. Ford Motor Co., 389 S.C. 434, 454, 699 S.E.2d 169, 179-80 (2010)

Considering these legal principles and this Record, the Trial Court did not abuse its discretion in limiting the Plaintiff from questioning Mr. Warren on redirect about the incident at Hole No. 2.

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[5] See State v. Young, 364 S.C. 476, 613 S.E.2d 386 (Ct.App.2005), aff'd as modified, 378 S.C. 101, 661 S.E.2d 387 (2008) (for a comprehensive review of door-opening doctrine).

Most fundamentally, there was no factual foundation to show substantial similarity between the incident on Hole No. 2 and the Plaintiff's fall on the bridge at Hole No. 4. The Plaintiff claims that his fall was caused by the dew and sand, while the incident at Hole No. 2 only involved dew. The difference is decisive because given that dew is a naturally occurring condition, the Plaintiff's effort to hold the Ocean Course liable hinged on his contention that the Ocean Course was responsible for the sand on the bridge and thereby created a dangerous condition.

In addition, as the Trial Court wisely saw upon review of the transcript, the Defendant Ocean Course did not "open the door" to questions on the incident at Hole No. 2 with Mr. Warren's testimony about the fact that there had never been any problems/falls at Hole No. 4. Under the circumstances shown in this Record, the Trial Court did not abuse its discretion in limiting the Plaintiff's cross examination Mr. Warren on redirect.

Ultimately, there simply is no showing of prejudice in view of the fact that the Trial Court, that heard all the evidence, directed a verdict because the slippery condition of the bridge at Hole No. 4 was, by the Plaintiff's own testimony, so open and obvious to the Plaintiff that he needed no warning. Accordingly, there is no basis to grant a new trial on this issue.

Conclusion

"'Not every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from someone. Thousands of accidents occur every day for which no one is liable in damages ....'" Young v. Meeting Street Piggly Wiggly, 343 S.E.2d at 638 (quotation omitted). This was one of those accidents.

The condition on the bridge from the naturally occurring dew fall and from the sand was, by the Plaintiff's own testimony, open and obvious, and he did not need a warning because his common sense told him the bridge would be slippery. In addition, there was no evidence of any negligent design in the use of sand on the paths or the design or construction of the bridge at Hole No. 4. Accordingly, the Trial Court properly granted a directed verdict which should be affirmed.

Respectfully submitted,

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January 9, 2014

Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 9, 2014

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas
Kristi L. Harrington, Circuit Court Judge

Civil Action No. 2011-CP-10-09543
Appellate Case No. 2013-001837

Joseph Barilotti,

Appellant,

v.

Ocean Course Golf Club, LLC,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that the Final Brief on behalf of Respondent Ocean Course Golf Club, LLC was served on the following counsel at the address listed:

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This the 9th day of January, 2014.

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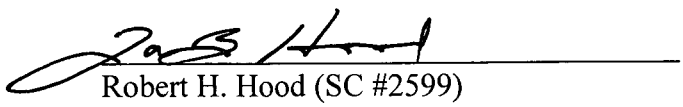

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