THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County Common Pleas Court
Hon. G. Thomas Cooper, Jr., Circuit Court Judge
Hon. Alison Renee Lee, Circuit Court Judge
Docket Number: 99-CP-40-0019

On Writ of Certiorari to the
South Carolina Court of Appeals
Opinion No. 306 (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,	)
vs.	)
South Carolina Electric and Gas, Inc.	)
Respondent-Petitioner.	)

FINAL BRIEF OF PETITIONERS-RESPONDENTS

Robert A. McKenzie
Gary H. Johnson, II
McDonald, McKenzie, Rubin Miller and LyBrand, L.L.P.
P. O. Box 58
Columbia, SC 29202
(803) 252-0500

Attorneys for Respondent-Petitioner

F. Xavier Starkes
William T. Toal
Johnson, Toal & Battiste, P.A.
P. O. Box 1431
Columbia, SC 29202
(803) 252-9700

Attorneys for Petitioners-Respondents

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QUESTION PRESENTED

I.

Does the Recreational Use Statute grant immunity to landowners who charge a fee to persons in automobiles entering the premises?

FACTS

George Cole was drowned while swimming at defendant's site at Lake Murray. (R-117 – 124; R-154 – 155). The facility is surrounded on the land areas by a chain link fence but is accessible by boat to anyone on Lake Murray. Walk-ins, though rare, are permitted without charge but persons in automobiles are required to pay a three-dollar charge. (R-3) South Carolina Electric and Gas Company denominates the charge as a "parking fee" but the fee is payable by anyone entering the premises in a car as drive through traffic is not permitted. (R-583). George Cole did not himself pay the fee but someone in his vehicle did. (R-3).

STATEMENT OF THE CASE

The Summons and Complaint in this matter were filed in the Richland County Common Pleas Court on January 5, 1999. The Complaint alleged three causes of action related to the drowning of George Cole at a site owned and operated by South Carolina Electric and Gas Company. The Complaint alleged causes of action in negligence, nuisance and unreasonably dangerous activity. (R-15-21). The Answer was filed on March 8, 1999, with defenses of a general denial, assumption of the risk, comparative negligence and gross negligence and accident among others. (R-22-26). An Amended Complaint was filed on February 24, 2000. (R-27-33). The Answer to the Amended Complaint was filed on March 6, 2000. (R-34-38). Defendant moved for Summary Judgment and on October 24, 2000, a hearing was held before Honorable G. Thomas Cooper.

In an Order dated December 21, 2000, Judge Cooper denied summary judgment as to the negligence and gross negligence causes of action and granted summary judgment on the nuisance and other hazardous causes of action. The court ruled that a three-dollar parking fee was not a "charge" under the Recreational Use Statute because it was not a charge for the recreational use of the site and that the company would be liable only for gross negligence. (R-1-8). After a Motion to Alter or Amend, Honorable G. Thomas Cooper ruled in an Order dated January 11, 2001, that the Recreational Use Statute was applicable notwithstanding a $3.00 "parking fee". (R-9-14).

The matter was called for a jury trial on January 29, 2001, through February 1, 2001, before Honorable Alison Renee Lee. At trial, Judge Lee refused to reconsider the

issue regarding the recreational use statute, (R-81) and charged the jury that a Department of Health and Environmental Control regulation may or may not be applicable to the case (R-518). The jury returned a verdict for the defendant. (R-552). A motion for a new trial and for judgment n.o.v. was denied. (R-553-554). Timely Notice of Intention to Appeal was filed and served and an appeal followed in the South Carolina Court of Appeals. The Court of Appeals issued its Order on June 9, 2003. The Court of Appeals held that the three-dollar "parking fee" was not a "charge" and that accordingly, the Recreational Use Statute applied. The Court held that failure to charge that the Department of Health Regulation applied was harmless error but the plaintiffs were entitled to a new trial because of the failure of the trial judge to charge that defendants had the burden of proving assumption of the risk. Both parties filed timely Petitions for Rehearing. (J.A. 14, 21). Plaintiff's Petition filed June 10, 2003, raised issues regarding the applicability of the Recreational Use Statute. Defendant's Petition filed June 20, 2003, raised the issue of the asserted conflict between the Recreational Use Statute and the Department of Health Regulation, and the issue of whether the charge on assumption of the risk was appropriate. The Petition also raised the issue of whether plaintiff's decedent was more than fifty percent at fault as a matter of law. The Court of Appeals, by Order dated August 21, 2003, denied both Petitions. Plaintiffs filed a Petition for Writ of Certiorari on September 17, 2003, raising the question "Does the Recreational Use Statute grant immunity to landowners who charge a fee to persons in automobiles entering the premises." Defendants filed its Petition for Certiorari on September 19, 2003, raising three questions:

I. Did the Court of Appeals err in failing to address the direct conflict between Regulation 61-50 which requires affirmative duties to protect visitors to natural swimming areas and the recreational use statute which declares a landowner owes no duty of care to visitors for recreational pruposes?

II. Did the Court of Appeals err in holding that the charge to the jury on assumption of the risk failed to convey a meaningful burden of proof element?

III. Did the Court of Appeals err in failing to address the decedent's assumption of the risk as a matter of law and the fact that the decedent was greater than fifty percent at fault as a matter of law?

This court granted both Petitions.

ARGUMENT

I.

The "parking fee" is a charge for entering the land. Because South Carolina Electric and Gas charges this fee, it is not entitled to the protection of the Recreational Use Statute.

This is a case of first impression interpreting the Recreational Use Statute. (S.C. Code Sections 27-3-10 through 27-3-70). The question involved is whether South Carolina Electric and Gas is entitled to the protection of the recreational use statute even though it charges a fee of three dollars to all persons entering the Lake Murray site in an automobile. The fee is called a parking fee.

The following sections of the Statute are relevant to this issue:

27-3-20 . . .

(a) "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty. . .

(b) "Charge" means the admission price or fee asked in return for invitation or permission to enter to go upon the land

. . . .

27-3-40 . . .

Except as specifically recognized by or provided in Section 27-3-60 an owner of land who permits without charge any person having sought such permission to use such property for recreational purposes does not thereby:

(a) Extend any assurance that the premises are safe for any purpose
(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed
(c) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons.

. . . .

27-3-60 . . .

Nothing in this chapter limits in any way any liability which otherwise exists:

. . . .

(b) For injury suffered in any case where the owner of land charges persons who enter or go on the land for the recreational use thereof

. . . .

This court is to apply the statutory terms according to their literal meaning. See, e.g. Tilley v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (S. Ct. 2003). And, because the statute is in derogation of the common law the statute must be strictly construed and should not impliedly extend to cases not within their scope and purpose. See, e.g., Olson v. Faculty House of Carolina, 354 S.C. 161, 580 S.E.2d 440 (S. Ct. 2003). The statute is to be interpreted narrowly. See, e.g., Harris-Jenkins v. Nissan Car Mart, 348 S.C. 171;

557 S.E.2d 708 (Ct. App. 2001); Steinert v. Lanter, 284 S.C. 65; 325 S.E.2d 532 (S. Ct. 1985).

With those principles in mind, an analysis of the language of the statute is appropriate. The protection of the statute is not lost because a person pays. It is lost "when the owner charges." S.C. Code Section 27-3-60(b). It is thus not relevant that George Cole did not personally pay the fee.

The "charge" must be "the admission price or fee asked in return for invitation or permission to enter or go upon the land." S.C. Code Section 27-3-20(d). The Court of Appeals found that there was no "charge" in this case. Cole v. South Carolina Electric and Gas, 355 S.C. 183, 584 S.E.2d 405 (Ct. App. 2003). In doing so, the Court of Appeals relied on cases which required the fee to be for recreational purposes, and on cases in which the fee was not for the entry. The Georgia cases upon which the Court of Appeals relied, Stone Mountain Memorial Association v. Herrington, 225 Ga. 746, 171 S.E.2d 521 (1969) and Hogue v. Stone Mountain Memorial Association, 183 Ga. App. 378, 358 S.E.2d 852 (1987) are at best confusing. Herrington noted that the "fee charged for admission to the park was purely a parking fee and was in no way related to the admission of persons to the park." Hogue explained that the fee was not a fee for "the recreational use of the park." 358 S.E.2d at 854. The confusion in Herrington comes from the fact that automobiles do not pay admission fees; people do. Even if an automobile could pay a fee, the question under the statute is whether the owner makes a charge. Hogue presents a better, but not a sufficient, rationale. If the statute required that

the fee be for the recreational use of the property, Hogue, the Court of Appeals and Judge Cooper would be right. It does not. The statute, by its express, terms takes away the protection otherwise offered where "the owner of land charges persons who enter or go upon the land for the recreational use thereof". The question to be decided then is whether the clause "for the recreational use thereof" modifies "charges" or "persons who enter or go upon the land." Two factors militate toward the resolution that the charge does not have to be for the recreational use. First is the location of the participle. The phrase "for the recreational use thereof" is not located next to "charge". If the legislature had meant for the phrase to modify charge, it could have included it in the definition of "charge" Section 27-3-20(d) would then have read: "Charge" means the admission price or fee for the recreational use of land asked in return for invitation or permission to enter or go upon the land." Or the modifying participle could have been placed next to the word "charge". The grammatically correct conclusion is that "for the recreational use thereof" modifies "persons who enter or go on the land".

This court has endorsed good grammar as a means of interpretation of statutes and other documents. The rule of proximity of the modifying clause with the noun to be modified was recognized in Rembert v. Vetoe, 89 S.C. 198, 71 S.E. 959 (1911). The court ruled "By grammatical construction, the words 'according to the statute of distributions of intestate estates' appearing in the will now at bar, can be taken only as qualifying the immediately preceeding words 'my next of kin at that time living.'" 89 S.C. at 202, 71 S.E. at 961-962. See also, Columbia Real Estate and Trust v. Royal

Exchange Assurance, 132 S.C. 427, 128 S.E. 865 (1925); Duncan v. The Record Publishing Co., 145 S.C. 196, 143 S.E. 31 (1927) (if the construction contended for could be stated in plain English another way, there is no reason to avoid the grammatical interpretation.) This preference for a grammatical interpretation is not absolute. "[W]hen the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purposes of the enactment or to some inconvenience or absurdity, hardship or injustice, presumedly not intended, a construction may be put upon it, which modifies the meaning of the words, and even the structure of the sentence. State ex rel Walker v. Sawyer, 104 S.C. 342, 346-347, 88 S.E. 894 (1916). The purpose of the Recreation Use Statute is to provide a degree of protection to persons who don't make money off persons who use their land for recreational purposes. The noble purpose of the statute would not be defeated by denying the protection of the statute to a landowner who takes in funds from persons entering the land by automobile.

The second factor militating toward a finding of that "recreational use thereof" modifies "persons who enter or go upon the land" is the employment of the word "thereof" "[T]hereof" obviously refers back to "land". It cannot refer to "charge". Again, the grammatical indicators point to the conclusion that the charge must be for entrance but it is not required to be for the recreational use of the property.

The Court of Appeals relied on Jones v. United States, 693 F.2d 1299 (1982) for the proposition that the landowner may charge for something other than the use of the land without losing the protection of a recreational use statute. In Jones the plaintiff had

rented an inner tube. That fee was not a fee charged for the use of the land. The Court of Appeals failed to mention Thompson v. United States, 592 F.2d 1104 (9 Cir. 1979). The Jones court took great pains to distinguish Thompson. In Thompson, the landowner charged a racing association a $10.00 application service fee and a $10.00 rental charge. Those fees were "for the use of the land" 693 F.2d at 1303. The plaintiff in Jones "entered the Park without paying a fee. She could have used the Hurricane Ridge or any other area of the Park without making any payment if she had brought her own tube." In this case, the fee is for coming in the gate in an automobile. Parking, the stated reason for the fee in this case, requires the use of a portion of the land. Even were the Washington Recreational Land Use Act identical to the South Carolina statute, following Jones would lead to this conclusion that the parking fee is a fee for the use of the land.

In fact the Washington statute is significantly different. That statute, RCW 4.24210 provides immunity to landowners "who allow members of the public to use them for the purpose of outdoor recreation . . .without charging a fee of any kind therefore. . ." The Washington Act, unlike the South Carolina Recreation Use Act, clearly requires the fee to be for the recreational use of the land. South Carolina's statute provides immunity to a landowner who does not charge a person entering the land when that person intends to use it for recreational purposes.

The Court of Appeals correctly identified the holding in Garreans v. City of Omaha, 216 Neb. 487, 345 N.W.2d 309 (Neb. 1984). The Nebraska Supreme Court held

that a camping and tent fee was not a fee for entry on the land. Garreans is factually distinguishable. In this case it is the entry by automobile, which triggers the fee. No other or additional fee is required.

Honorable G. Thomas Cooper, Jr. entered an Order, which among other things, granted defendant's motion that the recreational use statute was applicable to this case. He ruled that the three ($3.00) dollar parking fee was not a "charge" as defined by South Carolina Code Section 27-3-20(d).

In support of his decision, Judge Cooper cited Twohig v. United States, 711 F.Supp 560 (D. Mont. 1989) and referenced the "unanimity of decisions under similar facts in states defining 'charge' as does South Carolina." (R-5). In explication of his ruling on a motion for reconsideration, the judge reasoned that while Twohig itself held the recreational use statute in Montana inapplicable, its citation of cases from Connecticut, Nebraska, Kentucky, Oregon, Iowa and Hawaii, states said to have statutes like South Carolina, was persuasive. An examination of those cases reveals nothing that could fairly persuade this court that the "parking fee" in this case is not a fee asked in return for permission to go on the South Carolina Electric and Gas site.

Before examining those cases, it is important to remember that the Recreational Use Statute is in derogation of the common law duties, which the company would owe to persons coming on its property. The "rules of common-law are not to be changed by doubtful implication, or overturned except by clear and unambiguous language."

Nuckolls v. Great Atlantic & Pacific Tea Company, 192 S.C. 156, 161, 5 S.E.2d 862, 846 (1939).

This principle was applied with decisive effect in Ducey v. United States, 713 F.2d 504 (9 Cir 1983). There the court found that fees for trailer spaces and boat fees were "consideration" for permission to use the land for recreational purposes. The court found that "where a landowner derives an economic benefit from allowing others to use his land for recreational purposes, the landowner is in a position to post warnings, supervise activities, and otherwise seek to prevent injuries." Id. At 511. "Since the recreational use statute is in derogation of common law rules of tort liability, we take care to avoid an overbroad interpretation of the statute that would afford immunity that was not intended." Id. At 510. With the principle established that immunity should not be granted where not intended, let us turn to the cases cited by Judge Cooper.

In Twohig a park and ski permit was considered "compensation". The court held that the decedent need not have paid for the parking permit himself; it was sufficient that someone had to pay to enter the premises. Accord Kantner v. Combustion Engineering, 701 F.Supp 943 (D.N.H. 1988), Hallacher v. National Bank & Trust Co., 806 F.2d 488 (3d Cir. 1986) (applying New Jersey law).

In O'Neal v. United States, 814 F.2d 1285 (9 Cir 1987) (applying Oregon law) no member of the hunting party had paid any fee nor did the United States make a charge to anyone to enter the land. Similarly in Hegg v. United States, 817 F.2d 1987 (8 Cir 1987) although the United States charged a camping fee, plaintiff did not intend to camp and had paid no fee.

In Genco v. Connecticut Light & Power Co., 7 Conn.App. 164, 508 A.2d 58 (1986) the defendant power company made no charge to use its beach although municipalities did. The company received the benefits of Connecticut's recreational use statute.

Garreans v. City of Omaha, 216 Neb. 487, 345 N.W.2d 309 (1984) (applying Nebraska law) and Midwestern, Inc. v. Northern Kentucky Community Center, 736 S.W.2d 348 (Ct.App. Ky 1987) (applying Kentucky law) are factually distinguishable. In Garreans a tent paid fee was not a fee for entering the premises. In Midwestern no fee was charged to anyone on this day.

In Viess v. Sea Enterprises, 634 F.Supp 226 (D. Hawaii 1986) the court held that a beach owner who charged nothing for access to the beach was entitled to the protection of Hawaii's recreational use statute even though an independent company charged a rental fee for "boogie boards." Not only do the cases cited not support Judge Cooper's ruling, other factually similar cases reach the conclusion that a fee paid removes the protection of the Recreational Use Statute.

In Hoth v. State of Ohio, Department of Natural Resources, 62 Ohio St. 2d 138, 404 N.E.2d 742 (S.Ct. Ohio 1980) the Ohio Supreme Court found that a person who paid a fee to park their camping trailer had paid "a fee or consideration to enter upon premises to engage in recreational pursuits," and that the fee was a charge necessary to utilize the overall benefits of the recreational area.

In Thompson v. United States, 592 F.2d 1104 (9 Cir. 1979) a $10.00 application

service fee and a $10.00 rental fee to a motorcycle club was a "consideration" to enter government land.

The cases relied upon by Judge Cooper do not support his ruling. The cases relied upon by the Court of Appeals either have flawed logic or they do not support its opinion. Indeed the purpose of the Recreational Use Statute is to distinguish between those who volunteer their land and those who charge and are thus capable of providing protection against known dangers. It makes no difference what defendant calls its charge; it is making money, which it should have used to place the safety lines properly and to hire lifeguards. This was a charge for entering the recreational property. No turnarounds were permitted. The gates were locked when there was no one to collect the fee. Boat traffic was discouraged by roping off the area. Although walk-ins or swimmers from boats paid no fees, the company actively discouraged that free access. South Carolina Electric and Gas can take in as much money from a "parking fee" as from a "swimming fee". George Cole's party had to pay the fee for George to enter the property. The company is not entitled to the protection of the recreational use statute.

CONCLUSION

Because a statute in derogation of the common law is to be construed to preserve the common law to the extent not absolutely required by its language and because a reasonable and grammatical reading of the statute requires that the parking fee be denominated a charge, the decision of the Court of Appeals regarding the Recreational

Use Statute is applicable to this case should be reversed and the matter should be remanded for a new trial at which the South Carolina Electric and Gas would not have the protection of the Recreational Use Statute.

Respectfully submitted,

JOHNSON, TOAL & BATTISTE, P.A.

BY: _____

F. Xavier Starkes
William T. Toal
Attorneys for Petitioners-Respondents
P. O. Box 1431
Columbia, SC 29202
(803) 252-9700

Columbia, South Carolina
June 14, 2004

CERTIFICATION

I certify that this Final Brief complies with Rule 211(b) SCACR.

JOHNSON, TOAL & BATTISTE, P.A.

F. Xavier Starkes
William T. Toal

Columbia, South Carolina
June 14, 2004

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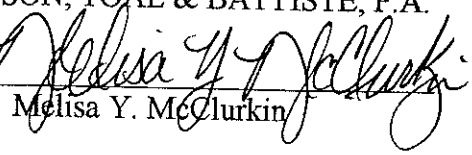
CERTIFICATE OF SERVICE

I, Melisa Y. McClurkin, employee of Johnson, Toal & Battiste, P.A., Attorneys for the Petitioners-Respondents, in the above-captioned case, hereby certify that I have served the **Final Brief of Petitioners-Respondents** on Robert A. McKenzie, Esquire, and Gary H. Johnson, Esquire, Counsel for Respondent-Petitioner, by mailing three copies postage prepaid and return address clearly indicated on said envelope on June 14, 2004, at the following address:

Robert A. McKenzie, Esquire
Gary H. Johnson, II, Esquire
P. O. Box 58
Columbia, SC 29202

JOHNSON, TOAL & BATTISTE, P.A.

BY: 
Melisa Y. McClurkin

Columbia, South Carolina
June 14, 2004