THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2016-CP-26-00135
Appellate Case No. 2014-002491

City of Myrtle Beach,...Appellant,

v.

Callie Barras.................................,.......................................Respondent,

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INITIAL BRIEF OF APPELLANT

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January 5, 2018
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STATEMENT OF ISSUES ON APPEAL

1. **Did the trial judge err by failing to direct a verdict in favor of Appellant as a matter of law on the ground that Respondent's legal status was governed by the Recreational Use Statute and there was no evidence of gross negligence on the part of the City?**

2. **Was the special verdict form flawed such that Appellant was prejudiced?**

STATEMENT OF THE CASE

Respondent Callie Barras (Barras) was a member of a group of bingo players known as Sarge's Group who sought and were permitted without charge to use Appellant City of Myrtle Beach's (City) property for recreational purposes. During one such use, Barras tripped on a mat in the kitchen area of the property, sprained her ankle and suffered bruises to her body and face.

Barras brought suit against the City on the theory that she was an invitee of the City and the mat constituted a dangerous condition. The City answered and alleged among other defenses that Barras was a recreational user under the Recreational Use Statute. If Barras was a recreational user the City could only be held liable if its maintenance of the Recreation Center was grossly negligent. *S.C. Code Ann. §27-3-60.*

Barras lawsuit was tried before the Hon. Larry B. Hyman and a jury. The City made motions for a nonsuit and a directed verdict as to the City's liability under the Recreational Use Statute and the South Carolina Tort Claims Act. Those motions were denied. At the end of the evidentiary phase, the trial judge gave a general negligence charge and charged the jury on the City's affirmative defenses of comparative negligence, assumption of

risk, South Carolina Tort Claims Act, *S. C. Code Ann. §15-78-60(16)* and the Recreational Use Statute. *SC Code Ann. §27-3-40.*

Over the City's objection, Judge Hyman gave the jury a special verdict form which contained only questions about the comparative simple negligence of the parties and Barras' actual damages. The special verdict form did not contain any questions about the about the application of the Recreational Use Statute or the gross negligence of the City. The special verdict form did not contain any place for the jury to enter a general verdict. The jury answered the questions by finding only that the City was negligent, Barras was not negligent and that Barras had sustained actual damages of $500,000 plus medicals: $47,128.93. The jury did not enter a general verdict against the City. [See Verdict Form]

The City made post-trial motions for J.N.O.V., New Trial Absolute, and New Trial Remittitur. On request of Judge Hyman both parties submitted proposed orders. After considering the motions and proposed orders, Judge Hyman denied the City's motions in a written order filed and served on July 5, 2017. The City duly served and filed its notice of Appeal on July 17, 2017.

STANDARD OF REVIEW

The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. The question of whether to grant a directed verdict is a question of law. *I'On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000)*; *Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000)*

If the trial judge uses a special verdict form, it may be so defective in its formulation that its submission results in a prejudicial effect which constitutes reversible error. *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 415–21, 734 S.E.2d 641, 643–46 (2012) Although the prejudicial effect of a defective special verdict form may be cured where the trial court provides clear and cogent jury instructions, if the form's overall structure is both confusing and prejudicial to Appellant, the jury's finding will be reversed. *Id.*

STATEMENT OF FACTS

The City owns the Base Recreation Center (Center) located on the former Myrtle Beach Air Force Base. [Tr. p. 213] The Center is used for a variety of recreational purposes as well as rental purposes. [Tr. p. 213] The

Center's uses include oil painting, quilting, senior's movies, guitar lessons and bingo. [Tr. p. 214]

Barras was a member a group of seniors who obtained permission and used the Center for recreation purposes without charge. [Tr.p. 71] The primary purpose of Barras' group was to play recreational bingo at the Center. [Tr. p. 72] Barras played recreational bingo at the Center after she assisted other bingo players with the preparation and serving of food. [Tr. p. 72] The bingo group, known as Sarge's Group, furnished its own prizes, food, utensils, paper plates and bingo accessories. [Tr. p.74] Sarge's Group operated its bingo games and served its own food through its volunteers who were recruited by Sarge's Group. [Tr. p. 72 & p. 216] Although volunteers are approved by the City, they are not considered employees. [Tr. p. 220]

On April 8, 2015, Barras was walking in the kitchen area helping other volunteers from Sarge's Group to prepare their food for that day's bingo game. [Tr. p 55] As she was walking through the kitchen she tripped and fell on a commercial kitchen mat. [Tr. p 55] Barras sprained her ankle and suffered bruises to her face and head. [Tr. p 81] She was taken by ambulance to the Grand Strand General Hospital where she was admitted for observation and received a series of head trauma tests. [Tr. p 63] The

following day she was released. [Tr. p 61] Thereafter she followed up with physical therapy and visits to her family doctor. [Tr. p 81]

Barras and other members of Sarge's Group testified that approximately three weeks before Barras fell, they had complained to Pam Stone, the Director of the Center, about the commercial mats used throughout the Center. [Tr. p 147] They claimed that on occasion some of the mats being used would bunch up or wrinkle. They claimed that some people had tripped on some of the mats in the past. [Tr. p.148]

The mats used by the Center were commercial grade mats that were provided by a private company known as Alsco pursuant to a purchasing bid that covered the entire City. [Tr. p. 191-192] The mats were replaced in the Center by Alsco every two weeks. [Tr. p. 121] The mat on which Barras fell had been replaced five days before the incident. [Tr. p. 128]

After Barras fell, the mat on which she fell was inspected. [Tr. p. 197] No one found any specific problems with the mat in question. [Tr. p. 197] There were no holes, worn places or tears. [Tr. p. 197] Some witnesses testified the mat was bunched up under Barras when she was lying on the floor. [Tr. p. 55] No one saw Barras fall or noticed any wrinkles in the mat before she fell. [Tr.p. 155]

ARGUMENTS

1. The trial judge erred by failing to direct a verdict in favor of Appellant as a matter of law on the ground that Respondent's legal status was governed by the Recreational Use Statute and there was no evidence of gross negligence on the part of the City.

At present, virtually all jurisdictions in the United States have enacted recreational use legislation in one form or another. *See Robin Cheryl Miller, Annotation, Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User, 47 A.L.R.4th 262 (1986) (cases discussed therein).* Essentially, a recreational use statute simplifies and limits the duty of the landowner or occupier towards visitors who do not pay a "fee," or "charge" for entering the premises for a variety of recreational purposes. Under traditional common law principles, the liability of an owner or occupier of land for injuries to an entrant caused by a condition or activity conducted on the land was determined by a somewhat rigid and mechanical system of classification, based solely upon the entrant's status as an invitee, licensee, or trespasser. See *Singleton v. Sherer, 377 S.C. 185, 198, 659 S.E.2d 196, 203 (Ct. App. 2008)*

The Recreational Use Statute drastically altered these principles. It created a new classification. Except where there is consideration or gross negligence on the part of the property owner, the Act fundamentally changed

the law by shifting the burden of liability for injuries from the land occupier to the entrant, regardless of his classification at common law. See *F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts (3rd Ed. 2004) p. 116; Brooks v. Northwood Little League, Inc., 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).* This fundamental change is consistent with the underlying objective of the legislation to encourage free use of land. *Id.* The Act reflects the judgment of the legislature that the public benefit of attracting private landowners to allow their land to be used outweighs the risk of potential injuries. *SC Code Ann. §27-3-10.*

In 1962, our legislature passed the Limitation on Liability of Landowners Act, commonly known as the Recreational Use Statute, to encourage landowners to make land and water areas available to the public. *S.C. Code Ann. § 27–3–10.* Its provisions shield landowners from liability to "persons who have sought and obtained [their] permission to use [their land] for recreational purposes." *S.C. Code Ann. § 27–3–30.* Landowners owe "no duty of care to keep the premises safe" for recreational users and need not "give any warning of a dangerous condition, use, structure or activity" on the property. *Brooks v. Northwood Little League, Inc., 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).*

The Recreational use statute expressly provides:

> Except as specifically recognized by or provided in § 27–3–60*(gross negligence)*, an owner of land who permits without charge any person having sought such permission to use such property for recreational purposes does not thereby:
>
> (a) Extend any assurance that the premises are safe for any purpose.
>
> (b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.
>
> (c) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons.
>
> (Italicized parenthetical added) *See S.C. Code Ann. §27-3-40; Harris v. Univ. of S.C., 391 S.C. 518, 706 S.E.2d 45, (Ct. App. 2011)*

The City contends that Barras legal status on the City's property is in recreational user class under the Recreational Use Statute. The undisputed evidence shows she was and is part of a group that obtained permission to enter and use the City's property for recreational purposes and she was allowed to use the property free of charge.

Barras claimed that the Recreational Use Statute did not apply to her because she was one of the City approved volunteers from Sarge's Group who helped put on bingo games. That recreational use should have been considered a service to the City connected with the recreational use of its property. Barras claims she was not using the property for recreational

purposes when the fall occurred. Barras claims at the time she fell she was a working as a volunteer for the City and that made her a business invitee.

The City contends that the Recreational Use Statute's status does not recognize volunteers as a special exception to the immunity given by the application to the statute. The statute applies to all persons who use property for recreational purposes and such permission is granted without charge. *S.C. Code Ann. § 27-3-30.* Barras is asking the court to add a volunteer work exception to the statute. Neither the word "volunteer" nor the concept of additional benefit to the property owner in lieu of an entry fee is mentioned in the Recreational Use Statute. *S.C. Code Ann. § 27-3-10, et. seq.* Only the exceptions contained in the Recreational Use Statute should be considered when deciding whether to apply the statute. See *Corbett v. City of Myrtle Beach, S.C., 336 S.C. 601, 606, 521 S.E.2d 276, 279 (Ct.App.1999)* (holding the primary rule of statutory construction is to give statutes their plain and ordinary meaning where the statute's language is unambiguous); also see *Harris v. Univ. of S.C., 391 S.C. 518, 526, 706 S.E.2d 45, 49 (Ct. App. 2011).*

The trial judge decided to leave to the jury the determination of whether the Recreational Use Statute applied. In making his ruling, the trial judge stated: "Well I think the issue of whether or not she was a volunteer or

whether she was there for recreational purposes is something that the jury can decide." [Tr. p 243]

The trial judge's decision to send the issue to the jury of whether or not the Recreational Use Statute should be applied to Barras was reversible error because it was contrary to the plain language of the Recreational Use Statute and the purpose of the statute. The City was prejudiced by the trial judge's decision because the jury was allowed to apply the wrong standard of care to the City. Under the Recreational Use Statute the City is only liable for gross negligence. *SC Code Ann §27-3-40 & §27-3-60.* In the present case the special verdict form showed that the jury only found the City negligent. [See verdict form].

The Recreational Use Statute does not distinguish between the kinds of activities occurring after a recreational user enters property. The only exception to the immunity of the Recreational Use Statute is the exception for gross negligence. *S.C. Code Ann §27-3-60.* The jury should not have been permitted to add a simple negligence exception to the Recreational Use Statute by parsing the activities performed after Barras entered the property. *S.C. Code Ann §27-3-10.*

The trial judge cited *Harris v. Univ. of S.C., 391 S.C. 518, 706 S.E.2d 45 (Ct. App. 2011)* in support of his decision to send the question of the Recreational Use Statute to the jury. *Harris, supra.* can be distinguished on the facts. In *Harris,* the jury was asked to decide a contested issue of fact on whether the plaintiff's initial purpose for entering the island was a recreational purpose or some other purpose not covered by the Recreational Use Statute. The Recreational Use Statute states: "The purpose of this chapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." *S.C. Code Ann. § 27-3-10* . The court in *Harris*, *supra,* did not attempt differentiate Harris's various activities at the particular time she was injured. *Id.*

No question of fact existed on Barra's primary purpose for entering the City's recreational center. Her primary purpose was to play bingo with Sarge's Group. Barras testified that she saw an ad in the newspaper for senior bingo at the Center thirteen years ago. She and a couple of friends went and liked it. So, they kept going. [Tr. p. 43] Barras was not invited to come to the center by the City to do volunteer work. She was not under the direction or control of the City. Barras was recruited by Sarge's Group. At the time of her fall, Barras was helping other members of Sarge's Group

prepare their food to serve during the bingo games. Barras was never charged to enter the property. The City did not derive a substantial direct benefit from her activities beyond the intangible value of improvement of good will and morale that is common to all kinds of recreation and social life. See *Leopard v. Blackman-Uhler, 318 S.C. 369, 458 S.E.2d 41 (1995).*

Barras's volunteer activity of preparing and serving Sarge's Group's food is consistent with the acts performed by persons engaged in picnicking activities. Barras prepared and served either her own food or Sarge's Groups food in a building that was offered free of charge by the City. Picnicking is expressly recognized as a recreational purpose by the Recreational Use Statute. *S.C. Code Ann. §27-3-20(d)*

The trial judge should have found that Barras was a recreational user under the Recreational Use Statute. *S.C. Code Ann. §27-3-10, et. seq.* Because Barras was a recreational user, the City could not be held liable if it was not acting in a grossly negligent manner. *S.C. Code Ann. §27-3-60, et. seq.* The City contends that there is no evidence that it was grossly negligent in its maintenance of the Recreational Center. There exists ample evidence in the record that the City exercised at least slight care in maintaining and operating the Recreational Center. [Tr. p. 224-225]

Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. *Clyburn v. Sumter County District Seventeen, 317 S.C. 50, 451 S.E.2d 885 (1994)*; *Richardson v. Hambright, 296 S.C. 504, 374 S.E.2d 296 (1988).* It is the failure to exercise slight care. *Clyburn, supra.* Additionally, while gross negligence ordinarily is a mixed question of law and fact, when the evidence supports but one reasonable inference, the question becomes a matter of law for the court. *Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000).*

The mat in question was a City approved commercial grade mat that was changed every two weeks by Alsco, a private company. [TR p. 46 & p. 226] The delivery man who supplied the mats for Alsco on a bi-weekly basis testified that the mats were good mats, free of defects or flaws. [Tr. p. 129] The mat was one of many mats that were supplied to the entire City through an agreement with Alsco under the City's procurement code. The Center administrator testified that staff always comes to the Center 30 minutes before the building opens. There is a whole list of things the staff checks when they come through the building. The check is part of a standard operating procedure. Staff walks through the building, turns on the lights,

looks for water on the floor and checks to see that the mats are flat. The staff checks for trip hazards. [Tr. p. 224-225]

In the present case, the undisputed evidence showed that there was no defect in the mat on which Barras fell. Barras testified that the mat was not ripped or torn. [Tr. p 79] Barras's friend Irene Demczuk testified that people didn't trip on the mats but you could see someone stumble from time to time. [Tr. p. 148] Demczuk further testified that when the Center administrator was asked if Sarge's Group could remove the mats in the kitchen area during the bingo games, the Center administrator stated she preferred to have the mats left in place because the Center was rented from time to time and the mats were in the kitchen area to prevent slippage, water, whatever. [Tr. p. 148] Barras testified that before she fell she knew the mats wrinkled on occasion although she continued to walk through the kitchen without looking for the mats. [Tr. p. 81] The mat on which she fell was a three foot by ten foot graphite colored mat placed on an orange tile floor near the water sink in the kitchen area of the Center. It is worth noting that the jury expressly found that Barras's conduct of walking over the mats without looking was not negligent conduct. [See Jury Verdict Form]

The City contends all of the evidence shows that it exercised at the very least "slight care." See *Etheredge v. Richland Sch. Dist. One, 341 S.C.*

307, 311, 534 S.E.2d 275, 277 (2000). Because Barras was a recreational user under the Recreational Use Statute, the City's exercise of "slight care" was sufficient for a directed verdict. *S.C. Code §27-3-10, et. seq.* The City contends the trial judge committed reversible error when he did not grant the City's motion for a directed verdict. [Tr. p. 237]

2. The trial judge's special verdict form was flawed such that the City was prejudiced.

As an alternative position, the City contends that if this court were to decide that the trial record contained some evidence of gross negligence, the appeal should be remanded to the trial court for a new trial because the trial judge submitted to the jury a flawed special verdict form which prejudiced the City. [Tr. p. 289] See *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 415–21, 734 S.E.2d 641, 643–46 (2012). The form was flawed because the special verdict form was framed in such a way that it only allowed the jury to frame their answers in terms of whether the City was negligent and whether the negligence proximately cause injuries to Barras. There was no place on the special verdict form that permitted the jury to apply the Recreational Use Statute or even permitted the jury to enter a general verdict. [Tr. p. 243]

The form contained only the following questions and suggested choices for answers:

1. Was the defendant negligent?
_____ YES - Go to Question 2
_____ NO - Stop deliberations

2. Was the defendant's negligence a proximate cause of the plaintiff's injuries?
______ YES - Go to Question 3
______ NO - Stop deliberations

3. Was the plaintiff negligent?
______ YES - Go to Question 4
______ NO - Go to Question 7

4. Was the plaintiff's negligence a proximate cause of the plaintiff's injuries?
______ YES - Go to Question 5
______ NO - Go to Question 7

5. Using the combined negligence that proximately caused the plaintiff's injuries as one hundred percent (100%), what percentage of that negligence is attributable to the plaintiff and what percentage is attributable to the defendant? [The percentage must add up to 100%. It is not necessary for each party to be assigned a percentage of negligence. It is perfectly acceptable for a party to be assigned a zero percentage (0%).]

Plaintiff ________%

Defendant ________%

Total ________%

6. Was the plaintiff's negligence greater than fifty percent?
______ YES - Stop deliberations
______ NO - Go to Question 7

7. Please state the amount of damages, if any, sustained by the plaintiff. [Do not reduce the plaintiff's total damages based on the percentage of negligence by any party. After you have answered these questions, the judge will compute the amount of damages for which the defendant is responsible based on the percentage of the defendant's negligence which you have decided proximately caused the plaintiff's injuries. You are to determine only the total amount of the plaintiff's damages and enter that amount below.]

$______________________________ Actual Damages

[See Verdict Form]

Each question and available answer on the special verdict form required the jury to frame their answers only in terms of the City's negligence and Barras's actual damages. How an issue is framed is important in influencing how an issue is resolved. Studies reveal that framing will lead to opposite results on the same facts. See *§ 72:10.Framing the key issues and the story, Am. L. Prod. Liab. 3d § 72:10; Kahneman, Daniel and Tversky, Amos, Choices, Values, and Frames, 39 Am. Psychol. 341 (1984).*

Framing in this sense is defined as the process of defining the context or issues that surround a problem or event in a way that serves to influence how the context or issues are seen and evaluated. See *What is FRAMING? definition of FRAMING (Psychology Dictionary)* The effects of how framing

an issue leads to prejudicial results can be seen in many communication applications. *Id.* With the same information being used as a base, the "frame" surrounding the issue can change the reader's perception without having to alter the actual facts. *Id.*

In the present case, the trial judge did charge the Recreational Use Statute and he did define gross negligence in his written charge. [Tr. p. 280 - 284] There is also authority to the effect that the prejudicial effect of a defective verdict form may be cured where the trial court provides clear and cogent jury instructions." *South Carolina Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 303, 641 S.E.2d 903, 908–09 (2007)*

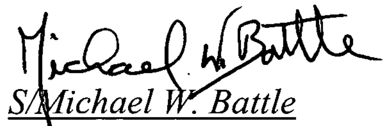
In the present case, however, the judge's comments to the jury were not clear or cogent and the flawed special verdict form was not cured notwithstanding the City's objection to the form. [Tr.p.243] The trial judge actually misstated the exception for the Recreational Use Statute as an afterthought the second time he referred to the Recreational Use Statute when he instructed the jury to consider the application of that statute in determining whether the City was negligent or not. [Tr.p.292] The trial judge told the jury:

> "Were they shielded by the Recreational Use Statute, was there assumption of risk? Those should be taken into consideration in determining whether the Defendant was negligent or not." [Tr.p.292]

The flawed direction given to the jury by the verdict form and the trial judge's confusing comments after giving the written charge indicated to the jury that the Recreational Use Statute would not shield the City if the City was merely negligent. [Tr. p.292] The trial judge's flawed special verdict form and his confusing comments are contrary to the expressed purpose and the plain language of the Recreational Use Statute. *S.C. Code §27-3-10, et. seq.* For those reasons, the appeal should be remanded to the trial court for a new trial absolute if the court does not find that the trial judge erred by not directing a verdict in favor of the City.

CONCLUSION

Because there was no evidence of gross negligence in operation of the Recreational Center, the Court of Appeals should apply the Recreational Use Statute and direct a verdict in favor of the Appellant City of Myrtle Beach. As an alternative, if the Court of Appeals decides the question of the application of the Recreational Use Statute should be determined by a jury under the facts of this case, Appellant City contends the appeal should be remanded on the basis that the trial judge's special verdict form was flawed such that the City was prejudiced.



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Teresa M. Phillips certifies that she is a Paralegal with Battle Law Firm, LLC, attorneys for Appellant City of Myrtle Beach and that she has mailed Appellant City of Myrtle Beach's Initial Brief and Designation of Matter to the address shown this 5th day of January, 2018, with proper postage attached thereto and has electronically filed the Notice with the Clerk of Court for Horry County.

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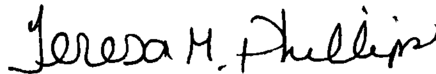

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JAN 09 2018
SC Court of Appeals

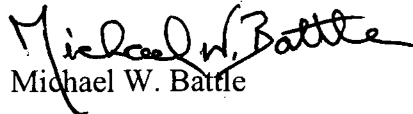
RE: Callie Barras, Respondent v. City of Myrtle Beach, Appellant
C/A#: 2016-CP-26-00135
Appellate Case No. 2017-001568

Dear Ms. Kitchings:

Enclosed herewith for filing please find one original and one copy of Appellant City of Myrtle Beach's Initial Brief, Designation of Matter to be included in the Record on Appeal and a Proof of Service in reference to the above action. By copy of this correspondence I am providing Counsel of Record with a copy of the same via U.S. mail.

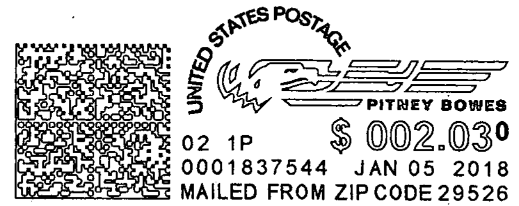
If you have any concerns, please do not hesitate to contact my office.

Sincerely,



Michael W. Battle

C: Mark Nappier, Tom Ellenburg
Enclosure: stated



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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 116929
Columbia, SC 29211