THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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SC Court of Appeals

Larry B. Hyman, Jr., Circuit Court Judge

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

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

v.

City of Myrtle Beach,...Appellant,

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. Barras's first argument is incorrect because Barras sought and obtained the City's permission to use the City's property free of charge for recreational purposes.

Barras claims the S.C. Recreational Use Statue was inapplicable because she was on the City's premises in her capacity as the City's volunteer, not for recreational purposes at the time of her injuries. An argument similar to this was considered and rejected by the Court of Appeals

in *Brooks v. Northwood Little League, Inc., 327 S.C. 400, 489 S.E.2d 647, (Ct. App. 1997)* There the plaintiff injured her ankle when she stepped into a hole on the grounds of Northwood Middle School while attending her granddaughter's Little League T-ball game. The plaintiff claimed she was an invitee because she had purchased several items at the Little League's concession stand and paid her granddaughter's team participation fee. She was returning from the concession stand when she injured her ankle. The Court held that plaintiff's claim was barred by the Recreational Use Statute. *Id.* The plaintiff qualified as a recreational user because her attendance at the game was permissive, it was for a recreational purpose, and she was not charged a fee to enter the property. *Id.*

The same reasons apply here. Barras was part of a group, Sarge's Group, that sought and obtained permission to use the City's recreational

center free of charge to play the game of bingo. Like T-ball, bingo is a recreational purpose that was not specifically listed in the statute but is included in its broad scope. *Id.* The City discussed in its opening brief the argument that the Recreational Use Statute does not create an exception for volunteer work done while preparing for recreational activities. The only three requirements for the statutes application are permission, recreational use, and free admission. *SC Code Ann. §27-3-30.* Those requirements were fulfilled in the present case. *Id.*

Barras testified she played bingo after helping the group prepare their food. [TR. 71] There is no evidence in the record that Barras ever went to the recreational center for any purpose other than to facilitate and participate in Sarge's Groups recreational activities. Barras was vetted by the City as a volunteer because she was given certain kitchen privileges that allowed her to assist Sarge's Group in their recreational activities. The City wanted to ensure that Barras would not abuse those privileges or endanger other recreational users. [TR. 218]

II. Barras's argument that the record contains evidence the City was grossly negligent is incorrect because the only reasonable inference that could be drawn from the evidence was that, at the very least, the City exercised slight care.

Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care. *Clyburn v. Sumter Cty. Sch. Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). Barras claims there was extensive testimony showing the City was on actual notice of problems with the kitchen mats more than a month before Barras's fall. (Tr. 52-53, 82, 144, 151). Multiple witnesses, including Barras, testified they raised concerns about the mats to the City, including a meeting with the Recreational Center's Director, Pam Stone, in March 2015. (Tr. 52-53, 82, 144, 151). The City admits that several witnesses testified they raised concerns about the mats throughout the recreational center in one meeting. However, the Recreational Center's Director, Pam Stone and its employee, Dustin Johnson, testified they did not recall any complaints about the mats. [TR. 206 & 225] The parties' failure to communicate may have been negligence, but the omissions of the City did not rise to the level of gross negligence.

Barras also claimed "Moreover, City employees testified they made no efforts to address the mat problems, despite their awareness of the problems and the volunteers' concerns for both their safety and that of the elderly program participants." Barras's claim is incorrect. The City's employees testified they were not aware of complaints until after the present lawsuit was filed. [TR. 206] Even if the City employees were aware of

complaints, Barras' witnesses testified that the City gave a reason for deciding to not change the kitchen mats. The City's reason was the City preferred the mats to the risk of slip and falls due to water spillage on the floor near the kitchen sink. [Tr. p 53]

As stated in the City's opening brief, the mats in question were commercial grade mats that were 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]

Barras did not dispute Recreational Center Director Pam Stone's testimony that City staff always came to the Center 30 minutes before the building opened. There was a list of things the City staff checked when they went through the building. That 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] Because Ms. Stone's evidence was not disputed, the only reasonable evidence that can be drawn from the evidence in the present case is that the City's precautions show the exercise of slight care in connection with maintaining the Recreational Center. *Etheredge v. Richland Sch. Dist. One,* 341 S.C. 307, 312, 534 S.E.2d 275, 278 (2000)

(stating the fact that a governmental entity "might have done more does not negate the fact that it exercised 'slight care' ")

III. Barras third argument is incorrect because the trial judge's verdict form was so defective and confusing in its formulation that its submission constituted reversible error.

Barras readily acknowledges that the trail judge's "verdict form is imperfect and could have been drafted more clearly to avoid inviting the issues now placed before this Court." [Respondent's Brief p. 10] On that point, the City whole heartedly agrees. The City disagrees with Barras's claim that the City waived its objection to the verdict form. The City further contends that the "imperfect" verdict form was prejudicial and warrants a new trial in the present case.

Rule 51, SCRCP states no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. In the present case, the City made the following objection on the record.

> "I need to lodge an objection about the verdict form. It makes no mention of the gross negligence standard or the Recreational Use Statute." [Tr. p244]

The City's objection was sufficient to preserve the objection to the verdict form for appeal. *Rule 51, SCRCP*; *Dixon v. Ford* (S.C.App. 2005) 362 S.C. 614, 608 S.E.2d 879. (Rule providing that no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict does not require that the objection to a charge be renewed after the charge is given and prior to the jury's retiring to deliberate; instead, it only requires an objection on the record, opportunity for discussion, and a specific ruling by the trial court on the jury charge issue).

The City's discussion of the trial judges confusing informal comments to the jury after he read his written charge was not included as an objection to those confusing comments. The discussion was included to refute Barras's anticipated claim that the trial judge's jury charge clarified or cured the imperfect verdict form. See *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). The trial judge's comments were not charges on the law. His comments were directions to the jury for their deliberation process. [R 292] The comments only became a source of confusion in connection with the trial judge's erroneous special verdict form.

Barras claims the court should ignore the erroneous special verdict form because the trial judge charged that she was a licensee and she claims such a charge gave the City the same immunity it would have had under the Recreational Use Statute. Barras claims the use of the word negligence as written on the special verdict form was actually gross negligence. Barras's claim is incorrect because it conflates a property owner's duty owed to a licensee with the property owner's duty owed under the Recreational Use Statute.

The trial judge correctly charged the jury a landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities. *Singleton v. Sherer,* 377 S.C. 185, 201, 659 S.E.2d 196, 204 (Ct. App. 2008).

He also charged the jury that under the Recreational Use Statute, subject to certain exceptions, an owner of land owes no duty of care to keep the premises safe for entry or use by persons who have sought and obtained his permission to use it for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to such persons entering for such purposes. *S.C. Code Ann. § 27-3-30.* The exceptions to the Recreational Use Statute apply if the property owner is

grossly negligent, willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity or if the property owner charges persons who enter or go on the land for the recreational use thereof. *S.C. Code Ann. § 27-3-60*

The trial judge's special verdict form omitted any reference to the Recreational Use Statute or its exception for gross negligence. The special verdict form funneled the City's duties and defenses as a property owner through one level of negligence. See *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209, 211–15 (7th Cir. 1995). The special verdict form did not require or even allow the jury to consider the application of the Recreational Use Statute or the gross negligence exception. The jury was only allowed to answer questions about the negligence of the parties and the amount of damages. [Verdict Form] Gross negligence is not the same as ordinary negligence. *Etheredge v. Richland Sch. Dist. One,* 341 S.C. 307, 312, 534 S.E.2d 275, 278 (2000).

A special verdict form may be so defective in its formulation that its submission constitutes reversible error. *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 415–21, 734 S.E.2d 641, 643–46 (2012); *9A Wright & Miller, Federal Practice and Procedure, Civil 2d § 2508, p. 193.* A judgment entered upon an answer to a question which inaccurately frames the issue to

be resolved by the jury must be reversed. *Cann v. Ford Motor Co.,* 658 F.2d 54, 58 (2d Cir.1981) (and citations therein), cert. denied, 456 U.S. 960 (1982).

In the present case the trial judge's special verdict form was not a general verdict form. It was a special verdict form which only asked the jury to answer certain specific questions. [Tr. p 289] Those questions were: 1) was Barras negligent; 2) was the City negligent; and, 3) if so, what was the City's liability for the damages? The special verdict form did not allow the jury to consider the City's affirmative defense of the Recreational Use Statute. Even though the jury found the City was negligent, it could have found the City was immune under the Recreational Use Statute because the City did not charge a fee for use and the City was not grossly negligent in failing to guard or warn against dangerous conditions. *S.C. Code Ann. §27-3-60.* There was no place for the jury to consider or apply the Recreational Use Statute on the trial judge's special verdict form.

A good analysis of an erroneous verdict form is shown in the case of *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209, 211–15 (7th Cir. 1995). In *Umpleby, a* former employee sued his former employer for violation of the Age Discrimination in Employment Act (ADEA). The trial judge in that case provided the jury with a verdict form that asked if the jury found from a

preponderance of the evidence that the employee's age was one of the reasons for his employer to discharge him.

In reversing the trial court on the issue of the verdict form the Seventh Circuit Court of Appeals found the question employed by the trial judge was too soft a standard and lowered the threshold of liability. Under the ADEA an age discrimination plaintiff, is required to demonstrate that age *accounts* for the decision, that is, "whether the same events would have transpired if the employee had been younger than 40 and everything else had been the same." *Id.*

In a similar manner the trial judge's special verdict form lowered the threshold for of liability under the Recreational Use Statute in the special verdict form's limited questions on negligence. The City was prejudiced because the jury was not allowed to fairly consider the Recreational Use Statute when answering those special verdict form questions. *Id.*

CONCLUSION

For the reasons stated in the City's opening brief and above in its reply brief, the City of Myrtle Beach respectfully requests that this court reverse the trial judge's order denying the City's request for a J.N.O.V. or, in

the alternative, order a new trial on the grounds that the trial judge's special verdict form was an abuse of discretion and was prejudicial to the City.

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Callie Barras...Respondent,

PROOF OF SERVICE

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 Reply Brief of Appellant to the addresses shown this 6th day of April, 2018, with proper postage attached thereto.

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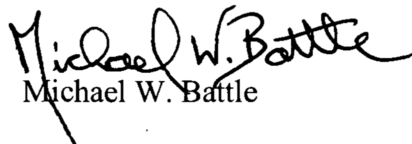
RE: Callie Barras, Respondent v. City of Myrtle Beach, Appellant
C/A#: 2016-CP-26-00135
Appellate Case No. 2017-001568

Dear Ms. Kitchings:

Enclosed herewith for filing please find an original and one copy of Appellant City of Myrtle Beach's Initial Reply Brief and 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,



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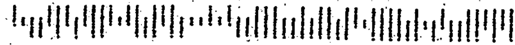

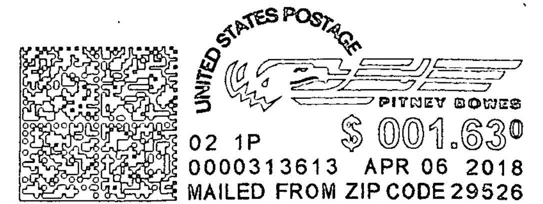

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