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

Case No. 2011-CP-10-9543

Joseph Barilotti,

Appellant,

v.

Ocean Course Golf Club, LLC,

Respondent.

BRIEF OF APPELLANT

Christopher J. McCool
Melissa A. Fried
Joye Law Firm, LLP
Post Office Box 62888
5861 Rivers Avenue
North Charleston, SC 29419-2888
Office: (843) 554-3100
Facsimile: (843) 529-9180

Attorneys for Appellant

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STATEMENT OF THE CASE

On December 28, 2011, Joseph Barilotti brought this premise liability action against Ocean Course Golf Club, LLC ("Ocean Course") due to the injuries he sustained while walking across a bridge near the fourth hole on the Ocean Course. (R. p. 10). Ocean Course filed their answer on March 9, 2012, alleging defenses of improper party, no proximate cause, comparative negligence, sole negligence, natural condition, open and obvious danger, punitive damages unconstitutional, and reservation and nonwaiver. (R. pp. 16-18). Ocean Course also filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, on March 9, 2012. (R. p. 23). Following a hearing, the trial court denied Ocean Course's motion to dismiss on June 29, 2012. (R. p. 8).

Ocean Course filed a motion for summary judgment on April 2, 2013. (R. p. 25). The case proceeded to trial in front of a jury on June 3, 2013. (R. p. 54). The trial court denied Ocean Course's motion for summary judgment prior to trial, finding more than a mere scintilla of

evidence existed to proceed to trial. (R. p. 55, lines 16-25). Following Barilotti's case, Ocean Course moved for a directed verdict. (R. 335, line 12—p. 338, line 8). The trial court granted the directed verdict on June 4, 2013. (R. p. 7). Barilotti filed a motion for a new trial and to alter/amend the order pursuant to rules 52(b), 59(a), and 59(e), SCRCP on June 12, 2013. (R. pp. 19-22). The trial court denied the motion on August 9, 2013, and filed the same on August 16, 2013. (R. pp. 1-6). On August 26, 2013, Barilotti served the notice of appeal on Ocean Course.

FACTS

During the last weekend in October of 2010, Joseph Barilotti traveled to Kiawah Island from Newton Square, Pennsylvania for a golf outing with business colleagues and clients. (R. p. 210, lines 1-25). Mr. Barilotti was fifty-eight years-old, in excellent health, and had been playing golf for fifteen years (R. 210, lines 6-7; R. p. 231, lines 5-7). After playing two other courses during their weekend, Mr. Barilotti's group had an early tee time between 7:30 a.m. and 8:15 a.m. on October 31, 2010 at the Kiawah Golf Resort's Ocean Course, located on Kiawah Island, South Carolina. (R. p. 211, line 22— p. 212, line 8). Although Mr. Barilotti had played the Ocean Course once before, approximately eight to ten years ago, this was the first and only time he had played it during the weekend of October 31, 2010. (R. p. 228, line 25—R. p. 229, line 5).

Mr. Barilotti's group divided themselves into two groups, a threesome and a foursome. (R. p. 212, line 25—R. p. 213 line 2). Mr. Barilotti was in the threesome which was the front group. (R. p. 213, lines 1-2). In order to get to the next hole, Mr. Barilotti had to walk over a bridge located at Hole Number 4 ("Subject Bridge"). (R. p. 115, line 24—R. p. 115, line 10). The Subject Bridge is made out of unpainted wood, and no grip additive is on the bridge to aid in traction for pedestrians. (R. p. 89, lines 14-18; R. p. 93, lines 3-5). The Subject Bridge was meant for both pedestrians as well as golf carts to travel over. (R. p. 115, lines 15-20). Although

golf carts were not allowed on the Ocean Course for play until noon each day, employees of the Ocean Course would take golf carts first thing in the morning to carry water onto the golf course. (R. p. 115, lines 21-23; R. p. 161, lines 16-19). By driving the golf carts first thing in the morning, the employees drive over the Subject Bridge, track sand on it, and create the condition of sand on the bridge. (R. p. 161, line 16—R. p. 162, line 1). Nevertheless, if someone is playing a round of golf before noon on the Ocean Course, they would be walking from hole to hole and across the bridges, including the Subject Bridge. (R. p. 115, line 24—R. p. 116, line 10).

The owners and operators of the Ocean Course created golf cart paths leading up to the Subject Bridge out of sand and coqina shells (R. p. 324, line 11—R. p. 325, line 2). Prior to 1991, the golf cart paths on the Ocean Course did not exist. (R. p. 324, lines 20-25). Every morning, before play begins that day, as to not disturb the golfers, employees of the Ocean Course were responsible for blowing off any debris that was on the bridges. (R. p. 94, lines 14-16; R. p. 95, lines 6-16; R. p. 108, lines 5-9; R. p. 151, lines 11-14; R. p. 161, lines 4-12). Ocean Course stated the reason for this precaution is safety in addition to presentation of the golf course. (R. p. 95, lines 2-5; R. p. 96, lines 6-12; R. p. 114, lines 17-22; R. p. 151, lines 15-17). According to the Ocean Course, the term "debris" included sand. (R. p. 273, lines 8-25; R. p. 274, lines 12-14).

Additionally, there is a bridge at Hole Number 2 made out of the same wood as the wood of the Subject Bridge. (R. p. 92, line 23—R. p. 93, line 5; R. p. 260, lines 12-14). However, unlike the Subject Bridge, the bridge at Hole Number 2 was covered by a black, rubber mat to allow traction for golfers to traverse over. (R. p. 92, lines 10-19; R. p. 114, lines 23-25; R. p. 204, lines 21-23; R. p. 250, lines 10-14; R. p. 257 lines 20-23; R. p. 288, lines 5-7; R. p. 290, lines 13-15; R. p. 294, lines 14-16). The black mat at Hole Number 2 was placed there following

a prior slip and fall on that bridge which resulted in a lawsuit (R. p. 56, lines 15-25; R. p. 318, lines 1-6). The Ocean Course admitted it would be feasible to place a similar mat on the Subject Bridge to allow traction for pedestrians. (R. p. 208, lines 1-25; R. 258, lines 1-7).

On October 31, 2010, as Mr. Barilotti was carefully walking over the Subject Bridge to get to the next hole, his feet came out from underneath him and he fell down, face first onto the Subject Bridge (R. p. 213, lines 5-8; R. p. 234, lines 5-13). According to a written statement by Mr. Barilotti's caddy, Steven Cipolla, the Subject Bridge was "both wet and sandy" where Mr. Barilotti fell. (R. p. 351). When he fell, he instinctively tried to reach out for something to steady himself, like a handrail, but there was nothing to help him. (R. p. 213, lines 5-8). There were no warnings signs to use caution while crossing the Subject Bridge nor did the caddy warn Mr. Barilotti that the bridge might be slippery. (R. p. 213, lines 18-24). Mr. Barilotti was in shock following the fall and had no idea how terrible it was until the gentlemen golfing with him advised him not to move. (R. p. 214, lines 11-14). The caddy called the clubhouse and had a visitor cart come to the scene to take Mr. Barilotti back to the clubhouse. (R. p. 214, lines 24-25). From there, an ambulance took him to St. Francis Hospital. (R. p. 215, lines 18-22). Mr. Barilotti was rushed to the emergency room where they took a series of x-rays which revealed Mr. Barilotti's right ankle was broken in two places. (R. 215, line 23—R. 216, line 1). Mr. Barilotti's right ankle required surgery, and he knew he needed to be with his family during his recovery, so the hospital stabilized his leg with a cast up to his hip and he was able to get on a plane arriving into Philadelphia by 12:50 a.m. the next day. (R. p. 216, lines 6-22).

Mr. Barilotti underwent surgery on his right ankle the Friday following the fall on the Ocean Course that Sunday. (R. p. 217, lines 5-8). During the surgery, two screws were placed in Mr. Barilotti's ankle. (R. p. 217, lines 17-19). Mr. Barilotti was in pain following the surgery,

and was only able to walk with crutches as he could not put pressure on his foot until the screws were removed from his ankle. (R. p. 219, lines 8-19). The screws were removed during a second surgery in January 2011. (R. p. 220, lines 6-7). Following the removal of the screws, Mr. Barilotti underwent physical therapy. (R, 220, lines 18-24). However, Mr. Barilotti still has not returned to his pre-injury level of physical abilities. (R. p. 223, lines 15-17). Prior to the fall on the Ocean Course, Mr. Barilotti was very active and fit for someone his age. (R. p. 223, line 18—R. p. 224, line 5). Before the fall, he enjoyed playing golf two to three days a week, racquetball once or twice a week, as well as cross fit to stay active. (R. p. 223, lines 20-23). Now, he has been forced to alter his entire workout routine and lifestyle because he is not able to have any impact or friction on his right ankle. (R. p. 224, lines 1-5). The appearance of Mr. Barilotti's foot has changed as a result of the fall—it is drastically skewed outward and there is scarring from the surgery. (R. p. 226, lines 1-9). He also experiences advanced arthritis in his ankle which is worst in the morning and whenever there is rainy or cold weather, causing him to have a minor limp. (R. p. 226, lines 12-25). His ankle is very unstable and he can no longer walk barefoot or in flip flops or Docksiders as he has to wear a shoe with substantial arch support. (R. p. 227, lines 8-24). Every day he experiences some level of pain or discomfort in his ankle as a result of the fall on October 31, 2010, at the Ocean Course. (R. p. 227, line 25—R. p. 228, line 5).

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING A DIRECTED VERDICT BECAUSE EVIDENCE INTRODUCED AT TRIAL DEMONSTRATED THAT SAND ON THE BRIDGE WAS DEBRIS THAT SHOULD HAVE BEEN BLOWN OFF BY EMPLOYEES AND THEREFORE THE CASE SHOULD HAVE BEEN SENT TO THE JURY.

The trial court erred in granting a directed verdict in favor of Ocean Course and should have allowed the case to be sent to the jury. In reviewing the trial court's decision on a motion

for a directed verdict, the appellate court applies the same standard as the trial court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 782 (2004). "When considering a directed verdict motion, the trial court should view the evidence and all reasonable inferences in the light most favorable to the non-moving party." S.C. Fed. Credit Union v. Higgins, 394 S.C. 189, 193-94, 714 S.E.2d 550, 552 (2011). In reviewing a circuit court's order granting a directed verdict, the appellate court applies the same standard as the trial court and must view the facts in the light most favorable to the nonmoving party. Anderson v. Augusta Chronicle, 365 S.C. 589, 594, 619 S.E.2d 428, 430-31 (2005); Minter v. GOCT, Inc., 322 S.C. 525, 527, 473 S.E.2d 67, 69 (Ct.App.1996) ("In deciding a motion for directed verdict, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party."). "If more than one inference can be drawn from the evidence, the case must be submitted to the jury." Hennes v. Shaw, 397 S.C. 391, 398, 725 S.E.2d 501, 505 (Ct. App. 2012). "The trial court should be 'concerned only with the existence or nonexistence of evidence,' not its credibility or weight." Id. at 194, 714 S.E.2d at 552. An appellate court will reverse the granting of a motion for directed verdict when there is no evidence to support the ruling or when the ruling is governed by an error of law. Austin v. Stokes-Craven Holding Corp, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010). The evidence in the record demonstrates not only that the trial court erred by weighing the evidence when deciding Ocean Course's directed verdict motion, but also more than one inference could be drawn from the evidence, and, thus, the case should have been submitted to the jury.

A. The Trial Court Erred by Weighing the Evidence in Granting Ocean Course's Motion for Directed Verdict Rather than Looking for the Existence of Evidence Favorable to Barilotti, the Non-Moving Party.

First, in ruling on the motion for directed verdict, the trial court went through selections of the testimony of select witnesses at trial and cited those statements which were favorable to Ocean Course. (R. p. 342, line 24—R. p. 345, line 5). The witnesses the trial court chose to select were 9 out of the 11 witnesses that presented testimony at trial: Stephen Youngner, Yvonne Johnstone, Jeff Stone, Joseph Barilotti, Steven Cipolla, Brian Gerard, MacArthur Forrest, Thomas Kyle Gregory, and Roger Warren. As the Court of Appeals has stated, when reviewing a motion for a directed verdict, "[b]ecause we are not a jury, we do not weigh the evidence and we do not decide matters of credibility. *We also eliminate from our consideration all evidence contrary to or in conflict with the evidence favorable to [Plaintiff]* and give to [Plaintiff] the benefit of every favorable inference that the facts reasonably suggest." Laney v. Bi-Lo, Inc., 309 S.C. 37, 38, 419 S.E.2d 809, 810 (Ct. App. 1992) (emphasis added); Collins & Sons Fine Jewelry, Inc. v. Carolina Safety Sys., Inc., 296 S.C. 219, 223, 371 S.E.2d 539, 541 (Ct. App. 1988) (stating the appellate court must eliminate from consideration all evidence contrary to or in conflict with evidence favorable to the nonmoving party and give the nonmoving party the benefit of every favorable inference that the facts reasonably suggest). In the case at hand, the trial court failed to look to the favorable inferences presented by the evidence favorable to Barilotti, as is required by the appropriate standard, and only cited to evidence favorable to Ocean Course in granting Ocean Course's directed verdict.

For example, the trial court failed to take into consideration that Ocean Course admitted that Ocean Course employees were required to blow off the bridges each day as a safety measure prior to the start of play. Stephen Youngner admitted during his testimony that the reason the

bridges are to be blown off every day with leaf blowers, to remove sand, is for safety. (R. p. 95, lines 2-5; R. p. 96, lines 2-12; R. p. 114, lines 17-21). Youngner stated that the reason for a black mat on the bridge is to provide traction for golfers and to make sure their footing is better than on unpainted bare wood surfaces. (R. p. 114, line 23—R. p. 115, line 6). More than one employee of the Ocean Course testified that it would be feasible to place a mat on the Subject Bridge similar to a mat on the bridge at Hole #2. (R. p. 208, lines 1-25; R. p. 258, lines 1-7). Yvonne Johnstone, the director of safety and security at the Ocean Course, stated during her testimony that a wet and sandy surface could contribute to an unsafe condition and that a wet and sandy surface could contribute to Barilotti's fall. (R. p. 149, line 24—R. p. 150, line 25). Several employees testified that the reason for blowing debris off the bridges was for safety. (R. p. 95, lines 2-5; R. p. 96, lines 6-12; R. p. 114, lines 17-22; R. 151, lines 15-17; R. p. 158, lines 12-14). The Ocean Course admitted that sand was a type of debris. (R. p. 273, lines 2-25; R. p. 274, lines 12-14). Moreover, the Ocean Course admitted that it created the hazardous condition of sand on the Subject Bridge. (R. p. 161, line 20—R. p. 162, line 1).

The above-referenced testimony leads to the inference that Ocean Course had a duty every morning to blow off the bridges on the course, the reason for this is safety, blowing off the bridges included blowing off debris and that debris included sand, as admitted by the Ocean Course. However, on the day at issue, it is reasonable to infer that the bridges were not properly blown off as required by Ocean Course employees, or that Ocean Course created the hazardous condition, because Barilotti fell due to both sand and dew on the bridge. (R. p. 351). The trial court committed an error of law by weighing the evidence rather than looking for the existence of evidence in favor of Barilotti. Thus, a directed verdict should not have been granted and Barilotti is entitled to a new trial.

B. The Trial Court Erred in Granting the Directed Verdict Because Evidence at Trial Indicated that Ocean Course Created the Hazardous Condition and Should Have Anticipated Barilotti's Injury.

The sand on the subject bridge is not a naturally occurring condition because Ocean Course created the condition and is therefore liable for Barilotti's fall. "In order to establish liability in a 'slip and fall' case, a plaintiff must show that the defendant either (1) created the defective condition or (2) had knowledge of the dangerous condition and failed to remedy it." Legette v. Piggly Wiggly, Inc., 368 S.C. 576, 579, 629 S.E.2d 375, 376-77 (Ct. App. 2006). "A plaintiff seeking damages suffered because of a dangerous or defective condition on a defendant's property must demonstrate that the defendant committed a specific act that created the dangerous condition, which in turn caused her injury." Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 389, 701 S.E.2d 776, 779 (Ct. App. 2010). Ocean Course admitted at trial that it created the golf cart paths using coquina shell and sand. (R. p. 324, line 11—R. p. 325, line 2). In doing so, Ocean Course admitted that the golf carts traveling over the paths pick up the sand and shell which ends up on the bridges where pedestrians walk, creating the condition of sand on the bridge. (R. p. 161, line 20—R. p. 162, line 1).

For example, in Cook v. Food Lion, Inc., 328 S.C. 324, 491 S.E.2d 690 (Ct. App. 1997), the plaintiff was injured after falling over a large floor mat that was "improperly placed" on the floor by Food Lion employees. The Court of Appeals reversed the trial court's granting of the directed verdict, stating that Food Lion's employees created the allegedly dangerous conditions by placing the mats by the exit doors and, therefore, the plaintiff did not need to show that the Food Lion employees had notice that the floor mats were wrinkled or bunched immediately prior to Cook's fall. Cook, 328 S.C. at 327, 491 S.E.2d at 691-92.

Likewise, here, Ocean Course admitted that it created the dangerous condition of sand on the Subject Bridge. First, Ocean Course admitted that it created the golf cart paths out of coquina shells and sand, therefore it was not a naturally occurring condition. (R. p. 324, line 11—R. p. 325, line 2). During the direct examination of Jeff Stone, the golf superintendent at the Ocean Course, the following exchange took place establishing that Ocean Course created the condition of sand on the Subject Bridge:

> Q. And as part of what you do before the start of play each day is there's persons who are supposed to blow the sand off the bridges each morning, before play begins, correct?
> A. That is part of the assignment, yes.
> Q. And that's part of the policy, procedure, and standard, that that be done before the first golfer gets on to the course, correct?
> A. They blow the debris, yes, correct.
> Q. And the first golf cart that gets onto the course, that a person playing the course, is able to get onto the course is 12 noon?
> A. A person playing the golf course, yes, that would be correct at 12 noon, but there are also caddies that take water on to the golf course and they drive over the bridges first thing in the morning.
> Q. So those caddies and those employees that would be driving over the bridge at hole number four, they would be tracking sand on to the bridge?
> A. Correct.
> Q. So they would be creating that condition of sand on the bridge, correct?
> A. Correct.

(R. p. 161, line 4—R. p. 162, line 1). Ocean Course employees admitted that sand on a wet surface is a dangerous or hazardous condition that could contribute to a fall. (R. p. 123, line 22—R. p. 124, line 5; R. p. 149, line 24—R. p. 150, line 21). Therefore, just as in Cook, employees of Ocean Course created the hazardous condition of sand on the bridge. As a result, evidence

existed that Ocean Course created the hazardous condition leading to Mr. Barilotti's fall and the trial court erred in granting a directed verdict.

Ocean Course argued that morning dew and sand was an open and obvious condition. "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.*" Hancock v. Mid-South Mgmt Co., 381 S.C. 326, 331, 673 S.E.2d 801, 803 (2009) (emphasis added). For example, in Creech v. South Carolina Wildlife and Marine Resources Department, 328 S.C. 24, 491 S.E.2d 571 (1997), the court found that it was inappropriate to grant a directed verdict on the theory that a dock without a railing was an open and obvious condition and that the plaintiff should have protected herself from falling off the dock. Creech, 328 S.C. at 30, 491 S.E.2d at 574. The Court looked to Restatement (Second) of Torts § 343A (1965) which provides that "'[a] possessor of land is not liable to his invitees for physical harm caused to them by an 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.'" Id. The Court found that the County should have anticipated the harm that happened to Plaintiff because the "County 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." Id. at 32, 491 S.E.2d at 575.

Creech is similar to this case because Ocean Course should have anticipated the harm to Mr. Barilotti as there had been a prior fall on the Ocean Course on a bridge made out of the same material as the bridge where Mr. Barilotti fell. (R. p. 56, lines 15-25; R. p. 318, lines 1-6; R. p. 92, lines 23—R. p. 93, line 5; R. p. 260, lines 12-14). Due to this prior fall, Ocean Course was put on notice of the potential hazard of the Subject Bridge. Therefore, Ocean Course had reason

to anticipate the same type of harm would happen to another golfer walking over a bridge made out of the same wood as the bridge at Hole #2 where the prior fall occurred.

Ocean Course's reliance on the case of Meadows v. Heritage Village Church and Missionary Fellowship, Inc., 305 S.C. 375, 409 S.E.2d 349 (1991) is misguided. In Meadows, a woman was walking back to her hotel after it had been raining for two days. Meadows, 305 S.C. at 376, 409 S.E.2d at 350. The gravel path back to the hotel was flooded as a result, so she chose to walk over wet grass although there were two other available routes. Id. Plaintiff fell and brought suit against Heritage Village Church and Missionary Fellowship, Inc. (PTL) for her injuries. In reversing the jury verdict in favor of Meadows, the Court found that "there is no evidence that PTL knew or should have known that either the gravel path or the grass were dangerous." Id. at 377, 498 S.E.2d at 351. Additionally the court ruled that "Meadows did not show that PTL could reasonably have foreseen that she would choose to try to cross the wet grass instead of using one of the other ways back to the hotel." Id. at 378, 409 S.E.2d at 351.

The facts and reasoning of Meadows is not applicable to the case at hand. Ocean Course had knowledge that the Subject Bridge was dangerous and Barilotti presented evidence to show that Ocean Course could have reasonably foreseen that someone would fall on the wooden bridge. First off, this was an appropriate and foreseeable route for golfers to take, unlike the route taken by the plaintiff in Meadows. Ocean Course employees confirmed that the subject bridge was meant for pedestrians to cross over, as well as golf carts. (R. p. 115, lines 15-20). Additionally, several Ocean Course employees confirmed that Barilotti was not doing anything wrong which lead to his fall. (R. p. 90, lines 11-13; R. p. 103, lines 1-8; R. p. 247, line 24—R. p. 248, line 11; R. p. 297, lines 9-16; R. 298, line 14—R. p. 299, line 3).

Moreover, this case is unlike Richardson v. Piggly Wiggly Cent., Inc., 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013), wherein the Court affirmed the JNOV after a customer slipped on a sidewalk where it had been raining because the plaintiff knew it was raining when she entered the Piggly Wiggly. Richardson, 404 S. C. at 234, 743 S.E.2d at 860. The Court ruled that the owner did not have a duty to warn about the danger of the wet sidewalk because the customer knew it was raining and the sidewalk was uncovered. Id. at 235, 743 S.E.2d at 860. While Mr. Barilotti admitted that he knew the bridge would be wet from morning dew, that is not the only condition on the Subject Bridge that lead to his fall. The accident report revealed that the Subject Bridge was both wet and sandy. (R. p. 351). Ocean Course admitted that it created the condition of sand on the bridge. (R. p. 161, line. 20—R. p. 162, line 1). Thus, there is a reasonable inference that Ocean Course created the hazardous condition, and should have anticipated the hazardous condition of sand on the bridge, and, thus, a directed verdict was unwarranted.

Furthermore, Ocean Course also admitted that it was feasible to place a mat on the Subject Bridge in order to make it safer:

> Q. You could take that black mat and put it on the left -- excuse me. You could put it on the left or right of the bridge where Mr. Barilotti fell, because that mat is only two or three feet wide?
> A. Correct.
> Q. And you're still going to have plenty of room for a golf cart, correct?
> A. If we can control the golf carts, that's right.
> Q. Right. And so you would have a black mat on one side of the bridge for pedestrians, and then you're going to have at least nine feet for a golf cart, correct?
> A. That's correct.
> Q. So you would have a traction filled surface for a golfer to walk across, hole number four, and still have room for a golf cart, correct?
> A. Correct.

Q. And it's absolutely feasible for you to do that, correct?
A. Correct.

(R. p. 208, lines 7-25). Thus, based on the evidence presented at trial, evidence existed of the inference that Ocean Course created the dangerous condition of sand on the bridge. Moreover, evidence existed that Ocean Course should have anticipated the harm caused by sand being on the Subject Bridge and should have placed a mat on the Subject Bridge, which it admitted was a feasible option. Therefore, the trial court erred in granting a directed verdict.

II. THE TRIAL COURT ERRED IN ALLOWING EVIDENCE TO BE USED AT TRIAL WHICH WAS NEVER PRODUCED DURING DISCOVERY AND UNFAIRLY PREJUDICIAL TO BARILOTTI.

Barilotti was unfairly prejudiced by the trial court's admission of several photographs by Ocean Course into evidence which were requested during discovery and never produced to Barilotti. A trial court's decision to admit or exclude evidence is typically a matter within their discretion and "will not be disturbed on appeal absent an abuse of that discretion and a showing of prejudice." Hilton Head Beach & Tennis Resort v. Sea Cabin Corp, 305 S.C. 517, 409 S.E.2d 434 (Ct. App. 1991). "The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required." Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987).

In Hilton Head Beach & Tennis Resort, a construction defect case, the defendants introduced at trial a copy of a gummed paper label which it alleged was on the lumber supplied the plaintiff, but the label was never produced to the plaintiffs during discovery. Hilton Head Beach, 305 S.C. at 519, 409 S.E.2d at 435. The trial court admitted the label into evidence and jury returned a verdict for respondent. On appeal, this Court reversed and remanded the case,

finding that the trial court erred in allowing the label to come into evidence as it prevented the plaintiff from having the opportunity to investigate the label and be fully prepared for trial. Id. at 520, 409 S.E.2d at 436.

Likewise, Barilotti's counsel specifically asked for any and all documents that would be presented at trial, including demonstrative exhibits in Plaintiff's Request for Production, Number 9. (R. p. 49). In Ocean Course's response to Plaintiff's Requests for Production, it objected to the request and stated that it had a right to supplement the response as discovery progressed. (R. p. 50). No supplemental responses to Plaintiff's Request for Production, Number 9 were ever produced to Barilotti's counsel prior to trial.

During the cross-examination of Yvonne Johnston, counsel for Ocean Course asked her about Defendant's Exhibit 5, which was a Google Earth image of the Ocean Course never produced during discovery (R. p. 141, lines 5-15). Counsel for Barilotti objected and stated that the picture was never produced during discovery, although counsel for Ocean Course contended that it was. (R. p. 141, line 17---R. p. 142, line 4). Even though counsel for Barilotti was able to demonstrate that this photo as well as five other photos counsel for Ocean Course wanted to use for demonstrative purposes, marked as Defendant's Exhibits 3-8, were never produced during discovery, the trial court ruled that all could be used at trial. (R. p. 189, lines 4-10; R. p. 191, lines 6-10). The trial court further ruled that counsel for Ocean Course could use a picture of the bridge at Hole #2, marked as Defendant's Exhibit 15, although it was never produced during discovery despite there being substantial testimony during depositions of the bridge and the black mat at Hole #2 (R. p. 190, line 4—R. p. 191, line 10).

The trial court's rulings on the pictures not produced during discovery was extremely prejudicial to Barilotti. During depositions, Barilotti was only able to use five small photos to

question the witnesses regarding the Subject Bridge which were attached to Plaintiff's Exhibit 19 (R. pp. 349-350; R. p. 187, line 18—R. p. 188, line 2). Barilotti was never able to use the new photographs to question the Ocean Course employees during their depositions regarding the Subject Bridge and the mat at Hole #2 or to assure the authenticity of the photographs. Moreover, there was much deposition testimony regarding the placement of a black mat on the bridge at Hole #2. This was not a new issue brought to counsel's attention during the course of trial. Counsel for Ocean Course had ample time and opportunity to produce the photograph to Barilotti's counsel. Because the photographs were of the Subject Bridge where Barilotti fell as well as the bridge at Hole #2, which Ocean Course admitted was made of the same wood as the Subject Bridge, the photographs were relevant to Barilotti's case. Ocean Course's decision to wait until trial to reveal these photos was very prejudicial to Barilotti and directly affected his counsel's ability to prepare for trial. As a result, the photographs should never have been shown to the jury as they were never produced during discovery. Because the photographs were not excluded, Barilotti should be entitled to a new trial.

III. THE TRIAL COURT ERRED IN NOT ALLOWING COUNSEL TO IMPEACH THE TESTIMONY OF ROGER WARREN REGARDING A PRIOR SLIP AND FALL ON A BRIDGE ON THE SAME COURSE MADE OUT OF THE SAME MATERIAL AS THE SUBJECT BRIDGE.

Barilotti was unfairly prejudiced by the trial court's decision to not allow his counsel to impeach the testimony of the President of the Kiawah Island Golf Resort, Roger Warren. "Impeachment of a witness by showing prior statements inconsistent or contradictory of his trial testimony is permissible." Mays v. Mays, 267 S.C. 490, 494, 229 S.E.2d 725, 726 (1976). "The South Carolina Rules of Evidence contemplate that use of a prior inconsistent statement for impeachment purposes is permitted only when the proponent is seeking to impeach a declarant

who has testified at trial inconsistently with the prior statement." Wright v. Hiester Const. Co., 389 S.C. 504, 520, 698 S.E.2d 822, 831 (Ct. App. 2010).

During cross-examination, counsel for Ocean Course asked the following:

> Q. Now, there have been some questions about the bridge at number two, and I want to ask you, did the golf course decide not to put a mat down on number four because it was not affordable?
> A. No. It had -- the decision to not put anything on the other bridges was based on the fact that it was not deemed necessary, based on the experience that we've had since 1991 with the safety of those bridges. We've had no incidents on those bridges at any time since 1991, and my personal experience, playing the golf course and walking on the golf course tells me that those bridges are safe.

(R. p. 303, lines 6-17) (emphasis added). Because Mr. Warren opened the door to any prior incidents by claiming there have been "no incidents on those bridges," Plaintiff proceeded to ask Mr. Warren about the prior fall resulting in a lawsuit at the bridge near Hole #2, which he admitted to during his deposition. (R. p. 312, line 6—R. p. 313, line 6). In his deposition testimony, Mr. Warren stated that there was a prior slip and fall on the bridge at Hole #2 at the Ocean Course, due to dew on the bridge, that occurred sometime in 2008 or 2009 (R. p. 51, line 24—R. p. 52, line 23). The trial court, however, ruled that "those bridges" meant the "two bridges" at Hole #4 (R. p. 321, lines 14-17). The trial court stated that the "tee box" at Hole #4 along with the Subject Bridge were "those bridges" that Mr. Warren's testimony encompassed. (R. p. 321, line 20—R. p. 322, line 3). And as such, counsel was not allowed to question Warren about prior incidents on the bridge at Hole #2.

The decision to exclude evidence is within the sound discretion of the trial court and is only reversed on appeal due to an abuse of discretion and resulting prejudice. Campbell v. Jordan, 382 S.C. 445, 452-53, 675 S.E.2d 801, 805 (Ct. App. 2009). "An abuse of discretion

occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Sapp v. Wheeler, 402 S.C. 502, 511, 741 S.E.2d 565, 570 (Ct. App. 2013). Throughout the course of testimony, there were only two bridges at issue, the Subject Bridge, which was referred to as the bridge at Hole #4, and the bridge at Hole #2. The question presented by counsel for Ocean Course was in regard to a single bridge at Hole #2 and single bridge at Hole #4. The jury would have heard the statement "we've had no incidents on those bridges at any time since 1991" to mean the two bridges at issue: the bridge at Hole #2 and the Subject Bridge. The tee box was never referred to in testimony as a bridge at the Ocean Course. There was no evidence to support the trial court's ruling and therefore the trial court abused its discretion by interpreting Mr. Warren's response to be tailored to counsel's question.

Moreover, the exclusion of this evidence resulted in prejudice to Mr. Barilotti. Evidence of a prior fall on a bridge made of the same wood as the Subject Bridge is relevant to Mr. Barilotti's case as it puts Ocean Course on notice that a similarly situated bridge would cause the same harm to another pedestrian on the Ocean Course. See Creech, 328 S.C. at 30, 491 S.E.2d at 574 ("'[a] possessor of land is not liable to his invitees for physical harm caused to them by an 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.'"). Furthermore, the probative value of the testimony regarding the prior fall is not outweighed by any unfair prejudice that would result to Ocean Course. See Rule 403, SCRE. Therefore, the trial court abused its discretion by not allowing Barilotti's counsel to question Mr. Warren on a previous slip and fall on the Ocean Course, thus resulting in prejudice to Mr. Barilotti's case.

CONCLUSION

For the foregoing reasons, Barilotti respectfully submits that the Court of Appeals should reverse the judgment of the circuit court and order a new trial.

Respectfully submitted,

January 8, 2014.

Christopher J. McCool
Melissa A. Fried
Joye Law Firm, LLP
Post Office Box 62888
5861 Rivers Avenue
North Charleston, SC 29419-2888
Office: (843) 554-3100
Facsimile: (843) 529-9180

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011-CP-10-9543

Joseph Barilotti,

Appellant,

v.

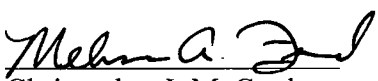
Ocean Course Golf Club, LLC,

Respondent.

PROOF OF SERVICE

I certify that I have served the Brief of Appellant by depositing a copy of it in the United States Mail, postage prepaid, on January 8, 2014, addressed to its attorneys of record, Robert H. Hood, James B. Hood, Deborah H. Sheffield, and Anne S. Reid, Hood Law Firm, LLC, Post Office Box 1508, Charleston, South Carolina 29402.

January 8, 2014



Christopher J. McCool
cmccool@joyelawfirm.com
Melissa A. Fried
mfried@joyelawfirm.com
Joye Law Firm, LLP
Post Office Box 62888
5861 Rivers Avenue
North Charleston, SC 29419-2888
Office: (843) 554-3100
Facsimile: (843) 529-9180
Attorneys for Appellant

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CERTIFICATE OF COUNSEL

The undersigned certified that their Final Brief complies with Rule 211(b), SCACR.

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Christopher J. McCool
cmccool@joyelawfirm.com
Melissa A. Fried
mfried@joyelawfirm.com
Joye Law Firm, LLP
Post Office Box 62888
5861 Rivers Avenue
North Charleston, SC 29419-2888
Office: (843) 554-3100
Facsimile: (843) 529-9180
Attorneys for Appellant