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

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**Oct 20 2020**

S.C. SUPREME COURT

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Appeal from Charleston County
Court of Common Pleas

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

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

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On Writ of Certiorari to the Court of Appeals

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Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Petitioner.

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# REPLY BRIEF OF PETITIONER

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Winsor[1] makes the following points in reply to Mrs. Connelly's brief.

## ARGUMENT IN REPLY

### 1. Mrs. Connelly is incorrect in asserting that Winsor "requests the Court [to] apply the known or obvious doctrine to all tort cases without any provable legal crossing of the Rubicon necessary."[2]

This is a vast overstatement by Mrs. Connelly. Winsor does not ask the Court to apply § 343A to "all tort cases," but rather to rule that the Court of Appeals (and the trial court before it) erred in failing recognize that § 343A applies in cases where, as here, liability is alleged on the basis of any activity or condition on land.

### 2. As Mrs. Connelly herself concedes, the liability asserted against Winsor here is based on an alleged dangerous condition on land.

By arguing, as she does, that "§ 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"[3] Mrs. Connelly necessarily concedes that the liability she asserts against Winsor is based on an "alleged dangerous condition on land."

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[1] Shorthand references defined in Winsor's principal brief (e.g., referring to Defendant/Petitioner, Winsor Custom Homes, LLC, as "Winsor" and to Plaintiff/Respondent, Rosemary Connelly, as "Mrs. Connelly") are continued in this reply brief.

[2] (Br. of Resp. p. 1.)

[3] (Br. of Resp. p. 1.)

### 3. Mrs. Connelly's argument that she was not an "invitee" contradicts her complaint.

Contrary to her instant protest that she was not an "invitee," Mrs. Connelly expressly alleged in her complaint that she was an "invitee." (R. p. 11 ¶ 24 ("Plaintiff was an invitee of the sidewalk or right of way at the sidewalk located directly in front of and at the Premises.").)

### 4. Being classified as an "invitee" is not a condition of § 343A's applicability, and Mrs. Connelly's protest that she was not an "invitee" is illogical.

Mrs. Connelly's brief reads as if she believes it is unfair to view her as an "invitee." Respectfully, this does not make sense. In premises liability cases, different standards of care apply depending on whether the plaintiff is classified as a trespasser, an invitee, a licensee, or a child, and it is "the invitee [who] is offered the utmost duty of care by the landowner[4] . . . ." *Sims v. Giles*, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). To classify Mrs. Connelly as an "invitee" is to afford her the benefit, and in turn impose upon Winsor the burden, of the utmost duty of care known to the law of premises liability.

The "invitee" language in § 343A is not, as Mrs. Connelly seems to believe, a condition of its applicability, but rather reflects the broad scope of liability

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[4] As explained in Winsor's principal brief, 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).

protection that it provides where it is applicable. Under Mrs. Connelly's reading of § 343A, it would only protect a possessor of land from liability to "invitees," not from liability to "licensees" or even "trespassers," even though the possessor owes them a lesser duty of care than he/she/it owes "invitees." The obvious absurdity of such a rule proves that it is not the rule. Rather, the proper reading of the "invitee" language in § 343A is that it makes clear that, *even as to* "invitees," where, as here, § 343A applies (and the exception for harms the possessor should anticipate despite knowledge or obviousness does not) there is no liability.

**5. Mrs. Connelly is incorrect in contending that § 343A does not apply because she was not on the Premises, nor was the dangerous condition on the Premises, when she encountered it.**

As explained in Winsor's principal brief, 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.[5]

In view of the clear aim of § 343A in eliminating liability for known or obvious dangers, it would be absurd—and in furtherance of no conceivable policy objective—to conclude that the rule in § 343A does not apply to the circumstances of the Subject Accident, which occurred on the sidewalk abutting the Premises, the Claimed Accident Condition indeed overlapping the boundary line.

**6. There is no genuine dispute about the Claimed Accident Condition.**

As explained in Winsor's principal brief, Mrs. Connelly, her witness Smith, and her counsel all established the photo Bates Labeled RMC 96 as depicting the Claimed Accident Condition in substantially the same condition as it was at the time of the Subject Accident. Indeed, Mrs. Connelly's counsel's expressly told the jury "[t]hat's what it looked like on June 6, 2011. The photo was taken on the next day,

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[5] According to Mrs. Connelly, "[n]ot 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." (Br. of Resp. p. 11 n.4.) This is of no moment. Mrs. Connelly's case against Winsor charges it with liablity for creating an unsafe condition on the sidewalk and/or based on Winsor having a special property interest in the sidewalk during the course of the construction project on the Premises it abuts. The very nature of Mrs. Connelly's claim against Winsor relies on the extension of Winsor's (the abutter's) possession of the abutting Premises to the sidewalk and, along with it, the legal duty on which she rests her case.

June 7, 2011." (R. p. 576:11–14.) This is a concession that Mrs. Connelly cannot now run from,[6] although her attempt to do so clearly betrays her awareness of just how undeniably open and obvious the Claimed Accident Condition was and, how, if § 343A does apply, that openness and obviousness, coupled with her express testimony about her knowledge of the same, dooms her case.

**7. Any suggestion by Mrs. Connelly that she was not familiar with silt fences or lacked the necessary knowledge to understand just how serious a hazard the fence posed to pedestrians on the sidewalk or about Winsor's having superior knowledge, cannot be given any credence.**

As evidenced by the Claimed Accident Condition photo itself, not to mention Mrs. Connelly's own counsel's description of the silt fence material as being like a "hefty bag," it should be plain that, in all material respects, the hazard posed by the Claimed Accident Condition was a matter of common and ordinary knowledge.

## CONCLUSION

For the reasons set forth herein, along with those set forth in its principal brief, 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.

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[6] *Cf. TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal.").

Respectfully submitted,

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