THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-CP-10-03251
Appellate Case No. 2019-002046

On Writ of Certiorari to the Court of Appeals

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Petitioner.

BRIEF OF PETITIONER

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INTRODUCTION

Plaintiff/Respondent, Rosemary Connelly ("Mrs. Connelly"), tripped and fell while jogging on the sidewalk in front of a new home that general contractor Defendant/Petitioner, Winsor Custom Homes, LLC ("Winsor"), was building at 1376 Smythe Street on Daniel Island (the "Premises"). Mrs. Connelly claims Winsor is liable for the dangerous condition of the sidewalk abutting its construction site, specifically, *this* condition (the "Claimed Accident Condition"):

South Carolina follows the rule of law in Restatement (Second) of Torts § 343A, regarding "Known or Obvious Dangers," which holds that "[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."

Mrs. Connelly's claim against Winsor flies squarely in the face of § 343A. *She flat out admits that she saw the dangerous condition beforehand, that she recognized it as a hazard, and that she nonetheless chose to encounter it—not stopping or even slowing her pace, nor simply making use of the readymade safe alternative route provided by the charming Daniel Island street she was jogging alongside, but instead just trying to alter her running stride around it (to "just sort of jog over to the left a little bit"), and indeed she thought she had successfully done so until, she says, the wind blew black plastic material into contact with her foot.* Properly judged against the § 343A standard, the evidence presented admits of but one reasonable conclusion: Winsor is not liable to Mrs. Connelly for the subject accident.

The trial court, however, ruled that § 343A did not apply to Mrs. Connelly's claim against Winsor and, thus, not only denied Winsor judgment as a matter of law based on § 343A but also refused to charge the jury on § 343A at all.

As it now stands, in the wake of a jury trial, unsuccessful post-trial motions, and an unfavorable decision from the Court of Appeals (the "Subject Decision"), Winsor has a $325,000 judgment against it when, quite simply, it should not. Most

respectfully, Winsor contends, first and foremost, it is entitled to judgment as a matter of law, but at a minimum, it should be granted a new trial.

QUESTIONS PRESENTED[1]

I. Did the Court of Appeals err in affirming the trial court's denial of Winsor's motions for judgment as a matter of law? Specifically, should the Court of Appeals have instead found that § 343A applies to Mrs. Connelly's claim against Winsor and that, properly judged against the § 343A legal standard, the only reasonable conclusion to draw from the evidence is that Winsor is not liable to Mrs. Connelly for the subject accident?[2]

II. Assuming, *arguendo*, Winsor is not entitled to judgment as a matter of law, is it entitled to a new trial? Specifically, should the Court of Appeals have found that § 343A's applicability to Mrs. Connelly's claim against Winsor is supported in law and fact and that the trial court committed reversible error in refusing to charge the jury on § 343A?[3]

STATEMENT OF THE CASE

The subject accident happened on June 6, 2011. Mrs. Connelly commenced this lawsuit in Charleston County on June 4, 2013, in the Court of Common Pleas.

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[1] Per the Court's order of August 10, 2020, Winsor's petition for a writ of certiorari to review the Subject Decision is granted only as to Questions IIA2 and IIB3 therein. Question/Argument I in this brief corresponds to Question IIA2 in Winsor's petition. Question/Argument II in this brief corresponds to Question IIB3 in Winsor's petition.

[2] This Question, and its matching Argument, covers the trial court's error in denying Winsor's directed verdict and JNOV motions, and the Court of Appeals' error in failing to recognize the same.

[3] This Question, and its matching Argument, covers the trial court's error in refusing to charge the jury on § 343A and in denying Winsor's motion for a new trial in light of that error, and the Court of Appeals' error in failing to recognize the same.

(*See* R. pp. 7–14.)[4] Referring to herself as "an invitee of the sidewalk or right of way at the sidewalk located directly in front of and at the Premises"[5] and to "Winsor . . . as . . . an[] agent[] of the owners of the Premises . . . ow[ing] [her] a duty to exercise reasonable and ordinary care for the safety and well-being of persons passing by on the [sidewalk] at the Premises,"[6] Mrs. Connelly alleged that the silt fence Winsor had installed (in conjunction with the new home it was building on the Premises at the time of the subject accident) "was in disrepair and was encroaching on the sidewalk or right of way at various places along, within, and/or abutting the property line of the Premises and the sidewalk or right of way"[7] and that, "through no fault of her own,"[8] she was caused to trip and fall when, "[w]hile [she] was jogging on the sidewalk located on the Premises,"[9] "her leg became entangled with the black plastic barrier fence that was intruding onto the sidewalk." (R. p. 11 ¶ 28.) She asserted a single cause of action styled "Negligence/Negligence Per Se/Gross Negligence." (R. p. 12 ¶ 37–p. 14 ¶ 45.)

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[4] As reflected in the caption of her summons and complaint, Mrs. Connelly sued four other defendants besides Winsor. By the time of trial, however, Winsor was the only defendant remaining in the case, and the trial court amended the caption to its present form. (R. p. 1.)

[5] (R. p. 11 ¶ 24.)

[6] (R. p. 12 ¶ 39.)

[7] (R. p. 10 ¶ 22.)

[8] (R. p. 11 ¶ 28.)

[9] (R. p. 11 ¶ 26.)

Winsor timely answered, denying Mrs. Connelly's material allegations and pleading a number of affirmative defenses,[10] and following a period of discovery, on August 25, 2015, the case came on for a jury trial before the Honorable J.C. Nicholson, Jr. (R. pp. 27–638.)

At the close of Mrs. Connelly's case, and again at the close of all evidence, Winsor unsuccessfully moved for a directed verdict, arguing, among other things, the evidence was such that, as a matter of law, it was not liable to Mrs. Connelly under § 343A. (R. pp. 491:21–503:7, pp. 563:15–564:8, pp. 1234–37.) The trial court not only denied Winsor's directed verdict motions but also refused even to charge the jury on § 343A, finding it inapplicable to Mrs. Connelly's claim. (R. pp. 613:13–633:1, pp. 1238–41.)

On August 28, 2015, the jury returned a verdict finding Winsor caused Mrs. Connelly $500,000 in damages but also finding Mrs. Connelly 35% comparatively negligent. (R. pp. 3–5, pp. 634:5–636:10.)[11] The trial court then entered judgment

[10] (R. pp. 15–26.)

[11] For context, as explained with respect to Question/Argument IIB2 in Winsor's petition for a writ of certiorari (as to which the Court denied cert), the trial court granted a partial directed verdict against Winsor as to liability, determining as a matter of law that it had breached a legal duty to Mrs. Connelly to maintain the silt fence, and thus sent the case to the jury to determine issues of proximate cause, comparative negligence, and damages. (R. pp. 3–5, pp. 556:8–563:15, pp. 565:22–566:17, pp. 613:13–633:1.)

in favor of Mrs. Connelly, against Winsor, in the amount of $325,000, i.e., $500,000 reduced by 35%. (R. p. 2.)[12]

Winsor timely served/filed its notice of appeal on February 26, 2016, following the trial court's hearing and denial of its timely post-trial motions, which had sought JNOV or, alternatively, a new trial. (R. pp. 639–711, pp. 1243–1305.) The Court of Appeals filed the Subject Decision on August 7, 2019, affirming the trial court. (App. pp. 1435–38.) Winsor's timely petition for rehearing was denied on November 15, 2019. (App. pp. 1439–77.)

By order filed August 10, 2020, this Court granted Winsor's timely petition for a writ of certiorari to review the Subject Decision as to Questions IIA2 and IIB3 in Winsor's petition.

STATEMENT OF FACTS

Though herself a resident of Sullivan's Island, Mrs. Connelly had been regularly jogging on Daniel Island for several years before the subject accident. Her

[12] For context, as explained with respect to Questions/Arguments IIB4 and IIB5 in Winsor's petition for a writ of certiorari (as to which the Court denied cert), far and away, the most substantial damage Mrs. Connelly claimed as a result of the subject accident was the alleged loss of her sense of smell and diminished sense of taste. (*See, e.g.*, R. p. 140:10–16.) Mrs. Connelly's other claimed damages are quite modest in comparison—chief among them a nondisplaced-to-minimally-displaced nasal fracture and related surgical procedure, which procedure Mrs. Connelly elected to combine with unrelated cosmetic enhancements. (R. p. 1123, pp. 1134–35, pp. 1137–38.) Her only claimed pecuniary loss consists of medical expenses totaling less than $13,500. (R. p. 1198.)

friend Cori Smith ("Smith"), a fitness trainer by trade, lived on Daniel Island, and three days a week on average, Mrs. Connelly would drive over to run with Smith. (R. p. 158:3–5, pp. 161:17–163:9, pp. 209:20–210:7, R. pp. 328:14–329:4, pp. 329:16–331:8.)

The subject accident happened on a windy, but otherwise pleasant, Monday morning about 9:15 a.m., when, while out jogging with Smith, about halfway through their run, Mrs. Connelly tripped and fell on the sidewalk in front of the Premises. Winsor was in the process of building a house on the Premises at the time and, as required by the Daniel Island Architectural Review Board ("ARB"), had installed a silt fence—made of black plastic attached to wooden support stakes—around the perimeter of the Premises for erosion control. (R. pp. 402:4–404:20, pp. 1210–1216.)[13]

Mrs. Connelly claims the subject accident happened because the silt fence was in disrepair, with downed detached black plastic fence material obstructing the sidewalk. Indeed, she claims the silt fence was in *obvious* disrepair and looked as depicted in the photo Bates Labeled RMC 96, i.e., the Claimed Accident Condition depicted in the introduction to this brief. (R. p. 164:4–10, p. 337:1–11, pp. 378:18–

[13] As a builder on Daniel Island, Winsor had to abide by the ARB's construction guidelines, which required it to, among other things, "[i]nstall erosion control measures (silt fencing) to the perimeter of the [Premises]." (*See generally* R. pp. 1211–1214.)

379:9, p. 576:11–15, pp. 1217–1218.)[14] Not only that, *Mrs. Connelly admits that she saw the dangerous condition beforehand, that she recognized it as a hazard, and that she nonetheless chose to encounter it—that she just tried to alter her running stride around it (to "just sort of jog over to the left a little bit"), and indeed she thought she had successfully done so until, she says, the wind blew black plastic silt fence material into contact with her foot*:

From Mrs. Connelly's Testimony

> [PLAINTIFF'S COUNSEL]: All right. Let me show you the photo of -- that we have of [the Premises (i.e., the Claimed Accident Condition)], and let me ask you, [Mrs. Connelly], take a look at it. And the jury can all see it. Does that accurately depict what [the Premises] looked like that day?
>
> [MRS. CONNELLY]: I would say yes. Maybe, you know, an inch here or an inch there, but I would say overall, yes.

(R. p. 164:4–10.)

> [PLAINTIFF'S COUNSEL]: Okay. *Did you see that when you came upon it* that day?
>
> [MRS. CONNELLY]: Well, when I run, I look forward. I look down. And, *yes, I saw there was plastic*.

[14] Smith took this picture (i.e., the photo depicting the Claimed Accident Condition) the day after the subject accident at the request of Mrs. Connelly's husband, Bill Connelly, an attorney. (R. pp. 241:23–242:23, p. 336:7–16, pp. 362:19–364:25.) The accident location is in the foreground, and the sidewalk along which the ladies were running as they approached it is in the background. In other words, they were running toward the place where Smith was standing when she took the photo, with the Premises to their right. (R. p. 336:3–20.)

I mean, I avoided it. I tried to avoid it, to not go -- you know, you adjust your running when you go -- and I run a 10 minute mile. I'm not saying I'm running any great distance here. Okay. And -- but I adjust to see what kind of conditions are -- you know, if there's a stop sign, I'm going to stop at the stop sign and look both ways crossing the street. So, yeah, I saw that there was something black, yes.

(R. p. 165:9–20 (emphasis added).)

[PLAINTIFF'S COUNSEL]: Okay. Tell the jury *as you came upon this fence*, to the best of your recollection, what happened?

[MRS. CONNELLY]: Okay. I'm running down here. [Smith] is running -- I'm on the right hand -- I'm on the right hand side, and she's on the left hand side. And so she's -- *I'm running a little bit faster than she is to get through there*. You know, I put my foot down -- I put my left foot down, you're running, you're running you're running, you're running.

It was a windy day. I saw a fluttering motion of this black plastic. The plastic is *like garbage can plastic*, you know, that sort of -- you know, *it's thin*. *I ran to avoid it* -- excuse me -- when I put my left foot down, I had my right foot up, and it caught on the plastic, and I fell forward, I -- toward my body. . . .

(R. p. 166:4–18 (emphasis added).)

From Smith's Testimony

[PLAINTIFF'S COUNSEL]: Is this picture [(i.e., the Claimed Accident Condition)] -- does it accurately represent your memory of what the tarp looked like on June 6, 2011?

[SMITH]: Uh-huh, yes, sir.

> [PLAINTIFF'S COUNSEL]: How was the weather that day?
>
> [SMITH]: It was nice. It was *windy*, but nice.

(R. p. 337:1–6 (emphasis added).)

> [PLAINTIFF'S COUNSEL]: Tell the ladies and gentlemen of the jury what happened as you and [Mrs. Connelly] ran past [the Premises] and *came upon this black plastic barrier*?
>
> [SMITH]: *We were running past it*, and it was fine, and just going at a normal stride. And she stepped down and the tarp kind of flew up a little bit and got her foot, and she tripped and fell on her head.
>
> [PLAINTIFF'S COUNSEL]: A couple things I want to go over on that. First of all, did you see any movement in the tarp from the wind as you were approaching it?
>
> [SMITH]: I mean it was moving just a little bit, like a -- *you could tell it was windy*, but not crazy movement.
>
> [PLAINTIFF'S COUNSEL]: Well, was it flopping up and down like a garbage bag or something like that?
>
> [SMITH]: No. No. *It was like just fluttering like wind would do to something*.

(R. pp. 337:12–338:2 (emphasis added).)

From Mrs. Connelly's Counsel's Opening Statement

> On . . . June 6, 2011, as [Mrs. Connelly and Smith] *approached that black plastic barrier fence* . . . as they were jogging . . . *they saw that the fence was partially in the sidewalk*, they did what many of us may have done. And that's *they just sort of jogged over to the left a little bit, because there was plenty of sidewalk there still*.

> . . . *And [Mrs. Connelly] sort of jogged a little bit to the left to avoid it.* It was a little bit of a *windy* day, and that black plastic barrier -- it's kind of *made of a light, almost like hefty bag material* -- all right. . . .
>
> And what happened was when it moved a little bit in the wind, . . . it caught [Mrs. Connelly's] right foot and she went forward. . . .

(R. pp. 137:10–138:9 (emphasis added).)

From Mrs. Connelly's Counsel's Closing Argument

> You folks have seen that photo [(referring to the Claimed Accident Condition)] over and over and over again in this trial. And *the fence <u>was</u> <u>laying</u> in the sidewalk, partially in the sidewalk.* All right. *<u>That's what it looked like on June 6, 2011. The photo was taken on the next day, June 7, 2011.</u>* . . .

(R. p. 576:11–14 (emphasis added).)

> *[W]hen [Mrs. Connelly and Smith] <u>saw</u> the fence <u>was down</u> a little bit*, they did what most of us would do. If it's over here, just sort of jog over to the left a little bit. And, unfortunately, the wind caught it a little bit, and it caught [Mrs. Connelly's] foot. And the accident happened. You all heard that. . . .

(R. pp. 577:21–578:1 (emphasis added).)

STANDARD OF REVIEW

Re: Motions for Directed Verdict and JNOV

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in

the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Strange v. S.C. Dep't of Highways & Public Transp.*, 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994). When considering such motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Creech v. S.C. Wildlife & Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). Essentially, the job of the reviewing court is the same as the trial court: to determine whether a verdict for a party opposing the motion is reasonably possible under the facts as liberally construed in his favor. *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981). "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *Quesinberry v. Rouppasong*, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998). This rule, however, does not authorize submission of speculative, theoretical, or hypothetical views to the jury. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997).

Re: Requests for Jury Charges and New Trial Motions

Requests for jury charges and motions for a new trial are within the discretion of the trial court and subject to an abuse-of-discretion standard of review. *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009) (new trial motions); *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (jury charge

requests). "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." *Cole*, 378 S.C. at 404, 663 S.E.2d at 33.

The trial court has a duty to give a requested jury instruction that correctly states the law applicable to the issues and evidence. *Wall v. Suits*, 318 S.C. 377, 458 S.E.2d 43 (Ct. App. 1995). If the requested charge states a sound principle of law that is applicable to the case and not otherwise covered by the charge, refusal to charge it is error and requires a new trial. *Sanders v. Western Auto Supply Co.*, 256 S.C. 490, 183 S.E.2d 321 (1971). Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error. *Jones v. Ridgely Communications, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991).

Re: Questions of Law

The appellate court "is free to decide questions of law . . . with no particular deference to the trial court." *Fabian v. Lindsay*, 410 S.C. 475, 482, 765 S.E.2d 132, 136 (2014).

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's denial of Winsor's motions for judgment as a matter of law. Section 343A applies to Mrs. Connelly's claim against Winsor. Properly judged against this legal standard, the evidence admits of but one reasonable conclusion: Winsor is not liable to Mrs. Connelly for the subject accident.

This case is—as indeed Mrs. Connelly herself pleaded it (*see* Statement of the Case, *supra*)—a premises liability case. Under a premises liability theory, a contractor, generally equates to an invitor and has the same duties that the property owner would have to invitees. *See Lane v. Gilbert Constr. Co. Ltd.*, 383 S.C. 590, 681 S.E.2d 879 (2009). While the general rule is an abutting landowner or occupier does not owe a duty of care with respect to the safety of the sidewalk there are exceptions where such a duty is imposed by legislation, where the abutter creates an unsafe condition on the sidewalk, or the abutter has a special property interest in the sidewalk. *Shaw v. City of Charleston*, 351 S.C. 32, 43, 567 S.E.2d 530, 535–36 (2002) (quoting *Epps v. U.S.*, 862 F. Supp. 1460, 1464 (D.S.C. 1994)). In other words, the abutter's (in this case Winsor's) duty normally stops at the property line. But where an exception to the general rule is at issue (as it is here based on Mrs. Connelly's claim that Winsor is liable for the Claimed Accident Condition) the abutter's duty extends to the sidewalk, i.e., to the extent of the land which, by virtue of the exception at issue, the abutter is deemed to owe the duty of a possessor.

Naturally, the applicability of § 343A follows suit—it would make no sense for it to be otherwise.

South Carolina adopted § 343A in *Callander v. Charleston Doughnut Corporation*, 305 S.C. 123, 126, 406 S.E.2d 361, 362–63 (1991). Section 343A provides as follows:

> (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.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

With respect to subsection (2), comment *g* explains that, even where it is applicable,

> *defendants . . . may [nonetheless] reasonably assume* that members of the public will not be harmed by *known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid*. This is *true particularly* where a *reasonable alternative way is open to the visitor, known or obvious to him, and safe*.

(emphasis added).

It cannot reasonably be denied that the hazard at issue (i.e., the Claimed Accident Condition) was known and/or obvious to Mrs. Connelly.[15] Indeed, even though Winsor would respectfully maintain that the jury could not reasonably have found (and did not reasonably find) Mrs. Connelly to be less than 51% at fault for the subject accident, the fact that the jury found Mrs. Connelly 35% at fault plainly reflects that the hazard was known and/or obvious to her.

Moreover, during trial, Mrs. Connelly made much of just how bad the Claimed Accident Condition was. Indeed, her counsel highlighted the obvious disrepair of the Claimed Accident Condition in both his opening statement and closing argument and even underscored the fact that the silt fence material was lightweight, like a garbage bag, and easily blown around. Nonetheless, as also shown above, it was admitted that, as Mrs. Connelly approached the Claimed Accident Condition, she saw that the sidewalk was partially obstructed—downed

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[15] Comment *b* on subsection (1) provides as follows:

> *b.* The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.

black plastic silt-fencing material fluttering in the breeze—and, recognizing this, she intentionally chose to leave a position of safety and encounter the hazard by trying to alter her stride around it. (*See also* R. p. 296:16 ([Mrs. Connelly]: "*I saw the plastic on the ground. I ran to avoid it*.") (emphasis added).) Mrs. Connelly said herself, she knew the Claimed Accident Condition was not supposed to be like it was. She knew the silt fence was supposed to be taut and secured to wooden stakes but, instead, was down and encroaching upon the sidewalk, unsecured, and moving on a windy day. (R. p. 168:6–21.)

Mrs. Connelly was not forced to run along the sidewalk, and she approached the Claimed Accident Condition from an unobstructed vantage point on a clear (albeit windy) day. (R. p. 210:8–10, p. 1218.) Not even Smith could have obstructed Mrs. Connelly's view: both testified Mrs. Connelly was in front. (R. p. 166:4–18, 337:21–25.) And they were not running particularly fast; according to Mrs. Connelly, she ran about a 10-minute mile—in other words, 6 miles per hour. (R. p. 165:9–20.)

Mrs. Connelly agreed it was important to watch for safety hazards while jogging, and she testified that she paid attention to the conditions around her[16]—and, again, it was admitted that she, in fact, observed and appreciated the Claimed Accident Condition, recognizing it as a hazard, and attempted to run around it but

[16] (R. p. 165:9–20, p. 211:3–12.)

was tripped up, not simply because of the hazard posed by the downed silt fence, but because a sudden gust of wind (on a windy day) blew the already fluttering detached fence material into her foot. Further still, Winsor notes, Mrs. Connelly's facebook post from the day after the subject accident makes no mention of the silt fence or being tripped at all. In fact, she herself lightheartedly blames the fall on her age:

> Hi!! an update! running yesterday I fell on the sidewalk and fractured my nose!! Thank goodness I didn't break any teeth-the moral of this story *I guess is running is dangerous for our crowd!!* No, not really, as soon as I can I will be back out there. In the meantime I look like I got hit with 10 uglysticks!!!!!

(R. p. 1230 (emphasis added).)

By its plain language, § 343A applies to "any activity or condition . . . [,]" and thus applies to the whole of Mrs. Connelly's claim of negligence against Winsor, however formulated. Consequently, even assuming, *arguendo*, a duty of care did exist that could theoretically support a cause of action by Mrs. Connelly against Winsor for ordinary negligence (outside the premises liability context), such a claim nonetheless fails as a matter of law under § 343A. The Court of Appeals erred in failing to recognize the trial court's error in denying Winsor judgment as a matter of law under § 343A.

II. Assuming, *arguendo*, Winsor is not entitled to judgment as a matter of law, it is at least entitled to a new trial. Section 343A's applicability to Mrs. Connelly's claim against Winsor is supported in law and fact. The Court of Appeals should have found that the trial court committed reversible error in refusing to charge the jury on § 343A.

Assuming, *arguendo*, the case should have been submitted to the jury at all, for the reasons set forth above, § 343A was applicable in view of the issues and evidence in this case, and the trial court's refusal of Winsor's legally correct jury charge thereon was prejudicial error, and the Court of Appeals should have recognized the same.[17] *See Wall*, 318 S.C. 377, 458 S.E.2d 43; *Sanders*, 256 S.C. 490, 183 S.E.2d 321, 304 S.C. 452, 405 S.E.2d 402

CONCLUSION

For the reasons set forth herein, Winsor asks the Court to reverse the Subject Decision and render its own decision, reversing the trial court and determining that Winsor is entitled to judgment in its favor as a matter of law or, as a lesser alternative, determining that Winsor is entitled to a new trial.

[17] Indeed, Mrs. Connelly herself submitted a proposed charge on § 343A before ultimately abandoning it. (*See* R. pp. 1274–97.)

Respectfully submitted,

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