

**THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

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**Oct 09 2020**

**S.C. SUPREME COURT**

Appeal from Charleston County  
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Judge

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Appellate Case No.: 2019-002046

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On Writ of Certiorari to the South Carolina Supreme Court

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Rosemary Connelly, .....Respondent,

v.

Winsor Custom Homes, LLC .....Petitioner.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Respondent Rosemary Connelly respectfully submits that the RESTATEMENT (SECOND) OF TORTS § 343A's known (or open) or obvious doctrine does not, as a matter of law, apply in a case where the plaintiff was not an invitee and where the alleged dangerous condition on land was situated "outside of" or "off" the possessor's premises. The trial court correctly refused to consider § 343A at the directed verdict stage of the trial, and correctly refused a charge which included portions of § 343A. The court of appeals' decision affirming the trial court should be upheld.

To be clear, Petitioner Winsor is asking this Court to change the law and expand the application of § 343A's known or obvious doctrine. Respondent Connelly was running along a public sidewalk when she encountered construction debris from a fence installed and maintained by Winsor. Winsor was building a home (for the owner) on a lot abutting the public sidewalk. Winsor asks this Court to change the current South Carolina known or obvious doctrine and apply it to persons who are not invitees and to land which is not owned, possessed or controlled by the landowner or his agents – here a public sidewalk. Petitioner cites no case law to support this expansion, and its appeal requests the Court apply the known or obvious doctrine to all tort cases without any provable legal crossing of the Rubicon necessary. If the Court were to reverse or grant a new trial on the grounds that § 343A applied to the facts of this case, or find that the jury should have been charged to consider the §343A known or obvious doctrine, such could upend the structure of South Carolina's system of defining tort duties to those injured on property based on the identity of the victim and as applied to owners or possessors of land.

Recognizing that the issues presented by the facts of this case do not appear to have been directly addressed in any South Carolina case, Respondent suggests that instead of expanding or complicating further the application of § 343A to all instances where someone is injured by a

condition on land, the Court should affirm the underlying decision, and then take this opportunity to either clarify the application of the “off the premises” duties, or consider rejecting the known or obvious doctrine in both “off” and “on” the premises” cases in favor of a more modern application of South Carolina’s modified comparative negligence scheme. Such approach would be similar to what the Court did in Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 71, 508 S.E.2d 565 (1998) when it abrogated assumption of the risk in favor of comparative negligence, see infra, p, 13, and alleviate confusion as to whether concepts of known or obvious risk are part of the duty to use due care itself or should be considered within the context of comparative negligence.

Under current South Carolina law and as applied in the instant case, the trial judge applied correct and current negligence and comparative negligence principals. Petitioner presented no evidence that it possessed or controlled the sidewalk where Connelly was injured, or that Connelly was any type of invitee, and therefore fails even the first prongs of § 343A: “[1] A possessor of land is not liable to his invitees ... “. The court of appeals decision should be affirmed.

## II. QUESTIONS ON WHICH CERTIORARI WERE GRANTED

1. Did the Court of Appeals err in failing to recognize the trial court’s error in denying Winsor judgment in refusing to rule, as matter of law, that in light of South Carolina’s adoption of the rule stated in RESTATEMENT (SECOND) OF TORTS § 343A and the only reasonable conclusion capable of being drawn from the evidence presented, Winsor was not liable to Mrs. Connelly for the Subject Accident? (granted only as to Question IIA2)
2. If Winsor was not entitled to judgment as a matter of law, did the Court of Appeals err in failing to recognize the trial court’s error in refusing to give Winsor’s requested jury charge regarding § 343A? (granted only as to Question IIB3)

### III. STATEMENT OF THE CASE

In June 2011, while running with a friend on a public Sidewalk in the Town of Daniel Island, Respondent Rosemary Connelly fell and injured herself. The fall took place on a public Sidewalk abutting the front of a residential lot under construction (hereinafter “Sidewalk” and “Homesite”) as Connelly encountered construction debris which blew into her feet as she ran by. Connelly suffered a broken nose, concussion, and head trauma which severed the olfactory nerves in the nasal and brain cavity (the cribriform plate) resulting in the loss of her sense of smell (anosmia) and reduction or distortion in her sense of taste (dysgeusia). Connelly brought suit against Petitioner Winsor, the builder on the Homesite. The case was tried to a jury before the Hon. J.C. Nicholson.

The relevant facts are as follows:

1. That the condition on land – construction debris in the Sidewalk – was not situated on the land Winsor possessed or controlled, but next to it.
2. Connelly was injured on the public Sidewalk, not the Homesite;
3. Connelly was not invited onto the Homesite (or premises possessed or controlled by Winsor) for any purpose;
4. Connelly did not enter the Homesite at any time;
5. Winsor maintained throughout the trial it was not responsible for the public Sidewalk; (R. p. 440)
6. Winsor presented no facts that it had any permanent or temporary control over the Sidewalk;
7. Winsor admitted it was responsible for the construction and maintenance of the construction fence, had actual knowledge its employees or subcontractors often dragged materials over the black part of the fence causing it to come down, and that the fence material could become airborne if detached from the stakes; (R. pp. 402, 406-07, 410)

8. Winsor had been issued a warning by the town less than three (3) months prior to the accident that this particular fence was in need of repair and in need of a construction entrance; (R. p. 461)
9. Connelly jogged past the debris along the side of the sidewalk opposite to where the debris was lying; (R. p. 165-68)
10. Wind picked up the fence debris and it blew into Connelly's path, entangling her rear jogging foot causing her to fall and be injured; and
11. The construction fence was partially down on portions of the adjoining public sidewalk at the time of the accident.

At the close of the evidence, Winsor moved for a directed verdict/JNOV, based in part on the argument that the "known or obvious" doctrine set forth in RESTATEMENT (SECOND) OF TORTS barred Connelly from proceeding to a jury as a matter of law. (R. pp. 466-71 ). The court denied the motion, (R. pp. 471, 538), held that Connelly was not an invitee as to Winsor, (R. 534), and therefore § 343A's known or obvious doctrine and the duty owed by an invitor to an invitee were not applicable. Connelly also moved for directed verdict. The trial court granted Connelly's motion, in part, and directed verdict for Connelly finding that Winsor owed Connelly a duty to use due care and that Winsor had presented no evidence to rebut that the fence was down on the sidewalk the day of the accident or that it had taken any action to remedy the danger despite opportunity, and therefore breached that duty. (R. pp. 534-35, 566) The ruling resulted in only the questions of whether the fall was the cause of her injuries, damages, and comparative negligence to go to the jury. (R. p. 566).

The court rejected Winsor's proposed charge regarding sidewalks, the duty a landowner owes an invitee, and a charge titled "known and obvious dangers." The court's charge contained a general statement of the elements of negligence, causation, damages, and comparative

negligence. (R. pp. 613-32). Winsor’s Charge No. 3 titled “Known or Obvious Dangers” is the subject of the second issue on which this Court granted certiorari, and stated:

In a premises liability case, a possessor of land, like Defendant, is not liable to invitees like Plaintiff for physical harm caused by 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.

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.

In this case, Plaintiff was entitled to make use of the public sidewalk; however, even where a Plaintiff is entitled to make use of public land, Defendant may 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 particularly true where a reasonable alternative way is open to the visitor, known or obvious to him, and safe. Callander v. Charleston Doughnut Corp. 305 S.C. 123, 406 S.E.2d (1991); RESTATEMENT (SECOND) OF TORTS, § 343A<sup>1</sup>

(R. p. 1240). The jury returned a verdict for Connelly in the amount of Five-Hundred Thousand Dollars (\$500,000.00), which was reduced to Three-Hundred Twenty-Five Thousand Dollars (\$325,000.00) based a finding that Connelly was Thirty-Five Percent (35%) comparatively negligent. (R. pp. 3-5). This appeal followed.

#### IV. STATEMENT OF THE FACTS

At the time of the accident, Winsor was building a home on Daniel Island, and the front of the Homesite abutted the public Sidewalk. As part of its construction activities, Winsor erected a temporary construction fence around the perimeter of the Homesite. The Fence was installed with black plastic sheeting, hung between and stapled to wooden stakes set into the ground around the

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<sup>1</sup> The first two sentences of the proposed charge are directly from Anderson, R.K., SOUTH CAROLINA REQUESTS TO CHARGE CIVIL, Ch. 31, 361 (§ 31-2 Premises Liability – Invitee Defined—In General) and § 343 A. The third paragraph, however, does not appear in the citations, but may be some combination of sidewalk- related law, possibly that related to a “public invitee.”

construction site. (Photo at R., p. 1215). Winsor admitted that a purpose of the Fence was “to help control construction debris from blowing off the construction site onto the property of others.” (R. p. 428). The uncontested testimony was that on the day of the accident the Fence was not completely secured to its wooden stakes, and a large portion of it had fallen into the Sidewalk. (R. pp. 408-10). Plaintiff introduced a photo showing the condition of the Fence, which was taken the day after the accident by Connelly’s running partner and eyewitness to the fall, Ms. Smith. (Pl’s Ex. 8, Photo RMC 96, R. p. 1218). Winsor relies heavily on this photo as an illustration of what the condition of the Sidewalk looked like at the time of the accident, and as support for its position that it was entitled to directed verdict, as a matter of law --so much so that it inserted the photo into the first page of its Brief. (Br. p. 1). The undersigned respectfully directs the Court’s attention to the text box and red arrow on the photo in the Brief, simply to point out that neither the red arrow nor text box was part of this photo in the record, (R. p. 1218), nor are those edits included on any admitted exhibit. Presumably, these notations were added for purposes of argument. Both Connelly and Smith testified as follows to the condition on the Sidewalk as they approached it. Despite that the arrow drawn into the photo could be viewed to indicate Connelly ran into the black plastic, the testimony was that she changed her stride to run by it, along the opposite side of the sidewalk to where the black plastic debris was located. Connelly explained:

I saw there was plastic. I mean, I avoided it. I tried to avoid it, to not go . . . So., yeah, I saw that there was something black ... ( R. p. 165);

It was a windy day. I saw a fluttering motion of this black plastic. The plastic is like garbage can plastic. . . . 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. (R. p. 166)

When comparing her recollection to photo RMC 96, Connelly stated that “it [the black plastic] wasn’t out that far. . . . [as is shown in photo RMC 96] that plastic was moving, and then I went down.” (R. p. 167). She said she knew the black plastic “was a little bit on the sidewalk,” and so

she “adjusted [her]stride, so did Cori, so we could run around it”, and testified there was room to run on the sidewalk to run around it. (R. p. 168). When asked if photo RMC 96 accurately represented the condition at the time of the fall, Connelly answered:

I am not going to say accurately, sir, because these pictures were taken afterwards. I’m saying similar. I don’t think that – in fact, I’m sure that there wasn’t that much of the black plastic light [sic] material there, may just an inch or two. I don’t know exactly. But I know I was running. . . . I can’t say accurately. All right. I would say it is similar to what it was.

(R. p. 293). On redirect, she testified that the black plastic “wasn’t that much over on the sidewalk” as it shows in the photo RMC 96. (R. p. 298). Smith, the witness to the fall said that the photo RMC 96 accurately represented her memory of what the tarp looked like the day of the fall. (R. p. 337). She described the fall such that the tarp “was moving just a little bit, like a – you could tell it was windy, but not crazy movement.” *Id.* On cross-examination, Smith said the photo looks “a little bit messier” than what she recalls that day. (R., p. 354). When asked if black plastic “fluttering” or “moving” in the wind was something anybody could see, she answered “ if they were looking at it, they could probably – I mean, I don’t know what people - like if you were to walk by or something, would you notice? I don’t – I don’t know if everyone would notice. (R., p. 358).<sup>2</sup>

Winsor's only corporate witness, Jeffrey Thomas (hereinafter "Thomas"), admitted: (1) Winsor was responsible for the Homesite, and for supervising and reviewing the subcontractors’

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<sup>2</sup> Winsor’s Brief quotes certain portions of Connelly and Smith’s testimony regarding the condition of the Sidewalk that day. In light of the issue at bar, within those quotations, there are several instances where “[the Premises]” was inserted into the quotations, (Br. p. 8, citing to R. p. 164, and p. 10 (citing to R. 337)). That term [the Premises] was not used by any witness, and the location to which the testimony referenced was, in fact, the street name. The term “premises” is typically used to identify where the accident took place relative to its owner. Here, the accident took place on the Sidewalk between the street and the Homesite. Also, Winsor quotes include portions of opening and closing statements, which are not evidence. (Br. p. 10-11).

work, (R. p. 399), (2) it was Winsor's sole duty to construct and maintain the Fence, (R. p. 402); (3) Winsor was aware that his own workers or subcontractors often walked over and dragged materials over the Fence causing it to come down, (R. p. 406-07); (4) it was foreseeable that the Fence plastic could become airborne if a gust of wind came through (R. p. 410); (5) that either after being notified of the accident or the following day, he went to the site and picked up the fence, took it out of the sidewalk, and placed a rock on it so it would not blow away; (R. p. 459-60); and (6) that the Fence was in a state of disrepair (at least 70% down) in the photo taken the day after the accident (R. pp. 409-10). Thomas initially stated he did not know or did not recall ever being warned by Daniel Island about having construction debris on the sidewalk. (R. p. 460). However, after being shown a document to the contrary not produced by Winsor, Thomas acknowledged that Daniel Island had in fact sent him a notice dated March 17, 2011 (less than three (3) months prior to the accident) regarding this specific address reporting that “the majority of the silt fence is down, and there is no construction entrance on the job site. Please repair or fix as soon as possible.” (R. p. 461). Thomas stated he was onsite daily in the May/ June 2011 timeframe, excepting other obligations. (R., 392, 432). Yet, Thomas denied having seen the fence in disrepair prior to the accident, (R. p. 392). He also testified that he had no memory of repairing the Fence between receiving the notice and the accident date. (R. p. 462-63) He then qualified that statement by saying that he supposed he must have because he always does. (R. pp. 464).

## V. ARGUMENT

When reviewing the trial judge’s denial of a motion for directed verdict, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Futch v. McAllister Towing, 335 S.C. 598, 518 S.E.2d 591 (1999). The trial court can only be

reversed if there is no evidence to support the ruling below. Creech v. South Carolina Wildlife & Marine Resources Dept., 328 S.C. 24, 491 S.C. 571 (1997).

- a. As a matter of law, Winsor was not entitled to directed verdict on the grounds of the known or obvious doctrine as set forth in § 343A, and therefore the trial court did not err in denying the motion.

Section 343A of the RESTATEMENT (SECOND) OF TORTS states:

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. 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. (emphasis added).<sup>3</sup>

In addressing premises liability as it relates to an invitee, this rule or doctrine was specifically adopted in Callander v. Charleston Doughnut Corp., 305 S.C. 123, 406 S.E.2d 361 (1991). Prior to Callander, a storekeeper or invitor owed no duty to warn of open and obvious conditions. It was effectively an absolute bar to recovery. After Callander, an invitor who had reason to or should have anticipated the harm had a duty of care to its patron or invitee, even if the condition were open and obvious. Id. In Callander, the injured party was a patron to the doughnut shop, and § 343A speaks directly to the duty owed an invitee. Comment e to §343A elaborates that “in the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions he will encounter if he comes. If he knows the actual conditions, activities carried on,

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<sup>3</sup> Section 343 of the RESTATEMENT (SECOND) OF TORTS is entitled Dangerous Conditions Known to or Discoverable by Possessor, and speaks directly to liability for physical harm “to his invitees”. Section 343(A) should be considered a subset of § 343, which provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained [by entering the land of the other] is sufficient to justify him in incurring the risk by entering or remaining on the land.”

This Court has stated that Callander, and Meadows v. Heritage Village Church, 305 S.C. 375, 409 S.E.2d 349 (1991), are seminal South Carolina cases interpreting § 343A. However, both are distinguishable from the case at bar. In Meadows, a visitor to the PTL’s Heritage Village, brought a negligence action against PTL because of injuries she sustained when she slipped on some wet grass while walking across the PTL property to the hotel (also on the PTL property). The court found that wet grass was an open and obvious danger absent a showing that PTL should have anticipated the harm the plaintiff suffered. Meadows chose to walk over wet grass instead of using other paths provided to patrons by the PTL to the PTL hotel. And, the court found that plaintiff had not shown PTL could reasonably have foreseen she would try to cross wet grass instead of using one of the other provided ways back to the hotel. Id. at 378, 409 S.E.2d at 351. Here, the Connelly was rightfully travelling along a public Sidewalk abutting the construction site. There is no evidence that Winsor provided or created some other pathway for those on the Sidewalk to use, such that there would be no reason to travel around the construction debris. Furthermore, the §343A cases all involve allegations that the owner or operator of the property created a dangerous condition which was then confronted by “invitees” onto its property, or where the dangerous condition was located (regardless of who created it) on the property the invitees were invited to enter.

Throughout this case, and without any factual basis, Winsor has repeatedly asserted that Connelly should be treated as an “invitee.” It is well recognized that invitee status is granted a person who enters a property belonging to another by invitation, and where said entry is connected

with the property or an activity that allows invitees on the property -- there is a mutuality of benefit between the invitee and property owner. See, e.g., Sims v. Giles, 343 S.C. 708, 541 S.E.3d 857 (2001) (finding a SCE&G meter reader on site for the benefit of the owner as part of the provision of power from the utility to the homeowner an invitee). “Invitees include patrons of stores, patients in a physician’s office, persons visiting a filling station to use the restroom or vending machine or to ask directions, and workmen invited to work on the premises.” F.P. Hubbard & R. L. Felix, SOUTH CAROLINA LAW OF TORTS 112-13 (2<sup>nd</sup> ed. 1997)(footnotes omitted)). Because Connelly was not an invitee, and because Connelly did not enter the “premises” which Winsor possessed, the trial court was correct in finding § 343A’s “known and obvious doctrine” had no application to the facts of this case. There is zero evidence that Connelly entered the Homesite under possession or control of Winsor. Winsor does not deny that Connelly was injured on the Sidewalk. Instead, Connelly was injured “off the premises” while running along a public Sidewalk.<sup>4</sup>

With regard to persons “off the premises” and on a public right of way adjacent to the owner/occupier’s land, the “landowner owes those on a public right of way adjacent to his land a duty of due care in the conduct of activities on his land.” Hubbard & Felix, SC LAW OF TORTS, p. 60, note 82. A person must use due to care to insure persons “outside of his premises” are not injured by “*activities* on the premises or by an *artificial* condition or structure which he constructs or know of on his land.” Id. pp. 123-24 (emphasis in original). In Epps v. United States, 862 F.Supp.2d 1460 (D.S.C 1994), (also cited in SC LAW OF TORTS at. p. 124, n. 442), the district court

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<sup>4</sup> Not only was there no evidence that Winsor owned, possessed or controlled the Sidewalk which might permit that question to go to a jury, Winsor did not attempt to introduce evidence of ownership, possession or control of that portion of the Sidewalk. (R., p. 440)

thoroughly analyzed the nature of the duty owed when one controls property abutting a public sidewalk explaining that, in South Carolina

the general rule appears to be that an abutting landowner or occupier normally does not have a duty of care with respect to the safety of the sidewalk *unless* such a duty is imposed by legislation, *the abutter created an unsafe condition on the sidewalk*, or the abutter has a special property interest in the sidewalk. . . . See 39 Am.Jur.2d Highways, Streets, and Bridges § 365 (1968) ("An owner or occupant of land abutting on a highway, street, or sidewalk, who does not enjoy a private servitude in the way, does not, in the absence of statute or ordinance to the contrary, owe to the public a duty to keep the way in a safe condition, and is generally held not liable for injuries sustained by travelers thereon as a result of conditions which he has not *been instrumental in creating or maintaining*") . . . This is also the English common law rule . . . .

Id. at 1464. (emphasis added). Whether a duty arises in a given case may depend on the existence of particular facts. Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997).<sup>5</sup>

In its Brief, Winsor recognizes the general rule that an abutting landowner or occupier does not owe a duty of care with respect to the safety of the sidewalk, unless that abutter creates an unsafe condition on the sidewalk, or the abutter has a special property interest in the sidewalk, (Br. p. 14), citing Shaw v. City of Charleston, 351 S.C. 32, 567 S.E.2d 530 (Ct. App. 2002). However, this is not the basis on which Winsor argues for reversal. The Shaw case, while at first glance factually somewhat similar, addressed whether summary judgment was appropriate when there was a factual dispute over ownership or control of the area in question – a hole next to and under a coal grate within the sidewalk abutting a private home – and whether the city (the owner of the sidewalk and a defendant) undertook to maintain the sidewalk. Id. at 42-43, 567 S.E.2d at

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<sup>5</sup> RESTATEMENT (SECOND) OF TORTS § 371 (1965) states that “a possessor of land is subject to liability for physical harm to others outside of the land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of physical harm to them under the same conditions as though the activity were carried on at a neutral place.” It does not appear this § 371 has ever been addressed by this Court, nor did Winsor raise that issue at trial.

535. Shaw, however, is telling for other reasons: (1) it makes no mention of § 343A or the “known or obvious” doctrine; and (2) it approvingly cites to the Epps v. U.S. case, infra. at 11-12, for the general statement of duty of care owed by an abutter to the sidewalk, who creates or maintains an unsafe condition, to those using the sidewalk. Id. The standards set forth in Epps and Shaw state the current and correct law, and the trial court’s denial of the directed verdict to Winsor and refusal to charge §343A is completely consistent with that law.<sup>6</sup>

After Winsor cites to Shaw on page 14 of its brief, Winsor leaps to the following conclusion: “naturally, the applicability of 343A follows suit – it would make no sense for it to be otherwise.” (Br. p. 15). This conclusion, however, is not supported by current South Carolina law, nor a citation to any law in any jurisdiction. Winsor’s argument that it was entitled to a directed verdict as a matter of law appears more akin to the defense that Connelly assumed the risk when she continued to run along the Sidewalk after seeing the black plastic debris fluttering in the wind to the edge of the Sidewalk. However, in Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 71, 508 S.E.2d 565 (1998), this Court rejected the absolute/common law defense of assumption of the risk as conflicting with South Carolina’s comparative fault system. The plaintiff in Davenport was injured in a darkened stairwell of his condominium, and sued the regime (which then asserted third-party claims against the maintenance contractor hired by the regime tasked with maintaining the lighting). The Court of Appeals reversed the trial court’s decision directing a verdict for the defendant on grounds that the plaintiff assumed the risk (or was more than 51% negligent), and held for the first time that the common law defense of assumption of the risk has been abrogated by South Carolina’s modified comparative fault system. 325 S.C. 507,

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<sup>6</sup> The court of appeals affirmed the trial court’s grant of directed verdict to Connelly on the duty of care and breach. This Court did not accept certiorari on those grounds, and therefore those rulings would appear to be the law of this case.

513-14, 482 S.E.2d 569, 574 (Ct.App.1997). In reviewing Davenport, this Court analyzed the continuing viability of assumption of the risk in South Carolina's comparative negligence system:

[I]t is contrary to the premise of our comparative fault system to require a plaintiff, who is fifty-percent or less at fault, to bear all of the costs of the injury. In accord with this logic, the defendant's fault in causing an accident is not diminished solely because the plaintiff knowingly assumes a risk. If assumption of risk is retained in its current common law form, a plaintiff would be completely barred from recovery even if his conduct is reasonable or only slightly unreasonable. In our comparative fault system, it would be incongruous to absolve the defendant of all liability based only on whether the plaintiff assumed the risk of injury. Comparative negligence by definition seeks to assess and compare the negligence of both the plaintiff and defendant. This goal would clearly be thwarted by adhering to the common law defense of assumption of risk.

Davenport, 333 S.C. at 86, 508 S.E.2d at 573. Based upon the foregoing, the Court concluded “a plaintiff is not barred from recovery by the doctrine of assumption of risk unless the degree of fault arising therefrom is greater than the negligence of the defendant.” Id. at 87, 508 S.E.2d at 573-74. In this case, the trial court denied Winsor's motions and argument that no reasonable juror could find that Connelly's fault was less than any negligence on the part of Winsor. The jury determined Connelly's fault was less than the negligence of Winsor, and this Court did not accept certiorari to review that issue.

The “known or obvious” doctrine has been similarly criticized in other jurisdictions as inherently inconsistent with modern comparative negligence schemes, and abolished in a growing number of states. See Hersh v. E-T Enterprises, Ltd. Partnership, 752 S.E.2d 336 (W. Va. 2013) (overruled by statute on other grounds) (abolishing open and obvious doctrine in premises liability, and holding that plaintiff's confrontation of an open and obvious hazard is merely an element of comparative fault); Steigman v. Outrigger Enterprises, Inc., P.2d 1238 (Haw. 2011) (detailed discussion of split among states on how to address § 343A and joining the states abolishing the

known or obvious defense in favor of comparative negligence consideration of the same); Tharp v. Bunge Corp., 641 So.2d 20, 25 (Miss.1994) (abolishing the known or obvious danger defense in favor of comparative negligence); Harrison v. Taylor, 768 P.2d 1321, 1326 (Idaho 1989) (same); O'Donnell v. City of Casper, 696 P.2d 1278, 1284 (Wyo. 1985) (abolishing open and obvious concept for man-created hazards); Woolston v. Wells, 687 P.2d 144, 149–50 (Or. 1984); Parker v. Highland Park, Inc., 565 S.W.2d 512, 517 (Tex. 1978). See generally End, James P., *The Open And Obvious Doctrine Where Does It Belong In Our Comparative Negligence Regime?* 84 MARQ. L. REV. 445, 489 (2000).; Hubbard & Felix, *SC LAW OF TORTS* at p. 122 & n. 428-437 (discussing criticism of the retention of the traditional scheme of variable duties of care owed to different categories of persons in the RESTATEMENT (SECOND) OF TORTS where the RESTATEMENT (THIRD) OF TORTS rejects that traditional scheme of categories of persons). South Carolina adopted comparative negligence in all cases, including premises liability, in 1991, the same year of the Callander decision. See Nelson v. Concrete Supply Co., 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991) (adopting a modified version of comparative negligence known as the “less than or equal to” approach). Under this version, “[f]or all causes of action arising on or after July 1, 1991, a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant.” Id.

In the alternative, if this Court were inclined to extend, for the first time, the application of §343(A) to the duty owed by a possessor who creates or maintains a dangerous condition on an abutting sidewalk, this Court should still affirm the trial court’s denial of Winsor’s motion for directed verdict in this case. First, there is evidence from which the jury could infer that Connelly did not subjectively have knowledge of both the condition of the downed plastic and appreciate the danger it involved. Comment b to § 343A reads:

[t]he 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 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.

Connelly testified that she saw the Fence plastic down and fluttering to the edge of the sidewalk, and that a gust of wind picked it up causing it to blow into her feet catching the back of her foot. There was no evidence that she ran directly into the black plastic debris. She attempted to run by it on the clear pathway of the sidewalk. There was also evidence from which a jury could infer that the photo Winsor asserts is determinative of its defense may not have reflected the exact condition of the Sidewalk when Connelly and Smith approached it on the day of their run. The fact that there was some conflicting testimony regarding whether the photo was an accurate depiction of what the condition of the Sidewalk looked like that day or whether the photo’s depiction was worse than it had appeared that day goes to weight of the evidence, which does not entitle Winsor to a directed verdict. Winsor states in its Brief at p. 7 that Connelly “claims the silt fence was in *obvious* disrepair and looked as described in the photo” (adding the italics). However, there is no testimony (including within the citations listed thereafter) where Connelly said the dangerousness of the black debris along the side of the Sidewalk was “obvious” to her.

Secondly, a possessor can owe a duty of care, even if the dangerous condition is obvious, if he should anticipate the harm because he has reason to expect that the invitee’s attention may be distracted, and fail to protect against it, like in Callander; or there is reason to anticipate that the invitee will proceed to encounter the open and obvious condition regardless. §343A Comment (1). Here, there was evidence from which a jury could infer that Winsor should have anticipated debris from the construction site blowing into the sidewalk might interfere with a person’s path,

potentially creating a dangerous condition; that Winsor should anticipate a person running along the Sidewalk may not anticipate the extent of its disrepair of the fence and the ease with which black plastic could blow into the Sidewalk. Winsor testified that one purpose of the fence was to keep construction debris from blowing off the site and onto another's property. (R., p. 428) Coupled with knowledge of the purpose of the fence, Winsor also said he knew his workers would sometimes cause the black plastic to become detached, (R. p. 410), and Winsor had been warned by the Town less than three (3) months prior that this exact Fence was in need of repair. (R. p. 461). Therefore, even considering portions of § 343A, evidence was presented that a jury could reasonably infer that Winsor should have anticipated the danger, despite its obviousness. Therefore, directed verdict is not appropriate.

- b. Winsor is not entitled to a new trial on the grounds that the trial court refused a jury charge on §343A's "known or obvious dangers" language.

"To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well. Refusal to give a properly requested charge is not error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved." Larimore v. Carolina Power & Light, 531 S.E.2d 535, 540-41 (S.C. App. 2000) (citations omitted). When instructing the jury, the trial judge is required to charge only the current and correct law of South Carolina. See Jones v. Cannarella, 297 S.C. 212, 215, 375 S.E.2d 352, 354 (Ct.App.1988) ("A trial charge must be considered as a whole and claims of error in a portion of the charge must be viewed in light of and in context with the rest of the charge.").

The jury charge at issue is as follows:

In a premises liability case, a possessor of land, like Defendant, is not liable to invitees like Plaintiff for physical harm caused by 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.

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.

In this case, Plaintiff was entitled to make use of the public sidewalk; however, even where a Plaintiff is entitled to make use of public land, Defendant may 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 particularly true where a reasonable alternative way is open to the visitor, known or obvious to him, and safe. Callander v. Charleston Doughnut Corp. 305 S.C. 123, 406 S.E.2d (1991); RESTATEMENT (SECOND) OF TORTS, 343A

(R. p. 1240).

First, if the court determines that § 343A does not apply because Connelly was not an invitee and the dangerous condition was not on the premises under control or possession of Winsor, it was not error not to charge portions of § 343A. The court's overall charge explained the current and correct law on the only issues the jury was to determine whether the dangerous condition caused Connelly's damages, the extent and amount of attributable damages, and the extent of Connelly's comparative fault.

If this Court holds that the § 343A and the known or obvious doctrine applied in some way, it was still not error to refuse the requested charge because the trial court directed a verdict for Connelly finding that Winsor owed a duty of due care, as a matter of law, and that Winsor breached that duty. Judge Nicholson's overall charge on comparative negligence allowed the jury to consider Connelly's acts or omissions when confronted with the dangerous condition as she ran along the Sidewalk.

Finally, Winsor has not established that it was prejudiced by the failure to include a charge based on § 343A. The verdict itself illustrates a lack of prejudice. The jury awarded Connelly \$500,000 in compensatory damages, then reduced that award by thirty-five percent (35%) by comparing Winsor's fault to Connelly's fault. This comparative fault analysis necessarily takes

into account Connelly's acts or omissions, including but not limited, whether Connelly was sufficiently paying attention to the black plastic debris along the side of the Sidewalk, whether Connelly should have exited the Sidewalk after seeing the fluttering condition of the black plastic, whether Connelly was paying close enough attention to her surroundings, and/or whether Connelly was distracted while running along the Sidewalk. A thirty-five (35%) allocation of fault to the her is significant evidence that the jury adjudged Connelly's fault compared to that of Winsor.

## VI. CONCLUSION

This Court should affirm the trial court's refusal to direct a verdict to Winsor on the grounds of the § 343A known or obvious doctrine. And, Winsor is not entitled to a new trial based on the omission of the § 343A known or obvious dangers jury charge.

Respectfully submitted,

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