THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County Common Pleas Court
Hon. Alison Renee Lee, Circuit Court Judge
Opinion Number: 365 (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.	)

REPLY BRIEF OF PETITIONERS/RESPONDENTS

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER STATUTES

This brief is written in reply to the Brief of Respondent/Petitioner.

I.

FACTS

Respondent/Petitioner asserts correctly that the fee charged does not depend on the number of persons in a motor vehicle. Only one of the persons in the vehicle need pay a fee. Respondent/Petitioner incorrectly asserts that the fee is for parking. The fee is collected for each vehicle entering the park site whether the vehicle is parked or not as "Drive through traffic prohibited" (R-583). A person in the vehicle has to pay the fee whether the vehicle is parked or not.

ARGUMENT

The "parking fee" is an entrance fee paid at the point of entrance. The fee does not, under the wording of the Recreational Use Act, have to be for the recreational use of the property.

Respondent-Petitioner contends that Stone Mountain Memorial Ass'n. v. Harrington, 171 S.E.2d 521 (Ga. 1969) and Majeske v. Jekyll Island State Park Authority 433 S.E.2d 304 (Ct. App. Ga.) stand for the proposition that a "parking fee for all vehicles was not an admission fee." Brief of Respondent-Petitioner p. 9. This holding omits the crucial reason the fee charged at the entrance was not an admission fee. It was not an admission fee because the charge was not for the recreational use of the property. It was a fee charged for entering but not a fee for the recreational use of the property. The court in Majeske held: "For the charge to constitute an admission fee it must be established that it is imposed in return for recreational use of the land." This difference is critical. The fees

in the Georgia cases, just as the fees in this case are charged at the point of entry. They are thus fees. The critical question as recognized in the Georgia cases in whether the fees must be "imposed for recreational use of the property." The correct answer to that question, as demonstrated in the Brief of Appellant-Respondent, is that the person must be going on the property for its recreational use, it is unnecessary that the fee be for the recreational use of the property.

City of Louisville v. Silox, 977 S.W.2d 254 (Ky. App. 1998) is another case which held that the parking fee was not a fee to use the park for recreational purposes. Indeed the fee was labeled an "Entrance Fee". Again our statute does not make the requirement that the fee be for recreational purposes.

Flohr v. Penn Power & Light Co., 800 F. Supp. 1252 (E.E. Penn. 1992) Genco v. Connecticut Light and Power Co., 508 A.2d 58 (Conn. App. 1986), Viess v. Sea Enterprises Corp., 634 F. Supp. 226 (Hawaii 1986), Covington v. United States, 916 F. Supp. 1511 (D. Haw. 1996), aff'd, 119 F.2d 5 (9 Cir. 1997), Henley v. State, 837 A.2d 707 (R.I. 2003); Midwestern v. Northern Kentucky Community Center, 736 S.W. 2d 348 (Ky. App. 1987) and Gorreans v. City of Omaha, 345 N.W.2d 309 (Neb. 1984) are all cases in which the charges were made away from the point of entry. They were not entry fees or charges to go on the land. The results in similar factual situations would not be determined by a ruling in this case involving a different question. Respondent-Petitioner is incorrect in concluding that under the reasoning in this reply and in the original brief, the sale of bait would remove the protection of the statute. The fee, under our statute must be "the admission price or fee asked in return for invitation or permission to enter or

go upon the land." The George Cole party because they arrived in a motor vehicle, could not get on the land without paying the fee. If South Carolina Electric and Gas were charging only for the bait, their access to the site would have been free and South Carolina Electric and Gas would have the protection of the statute.

Respondent-Petitioner chose not to engage the Personal Representatives argument that the plain meaning of the statute does not require that the admission fee be for recreational purposes. Rather it relies on the proposition that the charge isn't made for permission to enter. Brief p. 14. That proposition is clearly wrong. If no one had paid the $3.00, George Cole would not have been allowed to enter the premises. The real question in this case is whether the fee has to be for the recreational use of the property. The grammatical parsing of the statute is necessary to decide that question. The failure of Respondent-Petitioner to address the question suggests that it could not refute Petitioner-Respondent's interpretation of the actual language of the statute. It relies instead on the unexplained and inexplicable reasoning of two jurisdiction which held that the payment must be for the recreational use of the property. It is true that Stone Mountain Memorial Ass'n, if persuasive, would require the application of the Recreational Use Statute in this case. It does not, as contended by Respondent-Appellant, stand for the proposition that the fee was not a fee for going on the land. It erroneously holds that the entrance fee had to be for the recreational use of the property. It provides no explanation, nor does any case cited by Respondent-Petitioner why the language of the statute creates that requirement. Petitoner-Respondents's Brief demonstrates there is no such requirement under the language of the statute. The motoring public is excluded from Lake Murray

Site #1 unless a person in the vehicle pays a fee. The Recreational Use Statute is designed to protect owners who don't charge people to go on their land. South Carol. Electric and Gas Company charges people to go on their land. It is not entitled to the statute's protection.

CONCLUSION

The cases relied on by Respondent-Petitioner do not address the question presented in this case except as a conclusory statement. It is only by an examination of the words in the statute that its intent can be determined. When that is done and applied to the undisputed facts in this case, South Carolina Electric and Gas Co. has no protection under the Recreational Use Statute.

Respectfully submitted,

BY: _____

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

Columbia, South Carolina

August 23, 2004

CERTIFICATION

I certify that this Final Reply Brief complies with Rule 211 SCACR.

JOHNSON, TOAL & BATTISTE, P.A.

F. Xavier Starkes
William T. Toal

Columbia, South Carolina

August 23, 2004

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County Common Pleas Court
Hon. Alison Renee Lee, Circuit Court Judge
Opinion Number: 365 (June 9, 2003)

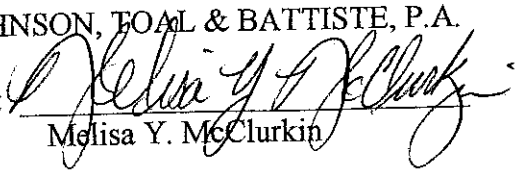
Gloria Cole and George Dewalt, Jr., in their capacities as Personal Representatives of the Estate of George Ernest Cole, deceased,	)
Petitioners/Respondents,	)
vs.	)
South Carolina Electric and Gas, Inc.	)
Respondent/Petitioner.	)

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 **Reply Brief of Petitioners-Respondents** on Robert A. McKenzie, Esquire, and Gary H. Johnson, II, Esquire, Attorneys for Petitioner, by mailing three copies of the Reply Brief of Petitioner-Respondents postage prepaid and return address clearly indicated on said envelope on August 23, 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
August 23, 2004