FINAL BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Judge

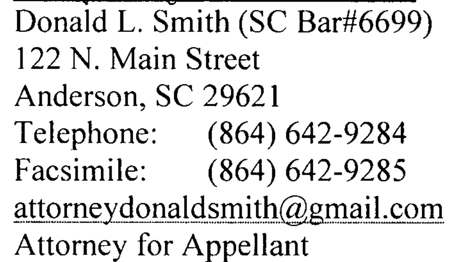
Appellate Case No. 2017-001330

Kenji Kilgore, Appellant,

v.

Estate of Samuel Joe Dixon, Samuel E. Dixon, and Fredda L. Dixon Respondents.

AMENDED FINAL BRIEF OF APPELLANT



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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE APPELLANT SUFFICIENTLY ALLEGED THE ELEMENTS OF NEGLIGENCE IN HIS CAUSE OF ACTION

II. WHETHER THE APPELLANT WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS

STATEMENT OF THE CASE

Appellant filed this action for the tortious injuries he suffered when deceased Samuel Joe Dixon shot him five times.

Sometime prior to July 2012, Appellant began living in a house/trailer located at 240 Thomson Road, Starr, in Anderson County. Said property is owned by Appellee Spouses Dixon. Appellant was a roommate with Joe Dixon, son of Appellee Spouses. They had a harmonious relationship which can be considered as friendly, during Appellant's stay at the aforementioned property. Appellee Spouses expressed happiness/gratitude in having him as a tenant on their property as they had notice that their son's behavior had gotten better. (R. 56). Appellant had no idea that they were talking about their son's violent/volatile behavior.

On or about July 2, 2012, Joe Dixon shot Appellant five times, without provocation, inside the rented house/trailer. Several days after shooting Appellant, Joe Dixon committed suicide.

On July 1, 2015, Appellant filed a Complaint against the Estate of Joe Dixon and Spouses Dixon for negligence. (R. 1). On November 9, 2015, Appellee Spouses filed their Answer, and moved to dismiss the case for lack of cause of action on March 3, 2016. (R. 8). A hearing was schedule for the motion, but Appellant's former counsel failed to appear due to lack of notice. (R. 27)

Appellee Spouses offered to settle the case, which the Appellant did not accept. Appellant had a change of counsel. Without giving new counsel the opportunity to conduct discovery proceedings, the Court ordered the dismissal of the case on January 24, 2017. (R. 30).

Appellant moved to reconsider the aforesaid Order on February 2, 2017 (R. 38), which the Appellee Spouses opposed on February 8, 2017. (R. 43). On May 8, 2017, the Court denied the Appellant's motion for reconsideration. (R. 62). Thus, this Appeal was brought.

STANDARD OF REVIEW

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Id. The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Doe*, 373 S.C. at 395, 645 S.E.2d at 247. The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. Ashley River Props. I, LLC v. Ashley River Props. II, LLC, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007).

ARGUMENTS

I. APPELLANT SUFFICIENTLY ALLEGED THE ELEMENTS OF NEGLIGENCE

In order to establish a cause of action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *Rickborn v. Liberty Life Insurance, Co*., 321 S.C. 291, 468 S.E.2d 292 (1996).

Appellant reiterates that Appellee Spouses had a duty to exercise that degree of care that a reasonable and prudent person would have exercised under the same and similar circumstances, including the duty to warn him of their son's mental health and violent behavior. While it is true that under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger, the court in *Faile v. South Carolina Department of Juvenile Justice,* 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) recognized five exceptions to this rule:

> (1) where the defendant has a special relationship to the victim;
> (2) where the defendant has a special relationship to the injurer;
> (3) where the defendant voluntarily undertakes a duty;
> (4) where the defendant negligently or intentionally creates the risk; and,
> (5) where a statute imposes a duty on the defendant. See generally, Hubbard & Felix, The South Carolina Law of Torts 57-72 (1990). Id.

Appellant contends that this case presents a novel issue which the Court may regard as special circumstance that may warrant a duty to warn on the part of the Appellant. Not only are the Respondents the parents of the injurer, who suffers from mental illness and has violent tendencies, but also, the landlord of the Appellant, the victim of their son's criminal act.

Appellant reiterates that the parental relationship between the Respondents and deceased Joe Dixon, the injurer, charges the Respondents with the ability to control and supervise their son, who lived in their property. *Doe v. Batson*, 338 S.C. 291, 296, 525 S.E.2d909, 911 (Ct. App 1999) *(hereinafter referred as Batson I*). and the case of *Rowe v. Bibby*, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014) laid down this doctrine:

> *"The defendant may have a common law duty to warn potential victims under the `special relationship' exception when the defendant `has the ability to monitor, supervise and control an individual's conduct' and when `the individual has made a specific threat of harm directed at a specific individual.'" Doe v. Marion, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (quoting Bishop, 331 S.C. at 86, 502 S.E.2d at 81). It is not necessary for the injuring party to have made a threat while under the defendant's control or custody. Bishop, 331 S.C. at 88, 502 S.E.2d at 82. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person. "*

Appellant believes that Respondents had the ability to monitor, supervise or control deceased Joe Dixon. Deceased son, despite not living under the same roof as the Respondents, was residing right behind the Respondents' house. With exercise of due diligence, the Respondents could have or should have easily walked over to their son's trailer/house to check on, monitor or supervise their son, considering that they knew of his mental illness and dangerous nature. That they are aware of their son's health problems was apparent with their previous conversation with the Appellant. Respondents told Appellant that their son "was doing better". Undoubtedly, Respondents had notice and/or knowledge of his mental issues, as well as volatile behavior.

Appellant argues that Respondents knew or should have known of a specific threat made to harm a specific person. They had already coaxed him into returning home from his marital home, following the devastating dissolution of his marriage. In this case, the specific threat was the mental condition of their son, who was capable of violence as evidenced by his shooting of the Appellant and his subsequent suicide. The specific person to be harmed was Appellant since he lived and stayed in the same house/trailer as the deceased.

As Appellant's landlord, Respondents had a duty to reasonably maintain safe conditions on their property. Under the special circumstances of this case, Appellant argues that a part of

the safe conditions required disclosure of Respondents' son's mental illness. Having knowledge of their son's volatile behavior and his ever-increasing mental instability, the Respondents were required to exercise a greater degree of care to secure the physical welfare of their tenant. This should be differentiated from a case where the criminal act or threat of harm comes from a third person, who is acting with complete cognizance of the act. In this case, the Respondents knew of their son's mental illness, but still allowed Appellant to rent their property and become roommates with their son and in turn, allowed Appellant to risk his life. What makes it worse is the reckless and/or negligent disregard of Appellant's welfare, by withholding information regarding what was truly an unstable, explosive environment. They deprived Appellant of the ability to weigh the pros and cons of leasing from them. In this sense, Respondents intentionally or recklessly created the risk of harm to the Appellant found herein.

In the alternative, Appellants argue that Respondents are liable for their negligence in failing to exercise that degree of care which a reasonably prudent people would have exercised under the same and similar circumstances.

It has long been held that the court cannot grant of a motion to dismiss for failure to state facts sufficient to constitute a cause of action if the facts alleged in the complaint, and inferences reasonably deducible therefrom, if proven, would entitle the plaintiff to relief on any theory of the case. *Newton v. South Carolina Public Railways Comm'n*, 319 S.C. 430, 462 S.E.2d 266 (1995); *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987). Appellant has sufficiently averred the cause of action for negligence on the part of Respondents.

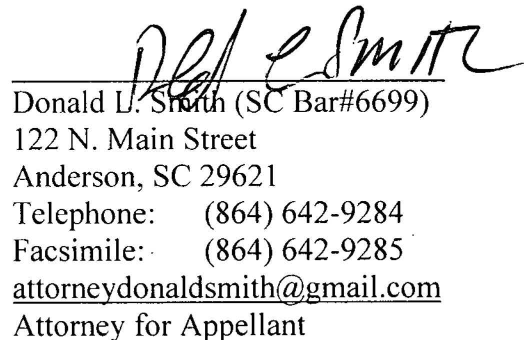
II. APPELLANT WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS.

The undersigned counsel was retained by Appellant a month before the January 24, 2017 Order. Very little discovery has been conducted in this matter. Counsel should be allowed to

pursue discovery, especially given the traumatic events which took place, and the subsequent mental scarring that followed an unbelievable experience. Outstanding motions prevented him from conducting discovery. Appellant believes that discovery will provide court with the necessary evidence to allow him to have his day in Court. In this regard, it is akin to the *Batson I* case, where the Court declined to impose summary judgment before sufficient discovery could be completed. Whether the Respondents had a duty to Appellant will be ferreted out with the completion of the aforementioned discovery.

CONCLUSION

For all of the foregoing reasons, Appellant prays that this Honorable Court reverse the final judgment dismissing the case, and remand the same for further proceedings in the trial court with instructions regarding the completion of discovery.



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FORM 16
CERTIFICATE OF COUNSEL IN AMENDED FINAL BRIEF

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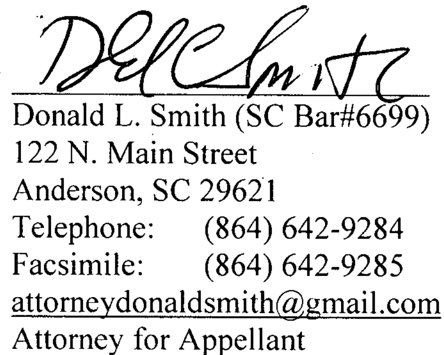
CERTIFICATE OF COUNSEL IN AMENDED FINAL BRIEF

I HEREBY CERTIFY that Appellant's Amended Final Brief in the above-captioned case complies with Rule 211 (b) SCACR.

December 6, 2017



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