THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Appellate Case No. 2016-002487

Cassandra M. Myers and Bartholomew Myers in their capacity as Co-Personal Representatives of the Estate of Evan Morris Myers, Appellants,

v.

The Consolidated Employee Recreation Clubs, a non-profit organization a/k/a Pine Island Club at Lake Murray; South Carolina Electric and Gas Holding Company, Inc.; SCANA, Respondents.

INITIAL BRIEF OF APPELLANTS

GRAHAM LAW FIRM, P.A.
KROMPECHER LAW FIRM, PLLC

Edward L. Graham (SC Bar: 2483)
J. Layton Ruffin (SC Bar: 78267)
Pedro E. Krompecher, III (SC Bar: 100485)
Post Office Box 550
Florence, SC 29501
t. (843) 662-3281
f. (800) 859-7028
Attorneys for Appellants

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STATEMENT OF THE CASE

This is a wrongful death case involving the drowning death of Evan Myers at the Pine Island Club at Lake Murray, which occurred in the evening of June 15, 2011. On June 13, 2014, Cassandra M. Myers and Bartholomew Myers in their capacity as Co-Personal Representatives of the Estate of Evan M. Myers filed this lawsuit against The Consolidated Employee Recreation Clubs a/k/a Pine Island Club at Lake Murray, South Carolina Electric and Gas Holding Company, Inc., SCANA, multiple Lexington County entities, and two individual defendants, designated as Civil Action Number 2014-CP-32-02210 (Compl.). Subsequent stipulations dismissed the Lexington County entities and the individual defendants from the lawsuit. A consent Order signed by the judge and parties was filed on October 26, 2015, granting Plaintiffs' motion to Amend the Complaint, (consent Order), making Plaintiffs' "Second Amended Complaint" the most recent Complaint filed in this lawsuit. (2nd Amend. Compl.). Defendants filed their answer to Plaintiffs' "Second Amended Complaint" on October 21, 2015. (Answer).

Defendants filed a motion for summary judgment on November 3, 2014. The motion set forth as the basis for summary judgment the following: (1) statute of limitations, lack of duty and

breach of duty, (2) judgment as a matter of law via South Carolina's Recreational Use Statute, (3) failure to prosecute, (4) failure to demonstrate "outrageousness" as purportedly required to support a claim for intentional infliction of emotional distress, and (5) failure to state a claim against Matthew Bellamy. (Def. Mot. Summ. J.). On December 8, 2015, Plaintiffs filed a Memorandum of Law in Response to Defendants' Motion for Summary Judgment. (Resp. to Mot. for Summ. J.). As Matthew Bellamy was dismissed as a Defendant and the claim for intentional infliction of emotion distress was dropped from the Second Amended Complaint, Plaintiffs addressed each of the remaining three grounds for summary judgment set forth in the Motion for Summary Judgment. On December 8, 2015, Plaintiffs filed two expert witness affidavits in response to Defendants' contention that there was no breach of any owed duty to the Decedent. (Affs. Of Drs. Pia and Johnson). The hearing was not scheduled until December 11, 2015. Therefore, Plaintiffs complied with the rules requiring any opposing affidavits be served not later than two days before the hearing. Plaintiffs' experts addressed only the contentions actually raised by Defendants. Because Defendants did not raise proximate cause, Plaintiffs' experts did offer opinion on causation.

Late afternoon on December 10, 2015, the day before the hearing, Defendants emailed Plaintiffs' counsel a "courtesy copy" of a memorandum in Support of the Motion for Summary Judgment. (Email 1). For the first time, defense counsel argued proximate cause had not been established. (Memo in Supp. of Mot. Summ. J.). The hearing occurred the following morning, on December 11, 2015. At the hearing, Plaintiffs' counsel requested the court consider only the arguments identified in Defendants' Motion for Summary Judgment. (Hr. Tr. p. 19:5-24). Even if it had been possible to obtain an opposing affidavit hours before the scheduled hearing, Rule 56(c), SCRCP, would have excluded it. Defendants' memo in support of its motion for summary judgment was filed December 14, 2015.

An Order granting Defendants' Motion for Summary Judgment was filed on August 8, 2016. (Order). Summary judgment was granted on the basis of failure to establish proximate causation as a matter of law and no duty owed to decedent. The Form 4 accompanying the signed order indicates the judgment was entered on August 24, 2016. A copy of the signed Order was received on August 30, 2016. On September 6, 2016, Plaintiffs filed a Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP and expert affidavits addressing the late causation argument. (Motion to Alter or Amend and Supp. Affs. of Drs. Pia and Johnson). Defendants filed a Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend on September 27, 2016. (Memo in Opp. to Mot. to Alter or Amend.). Plaintiffs filed a Reply to Defendants' Response on October 10, 2016. (Reply). The trial court entered an Order denying Plaintiffs' motion to alter or amend dated November 4, 2016 and clocked as filed on November 9, 2016. The Form 4 indicated the judgment was entered on November 15, 2016. (Order denying motion to alter or amend).

Appellants served a notice of appeal upon Defendants on December 12, 2016, and the notice was filed on the same date. An amended Notice of Appeal was served on December 27, 2016 and received December 28, 2016. The amount involved on appeal is indeterminable at this time, but would include all damages associated with the wrongful death of a twenty-one-year-old.

STATEMENT OF THE FACTS

On June 15, 2011, Evan Myers and Mandy Bellamy arrived at the Pine Island Club on Lake Murray. Mandy Bellamy was a member of the Pine Island Club and Evan accompanied Mandy as her guest. The Pine Island Club is owned and operated by Consolidated Employee Recreation Clubs. Pine Island Club is a membership-only recreational facility available solely to employees of Defendant SCANA. (Def. Ans. To Interrog. ¶¶ 1-3). To be a member of the Pine Island Club and have access to the facilities, including the swimming beaches, a person must be: (1) an

employee of SCANA, (2) have applied for and been accepted for membership, (3) have paid an initiation fee, and (4) pay monthly membership fees.

Pine Island Club is analogous to a private country club. Guards at the entrance prevent entry of non-members onto the island. Members are checked upon entrance. Members are permitted to bring guests onto the island. However, if a non-member accesses the Pine Island Club without a member, that person is a trespasser and subject to prosecution. (Defs. Ans. to Interrog. ¶ 3, Defs. Ans. to 2d Set of Interrog, ¶¶ 2, 27, 29, Pine Island Chapter Bylaws Art. V; Consolidated Employee Recreation Clubs Bylaws Art. V.).

Facilities like the Pine Island Club that hold themselves out as providing swimming areas and lifeguards to club members have certain duties and obligations to those who lawfully use its facilities. National water safety organizations put out industry safety and standards and practices including those set forth by the National Oceanic and Atmospheric Administration, the National Lightening Safety Institute, the National Weather Service, the American Red Cross, the National Water Safety Congress, and the YMCA to name a few. (Affs. of Drs. Pia and Johnson). The duties owed by a landowner like Pine Island Club to its members include duties to have: (1) weather monitoring equipment, (2) a severe weather safety plan, (3) an Operations Policies and Procedures Manual for life guards, (4) to clear the beach and pool in anticipation of an incoming storm, (5) to warn all swimmers of potentially unsafe water conditions, (6) to have safety posts near the swimming waters that included throwing components, (7) to have water rescue devices on and around the boating dock, and (8) to have a life guard on duty at the swimming pool and beach. (Aff. of Drs. Pia and Johnson).

Evan was the invited guest of Mandy Bellamy, a member of Pine Island Club, when he was granted access to the island club on June 15, 2011. Evan had attended the club previously as

an invited guest of Ms. Bellamy as well. (Bellamy Depo 44:9-16). On the previous occasion, Evan, Mandy, and Mandy's boyfriend went swimming at the swimming beach. (Bellamy Depo 48:17-19). During the previous swim, Evan never appeared to have any problems swimming. (Bellamy Depo 53:10-15). The date of Evan's drowning, Mandy's boyfriend had planned to go with Mandy and Evan, but he had work that evening. (Bellamy Depo. 56:11 to 57:8).

Evan and Mandy placed their towels and bags on the beach and then entered the water at the swimming beach. (Bellamy Depo. 74:7-10). While Evan and Mandy were swimming at the swimming beach, Respondents received notice that a storm was approaching the island. Respondents had no severe weather safety plan in place as required by industry standards. Respondents had no operations policies and procedures or manual in place for its life guards instructing the lifeguards on what to do when a storm approached. When the storm approached, the lifeguards simply went off duty. Before going off duty, the lifeguards did not even attempt clear the beach area. Before leaving their posts, the lifeguards provided no warnings to swimmers near the beach that the lifeguards were going off duty, or even that a storm was fast approaching. There should have been a severe weather safety plan in place that would have provided instruction on how to handle this situation. There was none. There should have been a policy and procedure instructing the lifeguards on how to appropriately respond to an impending storm. There was none. There should have been policies and procedures instructing the lifeguards to warn swimmers that the lifeguards were going off duty and that a storm was approaching. There were none. There should have been a life guard manual instructing the life guards to clear the beach before they went off duty, but there was none. Accordingly, the lifeguards did not clear the beach or provide warning of the approaching storm to Evan or Mandy before they left their posts and went off duty.

Evan and Mandy continued to swim, wholly unaware that the nearby lifeguards had gone off duty because there was a storm approaching. Evan and Mandy swam to the buoy line and sat on the buoy line for a period of time. (Bellamy Depo 69:24-25, 71:22 to 72:2). They then swam back to shore and walked by the shelters and to the dock. (Bellamy Depo 81:1-9). John W. Seay, the caretaker for Pine Island, admitted that he watched both Evan and Mandy walk by the shelters toward the dock. (Statement of J.W. Seay). The Pine Island caretaker never warned Evan and Mandy that there was a storm approaching, that the lifeguards had gone off duty, or that swimming areas had been closed. They walked onto the dock, Evan jumped into the water, and then Mandy jumped into the water. (Bellamy Depo. 92:13-19, 93:7-13).

While making their way to the buoy, Evan became distressed in the water and began having difficulty swimming. (Bellamy Depo. 96:25 to 97:24). Mandy tried to help, but in panic, Evan grasped at Mandy and caused her to go under water. Mandy swam to safety and called for help. Because the lifeguards had gone off duty, there was no lifeguard nearby to hear her cries for help. Because the lifeguards had gone off duty, there was no lifeguard nearby who could have assisted. The caretaker and a couple whom the caretaker was talking with heard Mandy's cries. Evan McPherson tried to swim out to help. However, by the time he got to the rope he was too tired to attempt to rescue Evan Myers. (Statement of Evan McPherson). Evan McPherson spoke with Mandy and asked her to swim back to shore.

The only way for Evan McPherson or any other bystander to help was to swim into the water. This is because, in contravention to industry practices and standards, Pine Island failed to have required water rescue devices near the boating dock. In contravention to industry practices and standards, Pine Island failed to have required safety posts near the swimming beach with throwing components. Because Pine Island failed to have required safety posts near the swimming

beach with throwing components and because Pine Island failed to have required water rescue devices near the boating dock, all Evan McPherson could do to help was to swim out into the water. However, by the time he reached the distressed swimmer, he himself was fatigued and could not assist. Had there been life saving devices on the shore or at the dock, Evan McPherson could have helped Mandy and Evan from outside the water. Had a lifeguard been on duty, a lifeguard would have heard Mandy's cries and been able to assist either by using the life saving devices on the shore or on the dock, if Pine Island had followed industry regulations and standards and had such life saving devices available. Even Mandy stated that if there had been a flotation or water rescue device nearby to use to save Evan, that she would have done so. (Bellamy Depo 149:15-150:1). In contravention of industry practices and standards, there were none, and Evan drowned. Evan was twenty-one at the time and was preparing to join the police academy.

STANDARD OF REVIEW

Summary judgment is appropriate only if there is no genuine issue as to any material fact. Rule 56(c), SCRCP. "To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party." *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008). Where the preponderance of the evidence burden of proof applies, the non-moving party is only required to submit a mere scintilla of evidence to overcome summary judgment. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Summary judgment is not appropriate where "further inquiry into the facts of the case is desirable to clarify the application of the law." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378, 537 S.E.2d 688, 692 (2000). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no

person will be improperly deprived of a trial of the disputed factual issues." *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009).

"The question of proximate cause is ordinarily a question of fact for determination by the jury." *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986). "Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law." *Id.* An appellate court "applies the same standard used by the [circuit] court" when reviewing a summary judgment order. *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT HELD AS A MATTER OF LAW THERE WAS NOT A SCINTILLA OF EVIDENCE THAT ANY OF DEFENDANTS' NEGLIGENT ACTS WERE A PROXIMATE CAUSE OF EVAN MYERS'S DROWNING.

The trial court's order sets forth two grounds for granting summary judgment, the first of which is "no evidence of proximate cause." (Order granting Summ. J., p. 6). Factually, this is incorrect. While the evidence of record might be contested, there is certainly *some* evidence to support proximate causation. Instead of reviewing all the causally significant breaches in Respondents' duties that Appellants set forth, the trial court focused solely on questions regarding if the weather conditions were the direct cause of the decedent's drowning. The trial court's narrowed focus on if "weather conditions caused the decedent to drown" misapprehended the causal significance of *approaching* bad weather and ignored the breaches Appellants did set forth.

a. Alleged breaches in the standard of care a reasonable jury could have found were a proximate cause of decedents drowning.

"To show the defendant was the proximate cause of the injury, the plaintiff must establish the defendant was both the cause-in-fact and the legal cause of the injury." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 620, 720 S.E.2d 473, 478 (Ct. App. 2011) citing *Mellen v. Lane*, 377 S.C. 261,

278, 659 S.E.2d 236, 245 (Ct. App. 2008). "The cause-in-fact requirement is proved by showing the injury would not have occurred but for the defendant's negligence." *Id.* "The legal cause requirement is proved by establishing the plaintiff's injury was foreseeable. *Id.* "An injury is foreseeable if it is the natural and probable consequence of the defendant's conduct in light of the attendant circumstances." *Id.* "Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have contemplated the particular event which occurred." *Sims v. Hall*, 357 S.C. 288, 298, 592 S.E.2d 315, 320 (Ct. App. 2003) "It is axiomatic in this State that issues of negligence and proximate cause may be resolved by direct or circumstantial evidence." *Mahaffey v. Ahl*, 264 S.C. 241, 247, 214 S.E.2d 119, 122 (1975). "Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law." *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986).

Affidavits of Drs. Francesco Pia and Ralph Johnson noted that Respondents had certain duties and obligations arising as landowner of a private club like Pine Island that provided swimming areas to persons with lawful access to their premises. These included duties to have: (1) weather monitoring equipment, (2) a severe weather safety plan, (3) an Operations Policies and Procedures Manual for life guards, (4) to clear the beach and pool in anticipation of an incoming storm, (5) to warn all swimmers of potentially unsafe water conditions, (6) to have safety posts near the swimming waters that included throwing components, (7) to have water rescue devices on and around the boating dock, and (8) to have a life guard on duty at the swimming pool and beach. (Aff. of Drs. Pia and Johnson, Exhibit 2). There is <u>no</u> evidence that Defendants: (1) had weather monitoring equipment, (2) had a severe weather safety plan, (3), had an Operations Policies and Procedures Manual for lifeguards, (4), cleared the beach and pool when the storm

approached, (5) warned all swimmers of potentially unsafe water conditions, (6) had safety posts near the swimming waters that included throwing components, (7) kept any water rescue devices near the boating dock, or (8) had a lifeguard on duty at the beach time decedent drowned. The absence or failure of *any* of the above presents a scintilla of evidence that Respondents breached their duties in the above-mentioned ways.

The causal significance of any of these breaches is a question for the jury. This is not the rare or exceptional case where proximate cause may be decided by the judge as a matter of law. *Ballou v. Sigma Nu General Fraternity*, 291 S.C. at 147, 352 S.E.2d at 493. It would be entirely reasonable for a jury to infer any of the aforementioned breaches in Respondents' duties were a proximate cause of decedent's drowning. Specifically, a reasonable jury could easily conclude that Respondents' conduct was both a "but-for" cause of the decedent's drowning and that that it was foreseeable to Respondents that if they breached the standards in the manner alleged, a person might drown. Accordingly, Appellants submitted ample evidence to satisfy the scintilla of evidence standard required to survive a motion for summary judgment.

b. Legal Causation.

"The touchstone of proximate cause in South Carolina is foreseeability." *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). A jury could reasonably determine it is foreseeable that if Respondents failed to follow industry guidelines and regulations for water safety, failed to monitor, failed to keep lifeguards on duty, failed to clear the beach when the lifeguards went off duty, and failed to have required life saving devices near the beach and near the dock, then someone might drown. Said differently, it is well within a reasonable jury's province to determine it was foreseeable to Respondents that someone might drown if they failed to follow industry standards and guidelines in the manner set forth by Appellants' experts.

These guidelines, rules, and regulations for landowners operating clubs like Pine Island exist for the very purpose of keeping swimmers safe and to rescue distressed swimmers. Their very purpose is to keep swimmers from drowning. Therefore, it is inconceivable that Respondents would not have foreseen that if it failed to follow safety rules and regulations and failed to have water safety devices near the water on the swimming beach or on the dock to save someone from drowning, then someone might in fact drown. The same is true for their failure to monitor, failure to clear the beach, failure to have in place appropriate policies and procedures, and every other breach. Accordingly, there is far more than a scintilla of evidence from which a jury could conclude that Respondents' breaches in their duties were a proximate cause and that it was foreseeable that if Respondents failed to have these in place, then a swimmer might drown.

c. Causation in Fact.

"Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 83 (1998). The record also presents far more than a scintilla of evidence that "but-for" Respondents failure to have in place the above-mentioned policies, monitoring, and safety devices, the decedent would not have drowned. A reasonable jury could easily reach this conclusion, and therefore it was error to determine that as a matter of law, Appellants had not submitted even a scintilla of evidence to support causation. But for the Respondents failure to have the appropriate equipment, or have a severe safety weather plan, or have an Operations Policies and Procedures Manual for life guards, or clear the beach and pool area, or warn swimmers of potentially unsafe water conditions, or have safety posts near the swimming waters with throwing components, or have water rescue devices near the boating dock, or have a lifeguard on duty at the swimming pool and beach, the decedent would not have drowned.

d. Appellants need only show Respondents' conduct was a cause, not the sole cause, of decedent's death.

It is not necessary for Appellants to prove that every alleged breach, or that any number of the alleged breaches, were the proximate causes of decedent's drowning. Appellants do not have to prove any specific negligent act was *the sole* proximate cause or even that a certain number of the alleged breaches formed the proximate cause of decedent's drowning. Appellants must only show that a negligent act, one of the alleged breaches in Respondents' duties, was *a proximate cause* of decedent's drowning. See *Skipper v. Hartley*, 242 S.C. 221, 224, 130 S.E.2d 486, 488 (1963) ("Negligence need not be the sole cause of injury in order to impose liability, but need only be a 'proximate concurring cause,' . . . .") To be found liable for negligence, a defendant's conduct need only be "at least one of the direct, concurring causes of the injury." *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 216-17, 609 S.E.2d 565, 569 (Ct. App. 2005).

The evidence of record establishes numerous breaches in Respondents duties. Respondents have failed to present any evidence that there were water rescue devices near the dock, that there were safety posts near swimming waters that included throwing components, that a lifeguard was monitoring the beach at the time of drowning, that the Respondents had appropriate lifeguard policies and procedures in place, that the beach and pool area were cleared when a storm approached, that swimmers at the beach were warned that a storm was approaching and that the lifeguards were going off duty, or any evidence negating any of the other alleged breaches. A reasonable jury could conclude that any one or more of this multitude of breaches was a proximate cause of decedent's drowning. Because Appellants presented far more than a scintilla of evidence that any one of these breaches was a proximate cause of decedent's drowning, summary judgment should not have been granted based upon the absence of causation. *See Mellen v. Lane,* 377 S.C.

261, 280, 659 S.E.2d 236, 246 (Ct. App. 2008) ("Liability can be imposed on a defendant if his actions, not necessarily the sole cause, are the proximate concurring cause of the injury").

e. Decedent's drowning was caused by Respondents' breaches, not the weather.

Despite Respondents' best efforts to mischaracterize Appellants' claims, Appellants' theory of liability is not merely, or solely, that the weather caused decedent to drown or that a storm was present and overhead at the exact moment decedent drowned. This is Respondents' attempt to frame Appellants' theory of the case in a manner Respondents believe is easiest to refute. Respondents ignore the breaches that were asserted that are entirely unrelated to weather conditions, such as the Respondents' failure to have safety posts near the swimming beach with throwing components or their failure to have water rescue devices near the boating dock. Additionally, Respondents ignore the relevancy of the *approaching* storm. The approaching storm was the impetus to the lifeguards going off duty. Because Respondents failed to have in place appropriate policies and procedures or lifeguard manuals, the lifeguards went off duty without warning persons at the beach of an approaching storm, failed to clear the beach, and failed to inform anyone at the beach that the swimming areas had been closed and the lifeguards were leaving their posts.

The order granting summary judgment acknowledges that issues about the weather were not pleaded. This is because it was not weather that caused decedent to drown. Respondents' negligent failure to have in place policies and procedures for incoming bad weather coupled with the other noted breaches caused decedent to drown. The Complaint alleges that the following breaches in the applicable standards of care were a proximate case of decedent's drowning:

> 28. Defendants deviated from the established and/or applicable standards of care and were negligent by:
>
> a. Failing to instruct Evan and Mandy to stop swimming and clear the swimming beach;

b. Failing to instruct Evan and Mandy not to jump off the dock and into the water;

c. Failing to warn Mandy and Evan of the dangerous condition of the freshwater in the face of an oncoming storm;

d. Failing to warn Mandy and Evan of the dangerous condition of the freshwater surrounding the dock area;

e. Failing to equip the swimming beach with proper safety equipment, lifeguards, and warning signs sufficient to ensure the safety and well-being of known swimmers;

f. Failing to prevent Evan from drowning at the Pine Island Club at Lake Murray;

g. Failing to have and implement proper policies and procedures to ensure the safety and well-being of known swimmers;

h. Failing train its employees, agents and/or representatives how to manage dangerous and hazardous situations, like an incoming storm; and

i. Other negligent conduct and/or omissions which may be identified through discovery.

29. As a direct and proximate result of the above-referenced negligence of the Defendants, the heirs and family of Evan Morris Myers have suffered the following injuries and damages . . .

(2nd Amended Compl. p. 6-7).

As evidenced by the Complaint, numerous breaches occurred irrespective of whether the storm was overhead at the moment the decedent drowned. Neither the Complaint nor Appellants' expert affidavit testimony is dependent upon a storm being overhead and causing the decedent to drown.

The trial court stated that a jury is not allowed to determine that the weather conditions caused or contributed to the "tragic drowning of this young man." (Order granting Summ J. p. 7). Again, however, this misses the crux of Appellant's argument. It is not that the weather directly caused decedent to drown.[1] It is the reaction to the incoming bad weather, the failure to plan for incoming bad weather, and the failure to have in place policies and procedures compliant with

[1] Such an argument would create its own problems for Appellants, as it would be difficult to hold Respondents accountable for the weather.

industry guidelines that is causally significant. Even if a jury would not be permitted to determine the weather itself caused decedent's drowning, a reasonable jury could easily determine that decedent's breaches related to planning for inclement weather were a proximate cause.[2]

Appellants theory of the case is simple. A storm approached. Respondents had no severe weather safety plan or operations policies and procedures manual for life guards. When the storm approached, the lifeguards just went off duty and left their posts. They did not clear the beach area, warn persons at the beach that a storm was approaching and that the lifeguards were leaving their posts, and did not close the beach area. They just left. This violated industry standards and was a breach. Evan and Mandy continued to swim. There should have been rescue devices on the dock and at the beach, but there were none. This violated industry standards and was a breach. Decedent became distressed while swimming. Because the lifeguards did not warn the swimmers of the impending storm or clear the beach, the swimmers remained in the water and continued to swim. Because there were no life guards on duty, there were no lifeguards nearby to hear Mandy's cries for help. Because there were no throwing components on the beach or water rescue devices near the dock, there was no way for the caretaker, Evan McPhearson, or Mandy Bellamy to help the decedent as he struggled in the water. Because there was no way to help Evan, he drowned. But for these failures, Evan would be alive today. It is entirely foreseeable to a private club like Pine Island that if it fails to meet its duties in the ways described, then someone might drown and die.

Had there been no approaching storm, then the lifeguards may not have gone off duty and left Evan to drown. Had there been no approaching storm, Respondents' negligent failure to have

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[2] The order also stated there is no evidence that lightening caused the drowning. Appellants never asserted lightening caused or contributed to the drowning. The order stated that there is no evidence weather conditions hindered EMS or anyone else from a rescue attempt. Appellants never asserted the storm hindered a realistic rescue attempt. The failure to have lifeguards nearby, water rescue devices on the dock, and safety posts near the beach with throwing components is what hindered a realistic rescue attempt. The failure of each of these was a breach in Respondents' duties and each was a proximate cause in decedent's drowning. There are innumerable things, such as lightening, that did not cause Evan to drown. However, what did cause decedent to drown is Respondents' negligence.

industry standard policies requiring the lifeguards to clear the area before leaving their posts might not have mattered. However, a storm did approach, Respondents failure did become relevant, and Evan died as a result. Respondents may dispute the exact moment the storm was upon Pine Island, but it cannot dispute that a storm approached and or that the lifeguards left without warning.

f. Expert testimony supports causation.

The above-stated is ample evidence from which a reasonable jury could determine Respondents' conduct was a proximate cause of decedent's death. All this was before the trial court at the hearing, despite Respondents not challenging causation until literally hours before the hearing. The eleventh-hour notice of a new grounds for summary judgment precluded Appellants' from submitting expert affidavits supporting causation, both because it would have been infeasible to get a completed affidavit from the experts on such short notice and because admission of the affidavit would have been procedurally barred by Rule 56(c), SCRCP. While not critical to the determination of whether a scintilla of evidence had been presented to support causation, Appellants nevertheless submitted affidavits supporting causation with the motion to alter or amend the court's order granting summary judgment.

By way of supplemental affidavit, Drs. Ralph L. Johnson, Ph.D. and Francesco A. Pia, PhD. explained that decedent's death was a direct and proximate result of Respondents breaches in their duties. Both Drs. Johnson and Pia stated:

a. Had the beach been timely cleared when the swimming pool was cleared, the decedent would not have drowned,

b. Had the decedent been warned of the unsafe weather conditions, the decedent would not have drowned,

c. Had there been appropriate water safety devices on the Safety Posts for use during the water rescue attempt, the decedent would not have drowned,

d. Had there been appropriate water safety devices on the boating dock for use during the water rescue attempt, the decedent would not have drowned,

e. Had a life guard been on duty supervising the beach area, the decedent would not have drowned,

f. Because all the above-mentioned are industry standards and well-known to exist to protect recreational swimmers from drowning, decedents death was a foreseeable result of Defendants' breaches.

g. J.W. Seay, Island Caretaker, observed the decedent and Ms. Bellamy walk from the beach area to the boat dock and failed to prevent them from entering the water. Had he prevented them from entering the water, the decedent would not have drowned.

(Supp. Affs. of Drs. Johnson and Pia, Ex. 3).

Except in the rarest of circumstances, the question of proximate causation should be determined by the fact-finder. *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986). This is not one of those rare circumstances. The evidence of record clearly establishes far more than the mere scintilla of evidence required to survive summary judgment. Therefore, Appellants' respectfully submit that the trial court committed reversible error when it determined as a matter of law that there was no evidence to support proximate causation. For this reason, Appellants request the trial court's decision be reversed and the case remanded.

II. GIVEN THAT THE TRIAL COURT ELECTED TO CONSIDER RESPONDENTS' CAUSATION ARGUMENT, DESPITE THE FACT IT WAS NOT RAISED UNTIL HOURS BEFORE THE HEARING, THE TRIAL COURT ERRED IN REFUSING TO CONSIDER AFFIDAVITS SUPPORTING CAUSATION SUBMITTED WITH THE MOTION TO ALTER OR AMEND.

As stated, the evidence on causation before the trial court at the hearing was more than sufficient to satisfy the scintilla of evidence requirement at the summary judgment stage. However,

because Respondents did not even challenge causation until literally hours before the hearing, Appellants requested the trial court consider only those arguments submitted in Respondents' initial motion for summary judgment and to which Appellants' had meaningful opportunity to respond in writing and to respond to with expert affidavits. Ultimately, the trial court elected to consider Respondents proximate cause arguments and granted summary judgment on that basis. Appellants submitted expert affidavits in support of causation with the motion to alter or amend the motion for summary judgment. The trial court refused to consider the affidavits in its review of the motion to alter or amend. Given that the trial court ultimately elected to consider Respondents' causation arguments, and that Appellants were denied opportunity to submit supporting affidavits prior to the hearing, it was error for the trial court to refuse to consider the affidavits that accompanied the motion to alter or amend.

Respondents filed their motion for summary judgment on November 3, 2014. Nowhere in the motion did Respondents contend Appellants failed to establish causation. Appellants responded to every asserted basis for summary judgment. Appellants submitted opposing expert affidavits within the required time period set forth in Rule 56(c), SCRCP. AT 3:39 PM, the day before the hearing, Respondents' sent an email to Appellants' counsel with a memo supporting summary judgment attached. Counsel was driving from his office to Lexington for the hearing scheduled the next morning when the email went to his inbox. In the memo, Respondents were attempting, for the first time, to argue that Appellants had not established causation.

Because Respondents waited until eighteen hours before the hearing to challenge causation, Appellants were effectively precluded from presenting any affidavits from their experts to show that Respondents' breaches were a proximate cause of decedent's drowning. First, it would have been impossible for Appellants to have contacted the experts, have them review the new

arguments, and then submit an affidavit expressing their opinions at such a late hour. Second, the affidavits would have been inadmissible under Rule 56(c), SCRCP. The rules mandate that the responding party *must* submit any opposing affidavits not later than two days before the hearing. Indeed, Respondents made this very argument to the trial court at the hearing in an attempt to keep the Court from reviewing the documents Appellants' counsel scrambled to compile. In the greatest show of gamesmanship, Respondents tried to use Rule 56 to prevent the trial court from considering even this evidence. Respondents argued:

> With regard to some of the documents that have been provided to you today, obviously, we object to the document . . . . Rule 56 [and] the case law that has been enunciated by our courts, clearly articulate the proper mechanism for attaching documents for consideration . . . by this Court for purposes of Rule 56 analysis.
>
> . . . And dumping a bunch of documents in at the summary judgment hearing doesn't count. Typically, this is done by affidavit.
>
> (Hr. Tr. 35:14-21, 37:11-13).

This confirms Respondents were fully aware of what effect it would have on Appellants' ability to respond to their new arguments if they waited until immediately before the hearing to raise them. Then, as if to highlight the injustice imposed by their actions, Respondents stated, "The other thing, too, we reiterate that these affidavits of these experts talk about duty, but they don't talk about proximate cause, and they have to provide that kind of testimony and neither one of them do." (Hr. Tr. 43:2-6).[3]

Appellants requested the trial court consider only those arguments Respondents raised in their motion for summary judgment and to which Appellants had a fair opportunity to respond. At the hearing, Appellants stated:

> [Defendant's November 3, 2015] motion for summary judgment . . . lays out the arguments and puts the plaintiff on notice of what the defendants are going to argue in terms of their motion for summary judgment. And in that document, you will see

[3] Respondents never sought to take the deposition of either of Appellants' experts.

> [lists arguments made]. And so last night at about 5:00 P.M., I received this memorandum of law that now makes a number of other arguments that were not contained in the motion. *For that reason, I think, at this time, it would only be appropriate to consider the arguments that were identified in the original motion for summary judgment.*
>
> (Ex. 1, Hr. Tr. 19:5-24).

The trial court elected to consider Respondents' argument on causation and granted summary judgment on this basis. In the order denying the motion to alter or amend, the trial court stated it was unaware of any rulings that prevented the record from being supplemented. Respectively, this misses the argument Appellants were trying to make. First, the trial court should not have considered the newly raised, eleventh-hour arguments at all. Appellants requested as much at the hearing. There would be no reason to supplement a record to support an argument that should not have been considered. Only once the court entered its order was it known that the court decided to consider the arguments on causation. Second, it is not a court ruling, but the South Carolina Rules of Civil Procedure that prevented an effort to supplement the record with affidavits after the hearing. Rule 56(c) is non-equivocal. It states that opposing affidavits are to be served "not later than two days before the hearing." Thus, Appellants should not have been expected or required to submit evidence in a manner that would have patently violated the rules of civil procedure and anticipated that it would have been considered by the court. This is why Appellants argued to the court that it *not* consider Respondents' eleventh-hour arguments.

In fairness to Appellants, considering the way Respondents raised the issue of causation, the trial Court should have considered the expert affidavits with the motion to alter or amend the order granting summary judgment. When the reason evidence was not presented before the hearing is due to Respondents tactic of waiting until hours before the hearing to raise new arguments, the trial court should have considered what affidavits would have been submitted had Respondents tactic not precluded their submission.

Substantial justice requires consideration of all the arguments that would have been available to the trial court had Respondents provided Appellants with appropriate notice and opportunity to respond through affidavit testimony to their arguments for summary judgment. *See. e.g. .Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 102, 668 S.E.2d 798, 801 (2008) "South Carolina courts have long observed that equity looks beneath rigid rules of law to seek substantial justice." For this reason, it was error for the trial court to refuse to consider the expert affidavits submitted with the motion to alter or amend, given that the trial court elected to consider Respondents causation argument at all.

III. THE TRIAL COURT ERRED WHEN IT HELD RESPONDENTS OWED NO COLORABLE DUTY OF CARE TO THE DECEDENT.

The trial court determined Respondents owed no duty of care to the Decedent. In reaching its holding, the trial court's ruling misapprehends the law concerning duties owed to an invitee and assumption of the risk.

a. Decedent was an invitee.

The trial court correctly held Evan Myers was an invitee. Evan was granted access to Pine Island because he was the guest of a paying member of the club. Mandy's father worked for Respondents and her family paid to be members of Pine Island Club. To even be granted access to the premises, Mandy had to present identification proving membership to a guard at a guardhouse. Accordingly, the trial court correctly held that Evan was an invitee.

b. South Carolina Recreational Use Statute does not apply.

The trial court correctly held that the South Carolina Recreational Use Statute found at S.C. Code Ann. §§ 27-3-10 to 70 did not apply to this case. Accordingly, the trial court correctly held that the protections afforded under the statute do not apply in this case.

In reaching its decision, the trial court noted that Evan's presence at the club and access to the lake required he be a guest of a paying member. The trial court noted further that this is a private club and not open to the general public. The trial court distinguished this case from *Cole v. SCE&G*, 362 S.C. 445, 608 S.E.2d 859 (2005). In *Cole* the Court held the SCE&G was afforded the protections of the recreational use statute because a parking fee was not a "charge" as defined by S.C. Code Ann. § 27-3-60(b). *Cole v. S.C. Elec. & Gas, Inc.*, 362 S.C. 445, 451, 608 S.E.2d 859, 862 (2005). Moreover, not everyone had to pay the parking fee to access the premises, such as bicyclists or pedestrians. *Id.* In this case, access to the property required membership to the private club and payment of dues. Therefore, the trial court correctly held the South Carolina Recreational Use statute did not apply to the facts of this case.

c. *Cole v. S.C. Elec. & Gas, Inc.* is factually similar to this case.

Because of its factual similarities, *Cole v. SCE&G* is instructive. The analysis in *Cole* confirms that Respondents owed Evan a duty. The precedent set forth in *Cole* also establishes that the jury is to weigh any purported assumption of risk by Evan against Respondents and that it should not have been decided as a matter of law by the trial court.

Cole v. SCE&G, involved some of the same parties that are in this case. *Cole* also involved a wrongful death action brought on behalf of a decedent who drowned in Lake Murray and had gained access to the lake from SCE&G property. Plaintiffs in *Cole* alleged SCE&G breached its duty by failing to have lifeguards on duty, failing to have safety equipment that could have been used by any bystanders to save a distressed swimmer, and failing to have proper warnings. *Id.* at 448, 608 S.E.2d at 861 (2005). The case involves similar allegations against the same defendant.

The fourteen-year-old decedent in *Cole* went swimming in Lake Murray. *Id.* at 449, 608 S.E.2d at 861. The decedent in *Cole* was known to be a good swimmer. He and his friend were instructed by their parents not to go swimming in the lake without first telling an adult. Despite

this instruction, they went into the lake without telling an adult. *Id.* The boys swam out to the safety line but did not know the water at the safety line was over their heads. *Id.* The decedent began to struggle. *Id.* Bystanders attempted rescue but were unable to help. *Id.* Eventually, the decedent's body was found at the bottom of the lake in seven to eight feet of water. *Id.*

At trial the plaintiff's expert testified that if there had been a lifeguard on duty, or if there had been safety equipment available for the bystanders to use, decedent would have lived. *Id.* The experts also testified that the warning signs were inadequate to warn of the dangers present and that the defendant failed to develop an effective risk management plan despite two prior drownings at the very same site. *Id.*

The jury returned a verdict for SC&G. The Court of Appeals affirmed application of the immunity statute. However, it reversed and remanded for a new trial on the claim of gross negligence because the trial judge failed to charge it was SCE&G's burden to prove its affirmative defense of assumption of the risk. The Supreme Court affirmed that the South Carolina Recreational Use Statute applied in *Cole*. Because this statute applied, the defendant in *Cole* was entitled to immunity from liability for simple negligence and could be held liable for gross negligence only. The Supreme Court affirmed that the burden of proof charge for affirmative defense was inadequate and reversed and remanded. *Id.*

d. *Cole* requires a finding that Respondents owed Decedent a duty.

Cole closes the door on any argument that Respondents in this case owed no duty to the decedent under primary implied assumption of the risk. The Supreme Court in *Cole* was asked to review the sufficiency of the trial court's charge on assumption of the risk as an affirmative defense. Assumption of the risk as a complete bar to recovery was abolished for causes of action accruing after November 9, 1998. *Id* at FN 4, citing *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 331 S.C. 71, 508 S.E.2d 565 (1998). However, the claim in *Cole* arose

before that date. *Id.* Nevertheless, *Cole* still had to determine the applicability of "primary implied assumption of the risk and "secondary implied assumption of the risk." Primary implied assumption of the risk asks whether a duty existed in the first place, and it is not an affirmative defense. Therefore, questions regarding jury charges for affirmative defenses would be immaterial to whether the law of primary implied assumption of the risk had been correctly applied.

The Court in *Cole* noted that primary implied assumption of the risk "is not a true affirmative defense but is another way of stating there is no duty to the plaintiff." *Id.* at 453, 608 S.E.2d at 863. The Court held, "We disagree that SCE&G owed no duty here." *Id.* The Court explained, "A landowner has a duty to warn a licensee of concealed dangerous conditions or activities known to the landowner." Finally, the Court held, "Despite immunity under the RUS, SCE&G may still be liable for gross negligence . . ." and "[w]hether SCE&G met this standard of care in warning only that there was no lifeguard is a question of fact for the jury."

In stating it disagreed that SCE&G owed no duty to the decedent, or more plainly, that SCE&G did owe the decedent a duty, the Court determined that primary implied assumption of the risk did not apply. Had it applied, there would have been no duty to the decedent. The Court reached this decision even though the decedent in *Cole* was only a licensee and not an invitee.

The factual similarities of this case to *Cole* require a determination that Respondents owed Evan a duty. Despite being only a licensee, *Cole* held SCE&G owed the decedent certain duties, namely, the duty to warn of concealed dangerous conditions or activities known to the landowner. Based upon this duty, the Court held, "whether SCE&G met this standard of care in warning only that there was no lifeguard is a question of fact for the jury." *Id.* at 454, 608 S.E.2d at 864. In this case, the duties Respondents owed Evan were even *greater* than those SCE&G owed the decedent in *Cole* because Evan was an invitee.

Both this case and *Cole* involved freshwater drowning of a young man who gained access to Lake Murray through SCE&G owned property, who drowned because of the defendants' failure to provide lifeguards, life-saving equipment, and proper warnings. Given the factual similarity of this case to *Cole*, the fact that *Cole* found duties were owed to the licensee decedent, and the fact that this case involves greater duties owed to an *invitee*, Respondents under the holding of *Cole* necessarily owed Evan certain duties as in invitee upon Respondents' property. Accordingly, the trial court overlooked that *Cole* required a finding that Respondents owed decedent a duty and primary implied assumption of the risk did not apply.

e. Even if Evan had been a *licensee*, Respondents would have owed him a duty.

Notably, the Supreme Court in *Cole*, viewing the decedent as a licensee and determining that the recreational use statute applied, *still* held that SCE&G owed the decedent a duty. *Id.* at 453, 608 S.E.2d at 863. The factual presentation of this case more strongly favors a finding that Respondents owed Evan a duty than was seen between decedent and defendant in *Cole*. Unlike *Cole*, the decedent in this case was an invitee. "A licensee is a person whose presence is tolerated, a person not necessarily invited on the premises, but one who is privileged to enter or remain on the premises only by the property owner's express or implied consent." *Singleton v. Sherer*, 377 S.C. 185, 198, 659 S.E.2d 196, 203 (Ct. App. 2008). In contrast, "[An invitee is a person] who enters onto the property of another by express or implied invitation, his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there is a mutuality of benefit or a benefit to the owner." *Singleton v. Sherer*, 377 S.C. 185, 199, 659 S.E.2d 196, 203 (Ct. App. 2008) (citations omitted).

Duties owed to a licensee are less than those owed to an invitee. "A landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or

activities." *Singleton v. Sherer*, 377 S.C. 185, 201, 659 S.E.2d 196, 204 (Ct. App. 2008) *quoting Landry v. Hilton Head Plantation Prop. Owner's Ass'n*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994). "[S]ince a licensee is there for his own benefit, he can be said to accept the premises as they are and demand no greater safety than his host provides himself." *Id.*

In contrast to a licensee, the landowner owes an invitee a greater duty. "[T]he owner of property owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from the breach of such duty." *Id.* at 202, 659 S.E.2d at 205. "[U]nlike a licensee, an invitee enters the premises with the implied assurance of preparation and reasonable care for his protection and safety while he is there." *Id.*

Duties owed by a landowner to a licensee are less than those owed to an invitee. Evan was an invitee. Because the decedent in *Cole* was a licensee, the duties SCE&G owed to the decedent in *Cole* necessarily were less than those owed to the decedent in this case. However, the Court in *Cole still* held SCE&G owed the decedent a duty, despite being a licensee. Therefore, because of the factual similarity between these cases and the fact that decedent in this case was an invitee, to whom a greater duty is owed, Respondents in this case clearly owed Evan a duty of care.

f. The trial court misapplied the law of primary implied assumption of the risk.

The trial court stated, "the decedent's assumption of the risk was primary because he knowingly assumed the inherent risks." (Order p. 12). It then stated primary implied assumption of the risk "deals more with situations where there is an absence of negligence on the part of defendants . . . ." (Order p. 13). The court held it was required to grant summary judgment when the risk is classified as primary implied.

Respectfully, the trial court misapplied the law. First, as already explained, *Cole* makes clear that this factual scenario does not invoke primary implied assumption of the risk. Primary implied assumption of risk focuses on "whether the defendant's legal duty encompasses the risk

encountered by the plaintiff." *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 81, 508 S.E.2d 565, 570 (1998). *Cole* confirmed the legal duty owed by defendants like Respondents' in this case does encompass the types of risks Evan encountered.

Primary implied assumption of the risk focuses on defendant's general duty of care. *Id.* *Davenport* stated:

> In its primary sense, implied assumption of risk focuses not on the plaintiff's conduct in assuming the risk, but on the defendant's general duty of care. . . . Clearly, primary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case [of negligence] by failing to establish that a duty exists.
>
> *Id.* (quoting *Perez v. McConkey*, 872 S.W.2d 897 (Tenn. 1994).

Thus, primary implied assumption of the risk assesses the defendants' general duty of care. Respondents, as a private club holding itself out as a provider of certain amenities to its members, had certain responsibilities and duties to its paying members. The duties Respondents, as owner of a private club providing these amenities to its members, owed to its members were clearly set forth in the expert affidavits submitted by Appellants. A landowner is still liable to invitees for harm caused by conditions known and obvious to the invitee where the landowner should anticipate the harm despite such knowledge or obviousness. *Singleton v. Sherer*, 377 S.C. 185, 202, 659 S.E.2d 196, 205 (Ct. App. 2008). Questions regarding to what extent Evan assumed certain risks relate to questions of secondary implied assumption of the risk.

g. The risks discussed in the trial court's order concern secondary implied assumption of risk which should not have been decided as a matter of law.

The trial court set forth extensive facts and analysis regarding what Respondents did and didn't do in comparison to what the decedent did and was aware of. In essence, the trial court was determining whether decedent's negligence or assumption of the risk was greater than any purported negligence by Respondents. This is the analysis one would expect when answering the

question of whether decedent's implied assumption of the risk outweighed Respondents' negligence as a matter of law. Under the scintilla of evidence requirement it has not, and summary judgment should not have been granted.

The trial court stated in its order that there were no lifesaving devices at the boat dock, that the dock had signage with restrictions and warnings, there was no ladder on the dock, that Plaintiffs submitted affidavits from experts noting what obligations landowners who provide swimming areas and purport provide lifeguard supervision have to its guests, and that by-laws allowed swimming only in designated areas. The trial court stated the decedent knew he was going into a lake without lifeguards or safety equipment, he understood and appreciated that the condition of swimming in the area was dangerous, understood the risks of drowning, and voluntarily exposed himself to that danger. (Order p. 12). The trial court even outlined the decedent's age, education, and ambitions. It then determined Respondents were not negligent because "dangers of swimming in the lake are open and obvious" and there was no evidence "Defendants' negligence caused or contributed to any dangerous conditions for which Defendants are responsible." (Order p. 9).

"[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." *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 87, 508 S.E.2d 565, 573-74 (1998). The trial court made this determination as a matter of law. In so doing, the trial court overlooked the facts of record which established a scintilla of evidence that any purported fault attributable to Evan by assumption of the risks does not outweigh Respondents' negligence.

Respondents' duties and breaches thereof have been set forth in expert affidavits and exhaustively discussed in this brief.[4] The alleged breaches have not been refuted. Therefore, the

[4] The trial court's order discusses many ways the Respondents did not breach any duties, including reference to the absence of evidence that the decedent became entangled in moorings or cables. (Order p. 14). Pointing out the ways

Court's finding that "there is no evidence that the Defendants' negligence caused or contributed to any dangerous conditions" is simply inaccurate. (Order p. 9). Even the trial court's citation to *Cole* highlights certain duties were in fact owed. It noted that *Cole* involved failure to have lifeguards on duty at the lakefront and failure to have safety equipment nearby (Order p. 10, 11). The Court concluded that *Cole* established "it is not gross negligence . . . to fail to provide recreational safety features such as life guards and lifesaving equipment because such a duty expressly exceeds the slight care standard." (Order p. 11). Because the Recreational Use Statute applied in *Cole*, the defendant could not be held liable for ordinary negligence, only the absence of slight care. *Cole* never stated failing to have the aforementioned would not constitute ordinary negligence. In fact, the opposite may be inferred from the court's analysis, especially with respect to a private club that holds itself out to its members as providing safe places to swim with lifeguard services. Additionally, the trial court's order ignores the fact that the court in *Cole* found a question of fact was created by alleging the defendant breached the standard of care by warning only that there was no lifeguard, even though the decedent was a licensee, and even though the plaintiff had to prove gross negligence. This case similarly involves allegations of failure to warn. Therefore, it is factually incorrect to state there is no evidence Respondents' negligence caused or contributed to the drowning death of Evan Myers.

The trial court's discussion of those risks purportedly known to Evan and which he accepted at best establishes that there is a factual question to be resolved by a jury. For instance, the Order claims "it is common knowledge that boat docks require sufficient water depth to allow boats to approach without grounding." (Order p. 12). First, a jury could determine this is not

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in which Respondents did not breach a duty, however, does not immunize Respondents from liability with respect to the ways in which they did breach their duties.

common knowledge. Second, a jury could determine that Respondents' breaches in their duties outweighed any purported knowledge Evan might have had regarding the depth of waters around boat docks. Therefore, pointing out what Evan might have known or what risks he might have accepted is not sufficient to prove, as a matter of law that his purported acceptance of these risks outweighed Respondents' negligence. The same is true with respect to the Order's statement that "the decedent knew about the realities forming the dangerous condition." Again, to the extent the Respondent did know, this should have been compared against Respondents' negligence, and such a determination was for the jury.

More importantly, what evidence is there to show Evan was even aware of the dangerous condition created by Respondents' negligence? The Order claims Evan knew he was going into the lake without lifeguards or safety equipment. There is no evidence Evan knew there was no safety equipment available or that he knew that the nearby lifeguards had gone off duty. Construing all inferences in favor of the plaintiff, the lifeguard went off duty after Evan entered the water, and neither Evan nor Mandy realized the lifeguards had left their posts. There is no evidence to show Evan was aware that Respondents failed to clear the beach before the lifeguards left their posts. There is no evidence that the decedent was aware Respondents had no operations policies and procedures manual applicable to the lifeguards, that Respondents had no severe water safety plan, or that Respondents failed to have industry required safety posts near the swimming waters with throwing components or water rescue devices near the dock. To the extent Evan knew that there wasn't a lifeguard on duty over the lake or knew of warning signs, this creates a question of fact from which a jury is to determine to what extent Evan assumed the risks. It is not sufficient to grant summary judgment. Therefore, the trial court committed reversible error when it determined

as a matter of law Respondents owed no duty of care to Evan and that Evan assumed the risks. For this reason, Appellants request the trial court's decision be reversed and the case remanded.

CONCLUSION

This is not the rare or exceptional case where proximate cause could be decided as a matter of law. There is ample evidence showing a question of fact exists as to whether one of the alleged breaches in Respondents' duties was a proximate cause of Evan's death. The trial court had this evidence even though Respondents waited until literally hours before the hearing before challenging causation for the first time. By focusing on if weather conditions caused the decedent to drown, the trial court overlooked all the breaches Appellants had actually alleged were a cause of Evan's drowning. As a private, gated club that offered swimming amenities and claimed to have lifeguards watching the waters for its guests, Respondents owed certain duties and obligations to those lawfully on their premises. Respondents breached these duties and a young man died as a result. Evan, as an invitee, was owed these duties, which is confirmed by *Cole v. S.C. Elec. & Gas, Inc.* Based upon the evidence presented, a question of fact existed as to whether Evan's purported assumption of any risk was greater than Respondents' negligence. This question should have been resolved by a jury and not as a matter of law by the court at summary judgment. Therefore, for the foregoing reasons, the trial court committed reversible error in granting summary judgment and denying Appellants' motion to alter or amend, and the trial court's orders should be reversed and the case remanded for further proceedings.

Respectfully submitted,

GRAHAM LAW FIRM, P.A.
KROMPECHER LAW FIRM, PLLC

Edward L. Graham (SC Bar: 2483)
J. Layton Ruffin (SC Bar: 78267)
Pedro E. Krompecher, III (SC Bar: 100485)
Post Office Box 550
Florence, SC 29501
t. (843) 662-3281
f. (800) 859-7028
Attorneys for Appellants

January 19, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2014-CP-32-02210

Cassandra M. Myers and Bartholomew Myers in their capacity as Co-Personal Representatives of the Estate of E. M. Myers, Appellants,

v.

The Consolidated Employee Recreation Clubs, a non-profit organization a/k/a Pine Island Club at Lake Murray; South Carolina Electric and Gas Holding Company, Inc.; SCANA; and Mandy Nicole Bellamy, Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellants certify that this Initial Brief of Appellants complies with Rule 208(a)(1), SCACR.

GRAHAM LAW FIRM, P.A.
KROMPECHER LAW FIRM, PLLC

Edward L. Graham (SC Bar: 2483)
J. Layton Ruffin (SC Bar: 78267)
Pedro E. Krompecher, III (SC Bar: 100485)
Post Office Box 550
Florence, SC 29501
t. (843) 662-3281
f. (800) 859-7028
Attorneys for Appellants

January 19, 2017

GRAHAM LAW
Shining a Light on Safety, Guiding the Way to Justice.

Edward L. Graham
Diane M. Rodriguez
J. Layton Ruffin

January 19, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *Cassandra M. Myers and Bartholomew Myers in their capacity as Co-Personal Representatives of the Estate of Evan Morris Myers, Appellants, v. The Consolidated Employee Recreation Clubs, a non-profit organization a/k/a Pine Island Club at Lake Murray; South Carolina Electric and Gas Holding Company, Inc.; SCANA, Respondents.*
Appellate Case No. 2016-002487

Dear Ms. Kitchings:

Enclosed for filing is the ***Appellants' Initial Brief*** and ***Designation of Matter to be Included in the Record on Appeal*** in the above case. By copy of this letter, I am serving attorneys for Respondents with a copy of the same. Please return a clocked copy to me using the enclosed self-addressed, stamped envelope.

Thank you for your attention to this matter.

Very truly yours,

J. Layton Ruffin
Pedro Krompecher

PK/jd
Enclosures
cc: Christian Stegmaier
Megan H. Hall

GRAHAM LAW FIRM, P.A.
383 West Cheves Street, Florence, SC 29501

MAIN OFFICE
P.O. Box 550, Florence, SC 29503
Phone 843.662.3281

SATELLITE OFFICE
P.O. Box 604, Sumter, SC 29151
Phone 803.774.4444

EFax 1.800.859.7028

EGraham@GrahamLawFirm.net • DianeR@GrahamLawFirm.net • JLRuffin@GrahamLawFirm.net

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Shining a Light on Safety, Guiding the Way to Justice.

GRAHAM LAW FIRM, P.A.
383 West Cheves Street, Florence, SC 29501
P.O. Box 550, Florence, SC 29503

TO:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201