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.

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Circuit Court properly held Respondents' did not owe a duty of care to Appellants' decedent?

II. Whether the Circuit Court properly refused to consider subsequent affidavits submitted by Appellants with the Rule 59(e), SCRCP, motion.

III. Whether the Circuit Court properly held Appellants failed to present evidence that any alleged breach of duty proximately caused decedent's death.

STATEMENT OF THE CASE

The instant case involves the accidental drowning of Evan Myers Morris ("Decedent") on June 15, 2011, in the freshwaters of Lake Murray in Lexington County, South Carolina. Appellants Cassandra M. Myers and Bartholomew Myers, in their capacity as Co-Personal Representatives of the Estate of Evan Morris Myers ("Appellants") brought a wrongful death action sounding in negligence and intentional infliction of emotional distress claims against Respondents 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., and SCANA ("Respondents"). Appellants also asserted the same claims against Lexington County Medical Center Auxiliary, Lexington County Sheriff's Department, and the Lexington County Coroner's Office ("Lexington County Defendants"), as well as Mandy Nicole Bellamy and her brother Matthew Bellamy ("Bellamy Defendants"). (Compl. Filed June 18, 2014).

Thereafter, Respondents moved for summary judgment (Motion for Summary Judgment). In their motion, Respondents averred: (1) Appellants failed to demonstrate the existence of any colorable duty of care owed to Evan Morris Myers, which Respondents breached; (2) Respondents are

entitled to judgment as a matter of law via South Carolina's Recreational Use Statute; (3) Appellants failed to prosecute their case; (4) Appellants are unable to demonstrate any conduct by Respondents that rose to a level of negligence, must less to a level of outrageousness, to support their claim for intentional infliction of emotional distress; and (5) Matthew Bellamy has no connection in the instant case and is thus not liable to Appellants. Respondents specifically reserved their rights to amend their motion prior to any hearing on their motion. (Id.)

Following the filing of Respondents' motion, Appellants voluntarily dismissed the Lexington County Defendants. Appellants subsequently amended their complaint, in which they eliminated their intentional infliction of emotional distress claims, and voluntarily dismissed the Bellamy Defendants. Appellants' remaining negligence and gross negligence allegations aver that the Pine Island Club failed to warn decedent of an incoming storm and failed to provide lifesaving measures, which they allege could have prevented decedent from drowning. (Am. Compl. filed June 3, 2015).

Prior to the hearing on Respondents' motion for summary judgment, Respondents and Appellants exchanged memoranda of law. Following oral

argument, a review of the memoranda and other supporting documentation respectively submitted by the parties, the Circuit Court issued an order granting summary judgment in favor of Respondents, holding Appellants failed to establish proximate causation as a matter of law and that no duty was owed to decedent Evan Myers Morris. (Order granting Motion for Summary Judgment).

Appellants filed a Rule 59(e), SCRCP motion. Attached as exhibits to their motion, Appellate provided supplemental expert affidavits addressing the causation argument. Respondents filed a Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend. Appellants subsequently filed a Reply to Respondents' Response.

The Circuit Court denied Appellants' Rule 59(e), SCRCP motion to alter or amend. (Order denying Rule 59(e), SCRCP, motion). Appellants served and filed their notice of appeal of the Circuit Court's judgments in the instant case. An amended notice of appeal was thereafter filed.

STATEMENT OF THE FACTS

The instant case involves the accidental drowning of Decedent on June 15, 2011, in the freshwaters of Lake Murray in Lexington County, South Carolina.

Decedent was a guest of Mandy Nicole Bellamy at the Pine Island Club at Lake Murray on June 15, 2011. (Compl. ¶ 7). Consolidated Employee Recreation Clubs owns and operates the Pine Island Club at Lake Murray and is a charitable non-profit organization created for the benefit of SCANA and SCE&G-related company employees and their families. (Aff. of Andrea L. Lange, at ¶ 4). Mandy Nicole Bellamy's father, Ralph Bellamy, is a member of the Pine Island Club; as a result she enjoyed the benefits of his affiliation. (M. Bellamy Depo. Transcript, p. 20, line 24 – p. 21, line 10). In the early evening hours of June 15, 2011, Myers and Bellamy first went for a swim at the swimming beach at Pine Island Club. (M. Bellamy Depo. Transcript, p. 74 line 24 – p. 75, line 6). Clear and prominent signage at the swimming beach informed swimmers that they swam at their own risk. (M. Bellamy Depo. Transcript, p. 74, line 24 – p. 75, lines 1-17; M. Bellamy Depo. Transcript, Deposition Ex. 7e).

After swimming at the swimming beach, Decedent suggested that they jump from the boat dock and swim in the open waters of Lake Murray. (M. Bellamy Depo. Transcript, p. 145 line 25 – p. 146 line 7). Decedent and Ms. Bellamy then left the confines of the Pine Island Club and went for a swim in the open freshwaters of Lake Murray. (M. Bellamy Depo. Transcript, p. 93, lines 10-13). Decedent struggled to keep afloat and tragically drowned. (M. Bellamy Depo. Transcript, p. 96, line 25 – p. 97, line 24). Additional signage at the subject dock from which Decedent jumped and entered the open waters of Lake Murray clearly prohibited swimming in the area in which he subsequently drowned. (M. Bellamy Depo. Transcript, p. 86, line 25 – p. 87, line 14; M. Bellamy Depo. Transcript, Deposition Ex. 8). Lake Murray is owned by South Carolina Electric and Gas and any person has access to its recreational use at any time.

STANDARD OF REVIEW

In Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001), aff'd, 354 S.C. 161, 580 S.E.2d 440 (2003), our Court of Appeals articulated the proper standard of review concerning summary judgment in a premises liability case:

> Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); see also Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998) (a trial court should grant motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law). In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

Id. at 200-01, 544 S.E.2d at 41; see also Glenn v. School Dist. No. Five of Anderson County, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988) (stating during a review of a grant of summary judgment on appeal, the appellate court's focus is driven by its reading of the complaint).

Our appellate courts have further stated that when a plaintiff is faced with a motion for summary judgment, the plaintiff cannot defeat the motion by relying upon the mere allegations of her complaint, but must disclose the facts the plaintiff intends to rely on by affidavit or other proof. Shupe v. Settle, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994); Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). "A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." Germann v. New York Life Ins. Co., 286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985). Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the Circuit Court is required under Rule 56 to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law. Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) (citing Garrett v. Reese, 262 S.C. 327, 329, 204 S.E.2d 432, 433 (1974)).

In reviewing a grant of summary judgment, the appellate court must apply the same standard as the trial court under Rule 56(c), SCRCP. Quail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010).

LAW/ANALYSIS

The Circuit Court properly granted summary judgment in favor of Respondents. Appellants have failed to articulate a colorable duty of care owed by Respondents to Appellants' Decedent. Further, to the extent Respondents breached any alleged duty of care, Appellants failed to demonstrate that any breach proximately caused Decedent's death. Appellants' failure of proof as to the key elements proves fatal to Appellants' case.

I. Appellants Have Failed to Demonstrate a Colorable Duty of Care Owed to the Decedent.

In South Carolina to prove negligence, a plaintiff must establish:

(1) a duty of care owed by the defendant to the plaintiff;[1]

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[1] While the Circuit Court's order granting summary judgment was silent as to the status of Decedent on Respondents' property at the time of his death, the Court's Order Denying Appellants' Rule 59(e), SCRCP, motion indicated the Circuit Court ruled that the "decedent was an invitee and discussed its understanding of the law in that context." (Order Denying Rule 59(e), SCRCP, motion).

Respondents take issue with such ruling. Respondents aver that Appellants' initially argued that Appellants' Decedent was a licensee at the time of his death. (See Appellants' Memorandum in Opposition of Summary Judgment, p. 4). Additionally, pursuant to Vogt v. Murraywood Swim and Racquet Club, 359 S.C. 506, 593 S.E.2d 617 (Ct. App. 2004), Appellants' Decedent was in fact a licensee at the time of his death because he was an invited guest of a paying member of the Pine Island Club.

(2) the defendant's breach of this duty by a negligent act or omission;

(3) the defendant's breach was the proximate cause of plaintiff's injury; and

(4) the plaintiff suffered damages.

Doe v. Marion, 361 S.C. 463, 470, 605 S.E.2d 556, 560 (Ct. App. 2004).

Furthermore, the party alleging negligence has the burden of proving actionable negligence and "[t]his burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence." King v. J.C. Penney Co., 238 S.C. 336, 120 S.E.2d 229 (1961); see also Hunter v. Dixie Home Stores, 232 S.C. 139, 144, 101 S.E.2d 262, 265 (1957) (stating "[i]t is elementary that in order for a plaintiff to recover damages there must be proof not only of injury, but also that it was caused by the actionable negligence of the defendant. It should be kept in mind that the doctrine of res ipsa loquitur does not apply in this State.").

South Carolina courts have held that the question of whether a duty actually existed between the defendant and the plaintiff is a question of law to

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Regardless, even with the heightened duty owed to invitees, the Circuit Court held that Appellants failed to articulate a colorable duty of care owed to the decedent. While Respondents take issue with the status of decedent, the Circuit Court properly ruled that there was no duty owed.

be determined by the trial court, and if the trial court determines that no duty exists, "the defendant is entitled to judgment as a matter of law." Marion, 361 S.C. at 470, 605 S.E.2d at 560; see also Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000). The burden of proving a breach of duty is on the plaintiff. Marion, 361 S.C. at 470, 605 S.E.2d at 560 (Ct. App. 2004) (citing Sabb v. S.C. State Univ., 350 S.C. 416, 429, 567 S.E.2d 231, 237 (2002)); Bishop v. S.C. Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998).

A. The South Carolina Recreational Use Statute Applies

The South Carolina Recreational Use Statue, S.C. Code Ann. §§ 27-3-10 to -70, applies in the instant case because Plaintiff's decedent drowned while voluntarily swimming in the open waters of Lake Murray, which is owned by South Carolina Electric and Gas and open to the public for its recreational use at any time. The Recreational Use Statute ("RUS") is designed to "encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability towards persons entering thereon for such purposes." S.C. Code Ann. § 27-3-10 (1991). "Landowners owe 'no duty of care to keep the premises safe' for recreational users and need not 'give any warning of a dangerous condition,

use, structure or activity' on the property." Brooks v. Northwood Little League, Inc., 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997) (quoting S.C. Code Ann. § 27-3-30 (1991))). Moreover, an owner that permits a person to use property for recreational purposes without charges does not: "(a) Extend any assurance that the premises are safe for any purpose[;] [or] (b) Confer upon such person the legal status of an invitee or a licensee to who a duty of care is owed." S.C. Code Ann. § 27-3-40 (1991).

In the case at bar, Appellants have failed to demonstrate the existence of any colorable duty of care owed by Respondents to Appellants' Decedent on June 15, 2011, which Respondents breached. Appellants have premised their claims upon the notion that decedent died while on the Pine Island Club premises. However, the evidence in this case is uncontroverted that Decedent and Bellamy were swimming **beyond the confines** of the Pine Island Club swimming beach at the time decedent accidentally drowned. (M. Bellamy Depo. Transcript, p. 145, line 25 – p. 146, line 7). **Therefore, Decedent was not upon Pine Island Club premises at the time of his death, but swimming in the freshwaters of Lake Murray, which are open to the public for recreational use**.

Furthermore, by virtue of the fact that Decedent had left the premises of the Pine Island Club, Decedent was neither an invitee nor a licensee of the club at the time of this incident. The RUS is clear in its language that Respondents owed no duty of care to Decedent to keep the premises safe, and need not have given any warnings of a dangerous condition, use, structure or activity on the property. See S.C. Code Ann. § 27-3-30 (1991).

In Cole v. S.C. Elec. & Gas, Inc., 362 S.C. 445, 608 S.E.2d 859 (2005), our Supreme Court analyzed the RUS and found, even where the landowner charged a fee for parking, the landowner was still afforded the protections of the statute and affirmed summary judgment to the defendant on this issue. In Cole, the Decedent and several friends were swimming within a recreational area at Lake Murray when the decedent drowned while swimming. The recreational site at issue in Cole was fenced-in and patrolled by a security guard. There were no lifeguards on duty at the lakefront, nor was there any safety equipment present at the site. The swimming area was roped off with buoy lines; however, in Cole, the decedent drowned within the swimming beach.

The Court held that the purpose of the statute was to encourage landowners to make their property available for public use and recreational

purposes and in accordance with that purpose, the statute shielded landowners from liability for negligence.

Here, twenty-one year old Decedent was not in the confines of Respondents' recreational area at the time of his death. Any inquiry into Appellants' Decedent's entrance to the Pine Island Club is moot because Decedent left the Pine Island Club premises at the time of his death, and was in the open and public waters of Lake Murray.

Likewise, Appellants' expert opinions regarding duty are irrelevant. These expert affidavits opine to the "obligations of a landowner, such as [Respondents] in this case, **to a person lawfully using this swimming beach** during an incoming storm...." See (Aff. of Francesco A. Pia at ¶ 7, dated Nov. 24, 2015). Again, Decedent was not using the swimming beach at the time of his death.

Moreover, Decedent had a right to enter the open waters of Lake Murray without permission. Lake Murray, which covers approximately 78 square miles of land and which is owned by SCE&G, is open to the public free of charge. Here, Pine Island Club owed no duty of care to Decedent to keep the open freshwaters of Lake Murray safe, and did not have to give any warnings as to a dangerous condition, use, structure, or activity regarding the

open waters of Lake Murray. However, the Pine Island Club did provide such warnings, notifying swimmers that they were to swim at their own risk, that no lifeguards were on duty, and specifically prohibiting swimming off the subject dock near which Decedent drowned. (M. Bellamy Depo. Transcript, p. 86, line 25 – p. 87, line 14 and Depo. Ex. 8).

The RUS provides that Respondents cannot be held liable as a matter of law because they owed the Appellants' Decedent no legal duty of care.

B. No Duty to Warn of Perils of Obvious Natural Conditions

Even if Appellants' Decedent were an invitee, to which the highest duty of care would be owed (and which Respondents deny), our courts have consistently held that a landowner has no duty to warn of the perils of obvious natural conditions of which an invitee is **reasonably** unaware. Meadows v. Heritage Village Church and Missionary Fellowship, Inc., 305 S.C. 375, 378, 409 S.E.2d 349 (1991) (holding wet grass an open and obvious natural condition).

There is no recognized duty in South Carolina, which would require the Pine Island Club to warn or notify decedent, an adult of twenty one years of age, of open and obvious weather conditions. The approaching rain clouds and overcast sky are nothing but an open and obvious condition of which

decedent was reasonably aware. See generally Hancock v. Mid-South Mngt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (finding no general duty to warn of open and obvious conditions); West v City of St. Paul, 936 P. 136, 139 (Alaska 1997) ("Because most weather conditions are open and obvious, and can be discovered with reasonable diligence, a wharfinger does not have a duty to warn of such dangers.").

For these reasons, Respondents owed no duty to Appellants' Decedent to warn of the incoming weather. Without such a duty, Appellants' claims fail as a matter of law.

C. Appellants' Decedent Assumed the Risk

A court may declare that the plaintiff assumed the risk as a matter of law when it clearly appears that the plaintiff freely and voluntarily exposed himself to a known danger and understood and appreciated the danger. Humphrey v. Day & Zimmerman Intern., Inc., 997 F. Supp. 2d 388 (D.S.C. 2014). The only competent evidence in the record indicates Appellants' Decedent assumed the risk. Accordingly, no duty was owed to Decedent.

1. Appellants' Decedent's Primary Implied Assumption of Risk Bars Appellants' Claim for Recovery

Appellants aver the Circuit Court inappropriately determined—as a matter of law—that Decedent assumed the risk of swimming in the subject waters. Appellants further contend the Circuit Court misapprehended the law of assumption of risk, asserting that the Court evaluated assumption of risk as a question of whether Respondents owed Appellants a duty. Rather, Appellants contend, the assumption of risk is secondary implied assumption of risk in which Decedent's assumption of risk must be compared to Respondents' negligence.

"Primary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are inherent in a particular activity." Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 81, 508 S.E.2d 565, 570 (1998). Importantly, our Supreme Court has clearly held that, "[p]rimary implied assumption of risk is not a true affirmative defense, but instead goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff." Id.

Appellants' Decedent assumed the risks inherent in swimming in an open body of water. It was Decedent's own decision and suggestion that he and Ms. Bellamy leave the Pine Island Club swimming beach and jump from the nearby dock into the open freshwaters of Lake Murray. (M. Bellamy

Depo. Transcript, p. 78, lines 9-21). Decedent ignored clear warnings posted at the subject dock which prohibited him from swimming in the area around the dock in which he subsequently drowned. (See M. Bellamy Depo. Transcript, p. 87, lines 7-10). Decedent knew of the dangers inherent in swimming, both knew and appreciated he was swimming in the open water of Lake Murray where no lifeguard would be present, ignored clearly posted signage which prohibited him from swimming from the subject dock, and by ignoring such warnings voluntarily exposed himself to the dangers of swimming in the open waters of Lake Murray.

The only competent evidence in the record, and the only reasonable inferences therefrom, show that Decedent knew about the realities forming a dangerous condition (if any), including that he was going into a large lake, without lifeguards or safety equipment. Any argument that the subject existing warning signs were of insufficient size, location, or content are not supported by any credible evidence in the record whatsoever.[2] Indeed, the only evidence in the record supports the existence of warning signs to "swim

[2] To the extent Appellants' rely on the supplemental affidavits of their experts to support their contention that a breach of the duties articulated in the original affidavits proximately caused Decedent's death, the supplemental affidavits are improper for the Court's consideration. See, Argument II.A, infra.

at your own risk" and "no lifeguard on duty." Moreover, the aforementioned signage specifically prohibits persons from swimming off the subject dock from which Decedent entered the open waters of Lake Murray. See Cantrell v. Plex Indoor Sports, LLC, No. 2015-UP-274, 2015 WL 3536560, at *1 (S.C. Ct. App. June 3, 2015) (citing Cole v. Boy Scouts of Am., 397 S.C. 247, 251, 725 S.E.2d 476, 478 (2011) ("Primary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are inherent in a particular activity." (internal quotation marks omitted)); id. ("The doctrine of primary implied assumption of risk goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff." (internal quotation marks omitted)); id. at 253, 725 S.E.2d at 479 ("Where a person chooses to participate in a contact sport, whatever the level of play, he assumes the risks inherent in that sport."); Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006) ("Under South Carolina common law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger."); Hurst v. E. Coast Hockey League, Inc., 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006) ("If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law.").

Respondents maintain that it is intellectually dishonest to suggest that Decedent did not adequately understand the risks inherent in swimming in the fresh waters of Lake Murray. Because Appellants' decedent assumed the risks inherent in the activity he was engaged in at the time of his death, Respondents owed no duty to Decedent. Accordingly, Appellants' claims are barred as a matter of law.

2. Appellants' Reliance on Cole is Misguided

Appellants attempt to analogize Cole v. S.C. Elec. & Gas, Inc., 362 S.C. 445, 608 S.E.2d 859 (2005), to the procedural posture and facts presented in the case *sub judice*. Specifically, Appellants aver that Cole requires a finding that Respondents owed Decedent a duty. However, Appellants' reliance on Cole for the reasons articulated in their brief is misplaced.

In Cole, a fourteen-year-old boy drowned in the open waters of Lake Murray. The Decedent's parents brought a wrongful death action against South Carolina Electric & Gas ("SCEG"), alleging SCEG was negligent and grossly negligent for failing to provide lifeguards, life-saving equipment, and the proper warnings at the site. Summary judgment was granted in favor of SCEG on the ground that SCEG was entitled to immunity from liability for

simple negligence under the Recreational Use Statute. A trial proceeded only on the issue of SCEG's gross negligence.

At trial, plaintiff's expert provided testimony that the "no lifeguard on duty" signs were inadequate in his opinion to warn of the dangers inherent in swimming in a lake.

A jury charge was given as to the decedent's assumption of the risk. The jury charge failed to instruct that SCEG had the burden of proving its affirmative defense of assumption of the risk.

The Supreme Court ultimately held that while the trial court properly applied the Recreational Use Statute, the jury charge was inadequate to properly instruct the jury regarding SCEG's burden of proof. While SCEG argued that there was no need to charge assumption of the risk under the doctrine of "primary implied assumption of the risk," the Court ultimately found that whether SCEG met the duty owed to licensees by warning that there was no lifeguard on duty was a question of fact for the jury. Notably, the Court referenced plaintiff's expert's testimony that the warning signs simply stating there was no lifeguard was insufficient notice of the danger involved.

Cole is notably distinguishable from the case at hand based on the procedural posture and issues on appeal. Particularly, the Cole Court found there were questions of fact for the jury based on evidence presented by plaintiffs and plaintiffs' experts. Notably, the decedent in Cole was fourteen years old. Moreover, the Cole Court noted that the decedent was unaware the buoy line was over his head. The Court found that a factual issue remained as to the whether a **child** legally assumed the risk of drowning in the lake.

Here, decedent was twenty-one years old. He was a graduate of nearby Irmo High School, was attending college courses, and had ambitions to become a first responder and join the local police department. (M. Bellamy Depo. Transcript, p. 42, lines 1-24; p. 55, lines 10-12; p. 144, lines 16-23). Further, unlike Cole, there is no allegation that decedent did not know the water was deep. More importantly, decedent previously accessed the waters of the Pine Island Club and previously appreciated the inherent dangers of swimming in the waters of Lake Murray. (M. Bellamy Depo. Transcript, p. 44, lines 2-12).

The analysis of Cole is procedural and factually distinguishable from the case sub judice. Accordingly, Appellants' reliance on the same for the reasons articulated in their brief is misplaced.

II. There is No Evidence that Any Breach Proximately Caused Decedent's Death

To the extent the Court finds Respondents owed Appellants' Decedent a duty of care, there is no evidence that a breach of any alleged duty owed to Decedent proximately caused decedent's death.

Appellants contend that based on the affidavits of Drs. Francesco Pia and Ralph Johnson, a jury could infer that any number of breaches[3] by the Respondents was the proximate cause of Decedent's drowning. (App. Initial Br. p. 9). Appellants further allege that they are only required to show Respondents' conduct was a cause and not the sole cause of Decedent's death.

A. The Supplemental Affidavits Are Improper for the Court's Review

Appellants initially submitted affidavits from Drs. Francesco Pia and Ralph Johnson asserting the duties owned by Respondents Decedent.

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[3] The duties referenced by Appellants, and which Appellants aver were breached, including: (1) weather monitoring equipment, (2) a severe weather safety plan; (3) and Operations Policies and Procedures Manual for lifeguards; (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 include 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. (Appellants' Initial Br. pp. 13-14).

However, those initial affidavits fall short of concluding that a breach of any one of the duties articulated in the affidavits was the proximate cause of Decedent's drowning. (Aff. of Dr. Francesco Pia, dated Nov. 24, 2015; Aff. of Dr. Ralph Johnson, dated Nov. 17, 2015).

Along with their Rule 59(e), SCRCP motion, Appellants submitted supplemental affidavits of Drs. Pia and Johnson. (Supp. Aff. of Dr. Pia, dated Sept. 1, 2016; Supp. Aff. of Dr. Johnson, Aug. 31, 2016). Within the supplemental affidavits, the experts opined that the breaches previously articulated in the initial affidavits proximately caused Decedent's death. Appellants attempted to argue that this new expert witness testimony compelled the Circuit Court to reverse its prior ruling. (Rule 59(e), SCRCP) motion).

However, "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990); see also Bogart v. Chapell, 396 F.3d 548, 555 (4th Cir. 2005) (recognizing that one of the limited purposes of Rule 59(e) is "to account for new evidence not available at trial"); Peters v. General Service Bureau, Inc., 277 F.3d 1051, 1057 (8th Cir. 2002) ("Arguments and evidence which could have been

presented earlier in the proceedings cannot be presented in a Rule 59(e) motion."); Nagle Industries, Inc. v. Ford Motor Co., 175 F.R.D. 251 (E.D. Mich. 1997) (explaining that a Rule 59(e) motion "should not be utilized to submit evidence which could have been previously submitted in the exercise of reasonable diligence."); Natural Resources Defense Council v. U.S. E.P.A., 705 F.Supp. 698, 701 (D.D.C.1989), vacated on other grounds, 707 F.Supp. 3 (D.D.C.1989) ("Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier."); Smith v. Stoner, 594 F.Supp. 1091, 1118 (N.D.Ind.1984) ("Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived."); Johnson v. City of Richmond, 102 F.R.D. 623, 623 (E.D.Va.1984) ("I do not conceive of Fed.R.Civ.P. 59(e) as serving the office of providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment.").

By the submission of the supplemental affidavits, Appellants attempted to improperly enlarge the record on which the Circuit Court could make its decision. Appellants are attempting to use the same mechanism before this Court.

The supplemental affidavits are dated August 31, 2016 and September 1, 2016—well after not only entry of judgment, but also the hearing on Respondents' motion. Appellants had a substantial amount of time to submit their supplemental affidavits well ahead of the Circuit Court's entry of judgment. Appellants attempted to use their Rule 59(e) motion as a mechanism to supplement the record and as an attempt to present evidence that was not new or unavailable prior to judgment. Indeed, in denying Appellants' Rule 59(e), SCRCP motion, the Circuit Court stated: "[T]he court attempted to be lenient in allowing presentation of all evidence and argument. The court is unaware of any rulings that prevented an effort to properly supplement the record prior to the decision being rendered." (Order Denying Rule 59(e), SCRCP Motion, p. 1).

Further, Respondents note that their motion for summary judgment was heard before the Circuit Court on December 11, 2015. Between the date of the hearing and the Circuit Court's order granting summary judgment dated August 8, 2016, the Circuit Court, via e-mail, entertained additional argument and evidence. During this time, Appellants failed to submit the supplemental affidavits of their experts, even though the issue of proximate cause was directly before the Circuit Court. (See Emails).

Accordingly, Appellants' supplemental affidavits are improper for consideration either before this Court.

B. No Evidence of Proximate Cause

1. No Evidence Weather Conditions Caused or Contributed to Decedent's Death.[4]

As an initial matter, Appellants contend they have made no such allegation that the purported change in weather conditions actually caused decedent to drown. Appellants contend that Respondents and the Circuit Court mischaracterized Appellants' claims regarding the change of weather conditions.

Despite Appellants' contention that they have made no such allegation that the purported change in weather condition actually caused Decedent to down, Appellants made numerous contentions disputing their current position. Specifically, in response to Appellants' assertion, Respondents

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[4] Respondents note that there is no duty to warn of the perils of obvious natural conditions of which an invitee is reasonably unaware. Meadows, 305 S.C. at 378, 409 S.E.2d 349 (1991). Accordingly, there can be no breach that proximately caused Decedent's death related to the failure to warn of unsafe weather conditions. However, to the extent Respondents owed Decedent a duty to warn of the change in weather conditions, there is no evidence that a breach of that duty proximately caused Decedent's death.

crave reference to the following colloquy from the hearing on Respondents' motion for summary judgment:

> [Circuit Court]: I'm trying to understand if the argument, this is address to both of you, if the argument about this weather condition is that there is evidence that the weather contributed to the decedent's death or if there is – the assertion is that the area should have been closed because of the weather so the decedent would never have entered into the water and, therefore, would not have drowned?
> ...
>
> [Appellants' Counsel]: Your Honor, on behalf of the [Appellants], its both of what you talked about. So both the fact that the weather was the condition that required the swimming beach to be closed down, required warning, that is part of the allegations that are supporting by the affidavit of our two experts,[5] but also that the weather, the reason why you close it down is because it affects the current of the water and for the same reason you close down the swimming pool when you have significant weather incoming .... So the argument is both. The weather was an element that required more things to have been done, such as closing the pool ... and warning people at the beach like they warned people at the pool, **but also that the weather played a role in why.**

(Motion for Summary Judgment Hearing Transcript, p. 39, line 7 – p. 41, line 9) (emphasis added).

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[5] Appellants' counsel was referring to the original affidavits of Drs. Pia and Johnson, which were never timely submitted.

Furthermore, following the hearing on Respondents' motion, the Circuit Court entertained additional arguments in support of their respective positions. Specifically, on June 15, 2016, the court posed the following query:

> Before I rule, I want to make sure I have each side's response to the following question. What evidence is there that the weather condition caused or contributed to [decedent's] drowning? I would appreciate your prompt response. Thank you.

(See Email dated June 15, 2016).

Counsel for Respondents and Appellants then engaged in a series of emails between June 15, 2016, and June 17, 2016, directly responding to this specific issue. In an email dated June 16, 2016, Appellants' Counsel responded to the Circuit Court's inquiry: "There is evidence that the weather conditions caused or contributed to [decedent's] drowning. I will send responsive materials when I arrive to the office." (Email, June 16, 2016). By a second email on the same date, Appellants' counsel stated: "Attached, please find an outline and documents that demonstrate that the weather conditions contributed to and caused [Decedent] to drown." (Email, June 16, 2016). Appellants' counsel attached a detailed two page memorandum setting forth Appellants' position as to weather contributing to Decedent's

downing, as well as some additional forty-seven (47) pages of documents in support of Appellants' proposition that the change in weather was the proximate cause of Decedent's death.

Following the adverse ruling, Appellants attempted to circumvent their original arguments in order to dodge the Court's unfavorable ruling that "[s]ince there is no evidence that the weather conditions were a proximate cause of the drowning the argument about liability based on a failure to warn or a failure to remove the [Appellants'] decedent from the property becomes irrelevant." Appellants are attempting to again circumvent their original argument regarding the weather conditions before this Court.

Respondents aver that Appellants' position before this Court-that Appellants' argument was not that weather conditions caused decedent's drowning-is disingenuous based on the arguments at the hearing and subsequent email exchanges with the Circuit Court.

Moreover, there is no evidence that the change in weather conditions caused or contributed to decedent's death. Indeed, the only competent evidence in the record indicates that the drowning occurred **before** the storm arrived at the Pine Island Club; the water was calm; and decedent exhibited distress for an unknown reason, seemed to panic, and did not follow

instructions to relax and try to float. (M. Bellamy Depo. Transcript, p. 99, lines 17 – p. 101, line 15; p. 116, lines 17-19). Further, there is no evidence that lightning or any other element associated with the storm caused or contributed to the drowning. There is no evidence that weather conditions hindered anyone, including the EMS personnel, from any realistic rescue attempt that could have saved the life of decedent.

Any assertion that the storm caused or contributed to Decedent's death is purely speculative. Accordingly, a jury is not allowed to determine that the weather conditions caused or contributed to the drowning of Decedent. Since there is no evidence that the weather conditions were a proximate cause of Decedent drowning, the argument about liability based on a failure to warn or a failure to remove Decedent from the property becomes irrelevant.

2. No Evidence of a Breach of Any Duty Owed to Decedent Proximately Caused Decedent's Death.

In addition to the lack of evidence that the weather conditions caused or contributed to Decedent's death, there is no competent evidence in the record that a breach of any other duty caused or contributed to decedent's death.

As previously articulated supra, the supplemental affidavits of Drs. Pia and Johnson are not properly before this Court. Further, the initial affidavits of Drs. Pia and Johnson fall short of concluding that a breach of any one of the duties articulated in the affidavits was the proximate cause of Decedent's drowning.

Appellants further contend that the supplemental affidavits are not critical to the determination of whether a scintilla of evidence has been presented to support causation. Appellants assert that a reasonable jury could "easily determine" that Respondents' "breaches related to planning for inclement weather were a proximate cause." However, such a finding would be purely speculative.

Indeed there is **no** evidence in the record as to what caused Decedent's death. The only competent evidence was that Decedent drowned before the storm arrived at the Pine Island Club; the water was calm; and that Decedent exhibited distress for an unknown reason, seemed to panic, and was not able to follow instructions to rely and try to float. (M. Bellamy Depo. Transcript, p. 99, line 17 – p. 101, lines 15; p. 116, lines 17-19). Appellants have merely concluded that a jury could possibly find that a breach of any of the duties

articulated by Appellants' experts could have caused Decedent's death. Without more, Appellants' argument is based upon mere speculation.[6] See Germann, 286 S.C. 34, 331 W.E.2d 385.

CONCLUSION

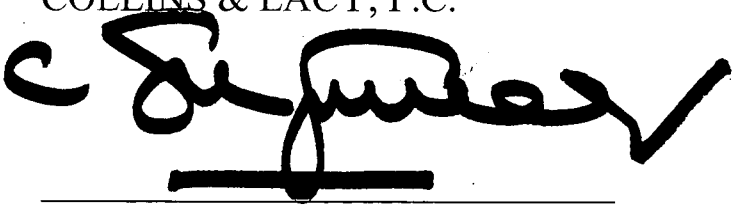
For the foregoing reasons, Respondents aver Appellants have not satisfied elements to support their claim for negligence. Specifically, Appellants have failed to adduce any evidence that Respondents owed Appellants' Decedent any colorable duty of care. Regardless of the lack of duty of care owed to Decedent, Appellants have failed to establish that a breach of any duty of care proximately caused Decedent's death. Based on

[6] Within their Statement of Facts, Appellants rely on the statement of Evan McPherson given to law enforcement. Appellants relied on such statement in their memorandum to the Circuit Court dated June 16, 2016 in response to the Circuit Court's inquiry on whether weather conditions caused or contributed to decedent's death. Appellants further cite to the statements of J.W. Seay and Evan McPherson in their Statement of Facts. However, these statements are inadmissible and are improper to consider during summary judgment. Rule 56(e), SCRCP; Hall v. Fedor, 349 S.C. 169, 175 S.E.2d 654, 657 (Ct. App. 2002) (holding hearsay evidence presented in response to summary judgment motion did not create a genuine issue of material fact because "[o]ur appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be admissible in evidence."). The only competent sworn testimony in this case is from Mandy Bellamy.

this failure to proof, Respondents respectfully request this Court affirm the Circuit Court's grant of summary judgment in their favor.

Respectfully submitted,

COLLINS & LACY, P.C.



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October 13, 2017

ATTORNEYS FOR RESPONDENTS

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.

PROOF OF SERVICE

I hereby certify that I served Respondents 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., and SCANA's Initial Brief upon all parties, by placing a copy in the United States

mail, postage prepaid, to all counsel of record on October 13, 2017, addressed to the following:

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Respectfully submitted,

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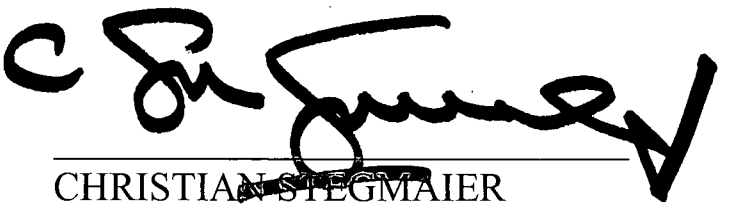

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October 13, 2017

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
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, vs. 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***
Civil Action No. ***2014-CP-32-02210***
Appellate File No. ***2016-002487***
Claim No. ***683-411339***
C&L File No. ***000001-02078***

Dear Ms. Kitchings:

Please find enclosed for filing the unbound original and two (2) copies of Respondents' Initial Brief and Designation of Matter in the above referenced matter. Please file the original and return a clocked copy of same via our courier.

By copy of this letter and enclosure, we are serving same on counsel of record.

Thank you for your time and attention. Should you have any questions or concerns, please do not hesitate to contact us.

Respectfully,

Christian Stegmaier

CS/mmm
Enclosures
cc: Edward L. Graham, Esquire
Pedro E. Krompecher, III, Esquire