

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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APR 12 2019
SC Court of Appeals

Appellate Case No. 2017-001330
Case No. 2015-CP-04-01605

Kenji Kilgore Appellant,

v.

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

Respondent's Return to Appellant's
Motion to Reconsider

This Court properly found that Appellant failed to plead elements needed to establish that Respondents owed a duty to warn of the dangerous propensities of a third party. A "special relationship" must exist to invoke an exception to the general rule that there is no duty to warn of the danger of another person. Rogers v. S.C. Dep't of Parole & Cmty. Corr., 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995). A "special relationship" requires allegations of (1) "the ability to monitor, supervise and control an individual's conduct" and (2) "the individual has made a specific threat of

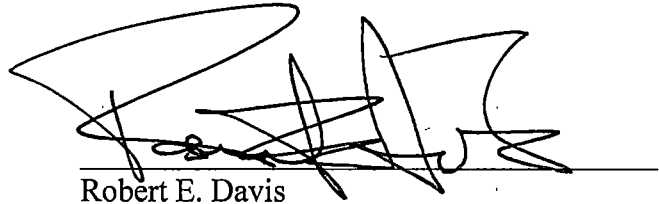
harm directed at a specific individual.” Roe v. Bibby, 410 S.C. 287, 295-96, 763 S.E. 2d 645, 649-50 (Ct. App. 2014). Appellant’s Complaint simply does not contain any allegations that Respondents had any “special relationship” with anyone, Respondents had “the ability to monitor, supervise, and control” anyone, or Respondents were aware of a “specific threat of harm” directed at Appellant. Accordingly, there is no basis for Appellant’s appeal and Appellant makes no specific argument to the contrary.

For the first time in the Motion to Reconsider, Plaintiff raises arguments and cites cases about a duty to provide security and a duty based on an undertaking.¹ These new arguments are not preserved for review on appeal. Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939) (requiring question presented for appellate review to be first fairly and properly raised and ruled on by the lower court); State v. Austin, 306 S.C. 9, 17, 409 S.E.2d 811, 815 (Ct.App. 1991) (“An exception not argued in the brief is deemed abandoned on appeal.”); Jean Hoefer Toal, Appellate Practice in South Carolina 185 (3d ed. 2016) (“The first step in preserving an issue for appellate review is to actually raise it to the lower court.”).

While improper, Appellant’s new arguments actually illustrate the exact type of allegations that Appellant needed to include in the Complaint to assert any type of duty. The failure of Appellant to make such allegations in the Complaint is exactly why the Appellant’s Complaint is deficient and why Appellant cannot prevail on this appeal.

This Court should, therefore, deny Appellant’s Motion to Reconsider.

¹ Appellant’s argument to the Trial Court and in his Brief to this Court was that Respondents had a duty to warn. (R. 40 & Amended Final Brief of Appellant p. 3)



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Attorney for Respondents

April _____, 2019.

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PROOF OF SERVICE

I certify that I have served Respondent's Return to Appellant's Motion to Reconsider upon Appellant's attorney of record, Donald L. Smith, 122 N. Main Street, Anderson, South Carolina 29621 by US Mail, on April 10, 2019.

April 10, 2019.



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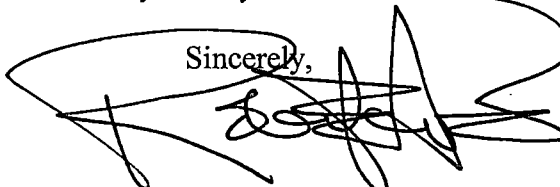
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Kenji Kilgore, Appellant v. Estate of Samuel Joe Dixon, Samuel E. Dixon, and Fredda L. Dixon, Respondents
Appellate Case No. 2017-001330

Dear Ms. Kitchings:

Please find enclosed the original and 7 copies of Respondent's Return to Appellant's Motion to Reconsider, along with the Proof of Service, in the above-referenced matter. Please return a file stamped copy to me in the enclosed, stamped envelope. By copy of this letter to Appellant's attorney, I am hereby serving Appellant with these documents. Thank you for your attention to this matter.

Sincerely,



Robert E. Davis

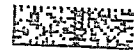
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Enclosures

cc: Donald L. Smith, Esquire (w/encls.)

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