THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
The Honorable Alison Renee Lee, Circuit Court Judge

Opinion No. 3650 (S.C. Ct. App. filed June 9, 2003)

Gloria Cole and George DeWalt, Jr., in their capacities as Personal Representatives of the Estate of George Ernest Cole, deceased ..... Petitioners/Respondents

v.

South Carolina Electric and Gas, Inc., ... Respondent/Petitioner.

BRIEF OF RESPONDENT/PETITIONER

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II DOES A PARKING FEE NOT RELATED TO THE RECREATIONAL USE OF THE PROPERTY REMOVE THE PROTECTIONS OF THE RECREATIONAL USE STATUTE?

STATEMENT OF THE CASE

This case was commenced by the filing of the Summons and Complaint stemming from the drowning death of George Cole. (R. p. 17). The Complaint alleged causes of action for negligence, nuisance, and unreasonably dangerous activity. The Defendant South Carolina Electric and Gas Company (hereinafter SCE&G) answered and asserted defenses of the Recreational Use Statute, assumption of the risk, comparative fault, accident, and others. (R. p. 22). Following amendments to both pleadings, SCE&G moved for summary judgment. Following a hearing before the Honorable G. Thomas Cooper, the lower court ruled that summary judgment was appropriate for the nuisance and unreasonably dangerous activity causes of action as well as holding that the parking fee did not remove the protections of The Recreational Use Statute. (R. p. 2). By Order dated January 11, 2001, Judge Cooper clarified his earlier order regarding the negligence cause of action. Judge Cooper affirmatively ruled that the Recreational Use statute was applicable and that the parking fee charged by SCE&G was not a charge within the meaning of S.C. Code Ann. Section 27-3-60(b) (1991). (R. p. 10).

This matter was tried before the Honorable Alison Renee Lee and a Richland County Jury from January 29, 2001, to February 1, 2001. The jury returned its verdict in favor of the Defendant. Plaintiff verbally made post trial motions for a judgment not withstanding the verdict or in the alternative a new trial. (R. p. 554). Judge Lee denied those motions and this appeal followed. (R. p. 555-56). In its decision, the Court of Appeals affirmed in part, reversed in part, and remanded the case for a new trial based solely on a finding that the charge to the jury on the burden of proof element of assumption of the risk was inappropriate. Both the Appellant below

and the Respondent/Petitioner filed Petitions for Certiorari with this Court which granted both Petitions in full.

STATEMENT OF FACTS

On August 6, 1997, George Cole arrived at Lake Murray Site #1 with Ms. Patricia Ferguson, Mr. Jonathan Green, and their sons Vincent and Jonathan. (R. p. 357, lines 2-14; p. p. 405, lines 1-2). Though told not to enter the water by Mr. Green, both Vincent and George entered the swimming area. (R. p. 408, lines 10-11; p. 418, lines 22-25; p. 419, lines 1-7; p. 423, lines 2-13). By all accounts, George was a good swimmer. (R. p. 131, lines 9-11; p. 320, lines 1-5; p. 383, lines 18-25). Vincent and George raced up and down the beach area and then decided to swim out to the buoy line. (R. p. 131, lines 12-15; p. 132, lines 4-6). They started to race back to the beach with Vincent catching and passing George. (R. p. 137, lines 8-24; p. 138, lines 6-11). When he got to shore and knew George was in trouble, Vincent ran to get his mother, Patricia Ferguson, then ran to the security officer on site who ran with him back to the beach. (R. p. 118, lines 6-9; p. 118, lines 9-12). Despite the efforts of rescuers, George Cole drowned.

Lake Murray Site #1 had no lifeguard and no lifeguard stand. (R. p. 128, lines 12-14; p. 321, lines 1-3; p. 370, lines 15-23; p. 377, lines 10-12; p. 407, lines 2-17). Signs were posted on the property providing notice that no lifeguard was on duty and that visitors swam at their own risk. (R. p. 345, line 22-p. 348, line 24; pp. 584-86). In addition, handouts were provided to all visitors which included the notice that no lifeguard was on duty and that visitors swam at their own risk. (R. p. 583; p. 326, lines 14-25). All the witnesses testified that they knew no lifeguard

was on duty. (R. p. 128, lines 12-14; p. 321, lines 1-3; p. 370, lines 15-23; p. 377, lines 10-12; p. 407, lines 2-17). George Cole's friend Vincent testified that he knew this meant "what happens is you know is on yourself. Swim at your own risk." (R. p. 130, lines 1-8). George Cole had been to this property before this occasion. (R. p. 320, lines 6-8; p. 370, lines 7-10). George Cole had swam out to the buoy line before this occasion. (R. p. 384, line 1-p. 385, line 6). Since he was a good swimmer, this activity did not disturb his mother. (R. p. 385, lines 1-9). Though a security guard was stationed at the site, the security guards wore uniforms and did not supervise swimming, they simply enforced the printed rules of the site. (R. p. 174, lines 1-21; p. 329, lines 9-25; p. 331, lines 3-17; p. 341, lines 8-11).

Lake Murray Site #1 is a recreational site open to the public for swimming, sunbathing, picknicking, reunions, games and other activities. (R. p. 207, lines 3-15). SCE&G charged a parking fee to park a vehicle at Lake Murray Site #1. (R. p. 59, lines 15-22). This was a parking for the vehicle itself and was not related to the number of visitors in each vehicle. (R. p. 59, lines 15-22). People who walked onto the property, rode bicycles onto the property, or swam or used some other means to enter the property were not charged a parking fee or a fee of any kind. (R. p. 59, line 24-p. 60, line 3; p. 40, lines 1-5).

I A PARKING FEE ON A PER VEHICLE BASIS IS NOT A CHARGE IN EXCHANGE FOR PERMISSION FOR PERSONS TO GO ONTO LAND FOR RECREATIONAL PURPOSES.

Petitioners/Respondents assert that the Court of Appeals erred in ruling that the parking fee on vehicles entering the site did not fall within the definition of a charge as defined by The Recreational Use Statute. Contrary to the arguments of the Petitioners/Respondents, the Court of Appeals correctly construed The Recreational Use Statute. As noted by the Court of Appeals in its decision, the meaning and scope of a "charge" under The Recreational Use Statute has not been addressed by the appellate courts of South Carolina prior to the decision of the Court of Appeals. See Cole v. South Carolina Electric and Gas, Inc., 355 S.C. 183, 584 S.E.2d 405 (Ct. App. 2003).

In introducing this issue, the Petitioner/Respondent indicates that SCE&G charged a "fee of three dollars to all persons entering the Lake Murray site in an automobile." (Petitioners/Respondents Brief p. 5). This is a misstatement of the facts. As found by the Court of Appeals, the facts of this case concerning the parking fees collected by SCE&G were not disputed by Petitioners/Respondents. Petitioners/Respondents did not dispute that the fee was a parking fee for vehicles entering the site. (R. p. 59, lines 15-22). This was a charge for the vehicle itself and was not related to the number of visitors in each vehicle. (R. p. 59, lines 15-22). As counsel for Petitioners/Respondents noted at argument before the lower court, it did not matter whether one person was in the vehicle or twenty, the parking fee was the same. (R. p. 59, lines 13-22). People who walked onto the property, rode bicycles onto the property, swam or used some other means to enter the property were not charged a parking fee or a fee of any kind.

(R. p. 59, line 24-p. 60, line 3; p. 40, lines 1-5). Thus, since no factual issue exists as to the method the parking fee was collected and from whom it was collected, the sole issue before the Court is whether a parking fee is a "charge" within the meaning of the statute.[1] The attempted characterization of the parking fee as an admission fee charged against all persons entering the site in an automobile is not supported by the Record and is improper.

That leaves the Court with the question of whether or not a parking fee to enter a site is a "charge" under the South Carolina Recreation Use Statute. The resolution of this issue turns on the construction of S.C. Code Ann. Section 27-3-20(d) (1991) which defines "charge" as meaning "the admission price or fee asked in return for invitation or permission to enter or go upon the land." This definition must be viewed in light of the context in which it is used in S.C. Code Ann. Section 27-3-60 (1991). Under Section 27-3-60, the immunity granted by the statute does not apply "[f]or injury suffered in any case where the owner of land charges persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the State or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section."

The goal of statutory construction is to ascertain and give effect to the legislature's intent. Jackson v. Charleston County Sch. Dist., 316 S.C. 177, 180, 447 S.E.2d 859, 861 (1994). "We determine legislative intent primarily through the plain language of the statute." Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct.App. 1996). "In construing statutes, the terms used therein must be taken in their ordinary and popular meaning. When such terms are

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[1]The ruling regarding the parking fee was made by Judge Cooper before trial and was the law of the case during the trial. Only the evidence before Judge Cooper is appropriately considered and Petitioners/Respondents did not contest the facts concerning the parking fee before Judge Cooper.

clear and unambiguous, there is no room for construction and courts are required to apply them according to their literal meaning." Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 28, 416 S.E.2d 641, 644 (1992).

In construing the Recreational Use Statute under the uncontested facts concerning the parking fee, the Court of Appeals held that

> a parking fee assessed only to those entering by motor vehicle, and on a per-vehicle basis, does not constitute a "charge" under section 27-3- 60(b). The undisputed evidence demonstrates only that the fee is purely for the privilege of using a motorized vehicle at the site and is not related to the admission of individuals to the recreation site and is not imposed in return for recreational use of the site.

Cole at 409.

The Court of Appeals properly ruled that under The Recreational Use Statute the definition of a charge is clear: it requires a quid pro quo on the part of the patron and the landowner. The patron must pay the landowner an "admission price or fee . . . in return for invitation or permission to enter or go upon the land." S.C. Code Ann. Section 27-3-20(d) (1991). In the present case, no charge was made for entrance upon the land. The charge was for vehicles to park at the site. (R. p. 59, line 15-p. 60, line 3; p. 40, lines 3-18). It was stipulated that this parking fee was assessed without consideration for the number of individuals in the vehicles themselves. (R. p. 59, line 15-p. 60, line 3). In addition, it was not contested that people who walked, swam, or rode a bicycle into the site were not charged. (R. p. 59, line 15-p. 60, line 3; p. 40, lines 3-18). The recreational use of this property was swimming, picnicing, sunbathing, and the like. The driving of a car and parking same at the site were not recreational uses and charges for such parking were not admission prices to enjoy the site for recreational

purposes. Since the undisputed facts clearly fall outside the definition of "charge" as used in our statute, the Court of Appeals properly upheld the lower court's ruling on this issue.

A. States with statutes similar to South Carolina's Recreational Use Statute support the decision of the Court of Appeals that the parking fee was not a charge for admission to the premises.

As noted by the Court of Appeals, South Carolina is not alone in adopting provisions similar to The Recreational Use Statute. South Carolina's version of the Recreational Use Statute derives from a model act developed by the Council of State Governments in the 1960s. See Holden by Holden v, Schwer, 495 N.W.2d 269 (Neb. 1993). In reference to the issue of charges, all contain language which removes the grant of immunity when admission is based upon a fee charged. The cases interpreting the various version of the statutes fall within two groups. The first group deals with statutes that have a specific definition of what constitutes a "charge" while the second group contains a very broad notion of economic benefit akin to consideration. Petitioners/Respondents have relied heavily on this latter group of cases in support of their argument that the parking fee was a charge. Contrary to this assertion, South Carolina's version of The Recreational Use Statute clearly falls within the former group with a specific and limited definition of charge.

Those states whose statute closely resemble South Carolina in the treatment of a charge include Georgia, Kentucky, Pennsylvania, Connecticut, Hawaii, Rhode Island, and Nebraska. All of these jurisdictions have almost identical language concerning the definition of a "charge" and that a landowner loses the protections of the Recreational Use Statute when they exact a

charge.

In Georgia, the same definition of "charge" is used as is found in the South Carolina Recreational Use Statute. See Stone Mountain Memorial Association v. Herrington, 171 S.E.2d 521 (Ga. 1969).[2] In Herrington and subsequent cases, the Georgia courts have reviewed whether parking fees to drive a vehicle into Stone Mountain Park were admission charges or fees for the permission to go upon the land. See Quick v. Stone Mountain Memorial Association, 420 S.E.2d 36 (Ga. App. 1992). The Herrington court noted that foot traffic was not charged and that the charge was on a vehicle basis and not based upon the number of visitors and therefore was not properly an admission fee under the statute. See also Majeske v. Jekyll Island State Park Authority, 433 S.E.2d 304, 305-305 (Ga. App. 1993) (holding a $1 parking fee for all vehicles was not an admission fee since boat traffic, foot traffic, and other type of entry was not subject to the charge); Hogue v. Stone Mountain Memorial Association, 358 S.E.2d 852 (Ga. App. 1987) (holding fee paid for vehicle sticker that allowed for re-entry without additional fee was not an admission charge for recreational use of land). The Georgia statute is a mirror of South Carolina's Recreational Use Statute, both using identical definitions for "charge" and almost identical definitions for when the "charge" removes the immunity provided by the statutes. See Ga. Code Ann. Section 51-3-21(1); Ga. Code Ann. Section 51-3-25(2); S.C. Code Ann. Section 27-3-20(d) (1991); S.C. Code Ann. Section 27-3-60(b) (1991). Though Petitioners/Respondents criticize the Georgia cases as being wrongly decided, they have been widely relied upon by other jurisdictions concerning the scope and meaning of similarly worded statutes.

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[2]The Georgia statute defines a charge as "the admission price or fee asked in return for invitation or permission to enter or go upon the land."

Also reviewing the question of parking fees was City of Louisville v. Silcox, 977 S.W.2d 254 (Ky. App. 1998). In Silcox, the City charged a $2.00 per car parking fee for access to a parking lot at a recreational site. Visitors who rode bikes or did not park in the parking lot in question paid no fee. Id. at 255. Under identical language to that contained in South Carolina's statute, the Kentucky Court of Appeals determined such fees where not charges as defined in the statute. Silcox relied heavily on the cases from Georgia since their statutes were almost identical. Id. at 256.

Under Pennsylvania's version of the Recreational Use Statute, the protections afforded are removed if a charge (defined as the "admission price or fee asked in return for invitation or permission to enter or go upon the land") is made for the "person or persons who enter or go on the land for recreational use thereof." See Flohr v. Penn Power & Light Co., 800 F.Supp. 1252 (E.D. Penn. 1992). In reviewing the question of whether overnight camping fees were charges under the statute, the District Court determined such fees were not charges for admission since only those who elected to stay overnight were charged a fee. Other visitors who did not remain at a campsite overnight paid no fee. Id. at 1255. The Flohr Court specifically noted the concept that "charge" as defined by the Pennsylvania Legislature required a quid pro quo – a charge for the owner's permission to enter the land for recreational purposes.

Under Connecticut's statute, charge is defined as "the admission price or fee asked in return for invitation or permission to go upon land." Genco v. Connecticut Light and Power Co., 508 A.2d 58 (Conn. App. 1986). In Genco, the Appellate Court of Connecticut reviewed boat slip charges and similar charges regarding use of a lake and determined such charges were operational or maintenance type charges and not admission charges. The lake in question being

open for recreational purposes free of charge if these services (for which fees were charged) were not used.

In Hawaii, the statute's wording is again almost verbatim to that contained in Georgia and South Carolina. See Viess v. Sea Enterprises Corp., 634 F. Supp. 226 (Hawaii 1986) (charge defined as "admission price or fee asked in return for invitation or permission to go upon the land."). In rejecting the broader interpretation of charge, the Viess court ruled that monies paid for rental of equipment, though conferring an economic benefit, did not meet the definition of charge used in the statute. Id. at 229; see also Covington v. United States, 916 F.Supp. 1511, 1521 n. 2 (D.Haw.1996), *aff'd,* 119 F.3d 5 (9th Cir.1997) ("[A]lthough the Warrens paid to use the picnic area behind the beach, this fee does not trigger the charge exception because it was not a prerequisite to Joshua's entry onto the beach.").

In Hanley v. State, 837 A.2d 707 (R.I. 2003), the Supreme Court of Rhode Island reviewed whether or not overnight camping and parking fees on a per vehicle basis destroyed the protections of the Recreational Use Statute when other visitors who did not enter via a camper or car paid no fee. The Hanley Court, reviewing almost identical language to South Carolina's statute, determined such parking and camping fees were not admission fees for entry to the land. Id. at 714.

When faced with similarly worded statutes, there is a uniformity of decisions that fees such as parking fees are not charges as contemplated under the recreational use statutes. See Midwestern v. Northern Ky. Com. Center, 736 S.W.2d 348 (Ky. App. 1987) (when plaintiff was injured when no charge was made for access, fact that charges were made at other times did not remove protection afforded by statute); Garreans v. City of Omaha, 345 N.W.2d 309, 313 (Neb.

1984) (charges for parking campers, pitching tents and such did not constitute a charge "in return for an invitation to enter or go upon the land.").

B. The cases relied upon by Petitioners/Respondents stem from states whose statutes incorporate the broader concept of consideration.

The decisions from states with similar statues should be contrasted from the statutes and decisions involving much broader language than the quid pro quo discussed above. When faced with terms such as "compensation" and "consideration," any economic benefit has been deemed enough to defeat the protection of the statutes. See Twohig v. United States, 711 F.Supp. 560 (D.Mont. 1989) (interpreting the Idaho statute which uses the term consideration as including purchase of a park and ski permit). Twohig discusses in detail the two approaches to what constitutes a charge for admission to the premises. Id. at 562-63.

It is particularly telling that all of the cases relied upon by Petitioners/Respondents in support of their argument that the parking fee is a charge deal with statutes that have much broader language than South Carolina's version. In discussing Thompson v. United States, 592 F.2d 1105 (9th Cir. 1979), Petitioners/Respondents fail to acknowledge that California's Recreational Use Statute removes the protection when a landowner is granted "consideration." Thompson, 592 F.2d at 1108 (9th Cir.1979) (citing California Civil Code Section 846 as removing the protection if a landowners is paid consideration for access to land). Moreover, the Ninth Circuit Court of Appeals acknowledged the distinction between the broad application of consideration and the narrow application of a charge for entry to the land in Jones v. United States, 693 F.2d 1299 (9th Cir. 1982). The Ninth Circuit reviewed the Washington Recreational

Use Statute which required a "fee" for access to the land and held that payment of a rental fee for an inner tube was not a "fee" for use of the land. Jones at 1303.

This same oversight exists in their discussion of Ducey v. United States, 713 F.2d 504 (9th Cir. 1983) in which the Ninth Circuit Court of Appeals reviewed the impact of Nevada's version of the Recreational Use Statute. Nevada's statute centered around "consideration" which the Ninth Circuit stated was not worded "in narrow terms of 'fee' or 'charge,' but rather in the far more encompassing terms, 'for a consideration.'" Id. at 510. Ducey acknowledged the distinction between the various Recreational Use Statutes, a distinction the Petitioners/Respondents fail to even address. Finally, Petitioners/Respondents cite Moss v. State of Ohio, Department of Natural Resources, 404 N.E.2d 742 (S.Ct. Ohio 1980). Again, Ohio's statutory language uses the concept of consideration. The Moss Court, however, limited to scope of its analysis of consideration to instances in which a charge was made to utilize the overall benefits of the recreational area so that it may be regarded as an entrance or admittance fee. Id. at 745. Contrary to the assertion by Petitioners/Respondents, the Court in Moss actually held that the fees charged for renting canoes and other items not related to an admission for the use of the overall benefits of the site were not such a consideration so as to remove the protections of their version of the Recreational Use Statute.

The South Carolina Recreational Use Statute clearly defines what constitutes a "charge." Since the facts regarding the parking fee were not disputed below, the parking fee is clearly not a charge within the meaning of the Statute and the Recreation Use Statute does apply to the present case as decided by the lower court and the Court of Appeals.

II THE PARKING FEE WAS NOT RELATED TO THE RECREATIONAL USE OF THE PROPERTY AND DID NOT REMOVE THE PROTECTIONS OF THE RECREATIONAL USE STATUTE.

Petitioners/Respondents discuss in length the grammatical structure of S.C. Code Ann. Section 27-3-60 (1991). In this discussion, Petitioners/Respondents ignore the plain language of the statute which first requires the charge to be made against a person for the owner's permission to enter or go onto the land. As discussed above, the parking fee does not fall within this definition in the first instance and thus the Court of Appeals correctly ruled the Recreational Use Statute applies to the present facts. Petitioners/Respondents also fail to properly incorporate this meaning of charge into S.C. Code Ann. Section 27-3-60 (1991). Under Section 27-3-60, the immunity granted by the statute does not apply "[f]or injury suffered in any case where the owner of land charges persons who enter or go on the land for the recreational use thereof. . ." In the present case, there was no charge for the recreational uses open to the public at the site. Such uses, including swimming, were absolutely free to all visitors without a charge. The only charge being made involved visitors wishing to park a motor vehicle in the parking lot. This parking fee was assessed not based upon the number of persons in the vehicle but was in fact simply a per vehicle charge. Such activities are clearly not related to the recreational uses of the site. The Courts that have reviewed similar issues under the narrower version of "charge" have held that fees and charges unrelated to the recreational use of the land, such as parking fees, did not remove the protection of the statute. See Herrington, at 522-23; Majeske at 305-306; Hogue at 380; Flohr at 1256; and Hanley at 714. Even some states adopting the broader language of consideration have ruled that the fees or charges must relate to the recreational use of the facility as opposed to incidentals such as camping space, parking, and equipment rental. See Reed v. City

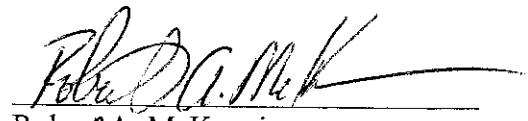
of Miamisburg, 644 N.E.2d 1094 (Oh. App. 1993); Moss, 404 at 745.

CONCLUSION

Under Petitioners/Respondents reasoning, any fee or consideration paid to a landowner could be used to defeat the protections afforded by the Recreational Use Statute. The landowner who sells bait in connection with allowing access to his land for fishing could be deemed to be making a "profit" and thus not protected by the statute even though those who bring their own bait pay no fee of any kind. The local community that opens a park for recreational purposes but who charges a fee to rent strollers or recreational equipment would lose protection under the statute even though no fees were charged to visitors who brought their own equipment or strollers. Requiring permits for docking boats on a lake, fishing, camping overnight, and other assorted fees would all remove the protections afforded by the Statute.

Petitioners/Respondents have cited no case from any jurisdiction which adopted the same form of the Recreational Use Statute as South Carolina which supports this reasoning. To the contrary, those jurisdictions which have considered the matter have uniformly held that fees such as parking fees not required for access to the land and not associated with recreational activity do not remove the protections afforded by the Act. This Court should uphold the decision of the Court of Appeals and affirm the lower court's grant of summary judgment on this issue.

August 13, 2004



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