

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

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SC Court of Appeals

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.

FINAL REPLY BRIEF OF APPELLANTS

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Statement of Issues on Appeal

- I. **Did the trial court err when it held as a matter of law there was not a scintilla of evidence that any of Respondents' negligent acts were a proximate cause of Evan Myers's drowning?**
- II. **Given that the trial court elected to consider Respondents' causation argument, despite the fact it was not raised until hours before the hearing, did the trial court err in refusing to consider affidavits supporting causation submitted with the motion to alter or amend?**
- III. **Did the trial court err when it held Respondents owed no colorable duty of care to the Decedent?**

Statement of Facts

Appellants rely on the Statement of Facts in their Brief of Appellants.

Argument

- I. **The trial court erred when it held as a matter of law there was not a scintilla of evidence that any of Respondents' negligent acts were a proximate cause of Evan Myers's drowning.**
 - a. **Alleged breaches in the standard of care a reasonable jury could have found were a proximate cause of Evan Myers' drowning.**

The expert affidavits initially filed by Appellants plainly provide evidence of both (1) applicable standards of care in the recreational swimming industry; and (2) breaches thereof. (R. p. 184-213) There is no need to repeat herein those standards of care nor breaches thereof, as they were set forth verbatim in the Brief of Appellants.

The supplemental expert affidavits addressed not only those subjects, but also the causal significance of Respondents' breaches. To the extent the causation component of those supplemental affidavits is considered by this Court, it expressly and plainly presents sufficient evidence to create a question of fact for the jury on the causation issue. *Id.* The sworn assertions in the supplemental affidavits explain the common sense causal connection between negligent

failures to provide lifesaving measures and equipment and consequent death resulting from the absence thereof. Those assertions represent far more than a scintilla of evidence and preclude summary adjudication of the proximate cause issue.

Appellants' initial expert affidavits did not expressly address causation, because the issue had not been raised by Respondents. See Argument II *infra*. Nonetheless, reasonable inferences arising from those affidavits, considered in a light most favorable to Appellants, represent at least a scintilla of evidence sufficient to overcome the motion for summary judgment on the proximate cause issue. But for the Respondents' negligent failure to clear swimmers from the lake, or stop them from entering the lake, Evan Myers (the "Decedent") would not have been in the lake subject to the risk of drowning. But for Respondents' failure to provide safety equipment, well-intentioned bystanders would have been able to prevent the Decedent from drowning by throwing him a life buoy or other safety device, rather than attempting a heroic rescue without lifesaving training or experience. The very purpose of safety measures and safety equipment at or near deep water is to prevent deaths from drowning. Jurors need not learn that from industry experts. The very purpose of standards of care mandating such safeguards is to prevent drowning deaths. It takes only common sense, not expert testimony, to determine that an absence of lifesaving measures and equipment may have been a contributing or concurrent cause of Decedent's death.

For these reasons, Appellants made a sufficient *prima facie* showing of proximate cause to preclude summary adjudication on that issue. That is true even if the supplemental affidavits are not considered.

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

The order under appeal misconstrued Appellants' comments about the causal significance of weather. Respondents continue to do so. Appellants do not argue that bad weather had any *direct*

causal significance. Such an argument would lack merit, among other reasons, because Respondents are not responsible for changes in the weather.

What Appellants have alleged is that *certain* of the Respondents' breaches are relevant because of the impending bad weather. Impending bad weather has *indirect* causal significance because without that, the lifeguards would not have left their post and there would have been no need to clear the lake or stop Decedent from re-entering the lake.

Other causally significant breaches by Respondents have nothing whatsoever to do with weather conditions. Those include, for example, the failure to have (1) an Operations Policy and Procedure Manual for lifeguards; (2) safety equipment such as safety posts with throwing components and rescue devices such as flotation buoys and other life-saving devices as required by industry standards. The very purpose of such equipment is to prevent drowning, no matter the weather.

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.

Respondents implicitly recognize that their motion should be reversed if the Appellants' supplemental expert affidavits are considered by this Court. Respondents argued not once, not twice, but at least four times¹ that the supplemental affidavits were untimely and must be disregarded.

Rule 56 (c), SCRCP, requires responsive affidavits from the non-moving party to be filed no later than two days before the hearing. The Rule contemplates, and fundamental fairness requires that the moving party provide advance notice to the non-moving party of the allegedly undisputed

¹ Respondent's Initial Brief: fn p. 18; pp. 24-25; fn 5 p. 28; p. 32.

material facts it plans to rely on at the hearing. To construe the Rule otherwise would lead to absurd results because it would deny the non-moving party a meaningful opportunity to respond to new assertions raised after the deadline for opposing affidavits. How could a non-moving party possibly obtain and serve opposing affidavits if there is no notice of a newly alleged undisputed fact until after the two-day deadline? To promote substantial justice, that notice must in fairness be provided early enough before the two-day deadline to permit time for a meaningful response.

Rule 56 (c), SCRCPP, is not intended to create an opportunity for summary judgment by ambush. That is precisely what Respondents' counsel has attempted with its late notice to Appellants of its intent to argue that proximate cause was a genuinely undisputed issue.

Our appellate courts abhor gamesmanship and trickery by members of the Bar. *See, e.g., Patton v. Miller [Op. 27730, (S.C. Sup. Ct. filed July 26, 2017)].*

It is too late in the day and entirely contrary to the spirit of the . . . Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The . . . Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

Sound policy dictates that efforts to prevail with such tactics must be rebuffed. Otherwise, there will be an incentive to repeat such tactics in the future.

Fortunately, the authors of our Rules foresaw the potential tactics used by Respondents' in this instance, and provided a remedy: Rule 56 (f) provides that summary judgment should not be granted when affidavits are unavailable for justifiable reasons. In that case, the court should "refuse the application for judgment," "order a continuance," or "make such order which is just."

Further, summary judgment is improper when “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. 372 537 S.E.2d 688 (2000) Further inquiry in this case was needed, unless the court was inclined to deny the motion on other grounds.

When a moving party plays “hide the ball” until hours before the hearing, the court should deny the motion, order a continuance or make another just order such as to allow supplemental affidavits beyond the two-day deadline. For the court to do otherwise is prejudicial, as revealed by the court’s decision to grant the motion for summary judgment despite the lack of clarity and late submission by Respondents. Respondents argue that the court allowed extra time for submissions and argument, but the court never invited opposing affidavits after the two-day deadline of Rule 56 (c). The court’s invitation cannot be construed as an implicit invitation to submit more opposing affidavits, because the two-day deadline had passed, and the court made no reference to an order under Rule 56 (f). The court’s decision to disallow the affidavits is inconsistent with substantial justice, the importance of which is expressed in Rule 61, SCRPC.

III. The trial court erred when it held Respondents owed no colorable duty of care to the Decedent.

a. Decedent was an invitee.

The court below correctly ruled that Decedent was an invitee. That conclusion follows from the undisputed fact that he was a guest of a member who paid for access to and use of the amenities of the Pine Island Club. Jumping off a dock, close to the nominally designated swimming area, is foreseeable. It is difficult to perceive how one’s foreseeable jumping off a dock transforms one from an invitee to an uninvited general member of the public.

b. South Carolina Recreational Use Statute does not apply.

The Recreational Use Statute does not apply to this case. That conclusion follows from the undisputed facts that (1) dues were required for members and their guests to have access to the lake through the Pine Lakes Club; and (2) the Club grounds were used by Decedent for access.

c. *Cole v. S.C. Elec. & Gas, Inc.* is factually similar to this case, and demonstrates that Respondents owe duties of care to the Decedent.

Cole has sufficient factual similarities to this case to be helpful to a proper analysis of the issues. *Cole v. S.C. Elec. & Gas, Inc.*, 362 S.C. 445, 608 S.E.2d 859 (2005) Those similarities include a drowning death in the same lake and a same owner-defendant.

The facts in *Cole* also have some important differences. No dues were required for use of the lake in *Cole*. The decedent in *Cole* was a licensee, not an invitee. The Recreational Use Statute applied. Despite those considerations, the *Cole* defendant was held on appeal to have duties of care to that decedent.

As the Decedent in this case was a guest of a dues paying member, the claims of the Decedent's Estate in this case are stronger than those in *Cole*. The decedent in *Cole* paid only for parking. The decedent in *Cole* was a licensee, thus the duties to Decedent Myers as an invitee were greater. Because the Recreational Use Statute is inapplicable in this case, Appellants must prove only ordinary negligence, not gross negligence as in *Cole*. No other factual differences between the cases, such as different ages or precise location of drowning, extinguish Respondents' duties. "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, 659 S.E.2d 196 (Ct. App. 2008)

d. The trial court misapplied the law of primary implied assumption of the risk by making findings of fact reserved for jury determination.

Case law establishes that primary implied assumption of the risk is a misnomer, and it is more accurately an absence of duty to the injured party. The lower court recognized the misnomer, and he characterized the doctrine as an “absence of negligence.” [R. pp. 13-14] He then conflated the doctrines of primary and secondary assumption of the risk.

The order acknowledges that primary implied assumption of risk does not truly involve any assumption of risk. It further recognizes that secondary implied assumption of the risk does involve factual issues of assumption of the risk, to be compared against negligence of the Respondents. Then, however, the order proceeds to discuss the court’s personal interpretation of disputed facts regarding secondary assumption of the risk. For example, the Court makes its factual finding that the Decedent understood the “realities” of the danger he encountered, and the amount of water boats need to approach a dock without grounding. [R. pp. 1-16]

To the contrary, there is no undisputed showing regarding what Decedent knew about lifeguards, lifeguard manuals, lifeguard rules, absence of lifeguards, absence of safety posts, throwing devices, flotation buoys, and the like. Further, it is difficult to perceive how the Decedent would have knowledge, as a matter of law, regarding how much water various boats need to avoid being grounded. Kayaks, canoes, jon-boats and Carolina boats involve little water displacement. Larger boats need varying water depths, depending on keel design and other factors. Even boat owners, who should know how much water their boat draws, make mistakes and get grounded. Without dredging, water depths may be lower than designed or expected by users thereof. Such issues are not to be resolved as a matter of law.

The defense argument that primary implied assumption of the risk precludes recovery has no merit. As explained *supra*, Respondents did indeed owe duties of care to Decedent. Those duties arise from his status as an invitee. Even if he were a licensee, as the decedent in *Cole*, Respondents

would still owe Decedent duties of care. Though lesser in scope, they are more than “colorable” duties, and have common sense causal significance.

So too does Respondents’ argument regarding secondary assumption of the risks lack merit. How any alleged assumption of risks compares with Respondents’ own negligence raises questions for the jury, not the court.

Respondents argue that their duties to Decedent were extinguished when he swam off of the dock, on the theory that he lost his status as an invitee or licensee by doing so. That ignores that (1) certain duties which were owed by Respondents when Decedent was unquestionably on club property would, if met, have prevented Decedent from being in a position to jump off the dock; (2) certain duties which were owed by Respondents when Decedent was unquestionably on club property would, if met, have enabled Decedent to be saved from any deep water in or near the nominally designated swimming area; (3) Decedent gained access to the lake *and the docks* via the Pine Island Club premises; (4) the docks provided access in fact to both boats and swimmers; (5) a portion of the lake was on club premises; (6) the dock in question was adjacent to, or close by, the nominally designated swim area; (7) there is a question of fact regarding what Decedent knew, if anything, about where club premises began and ended; (8) there is a question of fact regarding what Decedent knew regarding safety equipment and safety practices on club property, as required by industry standards; (9) there is no evidence of boat motors being present to present risk of harm from motor propellers; and (10) there is nothing at all in the record to suggest that Decedent was knowledgeable about water depth requirements for boats which sometimes used the dock. Respondents’ argument also ignores that it was foreseeable to them that Decedent and others would swim from the dock, despite warnings or alleged openness and

obviousness of risks. As such, no duty owed to Decedent by Respondents was extinguished. *See Singleton, supra.*

Foreseeability is a question of fact for jury determination. Respondents have every right to argue at trial that there was no foreseeability, but Appellants should be allowed to argue at trial that there was. That issue is not one to be decided in this case as a matter of law.

Respectfully, the court below made factual findings and applied the law to those facts as he deemed appropriate. That constitutes error, for there are genuine disputes of material facts which must be resolved by a jury. All that is required to overcome summary judgment is a scintilla of evidence, and the Appellants have not only met but have exceeded that standard.


Conclusion

For the reasons stated, Appellants request this Court to reverse the decision of the trial court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for Appellants certify that this Final Reply Brief of Appellants
complies with Rule 211(b), SCACR.

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